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Information from Editors

On behalf of the Board of Editors we would like to apologize for the delay in publishing of the volume XXIV of the Polish Yearbook of International Law. Because of important editorial and technical problems we were to suspend the work on the present volume; we were also unable to include the current Polish bibliography on international law, as well as the list of international agreements concluded by Poland and entered into force during the two recent years, and a part of book reviews. The publication was finally made possible thanks to the gracious help of the Ministry of Foreign Affairs of the Republic of Poland. We would like to announce however that the forthcoming, XXV volume of the Polish Yearbook will be fully devoted to the integration of Poland with the European Union, and will contain articles by leading Polish and international scholars and practitioners. It will also contain actual bibliography and report on the Polish practice in international law.

Warszawa, April 2001

Professor Renata Szafarz, Editor-in-Chief
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The Concept of a Genuine and Just Peace

FRANK PRZETACZNIK*

Introduction

The object of this study is the analysis of the concept of a genuine and just peace in the works of the major philosophers, political and social thinkers and also World War. The problem of peace is a very hot and crucial matter that now absorbs humanity. Reason dictates that peace is and normally should be a natural state of mankind. Peace is then the principal preoccupation of every rational and compassionate person, because there is not a topic so deeply affecting the happiness of mankind, both spiritual and temporal, as the problem of a genuine and just peace. A peace is the highest good of individuals, peoples, nations, States, and of all mankind, provided that it is a genuine and just peace.

The political and legal thinkers whose works will be discussed below used different formulations in their expressions of the idea of a genuine and just peace. Among these formulations are: "genuine peace," "real peace," "perfect peace," "ideal peace," "just peace," "righteous peace," "democratic peace," "genuine and just peace," and "just and durable peace."¹ These terms explicitly mean that peace should or must be "genuine" (real, perfect, or ideal, which generally signifies genuine), or "just" (righteous or democratic, which generally signifies just). The authors also utilize such expressions as "lasting peace," "enduring peace," "durable peace," "stable peace," "permanent peace," "universal peace," and "eternal peace." These terms simply mean that peace should or must be genuine and just if it is to be lasting and permanent. The term "genuine and just peace" is the most fitting term, for it best expresses the essence of this institution.²

The individuals, peoples and nations of the world have a sacred right to peace, and its preservation is not only the fundamental obligation of each country, but also of every individual in the world, irrespective of nationality, sex, color, political and social position or status, ideology, religion, or affiliation with any political, social, cultural or religious organization. A genuine and just peace is an achievable objective, if individuals, peoples, nations, and States show a proper understanding of its

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¹ F. P r z e t a c z n i k: "The Concept of Genuine and Just Peace as a Basic Collective Human Right," 6 *New York Law School Journal of Human Rights* 241 (Part Two, 1989).

² *Ibid.*, p. 241.

existence in their relations, and show a willingness to establish, maintain and preserve it by appropriate means.

A Definition of Peace

It is not easy to correctly and precisely define peace, which is often used in a variety of different meanings. Although there are many definitions of peace, no satisfactory and generally acceptable definition of this institution has been found yet, and those definitions which have been given are of little practical value, since they not determine precisely the essence of a genuine and just peace.

Negative and Positive Peace.

Johan Galtung asserts that in “peace research, as it took shape at the end of the 1950s, the debate about the meaning of that very concept proved to be fruitful.”³ He affirms that it “was evident from the beginning that there were two classes of meanings: ‘negative peace,’ meaning absence of war and violence (any type of destruction); and ‘positive peace,’ coming closer to integration, or union – with connotations of harmony and justice.”⁴ Referring to “the *Roman Pax absentia belli*,”⁵ Galtung says that, in other words, a negative concept of peace is defined as the absence of war among countries.⁶ As described here by Galtung, the concept of “negative peace,” meaning the absence of war and violence, is absolutely wrong. It seems that Galtung does not understand the meaning of the word “negative.” Hence, it is vital at this juncture to determine the proper meaning of the word “negative.”

According to the *Webster Encyclopedic Dictionary of the English Language*, “negative” basically means implying or containing denial or negation.⁷ Similarly, pursuant to the *Random House Dictionary of English Language*, “negative” signifies: (a) expressing or containing negation or denial, or (b) expressing refusal to do something.⁸ Likewise, the *Shorter Oxford English Dictionary* defines “negative as meaning the denial of something.”⁹ It is clear from these definitions of the expression that in the context of peace the wording “negative peace” literally and in substance means the non existence of peace. There is no such thing as “negative peace.” Peace either exists or does not exist. If peace exists as an institution it always is and must be positive. If there is armed conflict – because now one cannot speak of war, which is an illegal institution, under contemporary international law – then there is no peace.

³ J. Galtung: “Peace”, in: A. Kuper and J. Kuper (eds.), *The Social Science Encyclopedia* (1985), p. 578.

⁴ *Ibid.*, p. 578.

⁵ *Ibid.*, p. 578.

⁶ *Ibid.*, p. 578.

⁷ V.S. Thatcher (ed.): *The New Webster Encyclopedic Dictionary of the English Language* (1971), p. 56.

⁸ J. Stein (ed.): *The Random House Dictionary of the English Language* (1971), p. 956.

⁹ C.S. Onions: *2 The Shorter Oxford English Dictionary, On Historical Principles* (1974), p. 1318.

If peace does not exist, then there is neither positive nor negative peace. One cannot speak of the existence of something, which does not exist at all. In such a situation one may merely talk about the lack of peace, but that in no way means negative peace. The notion of a negative peace is the negation of itself. Thus, the notion of negative peace does not make any sense at all; it is simply an absurdity. As used by Galtung, "the so-called negative peace," where there is the absence of war and violence, and any type of destruction, pursuant to the most elemental principles of logic and the most basic common sense obvious to everybody, is par excellence a positive peace. Therefore, the absurd notion of the so-called "negative peace" must be categorically rejected as confusing and even dangerous. All of this misconception is caused by Galtung because he confuses two different institutions, i.e., international peace in a strict sense with the internal order of a State.

It must be stressed that different principles apply to international peace and to internal order, even though some of those principles might overlap. Nevertheless, Galtung considers the principles applicable to one of these institutions (internal order) and then applies them to the other institution (international peace), as if these two distinct institutions were the same. Galtung uses only the expression "peace," even though he clearly speaks of the internal order of the States. He speaks of direct violence, which may be applied to the international relations between States as well as to the internal order within a particular State. Galtung also talks about structural violence, "but into the social structure, which is also capable of killing, but then, usually slowly (through hunger, misery, and disease)," and "which is, as a rule, not steered by some clear intention – it just is."¹⁰ Structural violence clearly applies within the internal order.

Galtung contends: "The concept of negative peace is extended through the concept of structural violence."¹¹ He explains that "absence of violence" is "more than absence of direct violence; it also implies the absence of repression and alienation and exploitation, and other forms of verticality in the social structure."¹² Thus, according to Galtung's concept, if there do not exist armed conflict(s) between States and any kind of violence or repression and alienation, or any form of exploitation or alienation within the State(s), then such a condition constitutes the negative concept of peace. As indicated earlier, such a situation, as far as international relations are concerned, constitutes a positive peace. If, however, such a happy condition exists in a particular State, it must be described as the desirable positive order, and not as a negative peace.

There is no more sense to make of the notion of Galtung's "positive peace." The components of positive peace, as formulated by him, which come closer to integration or union, with connotations of harmony and justice, without further elaboration and explanation, do not make sense. It goes without saying that those components of positive peace as they are phrased by Galtung do not express the substance of peace.

¹⁰ Galtung, *supra*, note 3, p. 578.

¹¹ *Ibid.*, p. 578.

¹² *Ibid.*, p. 578.

Accordingly, Galtung's concept of "negative peace" and "positive peace," which is arbitrarily divided by artificial and oversimplified criteria not reflecting the existing reality of international relations, must be rejected.

Accepting uncritically Galtung's erroneous concept of negative and positive peace, Hakan Wiberg tries to expound upon the false concept of negative peace, and thus even further distorts the meaning of peace. Wiberg states that the "pair of terms, 'positive peace' and 'negative peace' have been with us from the very beginning."¹³ He accepts the substance of Galtung's definitions of "negative peace" and "positive peace." "Negative peace" is defined as "absence of violence, [and] absence of war."¹⁴ "Positive peace" is defined by Wiberg in terms of "the integration of human society, and functional cooperation."¹⁵ To those definitions the same comments apply as applied to the definitions of Galtung. Wiberg stresses that he will focus on negative peace, limiting himself "to taking up positive peace" which, he says, is not as important as negative peace.¹⁶

Also Helmut Rumpf uncritically accepts Galtung's false concept of "negative peace" and "positive peace." He asserts "Two concepts of peace are distinguished: '*negative peace* defined as the absence of organized violence between such human groups as nations but also between racial and ethnic groups (...) and *positive peace* defined as a pattern of cooperation and integration between major human groups."¹⁷ Rumpf stresses Galtung's negative peace also means "peaceful coexistence" and he "views the two concepts as empirically interrelated."¹⁸ Rumpf erroneously asserts that for "political science, diplomacy, and international law, the pattern of positive (or material) peace also implies the possibility of *peaceful change* as a condition for continued and true cooperation and integration – an implication often neglected by peace theorists."¹⁹

Perhaps, with the exception of political science, where especially after the Second World War, the so-called "theorizers" have engaged themselves only in the most absurd and meaningless sophistry. In diplomacy and international law, as a practitioner and scholar in both of these fields for many years, I have never met any serious diplomat or scholar who would assert such absurdity and nonsense as "negative peace." As indicated earlier, there is no such thing as "negative peace." Peace is always positive, otherwise there is not peace at all. The so-called "theorizers," whether they want to or not, must accept this fundamental principle. Otherwise, if they would insist on this absurdity, they would not only make themselves ridiculous – they are free to do it – but they would also make ridiculous peace as such, which is the highest good for

¹³ H. Wiberg: "JPR 1964–1980 – What Have We Learnt about Peace," 18 *JPR* 112 (No. 2, 1981).

¹⁴ *Ibid.*, p. 112.

¹⁵ *Ibid.*, p. 112.

¹⁶ *Ibid.*, p. 112.

¹⁷ H. Rumpf: "The Concepts of Peace and War in International," 27 *GYBIL* 341 (1984).

¹⁸ J. Galtung: "Peace," in: D.L. Sillis (ed.): 11 *International Encyclopedia of the Social Sciences* (1968), pp. 487–496.

¹⁹ Rumpf, *supra*, note 17, p. 341.

individuals, peoples, nations and States, provided that it is just and genuine. Therefore, they cannot do it.

Emphasizing the fact that the meaning of peace has not been among the most popular topics in peace research journals during the past two decades, Paul Smoker indicates that there are differing definitions of peace.²⁰ Referring to the concept of "world order," Smoker indicates that "peace is primarily defined in terms of absence of violence, economic welfare, social justice, human rights and ecological balance and partnership with nature."²¹ Irrespective of who says it, "peace may be conceived of not only as the absence of physical or structural violence, but also positively as harmony between culture and structure."²² He also argues that the "concept of world peace, in a sense other than the absence of war, is still more difficult." Smoker's absurd speculations concerning peace are absolutely erroneous and must be categorically rejected.

A Proper Definition of Peace

Having critically analyzed some definitions of peace given by distinguished scholars and having demonstrated the fact that they are unsatisfactory, erroneous, and among individuals, peoples, nations, and States, the author of this study will attempt to give the proper definition of peace. In my opinion, peace may be defined as the existence of internal tranquillity within a State based upon the recognition, guarantee and strict observation of the basic human rights of all individuals living in such a State, and normal relations with other States, based upon the mutual recognition and observation of the rights and legal interests of each other.²³ Accordingly, to be genuine and just, peace must satisfy several prerequisites.

These prerequisites are the following: (a) basic human rights, such as the right to life, the right to live, political freedom, freedom of religion, the right to work, the right to education, equality, freedom of expression, freedom of association, unrestricted freedom of movement within the country and the right to leave and return to one's own country, must be guaranteed to all individuals and strictly observed by each State; (b) any kind of oppression – i.e., political, economic, ideological, or religious, either internal or external – of individual persons, or peoples, must be forbidden by each State, and this prohibition must be strictly implemented; (c) all peoples and nations must have the right to self-determination guaranteed and strictly implemented by each concerned State; (d) the occupation, subjugation or domination over other peoples, nations or States by foreign powers must be abolished; and (e) disputes

²⁰ P. Smoker: "Small Peace," 1 *JPR* 153 (No. 2, 1981).

²¹ *Ibid.*, p. 153.

²² *Ibid.*, p. 150.

²³ P. Przetaczniak: "The Philosophical Concept of Peace as a Basic Collective Human Right," 26 *The Military Law and Law of War Review* 363 (1987); "The Soviet Type of Peaceful Coexistence is not a Prerequisite of Peace," *Revue de Droit International de Sciences Diplomatiques et Politiques* (referred hereafter as *Rev. Dr. Int'l & Sci. Dipl. et Pol.*) (1987), p. 201.

between the States, which constitute a threat to international peace, must be submitted by the States involved to the International Court of Justice for their peaceful settlement.

All these prerequisites must be satisfied for a peace to be genuine, just and durable. Otherwise, any peace imposed and maintained by naked force is a brutal oppression of individuals, peoples and nations. Such a peace is a source and cause of struggle of individuals and peoples for their individual and collective human rights, and it is the cause of war by oppressed peoples, nations or States. The oppressed individuals, peoples and nations have the inalienable right to demand the strict observation of their individual and collective human rights, including their right to self-determination of peoples and nations.

If basic human rights – either individual or collective – are not recognized and strictly implemented by any country of the world, or by a group of such countries, the prerequisites for the existence of a genuine, just and lasting peace are not satisfied, and even if, despite this, peace exists temporarily, such a peace is in great danger, as a result of the oppressive behaviour of such State or group of States. Otherwise, instead of being a genuine institution worthy of its name, peace will mean the enslavement of peoples or nations and cruel oppression and tyranny. Philosophers and political and social thinkers as well as statesmen from the antiquity to the present time dealt with the problem of a genuine and just peace.

Ancient Thinkers

Hesiod was one of the first thinkers, who expressed the idea of a genuine and just peace. He asserted that peace must be just,²⁴ for peace without justice cannot exist. However, he did not elaborate upon the concept of a just peace. Similarly, **Confucius** spoke of preserving peace by upholding the laws of propriety and by recompensing evil with justice.²⁵ Thus, in Confucius's system of philosophy, justice was a basic prerequisite of peace.²⁶ **Isaiah** and **Pindar** also expressed, in general terms, the concept of a genuine and just peace. **Isaiah** said that the work of justice shall be peace.²⁷ **Pindar** affirmed that peace is a daughter of righteousness and makes a nation great.²⁸ Accordingly, he asserted that any citizen "who desired prosperity for his state must seek the radiant light of high-minded Peace,"²⁹ i.e., a genuine and just peace.

The idea of genuine and just peace was expressed by **Thucydides** in the speech of the Spartan plenipotentiaries who had been sent to Athens to offer peace during the

²⁴ G. Zampaglione: *The Idea of Peace in Antiquity* (R. Dunn trans.) (1973), p. 27; Przetacznik, *supra*, note 1, pp. 242–243.

²⁵ No-Yong, Park: *The White Man's Peace* (1948), p. 58; Przetacznik, *supra*, note 1, p. 243.

²⁶ F. Przetacznik: "The Basic Principles of Philosophical and Legal Concept of Peace as a Cardinal Human Right," *75 Rev. Dr. Int'l & Sci. Dipl. et Pol.* 24 (1997).

²⁷ *Isaiah 9:7*; R. Garvey (ed.): *A Concise Treasury of Bible Quotations* (1975), p. 116; Przetacznik, *supra*, note 1, p. 243.

²⁸ W. Cadwell: *Hellenic Conceptions of Peace* (1919), p. 78.

²⁹ *Ibid.*, p. 78; Przetacznik, *supra*, note 1, p. 243.

Peloponnesian war. He maintained that a genuine peace cannot be imposed upon vanquished opponents³⁰ by force. **Isocrates** also disapproved of and rejected peace imposed by force in the form of slavery, domination and oppression.³¹ The concept of genuine and just peace has been expressed by **Marcus T. Cicero**, who strongly recommended that one should always work toward peace, but he believed that war might be justifiable when the price of peace was slavery.³² Cicero was against the idea of peace at any price and he taught that slavery, tyranny and oppression are incompatible with a genuine and just peace.³³ Like Thucydides, **Titus Livius (Livy)** maintained that a genuine and just peace cannot be imposed by force upon the vanquished or weaker opponent(s). He stated that peace must be based upon justice, because only righteous peace, i.e., a genuine and just peace, can be lasting.³⁴

Ecclesiastic Thinkers

Many ecclesiastic thinkers advocated that peace must be just and genuine and furthermore maintained that only such a peace can be lasting. **Clement of Alexandria** maintains that peace must be a genuine and just peace. Considering that peace is very important in the relations among individuals, and among nations,³⁵ Clement asserts that peace must always be based on justice, because justice is the peace of life and governs its stability and tranquillity.³⁶ Similarly, **St. Ambrose** believed that peace must be founded on justice.³⁷ The same position was taken by **St. Augustine**. In his view, justice is the first condition of peace among nations. Therefore, peace based on injustice does not deserve the name of peace.³⁸ He defined justice as the virtue which accords to each and every man what is his due.³⁹

Thomas Aquinas states that peace may be true or apparent.⁴⁰ He maintained that true peace exists where people's desire is directed to what is truly good,⁴¹ and it follows

³⁰ F. Przetacznik: "The Basic Ideas of the Philosophical Concept of War and Peace," 66 *Rev. Dr. Int'l & Sci. Dipl. et Pol.* 297 (1988).

³¹ "Isocrates" in: W.R. Conner (ed.): *Greek Orations* (1966), p. 33; F. Przetacznik: "Philosophical and Legal Concept of Genuine and Just Peace as a Basic Collective Human Right," 68 *Rev. Dr. Int'l & Sci. Dipl. et Pol.* 98 (1990).

³² „M.T. Cicero”, in: R. Zouche: *2 An Exposition of Facial Law and Procedure, or of Law between Nations, and Questions Concerning the Same* (J.L. Brierly trans.); J.B. Scott (ed.): *The Classics of International Law* (1911), p. 59.

³³ Przetacznik, *supra*, note 26, p. 24.

³⁴ "T. Livy", in: P. Belli: *2 Treatise on Military Matters and Warfare* (H.C. Nutting trans.) (1936), p. 279; Przetacznik, *supra*, note 31, p. 100.

³⁵ F. Przetacznik: "The Christian Concept of Genuine and Just Peace", 83 *Rev. Dr. Int'l & Sci. Dipl. et Pol.* 164 (1995).

³⁶ Zampaglione, *supra*, note 24, p. 251; Przetacznik, *supra*, note 35, p. 164.

³⁷ Zampaglione, *supra*, note 24, p. 294; Przetacznik, *supra*, note 26, p. 25.

³⁸ St. Augustine: *City of God* (G.G. Walsh and others trans.) (1958), p. 454.

³⁹ *Ibid.*, p. 469; F. Przetacznik: *The Catholic Concept of Genuine and Just Peace as a Basic Collective Human Right* (1991), p. 54.

⁴⁰ T. Aquinas: *2 Summa Theologica* (D.J. Sullivan rev.); R.M. Hutchings (ed.): *Great Books of the Western World* (1952), p. 532.

⁴¹ *Ibid.*, p. 531.

that such peace must be based upon justice.⁴² He explains that “if one man’s concord [peace] with another [is] not by a spontaneous will but through being forced, as it were, by the fear of some evil that threatens him, such concord [peace] is not really peace, because the order of each concordant is not observed, but is disturbed by some fear-inspiring cause.”⁴³ This somewhat complicated statement means that peace imposed by force is not a genuine peace and such peace, being unjust, is not observed voluntarily but is merely kept by physical or psychological, direct or indirect coercion.⁴⁴

Recognizing that peace must be genuine and just, **Marcurino A. Gattinara** asserted that justice and peace were sisters (daughters of Zeus), and could not exist for long without one another.⁴⁵ **William Cowper** expressed the hope that peace and righteousness would reign and there would never be oppression.⁴⁶ It means that where peace and justice reign there is no oppression.⁴⁷ Thus, he expresses the idea of a genuine and just peace. Likewise, the concept of a genuine and just peace is advocated by **E.H. Chapin**, who is against peace at any price. He argues that one should never be at peace, which shames one’s conscience and is tantamount to a violation of one’s integrity as a person.⁴⁸

In modern times the concept of a genuine and just peace was expressed, among others, by **Pope Leo XIII**, who speaks of a true, solid and lasting peace.⁴⁹ The Pope also uses the expression “the real peace,” which means “the peace of order.”⁵⁰ As to the practical realization of a genuine and just peace, Pope Leo XIII affirms that peace cannot be established if it does not rest on the foundation of Christian public law, from which comes the concord of rulers among themselves and of peoples with their rulers.⁵¹ Having in mind a genuine and just peace, and believing that peace depends upon persons who must have a profound sense of justice,⁵² **Pope Pius X** exhorts Catholics to “constantly stand on the side of peace and order” and “do everything to preserve tranquil peace in justice.”⁵³

Considering that a genuine and just peace is the best and most desirable possession of mankind, **Pope Benedict XV** stresses that we desire peace – a peace as is needed by justice and is consonant with the dignity of peoples.⁵⁴ He also emphasizes that a genuine and just peace should be founded upon Christian principles of jus-

⁴² *Ibid.*, p. 532; Przetacznik, *supra*, note 35, pp. 165–167.

⁴³ Aquinas, *supra*, note 40, p. 530.

⁴⁴ Przetacznik, *supra*, note 35, p. 165.

⁴⁵ J.G. Russell: *Peacemaking in Renaissance* (1986), p. 116.

⁴⁶ W. Cowper: “The Future Peace and the Glory of the Church,” in: W. Eliot (ed.), 45 *The Harvard Classics, Sacred Writings*, Part Two (1910), p. 563; Przetacznik, *supra*, note 26, p. 25.

⁴⁷ Cowper, *supra*, note 46, p. 563.

⁴⁸ “E.H. Chapin”, in: T. Edwards (ed.): *The New Dictionary of Thoughts* (1974), p. 473.

⁴⁹ H.C. Koening (ed.): *Principles of Peace, Selection from Papal Documents Leo XIII to Pius XII* (1943), p. 7.

⁵⁰ *Ibid.*, p. 46; Przetacznik, *supra*, note 35, p. 168.

⁵¹ Koening, *supra*, note 49, pp. 93–94; Przetacznik, *supra*, note 35, pp. 168–169.

⁵² Koening, *supra*, note 49, p. 123.

⁵³ *Ibid.*, p. 117.

⁵⁴ *Ibid.*, p. 187; Przetacznik, *supra*, note 35, p. 170.

tice.⁵⁵ Likewise, having in mind a genuine and just peace, **Arthur J. Brown** urges that world peace must be based on international justice and goodwill.⁵⁶ **Pope Pius XI** maintains that the only true peace is that which unites individuals, peoples, nations and States in brotherly love and mutual understanding.⁵⁷ He correctly contends that a true and lasting peace cannot rule among men and peoples if they seek only material things, because moral and spiritual values are very essential for peace.⁵⁸

Like his predecessor, **Pope Pius XII** was also a strong supporter of a genuine and just peace among nations. He demonstrates that the world has a need for peace – not a peace which is not a real peace, but a peace which means an ordered harmony among men which brings smiles to the faces of all peoples and nations.⁵⁹ His ardent desire was for “a just and lasting peace,” which rejoices all peoples and nations – a peace that joins nations and peoples through mutual brotherly love, so that each race strive for the greater happiness of the whole human family.⁶⁰ Starting from the premise that a genuine peace must be supported by the loyal and sincere consent of all peoples, and must exclude a double standard of morality and justice for the great and small or for the strong and weak States, **John C. Murray** stresses that such a peace must be founded upon justice, moral principles of friendly relations and a spirit of brotherly collaboration.⁶¹

As to a genuine and just peace, **Miles H. Krumbine** asserts: “To wage a ‘just peace’ now is the only alternative to waging a devastating war later.”⁶² Starting from Isaiah’s aphorism that “the effect of righteousness will be peace,”⁶³ Krumbine maintains that achieving justice [the word we prefer today to righteousness] is the only way to ensure peace, because peace becomes possible only when justice flourishes.⁶⁴ The concept of a genuine and just peace found its expression in the Encyclical Letter *Pacem in Terris* by **Pope John XXIII**, who advocated the establishment of “true peace on earth” based upon the observation of human rights. He maintained that true peace must be founded upon an order based on truth, built according to justice and put into practice in freedom.⁶⁵ Referring to Pope John XXIII’s Encyclical Letter *Pacem in Terris*, **Giovanni Benelli** states that the basic requirements for peace are justice, freedom, education and a respect for fundamental human rights.⁶⁶

⁵⁵ Koenig, *supra*, note 49, p. 308; Przetacznik, *supra*, note 35, p. 170.

⁵⁶ C.S. Macfarland: *Pioneers for Peace Through Religion* (1946), p. 17.

⁵⁷ Koenig, *supra*, note 49, p. 342; Przetacznik, *supra*, note 39, p. 58.

⁵⁸ Przetacznik, *supra*, note 35, p. 171.

⁵⁹ Koenig, *supra*, note 49, p. 708.

⁶⁰ *Ibid.*, p. 554; Przetacznik, *supra*, note 35, p. 171.

⁶¹ J.C. Murray and The Ethics Committee: *The Pattern for Peace and the Papal Peace Program, A Report of the Ethics Committee* (1944), p. 10.

⁶² M.H. Krumbine: *The Will to Peace* (1956), p. 51.

⁶³ Isaiah 32:17 in: H.G. May and B.M. Metzger (eds.): *The Oxford Annotated Bible* (1962), p. 861.

⁶⁴ Krumbine, *supra*, note 62, pp. 50 and 56; Przetacznik, *supra*, note 35, p. 174.

⁶⁵ Pope John XXIII: *Pacem in Terris/Peace on Earth* (W.J. Gibbons ed.) (1963), p. 57.

⁶⁶ Permanent Observer Mission of the Holy See to the United Nations: *Path to Peace: A Contribution, Documents of the Holy See to International Community* (referred hereafter as *P.O.M.H.S.*) (1987), p. 123.

Pope Paul VI also advocated the idea of a genuine and just peace. Like his predecessor, John XXIII, Pope Paul VI states that there is a direct relation between human rights and peace.⁶⁷ Accordingly, he maintained that without the recognition and implementation of human rights, a true peace can never be achieved.⁶⁸ The concept of a genuine and just peace is dealt with by **Jacques Fougerat**, who also asserts that peace is connected with the respect for human rights.⁶⁹ Accordingly, so that a genuine and just peace can exist and be preserved, human rights must be expressly recognized, and strictly implemented by every State of the international community.⁷⁰ A similar opinion on a genuine and just peace was expressed by **Giuseppe M. Sensi** who insists that a true peace must be based on justice and on the recognition of human rights.⁷¹

The concept of genuine and just peace is strongly advocated by **Pope John Paul II**, who shows that there are few topics on which so much falsehood is spoken of as peace, and few topics which are so susceptible to manipulation.⁷² In his opinion, this is a serious threat to peace. Pope John Paul II indicates that one of the dangerous threats to peace results from inequality in the possession of material goods and the enjoyment of them. Such inequality contains within itself substantial elements that restrict or violate human rights.⁷³ The Pope contends that for a genuine and just peace, it is necessary that all persons in every country should be able to effectively enjoy all their human rights. Peace comes only when human beings strive for truth and love in their dealing with one another.⁷⁴ Finally, he states that peoples want peace with justice and not peace at any price.⁷⁵

An interesting concept, of a genuine and just peace is expressed by **Manuel Obando y Bravo**. Referring to the activities of totalitarian regimes, Obando y Bravo states that it "is common to impose peace, to 'pacify' a country with a formidable army, with executions [and] prosecution."⁷⁶ He correctly asserts that peace can never be imposed by anyone, and he is absolutely right when he says that peace should create joy, not fear, it should stimulate fellowship, not provoke hate.⁷⁷ Obando y Bravo correctly insists that peace cannot be imposed, bought or sold, but must be sought; it has to be molded, and one must make sacrifices for peace. He considers that a genuine and just peace insures the positive growth of many as an individual, as a member of a family and a citizen of a country. Finally, Obando y Bravo insists that there can be no peace without justice.⁷⁸

⁶⁷ *Ibid.*, p. 60; Przetacznik, *supra*, note 35, p. 175.

⁶⁸ *P.O.M.H.S.*, p. 78; Przetacznik, *supra*, note 39, p. 62.

⁶⁹ *P.O.M.H.S.*, p. 144; Przetacznik, *supra*, note 39, p. 64.

⁷⁰ *P.O.M.H.S.*, p. 144; Przetacznik, *supra*, note 35, p. 177.

⁷¹ *P.O.M.H.S.*, p. 141.

⁷² *Ibid.*, p. 53; Przetacznik, *supra*, note 35, p. 177.

⁷³ Przetacznik, *supra*, note 39, p. 64.

⁷⁴ *Ibid.*, p. 64; *P.O.M.H.S.*, p. 53; *ibid.*, p. 85.

⁷⁵ *P.O.M.H.S.*, p. 370.

⁷⁶ M. Obando y Bravo: "Peace in Nicaragua," *The New York Times*, 25 April 1983, p. A17.

⁷⁷ *Ibid.*, p. A17.

⁷⁸ *Ibid.*, p. A17; Przetacznik, *supra*, note 39, p. 66.

Agostino Casaroli is a very strong supporter of a genuine and just peace. Recognizing that peace is never a state of perfection achieved once and for all, but Casaroli demonstrates that a balance of this sort remains subject to possible changes of positions by those concerned, who are free to choose it or call it into question, when basic conditions, upon which peace is established, change substantially.⁷⁹ Casaroli asserts that peace imposed by victors on the vanquished would be nothing more than an apparent peace.⁸⁰ In Casaroli's view, a lasting peace can only be built upon justice.⁸¹ It follows from the above considerations that ecclesiastic thinkers consider that peace must be genuine and just. Thus, they made substantial contributions to the development of a genuine and just peace.

Renaissance and Modern Thinkers

Many renaissance and modern thinkers considered that peace, to last, must be genuine and just. **Pierino Belli** maintained that there can be no peace apart from justice, because justice and peace have "kissed" each other.⁸² Hence, he argued that peace must be genuine and just.⁸³ Similarly, **Richard Pace** advocated that a peace must be peace with justice.⁸⁴ The idea of a just peace is also expressed by the **Bohemian King, George**. In his *Treatise on the Establishment of Peace Throughout Christendom*, the Bohemian monarch stated: "The cult of peace is unthinkable without justice (...) because peace is born of justice and is upheld by it."⁸⁵ He explains that "because we and our subjects cannot subsist in peace without justice, we link justice with the cause of peace."⁸⁶

The concept of a genuine and just peace is dealt with by **Blaise Pascal**, who maintained that men have failed to establish a universal principle of justice which, alone could guarantee peace.⁸⁷ **Jean J. Rousseau** expounded on the idea of a genuine and just peace. In Rousseau's philosophical system, peace and justice are inseparably connected.⁸⁸ Therefore, he disapproved peace which is not just, and he indicated that men are constantly crying about "peace and tranquillity they enjoy in their irons, and that *miserriman servitutem pacem appellant* (miserable servitude is called peace)."⁸⁹

⁷⁹ *P.O.M.H.S.*, p. 172; *Przetacznik*, *supra*, note 39, p. 67.

⁸⁰ *Ibid.*, p. 67; *P.O.M.H.S.*, p. 172.

⁸¹ *P.O.M.H.S.*, p. 172.

⁸² *Belli*, *supra*, note 34, p. 278.

⁸³ *Przetacznik*, *supra*, note 35, p. 180.

⁸⁴ *Russell*, *supra*, note 45, p. 56; *Przetacznik*, *supra*, note 35, p. 180.

⁸⁵ *Georgius*, Bohemiae Rex: "Perpetuae Pacis Constituendae Gratia Proposuit [Treaty on the Establishment of Peace Throughout Christendom, I. Dvorak trans.], *Metryka Koronna* (Warszawa n.d.), Archiwum Główne Akt Dawnych, p. 85.

⁸⁶ *Ibid.*, p. 85.

⁸⁷ *E.V. Souleyman: The Vision of World Peace in Seventeenth and Eighteenth-Century France* (1941), p. 56; *Przetacznik*, *supra*, note 35, pp. 180–181.

⁸⁸ *J.J. Rousseau: "From the Social Contract,"* in: *S. Commins and R.N. Linscott (eds.): The World's Great Thinkers, Man and the State: The Political Philosophers* (1947), p. 275.

⁸⁹ *J.J. Rousseau: "Discourse Upon the Origin and the Foundation of Inequality Among Mankind,"* in: *C. Eliot (ed.): 34 The Harvard Classics* (1910), p. 221.

He also affirmed correctly that the peace of despotism and the sweetness of liberty cannot go together.⁹⁰

Starting from the premise that a demand for peace is a demand for justice, equal rights and universal liberty, **William Penn** asserted that without liberty peace is impossible.⁹¹ Hence, he said that peace requires justice between and within nations.⁹² Believing that justice is the preserver and procurer of peace, Penn asserted that "justice is the means of peace, between the government and the people."⁹³ Hence, in his view, peace is the truest effect of justice.⁹⁴ **Benjamin Franklin** advanced a very interesting concept of a genuine and just peace, when he said "there never was a good war, or a bad peace."⁹⁵ Franklin's maxim that every peace is always good may sound plausible, but in substance it is erroneous.

Franklin is wrong, because the history of international relations has demonstrated that there can be imposed an oppressive and repressive peace which is unjust and evil. A peace which imposes domination, oppression, exploitation and the slavery of individuals, peoples and nations, is a repressive order kept by naked force, and is not a peace at all, because it is not established with the consent of all parties involved. Accordingly, Franklin's rigid maxim concerning peace is not only erroneous, but even dangerous, because its strict application in practice might bring more harm than good. Therefore, it must be rejected. The same idea in a different formulation is phrased by **Mark Twain**, who expresses it in the following phrase: "An inglorious peace is better than a dishonourable war."⁹⁶ Observations on Franklin's concept of peace apply equally to that of Twain.

Charles Maurice of Talleyrand advocates a genuine and just peace when he says that nothing matters except peace, but it must not be peace at any price, but peace with honor.⁹⁷ Likewise, **Pierre-Andre Gargaz** insisted that in order for peace to be form and lasting, it is absolutely necessary that its terms be just.⁹⁸ **August Comte** contended that peace concluded and enforced by oppressive rulers is not a genuine and just peace.⁹⁹ The same idea is expressed by **Louis Kossuth**, who affirmed that oppression must not be confused with peace, because in a genuine peace there is no place for oppression.¹⁰⁰ He is right, because peace and oppression are diametrically different conditions, and are mutually exclusive.

⁹⁰ *Ibid.*, p. 222.

⁹¹ W. Penn: *An Assay Towards the Present and Future Peace of Europe* (1912), p. 4.

⁹² The William Penn Tercentenary Committee (comp.): *Remember William Penn 1644-1944, A Tercentary Memorial* (1945), p. 123.

⁹³ *Ibid.*, p. 126.

⁹⁴ Przetacznik, *supra*, note 35, p. 181.

⁹⁵ S. Bradley, R.C. Beatty and E.H. Long (eds.): *The American Tradition in Literature* (1967), p. 277.

⁹⁶ D. Lawson (ed.): *The Fighters for Peace* (1971), p. 38.

⁹⁷ J.J. Bernard: *Talleyrand, A Biography* (1974), p. 570.

⁹⁸ P.A. Gargaz: "A Project of Universal and Perpetual Peace (1782)," in: E. Wynn and G. Lloyd: *Searchlight on Peace Plans* (1949), p. 29.

⁹⁹ Przetacznik, *supra*, note 31, p. 107.

¹⁰⁰ *Ibid.*, p. 107; Przetacznik, *supra*, note 35, p. 183.

Contemporary Thinkers

Many contemporary thinkers believe that peace must be genuine and just. Starting from the premise that peace is a great good, **Theodore Roosevelt** asserts that peace may be good, but it must also be righteous, for unrighteous peace may be worse than war.¹⁰¹ He says that peace is generally good in itself, but it is only the highest good if it is just. Peace which serves merely as a mask and instrument for despotism and oppression, becomes a very evil condition.¹⁰² The idea of a genuine and just peace is dealt with by **William H. Monroe**, who asserts that peace must be based upon justice, for a peace which is not based on justice is not a true peace.¹⁰³

George K. Shaw also advocates the concept of a genuine and just peace. Starting from the idea that there is no enduring basis for peace save the mutual respect between nations, Shaw believes that peace can breed peace if it is based upon the right motives. The cornerstone for such a peace is justice.¹⁰⁴ Accordingly, to maintain and preserve peace, nations must pursue a policy of justice.¹⁰⁵ An interesting concept of a genuine and just peace is expounded upon by **William J. Bryan**, who shows that the concept of peace by terrorism, i.e., peace imposed by force, has failed.¹⁰⁶ He shows that peace must be genuine and just and that an oppressive order imposed and kept by naked force is not a peace but a negation of peace.¹⁰⁷

David S. Jordan also advocates the somewhat vague concept of a genuine and just peace. He affirms that one must contrast the peace of force with the peace of law, the peace which is temporary with the peace that is eternal, so long as it rests on the balance of justice.¹⁰⁸ Jordan uses vague expressions such as "peace of force," "peace of law," "balance of justice," and "universal order," but he does not define these expressions, which may denote different things to different persons. Therefore, Jordan's concept of peace of law without its definition and further specification is of little practical utility in arriving for a genuine and just peace.

Charles E. Jefferson states that an armed peace is not a genuine and just peace. In 1916, by armed peace he meant the policy of international life in Europe during the last hundred years. Jefferson explained that the motto of armed peace was "preparedness," and its creed was "in time of peace, prepare for war."¹⁰⁹ In his view, the fundamental assumption of the policy of armed peace was false, for militarism makes a constant appeal to force and armaments are the creation of fear.¹¹⁰ Accordingly, Jefferson maintains that an armed peace is fatal because it plays into the hands of

¹⁰¹ W.H. Haraugh: *The Writings of Theodore Roosevelt* (1967), p. 28.

¹⁰² Przetacznik, *supra*, note 31, p. 108.

¹⁰³ W.H. Monroe: "War and Peace: The Military Point of View," in: M.K. Reely: *Selected Articles on World Peace* (1914), p. 131; Przetacznik, *supra*, note 31, p. 108.

¹⁰⁴ G.B. Shaw: "The Basis of Enduring Peace," *The Peace Forum* (March 1913), pp. 42-43.

¹⁰⁵ *Ibid.*, p. 42.

¹⁰⁶ W.H. Taft and J. Bryan: *World Peace, A Written Debate between* (1970), p. 29.

¹⁰⁷ Przetacznik, *supra*, note 35, p. 185.

¹⁰⁸ D.S. Jordan: *War and Waste* (1913), p. 288.

¹⁰⁹ C.E. Jefferson: *What Armed Peace Leads To* (1916), p. 137.

¹¹⁰ *Ibid.*, pp. 151, 156 and 158.

only a few men, who, because of the structure of modern society, are capable of unmeasurable mischief.¹¹¹ Jefferson is right that an armed peace, as it was understood in the nineteenth and at the beginning of twentieth century, was not a genuine and just peace.

Having in mind a nefarious and oppressive peace, **James M. Beck** affirms that the preservation of a peace that is based upon fear cannot be either durable or just, for such a peace would generally mean the acquiescence of weaker States to the demands, often unjust, of stronger powers.¹¹² Beck believes that a genuine and just peace is that which, in the relations between States, is based upon justice, mutual respect and fair dealing and, when there is any international dispute between them, it is settled by an international tribunal.¹¹³ **William E. Wilson** maintains that a genuine peace must be compatible with justice.¹¹⁴ He says that if peace were preserved, but freedom suppressed, it would be a mean peace, for it would not be peace with justice.¹¹⁵

The concept of a genuine and just peace expounded upon by **Woodrow Wilson** in his address to the U.S. Congress on 22 January 1917, wherein he outlined to the world his concept of a proper peace settlement, i.e., a peace that would win the approval of mankind.¹¹⁶ According to Wilson, a genuine and just peace would be such, a peace, which would guarantee not only the basic human rights of individuals within its territory by every State of the world, but also the rights of individuals within all territories by every State.¹¹⁷ He insisted that the only lasting peace is one where the very principle of it is equality and common participation in the common good.¹¹⁸ Wilson believed that the basic prerequisite for a genuine and just peace is the strict recognition and the rigorous implementation by every State of the basic human rights of individuals.¹¹⁹

Similarly, **Felix Mlynarski** insists that a condition of peace should be the principle of justice.¹²⁰ He asserts that humanity must establish a peace in which calm and justice will reign.¹²¹ Similarly, **Hamilton Holt** affirms that peace must be with justice.¹²² Referring to the French Declaration of the Rights of Man, which set down for all mankind the principles of justice,¹²³ **Leon Bourgeois** maintained that a genuine

¹¹¹ *Ibid.*, p. 160.

¹¹² J.M. Beck: *The War and Humanity* (1916), pp. 34–35.

¹¹³ *Ibid.*, p. 39.

¹¹⁴ W.E. Wilson: *The Foundation of Peace* (1918), p. 96.

¹¹⁵ *Ibid.*, p. 112.

¹¹⁶ President Wilson's: "Senate Address on Permanent Peace," in: 10 *Current History, The European War* 1090 (1917); Przetacznik, *supra*, note 31, p. 109.

¹¹⁷ Przetacznik, *supra*, note 31, p. 110.

¹¹⁸ Wilson, *supra*, note 116, p. 1091.

¹¹⁹ Przetacznik, *supra*, note 31, p. 110.

¹²⁰ F. Mlynarski: *The Problems of the Coming Peace* (1916), p. 11.

¹²¹ *Ibid.*, p. 165.

¹²² H. Holt: "The Way to Disarm: A Practical Proposal," 5 *The Church and International Peace* 4 (1916).

¹²³ L. Bourgeois: "The Reasons for the League of Nations," in: F.W. Haber man (ed.): *Peace, Nobel Lectures, 1901–1925* (1972), p. 308.

and just peace must be based upon justice. He asserted that without justice it would never be possible to lay a foundation for a true and lasting peace.¹²⁴ Similarly, Lord Davies insisted that “permanent peace can be based only upon the rock of justice.”¹²⁵

All these authors consider justice to be the basic prerequisite for peace, but like many others they do not define justice. Justice has different connotations; for example, it can mean social justice, or justice in the meaning of the administration of justice. By not explaining exactly what they understand by the notion of justice, their views have little practical value. The concept of a genuine and just peace is dealt with by **Leo Perla**. Referring to the statement of T. Roosevelt that peace must be righteous, i.e., morally and legally right, Perla states that peace-at-any price is not a doctrine that attracts many enthusiasts, while it has a great many firm opponents, who see in such a peace the lowest depths of immorality.¹²⁶ In his view, for a peace to be a genuine and just peace, it must be morally and legally right.¹²⁷

An interesting concept of a genuine and just peace is advocated by **Y. Sakatani**, who believes that a genuine peace must be founded on the universal ideas of justice, humanity, liberty, independence and equality.¹²⁸ He indicates that such universal ideas belong to both the rich and poor, and the strong and weak¹²⁹ of every country of the world. A similar idea was expressed by **William A. White** who asserted that peace without justice is tyranny, no matter how you may sugar-coat it with expediency.¹³⁰ White’s view is, that in a situation where human rights are suppressed, peace is more endangered in case of violence, because in the end, suppression leads to violence.¹³¹ Finally, White concludes that whoever pleads for justice helps to keep peace, and whoever tramples upon a plea for justice, in the name of peace, outrages peace.¹³²

The concept of genuine and just peace is dealt with extensively by **Bolton C. Waller**. Starting from the premise that permanent peace is attainable,¹³³ Waller contends that such a peace must be based on freedom,¹³⁴ justice and human progress, which will make good life for individuals possible. In his view, peace may be made permanent only by constant adjustments and readjustments, by dealing with each new problem or difficulty whenever it arises, by applying wise and constructive statesmanship, not once, but repeatedly, and by resolute determined efforts which must continue so long as man lives upon the earth.¹³⁵ Accordingly, the international com-

¹²⁴ *Ibid.*, p. 308.

¹²⁵ Lord Davies: “Harnessing Power to Peace,” *1 Peace* 3 (No. 3, 1933).

¹²⁶ L. Perla: *What is National Honor?* (1918), p. 21; Przetacznik, *supra*, note 31, p. 111.

¹²⁷ Przetacznik, *supra*, note 31, p. 111.

¹²⁸ Y. Sakatani: “International Mind – The Basis for the Conclusion of Peace,” *6 Japan Peace Movement* 1 (1918).

¹²⁹ *Ibid.*, p. 1.

¹³⁰ W.A. White in: “The Importance of Free Speech,” in: R.E. Hoop, R.E. Piper and W.P. Tolley (eds.): *Preface to Philosophy: Book of Readings* (1967), p. 290.

¹³¹ *Ibid.*, p. 290.

¹³² *Ibid.*, p. 290.

¹³³ B.C. Waller: *Paths to Peace* (1926), p. 13.

¹³⁴ *Ibid.*, pp. 14 and 74.

¹³⁵ *Ibid.*, p. 79.

munity must ensure peace, freedom and justice and provide the means for bringing about these objectives.¹³⁶

Roland S. Morris argues that without the principles of justice and international rights a genuine peace is impossible.¹³⁷ In his view, the basis for a genuine and just peace must be the recognition of legal rights of all States of the international community. An interesting concept of a genuine and just peace is advanced by **Nicolas M. Butler**. He maintains that a durable peace is to be based upon freedom, justice, and honorable conduct.¹³⁸ In his view, without these conditions there can be no peace, but only a rule of force until freedom and justice revolt against it in search of peace.¹³⁹ Butler is right in saying that certainly "peace cannot be invoked to protect a denial of human liberty, or injustice, or dishonorable and menacing conduct on the part of any state."¹⁴⁰ Finally, he concludes that a genuine and just peace must be based upon freedom, justice and the observation of international law by every State.

Starting from the premise that it is impossible to build lasting peace merely upon a materialistic foundation, **Francis B. Sayre** asserts that a genuine and just peace can be built only upon generally accepted moral and ethical standards restraining the conduct of States and their rulers.¹⁴¹ Sayre correctly insists that a stable peace cannot be won overnight by mere treaties or legal documents.¹⁴² Also it cannot be stable, if it is imposed from outside. In his view, a genuine and just peace must grow from within and is the fruit of long experience.¹⁴³ Sayre correctly stresses that peace, to be enduring must be built upon justice and full consent and not upon superior force. Such a peace can come only through the understanding and cooperation among nations.¹⁴⁴

Aleksander Skrzyński maintained that peace must be genuine and just. He asserted that peace must be based on justice.¹⁴⁵ Accordingly, Skrzyński tried to explain what he meant by justice. He indicated that there is justice based on a recognized code of law; but there is also another kind of justice, which is not based upon law, and should not be applied toward peace, for justice in the abstract, without law, means revolution.¹⁴⁶ Thus, Skrzyński believed that justice based upon valid law is a prerequisite for a genuine and just peace. **Gustav Stresemann**, speaking of a genuine and just peace, asserted that "it is easier for the victor than for the vanquished to advocate peace."¹⁴⁷ He

¹³⁶ *Ibid.*, p. 78.

¹³⁷ *6 Japan Peace Movement* 1 (No. 3, 1918).

¹³⁸ N.M. B u t l e r: *The Path to Peace* (1930), p. 9.

¹³⁹ *Ibid.*, p. 9.

¹⁴⁰ *Ibid.*, p. 9.

¹⁴¹ F.B. S a y r e: "The Education and International Relations," 873 *The Department of State Publication* 11 (1936).

¹⁴² F.B. S a y r e: "The American Spirit," 1142 *The Department of State Publication* 4 (1938).

¹⁴³ *Ibid.*, p. 4.

¹⁴⁴ *Ibid.*, p. 5; P r z e t a c z n i k, *supra*, note 31, pp. 113–114.

¹⁴⁵ League of Nations: *Arbitration, Security and Reduction of Armaments, Debates of the Fifth Assembly, First and Third Committees, Reports & Resolutions, adopted by the Assembly and the Council*, Doc. C.708.1924.IX. (C.C.O.I), Sept. 4, 1924, p. 14.

¹⁴⁶ *Ibid.*, p. 14; P r z e t a c z n i k, *supra*, note 39, p. 69.

¹⁴⁷ G. S t r e s e m a n n: "The New Germany," in: F. H a b e r m a n, *supra*, note 123, p. 11.

explained that for the victor, peace means the preservation of the position of power which he has secured, and for the vanquished, it means resigning himself to the position left for him.¹⁴⁸

Believing in brotherhood and justice as a basis for peace, if peace is to become a reality on earth,¹⁴⁹ **Nathan Soderblom** argued that eternal peace must be secured and sustained by law and justice.¹⁵⁰ **Lord Davies** urged that peace must be a righteous peace, and that when injustices or grievances arise, they must be settled by resort to reason and equity, instead of to violence and force.¹⁵¹ He insisted that the anemic vendors, of peace at any price, the appeasers and peace-pledgers, must be driven out because such a concept of peace is wrong and short-sighted. In his view, peace at any price means war in the long run.¹⁵²

Starting from the premise that peace is a valuable and desirable thing, **Josef Beck**, the Polish Foreign Minister before World War II, pointed out that peace is certainly the aim of hard working Polish diplomacy.¹⁵³ He indicated that our generation, which bled in several wars [in the struggle for Polish independence from enslavement and oppression, for more than 125 years, by foreign aggressive powers]. In Beck's view, two conditions are necessary for a genuine and just peace: "One, peaceful intention; two, peaceful methods of actions," with a respect for the principles of international law. However, "peace, like almost all things of this world, has its price, high but definable."¹⁵⁴ Beck stated: "We in Poland do not know the conception of peace at any price. There is only one thing in the life of men, and States which is without price – that is honor."¹⁵⁵ He asserts that peace cannot be at any price without honor.¹⁵⁶

The concept of a genuine and just peace was asserted strongly by **Edouard Daladier**. Referring to the deceitful proposal for peace by Adolf Hitler in his speech before the Reichstag on 6 October 1939, Daladier stated that the talk "of peace, German peace, (...) which would only consecrate conquests by deceit or violence [of Austria, Czechoslovakia and Poland], and would not prevent preparation for new ones [conquests]."¹⁵⁷ Daladier correctly indicated that if "peace is really desired, a lasting peace, it will be necessary to understand that security of nations can rest only on reciprocal guarantees excluding any surprise and erecting a barrier against any attempt at domination."¹⁵⁸

¹⁴⁸ *Ibid.*, p. 11.

¹⁴⁹ N. Soderblom: "The Role of the Church in Promoting Peace," in: Haberma, *supra*, note 123, pp. 96 and 115.

¹⁵⁰ *Ibid.*, p. 95.

¹⁵¹ Lord Davies: *The Seven Pillars of Peace* (1945), p. 20.

¹⁵² *Ibid.*, pp. 20–21.

¹⁵³ J. Beck (Polish Foreign Minister): "Speech to Sejm on 5 May 1939," 351 *International Conciliation* 360 (June 1939); Przetacznik, *supra*, note 31, p. 114.

¹⁵⁴ Beck, *supra*, note 153, p. 360.

¹⁵⁵ *Ibid.*, p. 360; Przetacznik, *supra*, note 31, p. 114.

¹⁵⁶ Beck, *supra*, note 153, p. 360; Przetacznik, *supra*, note 35, p. 193.

¹⁵⁷ Premier E. Daladier's Broadcast to the French Nation, 10 October 1939, 354 *International Conciliation, Documents for the Year 1939* 525 (December 1939).

¹⁵⁸ *Ibid.*, p. 527; Przetacznik, *supra*, note 1, p. 260.

Daladier stressed: "If peace is really desired, a lasting peace, it will be necessary to understand finally that the time has passed when territorial conquests bring well-being to the conquerors."¹⁵⁹ It is clear from the above considerations that according to Daladier, peace must be genuine and just. Such a peace must be based upon strict observation of the principles of international law by all States, and the mutual recognition of the rights and legal interests of all States. The occupation, subjugation or domination of other peoples, nations or States by foreign powers is incompatible with a genuine and just peace and must be abolished.

Neville Chamberlain was a vigorous proponent of peace and at the 1938 Munich Conference paid a very high price at the expense of Czechoslovakia for the preservation of an illusory "peace in our time."¹⁶⁰ However, even this high price could not preserve peace. Finally conscious of Hitler's fraudulent concept of peace, Chamberlain rejected the peace proposals put forward by the German Chancellor in his speech on 6 October, 1939.¹⁶¹ He indicated that on 1 September 1939, Hitler had violated Polish frontiers and invaded Poland. In contravention of international law, Polish towns and villages were bombed into ruins and civilians were slaughtered in mass numbers. Chamberlain stated that it is "after this wanton act of aggression, which has cost so many Polish and German lives, sacrificed to satisfy his own insistence on the use of force, that the German Chancellor now puts forward his peace proposals."¹⁶²

Chamberlain demonstrated that Hitler's deceitful peace proposals were "based on recognition of his conquests and his right to do what he pleases with the conquered."¹⁶³ The British Prime Minister emphasized that all the peoples of Europe, including the people of Germany, long for peace, but for a genuine and just peace. Such a "peace which will enable them to live their lives without fear and to devote their energies and their gifts to the development of their culture, the pursuit of their ideals, and the improvement of their material prosperity."¹⁶⁴ Finally, Chamberlain asserted that the "peace which we are determined to secure, however, must be a real and settled peace, not an uneasy truce interrupted by constant alarms and repeated threats."¹⁶⁵

The concept of a genuine and just peace was advanced by **Emery Reves**. Starting from the idea that peace means that the relations among States, nations and individuals are regulated by law, Reves argued that the problem of a genuine peace "is not to create a permanent *status quo*."¹⁶⁶ In his view, the concept of peace based on force and kept by force is absolutely erroneous, because "*status quo* is a grotesque misconception of peace."¹⁶⁷ Reves maintained that if we continue to refuse to recognize the

¹⁵⁹ Daladier, *supra*, note 157, p. 527; Przetacznik, *supra*, note 1, p. 260.

¹⁶⁰ N. Chamberlain: *In Search of Peace* (1939), p. 278.

¹⁶¹ Prime Minister N. Chamberlain's Speech before the House of Commons, 12 October 1939, *International Conciliation*, *supra*, note 153, p. 530.

¹⁶² *Ibid.*, p. 530; Przetacznik, *supra*, note 1, pp. 260-261.

¹⁶³ Chamberlain, *supra*, note 161, p. 530.

¹⁶⁴ *Ibid.*, p. 530; Przetacznik, *supra*, note 1, p. 261.

¹⁶⁵ Chamberlain, *supra*, note 161, p. 532.

¹⁶⁶ E. Reves: *The Anatomy of Peace* (1946), p. 146.

¹⁶⁷ *Ibid.*, p. 148.

essence of peace and believe that it is a negative state of affairs which can be “lasting,” which can be “kept” for a long time without changes, which can be “enforced” by forceful means, then the problem of peace will never be solved.¹⁶⁸ **James P. Warburg** stresses that peace can exist only through the firm establishment of justice.¹⁶⁹

Philip M. Brown insists that peace cannot be *imposed*, and he criticizes peace advocates who advance the idea creating international peace by imposing peace on individual nationals and blocs of nations.¹⁷⁰ He explains: “No lesson in recent times could be more impressive and poignant than that the way to peace does not lie along the road of force,” because mankind will always abhor coercion of any kind, be it physical or moral.¹⁷¹ **Victor H. Duras** confirms that there is such a thing as armed peace in the preparation for war.¹⁷² Therefore, the concept of armed peace is erroneous and must be rejected.

Nevile Henderson promoted the concept of a genuine and just peace. Convinced that the peace of Europe depended upon the realization of an understanding between Great Britain and Germany,¹⁷³ Henderson stated that “nobody strove harder for an honorable and just peace than I did.”¹⁷⁴ He explains not convincingly that it is easy to be wise after the event, and that the national hatreds and resentments of 1919 were an impossible atmosphere for the creation of a “genuine peace and tranquility of the world.”¹⁷⁵ The national hatreds and resentments in Nazi Germany, were based on blind Prussian Militarist and aggressive ideology, as developed in the nineteenth and twentieth centuries by German politicians, ideologues and philosophers. It was designed to achieve world domination by conquest, enslavement and even annihilation of other peoples, nations, and States.¹⁷⁶

It is to be noted that the Nazis used the Versailles Treaty merely as an excuse for their criminal designs of conquest, enslavement and annihilation of other peoples, nations, and States and for the commission of their heinous crimes, the greatest in the history of civilization. **Anthony Eden** stressed that a genuine and just peace does not “mean simply the absence of war.”¹⁷⁷ In his view, a genuine and just peace will never exist on earth, unless there is established an economic system in which men and women, who are willing to work, are able to work and find the reward of their labor.¹⁷⁸ Eden points out that there can be no social advancement without peace, but it is equally true that one cannot have peace without social progress.¹⁷⁹

¹⁶⁸ Przetacznik, *supra*, note 31, p. 116.

¹⁶⁹ J.P. Warburg: *Peace in Our Time?* (1940), p. 47.

¹⁷⁰ P.M. Brown: *The Science of Peace* (1942), p. 13.

¹⁷¹ *Ibid.*, p. 14; Przetacznik, *supra*, note 35, p. 192.

¹⁷² V.H. Duras: *Universal Peace* (1908), p. 20.

¹⁷³ N. Henderson: *Failure of a Mission, Berlin 1937–1939* (1940), p. 9.

¹⁷⁴ *Ibid.*, p. 10; Przetacznik, *supra*, note 35, p. 195.

¹⁷⁵ Henderson, *supra*, note 173, p. 91.

¹⁷⁶ F. Przetacznik: *The Philosophical and Legal Concept of War* (1994), pp. 78–99.

¹⁷⁷ A. Eden: “The Future of Germany,” 2 *Britain’s Peace Aims* (n.d.), p. 32.

¹⁷⁸ Przetacznik, *supra*, note 31, p. 116.

¹⁷⁹ *Ibid.*, p. 116.

In Eden's opinion, great unemployment, malnutrition, poverty and an animal-like standard of living in many countries are serious factors jeopardizing peace. A genuine and just peace cannot coexist with such social and economic evils and calamities, because sooner or later they will lead to revolution, or civil or international wars.¹⁸⁰ He stated: "We have learned that (...) the price of [a genuine and just] peace is constant vigilance, readiness, courage; and we must never forget that lesson."¹⁸¹ Therefore, Eden emphasized that one must make sacrifices for a genuine and just peace, because it is the law of life that one does not get something for nothing. Accordingly, he insisted that one must show the willingness to preserve a genuine and just peace and one must have the adequate force and the will to do it if necessary.¹⁸²

The specific concept of a genuine and just peace is expounded by **Wei Tao-Ming**, who asserts that peace depends on extending collaboration, mutual understanding and active assistance.¹⁸³ Wei Tao-Ming affirms that to have a genuine peace one must constantly develop harmony of interests and desires among all peoples. For this purpose, there must also be established an equitable system of international relations founded on just and equal treatment regardless of race, creed or color.¹⁸⁴ In Wei Tao-Ming's concept of genuine and just peace, nations large and small stand as equals in the family of nations; there must be no thought of superior or inferior nations or peoples or individuals; each must also be allowed to work out its own destiny without external interference and independently make its proper contributions to the common achievement of scientific, cultural and spiritual values.¹⁸⁵

In such a peace, individuals, peoples, nations and States should work not only for their own gains, but should also work for the common good of all mankind. Accordingly, a genuine and just peace is in the common interest of the entire world. Individuals, peoples, nations and States must be aware of the benefit of such a peace. As to a genuine and just peace, **Henry G.R. Mason** asserts that the "peace at which we aim must not only be based on justice, but is also must appear just to those who come after us."¹⁸⁶ He stresses that our conception of justice today is to be far-sighted and thus avoid those elements of instability that will disrupt an established peace.¹⁸⁷

Starting from the premise that peace is a precious thing, **Harry S. Truman** shows that even "more precious than peace are freedom and justice."¹⁸⁸ In his view, a genuine and just peace must be based upon freedom and justice, which are things that give meaning to human lives. Truman stresses that a just and lasting peace must be built

¹⁸⁰ Przetacznik, *supra*, note 35, p. 195.

¹⁸¹ Eden, *supra*, note 177, p. 30.

¹⁸² *Ibid.*, p. 32.

¹⁸³ Wei Tao-Ming: "Victory Is Not Enough," 5 *Free World* 15 (1943); Przetacznik, *supra*, note 31, p. 117.

¹⁸⁴ Wei Tao-Ming, *supra*, note 183, p. 15.

¹⁸⁵ *Ibid.*, p. 15; Przetacznik, *supra*, note 31, p. 117.

¹⁸⁶ Ministry of Foreign Affairs: *New Zealand Foreign Policy, Statements and Documents 1943-1957* (1972), p. 110.

¹⁸⁷ *Ibid.*, p. 110.

¹⁸⁸ T.S. Settel (ed.): *The Quotable Harry Truman* (1967), p. 121.

upon good will and good deeds as well as upon power.¹⁸⁹ This means that peace must be protected by appropriate force. He contends that peace is not a reward that comes automatically to those who cherish it. Accordingly, efforts toward a just and lasting peace depend upon the strength of those who are determined to maintain it,¹⁹⁰ and a genuine and just peace must be pursued, unceasingly and unwaveringly, by every means at our command.¹⁹¹ Finally, Truman states that the benefits of peace come to those who have sown the seeds of peace.¹⁹²

Grenville Clark advances the idea of genuine and just peace when he maintains that peace, not a mere truce is needed to make life less hard for hundreds of millions. He argues that half the people of the world live at a very low level with respect to the bare necessities of food, clothing, and shelter.¹⁹³ He insists that peace must be based upon a valid law, because no peace can exist without law.¹⁹⁴ Clark emphasizes the need to improve the economic and social conditions of most of the countries of the world as a requirement for a genuine and just peace. Economic and social justice is a very important condition for a genuine and just peace, but it is only one prerequisite of such a peace. It is well known that some totalitarian regimes had satisfied the basic economic and social needs of their populations, yet they did not establish a genuine and just peace, but rather an oppressive order kept by naked force, which had nothing to do with peace.

The rational concept of a genuine and just peace was urged by **Dwight D. Eisenhower**, who asserted that such a peace should guarantee to all nations, great and small, freedom, security and justice.¹⁹⁵ Eisenhower indicated that peace may be marked by, or even be a product of, treachery and the temporary triumph of expediency over all spiritual values. He contended that without spiritual values [such as political and religious freedom, as well as the recognition and observation of basic human rights] peace is an inhuman existence.¹⁹⁶ Having in mind a genuine and just peace, Eisenhower says that people want to live not in a peace that is a mere stilling of guns, but in a peace in which they can live happily, confident that they can raise their children in a world of which they will be proud.¹⁹⁷

Starting from the idea that peace is a right of every human being, Eisenhower states that "mankind hungers for [a genuine and just] peace."¹⁹⁸ He argues that this universal hunger must be satisfied, because, either the nations will build a cooperative peace, or one by one, they will be forced to accept an imposed peace, i.e., an oppressive order, which was pursued by Communist powers, imitating Hitler in this

¹⁸⁹ *Ibid.*, p. 120; Przetacznik, *supra*, note 8, p. 117.

¹⁹⁰ Settel, *supra*, note 188, pp. 119–120.

¹⁹¹ *Ibid.*, p. 120; Przetacznik, *supra*, note 31, p. 117.

¹⁹² Settel, *supra*, note 188, p. 122.

¹⁹³ G. Clark: *A Plan for Peace* (1950), p. 69.

¹⁹⁴ *Ibid.*, p. 78.

¹⁹⁵ Przetacznik, *supra*, note 31, p. 118.

¹⁹⁶ D.D. Eisenhower: *Peace with Justice* (1961), pp. 2, 3, 89, 129.

¹⁹⁷ Przetacznik, *supra*, note 31, p. 118.

¹⁹⁸ Eisenhower, *supra*, note 196, p. 137.

respect.¹⁹⁹ Eisenhower stresses that the peace we seek is a secure and just peace not bought by the abject surrender of our vital interests, i.e., the preservation of freedom, justice, and other human rights. He asserts that peace so bought would be an illusion and a permanent loss of most precious human values. Finally, Eisenhower concludes that the means of a genuine and just peace are justice, honesty, mutual understanding, and the respect of the rights of others.²⁰⁰

John F. Dulles indicates that there has been a grave misconception on the nature of peace.²⁰¹ He states that many peoples have tried to identify peace as a perpetuation of the oppressive *status quo* and they have asserted that “peace” means keeping it forever.²⁰² However, an oppressive *status quo* cannot be maintained, because it constitutes a violation of the basic human rights of individuals, including the right to self-determination of peoples and nations. Hence, in Dulles’s view, peace must take into account the fact that life is essentially dynamic, that change is inevitable, and that transformations are bound to occur violently, unless provisions are made for ways of peaceful change.²⁰³ Dulles is absolutely right when he says that any world system is doomed if it identifies peace with a mere maintenance of *status quo*.

The idea that peace must be just and genuine is strongly advocated by **Dag Hammarskjöld** who insists that the justness of peace is closely related to the recognition and observation of human rights. In this respect he states: “Without recognition of human rights, we shall never have peace, and it is only within the framework of peace that human rights can be fully developed. In fact, the work for peace is basically a work for the most elementary human right: the right of everyone to security and freedom from fear.”²⁰⁴ As to the idea of a genuine and just peace, **A.F.K. Orgański** asserts that the terror of modern warfare has greatly increased the price that nations are willing to pay for peace, but no nation seeks peace at any price.²⁰⁵

Orgański opines that peace is only one of many goals, and although it is important, it is not necessarily supreme.²⁰⁶ Orgański is correct, because the freedom of individuals and the independence of States are even more desirable than peace, in particular an oppressive peace. He emphasizes: “Peace is a major goal of modern nations, but is not always the goal that takes precedence.”²⁰⁷ He correctly states: “Nor is peace exactly synonymous with the maintenance of the *status quo*,”²⁰⁸ because change in international relations is constant. Orgański explicates that peace – particu-

¹⁹⁹ *Ibid.*, pp. 66–67.

²⁰⁰ *Ibid.*, p. 83; Przetacznik, *supra*, note 31, p. 119.

²⁰¹ J.F. Dulles: “Peaceful Change,” 239 *International Conciliation* 493 (1941).

²⁰² J.F. Dulles: *War or Peace* (1950), p. 18.

²⁰³ Dulles, *supra*, note 201, p. 493.

²⁰⁴ E. Kelen (ed.): *Hammarskjöld, The Political Man* (1966), p. 16; Przetacznik, *supra*, note 12, p. 199.

²⁰⁵ A.F.K. Orgański: *World Politics* (1961), p. 62.

²⁰⁶ *Ibid.*, p. 61; Przetacznik, *supra*, note 35, p. 199.

²⁰⁷ Orgański, *supra*, note 205, p. 63.

²⁰⁸ *Ibid.*, p. 332.

larly if peace means the preservation of *status quo* – does not benefit all nations equally, and that “those who pursue peace as a national goal while claiming that they are interested in the welfare of all men are often more seriously interested in avoiding the destruction of their own wealth, which war would cause, and in perpetuating their positions of privilege, which peace would help to guarantee.”²⁰⁹

The concept of genuine and just peace has been expounded upon by **John F. Kennedy**. In his opinion, a genuine and just peace is a peace which makes life on earth worth living, the kind of peace that enables men and nations to grow and to hope and to build a better life for their children – not merely peace for Americans, but peace for all men and women; not merely peace in our time but peace for all time.²¹⁰ Kennedy indicates that a genuine and just peace must be a product of many nations and it must express their interests. It is a fundamental principle that all nations have a common interest in peace and should cooperate to maintain it. Kennedy also maintains that a genuine and just peace must recognize and implement the right of the freedom of individuals and other basic human rights.²¹¹

The concept of a genuine and just peace was advocated by **Lester B. Pearson**. In his view, a genuine and just peace must be based upon the understanding, friendship and cooperation of peoples.²¹² He is against a peace “of the policeman and jail,” for it is not a genuine and just peace. Pearson insists that in order to achieve a genuine and just peace, we must, at all costs, stand as individuals and as nations on the side of those who choose a free life.²¹³ If we get peace and security, without the recognition of human dignity and freedom, we will have failed. Therefore, we must always refuse to concede that the only viable alternative to peace is surrender to unjust demands, because of fear of destruction if we do not do so.²¹⁴ Finally, in his view, a strict observation of human rights is a prerequisite for a genuine and just peace.²¹⁵

Starting from the premise that peace is not always an absolute good, **Urpo Harva** states that it must be admitted that not every kind of peace is good. He asserts that a peace may be so ridden with injustice, oppression, and deprivation of liberty that this situation may well be considered worse than war.²¹⁶ It is obvious that such a peace is not a genuine and just peace. Likewise, **Eugene V. Rostow’s** idea of peace is linked to the idea of law, such that peace is a condition of society characterized by the expectation of a general obedience to law.²¹⁷ However, such law must be a valid law, because linked or based on invalid law, is not a peace but order essentially imposed by force. Similarly, according to Rostow, a genuine peace must be based on law and must secure freedom and justice.²¹⁸

²⁰⁹ *Ibid.*, p. 70.

²¹⁰ President J.F. Kennedy: *The Burden and the Glory* (A. Nevins ed.) (1964), pp. 53–54.

²¹¹ Przetacznik, *supra*, note 31, p. 120.

²¹² L.B. Pearson: *The Four Faces of Peace and International Outlook* (S.G. Pierson ed.) (1964), p. 167.

²¹³ Przetacznik, *supra*, note 31, p. 120.

²¹⁴ Pearson, *supra*, note 212, pp. 72–73.

²¹⁵ *Ibid.*, p. 74.

²¹⁶ U. Harva: “War and Human Nature,” in: G. Ginsburg (ed.): *The Critique of War* (1969), p. 51.

²¹⁷ E.V. Rostow: *Peace in the Balance* (1972), p. 286.

²¹⁸ *Ibid.*, pp. 283, 291.

The concept of a genuine and just peace is expressed by **Lech Wałęsa**, who asserts that only a peace built upon the foundation of justice and moral order can be a lasting peace. Wałęsa correctly points out that every community has an inalienable right to peace based upon the basic human right to life and that all nations of the world have the right to live in freedom and dignity.²¹⁹ He stresses that it is his cherished desire that peace not be separate from freedom, which is the right of every nation. Having in mind the inalienable right of individuals, peoples, nations and States, Wałęsa rightly states that nations of the world have the right to live in dignity.²²⁰ Thus, according to Wałęsa, the right to peace, which is a basic collective human right, is strictly connected with the observation of their individual and collective human rights.

Albert Einstein also teaches that peace cannot be kept by force. It can only be achieved by understanding.²²¹ Similarly, **Asbjørne Eide** maintains: "There can be no lasting peace without respect for basic human rights" or conversely, "Human rights cannot in our time be promoted without the maintenance of peace."²²² Having in mind that peace and law are unavoidably united concepts and that peace and justice are related notions, **Hector Gross Espiell**, like **Hammarškjold**, insists that human rights cannot be respected without the existence of peace, and peace cannot exist without the respect of human rights.²²³ Accordingly, he maintains that genuine peace necessarily identifies itself with the idea of justice. In his view, peace must be the harmonious order of freedom, in which a balance between rights and duties exists.²²⁴ **Oscar Arias Sanchez** contends that peace and democracy go together, and are indivisible, and that genuine peace means an end to the suppression of human rights.²²⁵

The concept of a genuine and just peace is strongly espoused by former U.S. President **Ronald W. Reagan**. Starting from the premise that: "Peace is God's commandment"²²⁶ and that: "Peace is holy shadow cast by men treading on the path of virtue,"²²⁷ Regan states that "just as well as we all know what peace is (...) we certainly know what peace is not."²²⁸ He correctly maintains that a "peace based on repression cannot be true peace and is secure only when individuals are free to direct their own governments."²²⁹ Reagan affirms that peace based on partition cannot be true peace. He explains that nothing can justify the continuing and permanent division of the European continent.²³⁰ (He referred to the unfortunate – and at the same time illegal – agreements made at the Yalta Conference by J. Stalin, W. Churchill and F.D. Roosevelt in 1945).

²¹⁹ *The N.Y. Times*, 12 Dec. 1983, p. A10.

²²⁰ *Ibid.*, p. A10.

²²¹ A. Einstein, in: G. Seldes (ed.): *The Great Quotations* (1968), p. 239.

²²² A. Eide: "The Right to Peace," 10 *Bulletin of Peace Proposals* (Oslo) 157 (1979), p. 157.

²²³ H. Gross Espiell: "El Derecho a la Paz," 3 *Revista del Instituto Interamericano de Derechos Humanos* 87 (1986).

²²⁴ *Ibid.*, p. 87.

²²⁵ O. Arias, *The N.Y. Times*, 11 Dec. 1987, p. A3.

²²⁶ R.W. Reagan, *The N.Y. Times*, 25 Oct. 1985, p. A11.

²²⁷ *Ibid.*, p. A11.

²²⁸ *Ibid.*, p. A11.

²²⁹ *Ibid.*, p. A11; Przetacznik, *supra*, note 35, p. 202.

²³⁰ Reagan, *supra*, note 226, p. A11.

This means that a genuine and just peace would be impossible while the Soviet Union kept under its domination and oppression almost half of Europe. Reagan declared: "When we speak of peace, we should not mean just the absence of war."²³¹ In his view, true peace "rests on the pillars of individual freedom, human rights, national self-determination, and respect for the rule of law."²³² Reagan asserts that building a safer future requires that we "seek not just to avoid war, but to strengthen peace, prevent confrontation, and remove the sources of tension."²³³ The prevention of confrontation and the removal of the sources of tension can be achieved only through the strict respect of law by the Soviet State and the observation of individual and collective human rights in general, and of freedom of individuals and the right to self-determination of peoples and nations in particular.

These statements were made by Reagan before the disintegration of the Communist system in the Soviet Empire, and the disintegration of the empire itself. Accordingly, Reagan insisted that walls of partition and distrust must give way to greater communication for an open world. In his view; "Peace based on mutual fear cannot be true peace because staking our future on a precarious balance of terror is not good enough. The world needs a balance of safety."²³⁴ Finally Reagan says that a peace based on averting trouble cannot be true peace.²³⁵ It is clear from the above considerations that Reagan advocated a genuine and just peace. In his view, a basic prerequisite for such a peace is the recognition and strict implementation of all individual and collective human rights by every State of the world. Peace based on domination, fear and repression enforced by brutal force is not a genuine and just peace and such a peace will not last.

The Concept of Genuine and Just Peace in Peace Proposals During the First World War

Proposals during the First World War concerning a genuine and just peace were expressed in the official statements by the States and unofficial statements by members of various international or national organizations.

Official Proposals by the Statesmanship

President **Woodrow Wilson**, in a Note of 18 December 1916, to the belligerents, speaks of "the formation of a League of Nations to ensure peace and justice throughout the world."²³⁶ Here peace is treated together with justice, the latter thus constituting an element of the former. On the same day, considering a genuine and just peace, **Baron Sonnino**, Italian Minister for Foreign Affairs, in his Speech in the Chamber of

²³¹ Reagan, *The N.Y. Times*, 15 Nov. 1985, p. A10.

²³² *Ibid.*, p. A10.

²³³ *Ibid.*, p. A10; Przetacznik, *supra*, note 35, p. 202.

²³⁴ Reagan, *supra*, note 226, p. A11.

²³⁵ *Ibid.*, p. A11.

²³⁶ G.L. Dickinson: *Documents and Statements Relating to Peace Proposals and War Aims, December 1916–November 1918* (referred hereafter as Dickinson: *Documents and Statements*) (1919), p. 5.

Deputies, declared: "We all desire a lasting peace, but we consider as such an ordered settlement whose duration does not depend upon the strength of the chains binding one people to another, but on a just equilibrium between States, and respect for the principle of nationality, the rights of nations, reasons of humanity and civilization."²³⁷

The Entente, in its Reply of 29 December 1916, to German Peace Proposals, affirmed that no peace is possible until the reparation of violated right and liberties, the acknowledgment of the principle of nationalities and the free existence of small States shall be assured; and as long as there is no assurance of a settlement to definitely suppress the causes which for so long a time have menaced nations and to give the only efficacious guarantees for the security of the world.²³⁸ The British Supplement of 13 January 1917, to the Entente Reply to President Wilson, indicates that it is clear from the President's Note that while he is motivated by an intense desire that peace should come soon and that when it comes it should be lasting, he does not, for the moment at least concern himself with the terms on which it should be arranged.²³⁹

The British Reply said that His Majesty's Government entirely shared the President's ideas, but that "they feel strongly that the durability of peace must largely depend on its character and that no stable system of international relations can be built on foundations which are essentially and hopelessly defective."²⁴⁰ The British Reply goes on to say that such "a peace would represent the triumph of all the forces which make war certain and make it brutal."²⁴¹ The German Note of 11 January 1917, to Neutrals, indicates that "our enemies describe the offer of the four Allied Powers as war manoeuvre,"²⁴² but Germany and her Allies considered that a "just peace acceptable to all belligerents was possible."²⁴³ **Arthur J. Balfour's** Dispatch of 16 January 1917, commenting on the Allied Note of 30 December 1916, addressed to the British Ambassador at Washington, states that peace based upon German Peace Proposals "would represent the triumph of all the forces which make war certain and make it brutal."²⁴⁴

President Wilson, in his Address of 22 January 1917, to the Senate, insists that the United States and other nations must add their authority and their power and the force of other nations to guarantee peace and justice throughout the world.²⁴⁵ Wilson points out that if the peace presently to be made is to last, "it must be a peace made secured by an organized major force of mankind."²⁴⁶ Accordingly, the terms of the peace agreed

²³⁷ J.B. Scott: *Official Statements of War Aims and Peace Proposals, December 1916 to November 1918* (referred hereafter as Scott: *Official Statements*) (1921), p. 12.

²³⁸ Dickinson: *Documents and Statements, supra*, note 236, p. 28.

²³⁹ Scott: *Official Statements, supra*, note 237, p. 46.

²⁴⁰ *Ibid.*, p. 46.

²⁴¹ *Ibid.*, p. 48.

²⁴² Dickinson: *Documents and Statements, supra*, note 236, p. 16.

²⁴³ *Ibid.*, p. 16.

²⁴⁴ A.J. Balfour, British Foreign Secretary, in Lloyd George's wartime coalition Government, *ibid.*, p. 23.

²⁴⁵ *Ibid.*, p. 50.

²⁴⁶ *Ibid.*, p. 51.

upon will²⁴⁷ be based on the equality of nations, and it is upon this which peace must be founded. Furthermore, if peace is to last, there must be an equality of rights; “the guarantee exchanged must neither recognize nor imply a difference between big nations and small, between those that are powerful and those that are weak.”²⁴⁸ Wilson also points out that rights must be based upon the common strength, not upon the individual strength, of the nations upon whose concert peace will depend.²⁴⁹

The President insists that only a peace between equals can last, and that no peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property.²⁵⁰ Finally, Wilson asserts that the world can be at peace only if its life is stable, and there can be no stability where will is in rebellion, where there is no tranquility of spirit and a sense of justice, of freedom, and of right.²⁵¹

President Wilson’s Reply of 27 August 1917, to the Pope’s Peace Note indicates that “no peace can rest securely upon political or economic restrictions meant to benefit some nations and cripple or embarrass others, upon vindictive action of any sort, or any kind of revenge or deliberate injury.”²⁵² He insists that “peace should rest upon the rights of peoples, not the rights of Governments – the rights of peoples, great or small, weak or powerful – their equal rights to freedom and security and self-government and to a participation upon fair terms in the economic opportunities of the world, German peoples, of course, included if they accept equality and do not seek domination.”²⁵³

President Wilson’s proposals on genuine and just peace may be summarized as follows:

1. A Peace must be built upon the principles of international law, justice and of humanity. It means that relations between and among nations must be governed by principles of international law and rules of morality of decent human conduct.
2. The peace, must not be in the interest of any particular nation or group of nations, but must be in the common interest of all, large and small States alike.
3. The peace must win the approval of the people or nation – of the major force of mankind.
4. The peace must be built upon the principle that governments derive their just powers from the consent of the governed – a democratic peace.

Wilson explained that the impartial justice meted out must involve no discrimination between those to whom we wish to be just and those to whom we do not wish to be just. It must be a justice that plays no favorites.²⁵⁴

²⁴⁷ *Ibid.*, p. 51.

²⁴⁸ *Ibid.*, p. 52.

²⁴⁹ *Ibid.*, p. 52.

²⁵⁰ *Ibid.*, p. 52.

²⁵¹ *Ibid.*, p. 53.

²⁵² *Ibid.*, p. 51.

²⁵³ *Ibid.*, p. 52.

²⁵⁴ R.E. S w i n d l e r: *The Causes of War, Including an Outline and Study of the World War and Official Peace Negotiations* (1920), p. 179.

Alexandre Ribbot, French Minister for Foreign Affairs, in his Reply of 12 October 1917, to Richard von Kuhlman, Foreign Minister of Germany, asserts that the return of Alsace-Lorraine to France is “a condition precedent to a peace founded on justice.”²⁵⁵ Ribbot further insists: “There would be no peace which would guarantee our children from a renewal of such a terrible war if the injustice of Alsace-Lorraine were not repaired.”²⁵⁶ President Wilson in his Address of 11 February 1918, to the Congress, discussing the Speeches of Georg von Hertling, German Chancellor and Ottokar Czernin, Austro-Hungarian Foreign Minister, explains that at stake was the peace of the world and that the United States and her Allies are striving for “a new international order based upon the broad and universal principles of right and justice – no mere peace of shreds and patches.”²⁵⁷

German Chancellor **Hertling**, in his Reply of 25 February 1918, to President Wilson’s Address of 11 February 1918, admits that “the final settlement must be based upon the essential justice (...) and upon such adjustments as are most likely to bring a peace that will be permanent.”²⁵⁸ Referring to St. Augustine’s maxim; *Justicia fundamentum regnorum*, Hertling affirms that it is still valid today. Accordingly, he asserts that it is certain that “only a peace based in all its parts on the principles of justice has a prospect of endurance.”²⁵⁹ Similarly, Austro-Hungarian Foreign Minister **Ottokar Czernin**, in his Speech of 2 April 1918, to the Vienna Municipal, maintains that to “endeavor to conclude peace at any price is despicable.”²⁶⁰

Referring to the 1918 Brest-Litovsk Treaty, signed on 14 June 1918, Lord **Alfred Milner** indicates that Germany has safeguarded herself in the East by a ring of dependent States, “leaving the supplying nations to enjoy just as much prosperity, freedom, and self-determination as Germany chooses to permit – a world of peaceful, servile States working for the profit of a great paramount Empire. That is the German peace as we see it illustrated today in the case of Russia and Rumania.”²⁶¹ On 29 December 1940, referring to Adolf Hitler’s concept of peace, President **Franklin D. Roosevelt** declared: “They call it a ‘negotiated peace.’ Nonsense! Is it a negotiated peace if a gang of outlaws surrounds your community and on threat of extermination makes you pay tribute to save your skins? Such a dictated peace would be no peace at all.”²⁶² President Roosevelt asserts: “We know that enduring peace cannot be bought at the cost of other people’s freedom.”²⁶³

²⁵⁵ *Ibid.*, p. 78.

²⁵⁶ *Ibid.*, p. 78.

²⁵⁷ *Ibid.*, p. 136.

²⁵⁸ *Ibid.*, p. 158.

²⁵⁹ *Ibid.*, p. 153.

²⁶⁰ *Ibid.*, p. 181.

²⁶¹ *Ibid.*, pp. 188–189.

²⁶² United States of America, Department of State: *Peace and War, United States Foreign Policy 1931–1941* (1943), p. 604.

²⁶³ *Ibid.*, p. 608.

Unofficial Proposals by Members of Various Organizations

The Neutral Conference for Continuous Mediation, composed of delegates from six neutral countries – Denmark, Holland, Norway, Sweden, Switzerland and the United States was convened at Stockholm by **Henry Ford** to work for the achievement of an early and lasting peace, based upon principles of justice and humanity.²⁶⁴ The Stockholm Conference submitted concrete proposals upon which peace might be founded. Such a peace should not only satisfy the legitimate demands of the warring nations, but also advance the welfare of humanity at large. Accordingly, the Stockholm Conference emphasized the universal demand that peace, when it would come, “shall be real, insuring mankind against the recurrence of a world war. Humanity demands a lasting peace.”²⁶⁵ **Women’s International Peace Congress**, at The Hague, adopted a Resolution concerning Peace. In paragraph 3 of its Resolution the Congress “demands that the peace which follows shall be permanent, and therefore be based on principles of justice.”²⁶⁶

The False Concept of Advanced Peace by Central Powers

The false concept of peace was expressed in Peace Proposals by Germany and other Central Powers. Germany, together with Austria-Hungary unleashed the First World War, and not being able as anticipated to quickly crush their opponents and secure decisive victory, after initial victories to secure their gains, came up with peace proposals to finish the war on their terms. Their imperialistic objective was dressed with humanitarian slogans. On 12 December 1916, German Chancellor **Theobald von Bethmann-Hollweg**, in the Reichstag, stated: “Our strength has not made our ears deaf to our responsibility before God, before our own nation, and before humanity. On 1 August 1914, the Emperor had personally to take the gravest decision which ever fell to the lot of a German – the order for mobilization – which he was compelled to give as the Russian mobilization.”²⁶⁷

Here von Bethmann-Hollweg reproached England for protesting against the violation of the Treaty guaranteeing the neutrality of Belgium, when Germany invaded that neutral country, saying that for a scrap of paper she wanted to conduct war against Germany. But he deliberately omitted the fact that Germany declared war on Russia and France and invaded and occupied French and other territories. The German Chancellor, in his hypocritical declaration, went on to say: “During these long and earnest years of the war the Emperor has been moved by a single thought: how peace could be restored to safeguard Germany after the struggle in which she has fought victoriously.”²⁶⁸ (The purpose of the German Proposal was to secure for herself the tempo-

²⁶⁴ R.S. Bourn: *Towards an Enduring Peace, A Symposium of Peace Proposals and Programs 1914-1916* (1916), p. 243.

²⁶⁵ *Ibid.*, p. 244.

²⁶⁶ *Ibid.*, p. 244.

²⁶⁷ S c o t t, *supra*, note 237, p. 1.

²⁶⁸ *Ibid.*, p. 1.

rary gains) Justifying perfidiously the German move, Bethmann-Hollweg pronounced that "in a deep moral and religious sense of duty toward his nation and, beyond it, toward humanity, the Emperor now considers that the moment has come for official action toward peace."²⁶⁹

Following his propaganda diatribe of duplicity and arrogance, the German Chancellor asserted that "in August 1914, our enemies challenged the superiority of our power in the war. Today we raise the question of peace, which is a question of humanity."²⁷⁰ Accordingly, he said: "We await the answer of our enemies with that serenity of mind which is guaranteed to us by our exterior and interior strength."²⁷¹ Bethmann-Hollweg went on perfidiously to say: "If our enemies decline to end the war [which Germany and Austria-Hungary arrogantly unleashed], if they wish to take upon themselves the world's heavy burden of all those terrors [which Germany applied in the occupied countries and especially in Belgium] which hereafter will follow [here Germany menaced the intensification of terror], then even in the least and smallest homes every German heart will burn in sacred wrath against our enemies, who are unwilling to stop human slaughter in order that their plans of conquest and annihilation may continue."²⁷²

As a matter of fact, it was Germany which in her plan of conquest invaded and occupied other countries, and their opponents were compelled to defend themselves against the aggression of Germany and her allies. Following her fake and deceptive stratagem disguised in the semblance of peace overtures, on 12 December 1916, Germany officially presented her Proposals for Peace. Those rather skillfully crafted illusive Peace Proposals were designed for two objectives: First, their purpose was to legalize through a peace treaty, the temporary conquest of the territories of their opponents and impose on them the German type of peace, based upon her conquest and enslavement of other peoples and achieving the world domination. Second, if their first objective failed, those proposals were framed to achieve propaganda gains in international public opinion over their opponents by accusing them of not accepting the peace proposals, and wanting to continue the war with all its harmful effects.

Accordingly, Germany with her crafty designs, in her Proposals for Peace, hypocritically affirmed: "The most formidable war known to history has been ravaging for two and a half years a great part of the world."²⁷³ The duplicity of this German assertion consisted in that it was Germany and her allies who at the beginning, by surprise attacks, invaded the territories of their opponents and ravaged them mercilessly with flagrant violations of the humanitarian rules of international law, and especially the Hague Conventions concerning the conduct of war. The German Proposals went on to perfidiously say in her propaganda design: "That catastrophe, that the bonds of a common civilization more than a thousand years old could not stop, strikes man-

²⁶⁹ *Ibid.*, p. 1.

²⁷⁰ *Ibid.*, p. 1.

²⁷¹ *Ibid.*, pp. 1-2.

²⁷² *Ibid.*, p. 2.

²⁷³ *Ibid.*, p. 2.

kind in its most precious patrimony [it was Germany and her allies who should have not committed their criminal acts, in flagrant violation of law and morality, against their opponents, and they were the ones who could stop them]; it threatens to bury under its ruins the moral and physical progress on which Europe prided itself at the dawn of the twentieth century."²⁷⁴

Following her distortion campaign of misinformation and at the same time of intimidation, Germany in her Peace Proposals, asserted: "In that strife Germany and her allies – Austria-Hungary, Bulgaria, and Turkey – have given proof of their indestructible strength in winning considerable successes at war. (...) The general situation much rather justifies their hope of fresh successes."²⁷⁵ Accordingly, "Conscious of their military and economic strength and ready to carry on to the end, if they must, the struggle that is forced upon them, but animated at the same time by the desire to stem the flood of blood and to bring the horrors of war to an end, the four allied Powers propose to enter even now into peace negotiations."²⁷⁶ Had Germany really desired peace, she would have presented honest and specific proposals for the negotiations in order to terminate the war and achieve a genuine and just peace.

But Germany did not wish such a peace; therefore, in her crafty proposals, she announced that the four Powers "feel sure that the propositions which they would bring forward and which would aim to assure the existence, honor and free development of their peoples, would be such as to serve as a basis for restoration of a lasting peace."²⁷⁷ Instead of submitting the specific and real propositions for negotiations to terminate war and establish a genuine and just peace, in her vague assurances of securing such ambiguous notions as existence, honor and free development of peoples, Germany tried to deceptively entice her opponents into peace negotiations, and from her position of strength to dictate a peace which would legalize her temporary gains. Aware that her opponents might not fall into her trap, consequently, for propaganda purposes, Germany declared that "if notwithstanding this offer of peace and conciliation the struggle should continue, the four allied Powers are resolved to carry it on to a victorious end, while solemnly disclaiming any responsibility before mankind and history."²⁷⁸

The same approach was applied in the German Note of 12 December 1916, to the Vatican regarding the Peace Proposals. Stressing that Germans were certain of "our strength, but realizing Europe's sad future if the war continued; seized with pity in the face of the unspeakable misery of humanity, the German Empire, in accord with her allies, solemnly repeats what the Chancellor already has declared, a year ago, that Germany is ready to give peace to the world by setting before the whole world the question whether or not it is possible to find a basis for an understanding."²⁷⁹ Ger-

²⁷⁴ *Ibid.*, p. 2.

²⁷⁵ *Ibid.*, p. 2.

²⁷⁶ *Ibid.*, p. 3.

²⁷⁷ *Ibid.*, p. 3.

²⁷⁸ *Ibid.*, p. 3.

²⁷⁹ *Ibid.*, p. 4.

many, which had unleashed the First World War, after discovering that she was not able to annihilate her opponents, expressed her readiness to give peace to the world – not a genuine and just peace, but peace on terms dictated by her. She expected that such a peace “can count upon the precious support of the Holy See.”²⁸⁰

The same method was followed by the Austrian Official Statement regarding the Peace Proposals of 12 December 1916. That Statement falsely asserted: “When in the summer of 1914 the patience of Austria-Hungary was exhausted by a series of systematically continued and ever increasing provocations and menaces, and the monarchy, after almost fifty years of unbroken peace, found itself compelled to draw the sword [rejected mediation by other countries to settle the dispute with Serbia – which accepted in principle all Austrian demands – and prevent war, instead, arrogantly and precipitously declared war on her in order to crush her], this weighty decision was animated neither by aggressive purposes nor by designs of conquest, but solely by the bitter necessity of self-defense, to defend its existence and safeguard itself for the future against similar treacherous plots of hostile neighbors.”²⁸¹

Serbia did not attack Austria, so the argument, of self-defense was not valid at all. The aggressive Austro-Hungarian monarchy had internal problems, because it was an oppressive and decadent imperium, which was based upon the conquests and annexations of territories of other countries, and the enslavement, domination, oppression and exploitation of their peoples. Its most ignominious conduct – it was a perverted monarchy, devoid of any legal and moral principles in the relations among men and nations – was her participation in the partition of Poland. Austria, whose independence was rescued in 1683 by the Polish King John Sobieski from the Turkish invasion and the siege of her capital Vienna, owed Poland a gratitude for this. She simulated friendship, as an ally of Poland, but was in fact a faithless monarchy. She was the first to treacherously invade Poland and participated in the illegal and abominable acts of dismemberment of her “ally.”

The last act of the Austrian illegal annexation of foreign territories was the annexation of Bosnia and Herzegovina in 1908, just six years before the unleashing of the First World War in conspiracy with Germany. The oppressed peoples who were deprived of their freedom and the independence of their countries had the right to struggle for their freedom and the independence of their countries. Culpable in this drama were not those who were struggling for their basic individual and collective human rights, but those who violated and denied them those rights, the aggressive and oppressive rulers of the corrupt and decadent Austro-Hungarian Empire. Blindly following the Germans and repeating like parrots their false arguments, the Austrian Official Note reverberated: “The Quadruple Alliance not only has won an immense series of victories, but also holds in its power extensive hostile territories.”²⁸²

The Note further indicated that the power of the Quadruple Alliance “have effectively pursued their aims, namely, defense against attacks on their existence and in-

²⁸⁰ *Ibid.*, p. 5.

²⁸¹ *Ibid.*, p. 5.

²⁸² *Ibid.*, p. 5.

tegrity, which were long since planned in concert, and the achievement of real guarantees, and they will never allow themselves to be deprived of the basis of their existence, which they have secured by advantages won.”²⁸³ History clearly showed that it was not the opponents of the Quadruple Alliance who planned in concert to deprive them of their existence and integrity, but Germany and Austria Hungary, in pursuit with their aims, who conspired, on how to attack their opponents. Therefore, in the first stage of the war, they won substantial successes over their opponents, who were not prepared for war and to the last minute tried to prevent it. Like Germany, Austria-Hungary, in the first stage of war, had tangible successes, but came to the conclusion that were not able to crush their opponents and win the war.

Accordingly, they feverishly pushed forward deceptive peace proposals with a view toward enticing their opponents into negotiation and dictating peace from a position of strength. Like Germany, Austria-Hungary did not want a genuine and just peace. Instead of presenting honest and specific proposals to establish such a peace, the Vienna Cabinet was deceptively talking “of making a candid and loyal endeavor to come to a discussion with their enemies for the purpose of paving a way for peace.”²⁸⁴ Using these false proposals for illusory propaganda purposes, the Vienna Cabinet declared: “Austria and her allies by this step have given new and decisive proof of their love of peace. It is now for their enemies to make known their views before the world.”²⁸⁵ Despite all the stratagems used by Germany and her allies to trap their opponents into the fraudulent peace, the Allied Powers properly understood the essence of those proposals, which showed a vicious intent, and flatly rejected them.

French Premier **Ariste Briand**, in his Speech of 13 December 1916, in the French Chamber of Deputies correctly rejected the Peace Proposals. He said: “It is after proclaiming her victory on every front that Germany, feeling that she can not win, throws out to us certain phrases about peace.”²⁸⁶ Briand properly indicated that “what they are sending us from over there is an invitation to discuss peace. It is invaded, Roumania invaded, ten of our Departments invaded! This invitation is in vague and obscure terms, in high-sounding words to mislead the minds, to stir the conscience, and to trouble the hearts of peoples who mourn for their countless dead.”²⁸⁷ He correctly stressed that in these declarations there was “the same cry of conscience, ever striving to deceive neutrals and perhaps also to blind the eyes of those among the German people whose vision is still unimpaired.”²⁸⁸

The French Premier stated that “the circumstances in which these proposals are made are such that I have the right to denounce them as a crafty move, a clumsy snare (...) What our enemies so generously offer to other nations is a sort of charitable promise not to crush them, not to annihilate them.”²⁸⁹ He declared that “even before

²⁸³ *Ibid.*, p. 6.

²⁸⁴ *Ibid.*, p. 6.

²⁸⁵ *Ibid.*, p. 6.

²⁸⁶ *Ibid.*, p. 7.

²⁸⁷ *Ibid.*, p. 7.

²⁸⁸ *Ibid.*, pp. 7–8.

²⁸⁹ *Ibid.*, p. 8.

the proposals are officially laid before us, I have the right to say to you that they are merely a ruse, an attempt to weaken the bonds of our alliance, to trouble the conscience and to undermine the courage of our people.”²⁹⁰ Similarly, **Nicolas Pokrovsky**, the Russian Minister for Foreign Affairs, in his Speech of 15 December 1916, in the Duma, said: “Words of peace coming from the side which bears the whole burden of responsibility for the world conflagration, which it started, and which is unparalleled in annals of history, however far back one may go, were no surprise to the Allies.”²⁹¹

Pokrovsky indicated: “In the course of the two and a half years that the war has lasted Germany has more than once mentioned peace. She spoke of it to her armies and to her people each time she entered upon a military operation which was to prove ‘decisive.’ After each military success, calculated with a view to create an impression, she put out feelers for a separate peace on one side and on the other conducted an active propaganda in the neutral press.”²⁹² He stated that all “these German efforts met with the calm and determined resistance of the Allied Powers.”²⁹³ Pokrovsky emphasized that now, “seeing that she is powerless to make a breach in negotiations.”²⁹⁴ But, he correctly pointed out: “In substance the German proposal contains no tangible indications regarding the nature of the peace which is desired.”²⁹⁵

Pokrovsky correctly indicated that the German proposal “repeats the antiquated legend that war was forced upon the Central Powers, it speaks of the victorious Austro-German armies, and the irresistibility of their defense, and then, proposing the opening of peace negotiations, the Central Powers express the conviction that the offers which they have to make will guarantee the existence, honor, and free development of their peoples, and are calculated to establish a lasting peace.”²⁹⁶ Moreover, it also contains “a threat to continue the war to a victorious end, and, in the case of refusal, to throw the responsibility for the further spilling of blood on our allies.”²⁹⁷ Referring to the circumstances in which the German proposal was made, Pokrovsky stated: “The enemies devastated and occupy Belgium, Serbia and Montenegro, and parts of France, Russia and Roumania.”²⁹⁸

Accordingly, Pokrovsky asked rhetorically, “Who, then, with the exception of Germany, could derive any advantage under such conditions by the opening of peace negotiations.”²⁹⁹ In this context he mentioned the serious domestic conditions in Germany, where a general forced labor had been imposed. Accordingly, to “attempt at the last moment to profit from their fleeting territorial conquests before their domestic weakness was revealed – was the real meaning of the German proposal. In the

²⁹⁰ *Ibid.*, p. 8.

²⁹¹ *Ibid.*, p. 9.

²⁹² *Ibid.*, p. 9.

²⁹³ *Ibid.*, p. 9.

²⁹⁴ *Ibid.*, p. 9.

²⁹⁵ *Ibid.*, p. 9.

²⁹⁶ *Ibid.*, p. 9.

²⁹⁷ *Ibid.*, pp. 9–10.

²⁹⁸ *Ibid.*, p. 10.

²⁹⁹ *Ibid.*, p. 10.

event of failure they will exploit at home the refusal of the Allies to accept peace in order to rehabilitate the tottering morale of their populations.”³⁰⁰ Pokrovsky declared: “The Russian Government repudiates with indignation the mere idea of suspending the struggle and thereby permitting Germany to take advantage of the last chance she will have of subjecting Europe to her hegemony.”³⁰¹

Finally, the Russian Foreign Minister declared: “All the innumerable sacrifices already made would be in vain if a premature peace were concluded with an enemy whose forces have been shaken, but not broken, an enemy who is seeking a breathing space by making deceitful offers of a permanent peace.”³⁰² On 15 December 1916, the Russian Duma adopted the Resolution against Acceptance of the German peace Proposals. In that Resolution, the Duma, among other things, asserted that the German proposals “are a hypocritical act from which the enemy expects no real success, but by which he seeks to throw upon the others the responsibility for the war and for what has happened during it, and to exculpate itself before public opinion in Germany.”³⁰³ Finally, the Duma “considers that a lasting peace will be possible only after a decisive victory over the military power of the enemy, and after the definite renunciation by Germany of the aspirations which render her responsible for the world war and for the horrors by which it is accompanied.”³⁰⁴

The concept of a false peace was expressed by the **German Peace Association**. Starting from the assumption that the supremacy of the Central Powers will decide the peace, which will consolidate the German position in the world, the German Peace Association expressed the hope that “the coming peace may contain the elements of a durable peace and lay the foundation for a lasting community of justice and culture between the nations, which must be restored after the peace.”³⁰⁵ In these obscure terms, the German Peace Association did not advocate a genuine and just peace, but the Teutonic kind of peace based on conquest, domination, oppression, and the exploitation of other peoples and nations by German masters. The same false concept, but in clearer terms, was expressed in the **Manifesto by 88 German Professors and Statesmen**.

Sharing the conviction with the entire German nation that the World War will end in a complete victory for Germany, German Professors and Statesmen asserted: “All those heroic deeds, those endless sacrifices and labors [in the preparation for the war], (...) entitle Germany to a price of victory corresponding – as far as that is possible – to what she has sacrificed.”³⁰⁶ It is obvious that the preparation for an aggressive war requires extraordinary sacrifices, but such unnecessary sacrifices cannot be rewarded and paid off by the victims of aggression. However, the German Professors and Statesmen, ever aggressors, were of a different opinion. They declared: “The

³⁰⁰ *Ibid.*, p. 10.

³⁰¹ *Ibid.*, p. 10.

³⁰² *Ibid.*, pp. 10–11.

³⁰³ *Ibid.*, p. 11.

³⁰⁴ *Ibid.*, p. 11.

³⁰⁵ *Ibid.*, p. 308.

³⁰⁶ *Ibid.*, p. 309.

German nation can only conclude a peace which assures the foundations of the strategic wants, of the political and economic interests of the country and the unimpeded development of its strength and its energy at home and on the free seas."³⁰⁷ Finally, the Professors and Statesmen expect that such a peace may be obtained resolutely, "while we are in the zenith of our military successes."³⁰⁸

The Critics of the False German Concept of Peace

In a speech delivered in January 1918, former President **Theodor Roosevelt** said: "We must accept no peace except the peace of overwhelming victory. To accept an inconclusive peace would mean that the whole war would have to be fought over again by ourselves or our children. To accept an inconclusive peace would really mean to work for a German victory."³⁰⁹ In the view of Theodor Roosevelt, "no peace can be conclusive unless the victory is overwhelming," and "such a conclusive victory can be rendered more secure by the imposition of drastic terms."³¹⁰ **W.E. Veyl** rightly stated that a conclusive victory "does not necessarily lead to a conclusive peace, but may have an exactly opposite effect."³¹¹ The German victory over France in 1870 was conclusive but as a peace was inconclusive. It was a punitive peace, based on outlived conceptions of international life, and did not, in effect, solve the outstanding problems between the two countries.³¹²

In 1871 the German generals, believing that France would begin a war of revenge at the earliest moment, sought to weaken her by levying a heavy indemnity and annexing territories of economic and strategic value. Germany would probably have been stronger during the last forty years had she trusted to a future reconciliation with France.³¹³ In 1918, Veyl stressed that "neither by an overwhelming victory, nor by a crushing or weakening of the enemy, nor by any form of negotiated peace which does not recognize new principles of international relationship, can security be maintained."³¹⁴ Considering the possible terms of peace between the two coalitions in the World War, Veyl said that theoretically there were five general forms which it might take. "These are, an Overwhelming German Peace, a Partial German Victory, the Peace of the Drawn Game, a Negotiated Allied Peace, and a Dictated Allied Peace."³¹⁵

From every point of view a complete German victory, followed by a dictated German peace, would be the worst result of the war. A new German Empire, more powerful than any Empire – including the Roman Empire – that has ever existed, would be set up in the middle of Europe.³¹⁶ For decades it would be a bulwark of autocracy and

³⁰⁷ *Ibid.*, pp. 309–310.

³⁰⁸ *Ibid.*, p. 310.

³⁰⁹ **W.E. Veyl**: *The End of the War* (1918), p. 207.

³¹⁰ *Ibid.*, pp. 207–208.

³¹¹ *Ibid.*, p. 209.

³¹² *Ibid.*, p. 209.

³¹³ *Ibid.*, p. 211.

³¹⁴ *Ibid.*, p. 212.

³¹⁵ *Ibid.*, pp. 212–213.

³¹⁶ *Ibid.*, p. 213.

militarism, and the teacher of these social forms to vassal and outside nations. The world would either be one great empire with dependencies and intimidated outlying States, or it would be an armed camp.³¹⁷ Even a partial German victory would be excessively dangerous. At that time, Germany sought a peace of give and take, as former Chancellor **Georg Michaelis** styled it. "She seeks a 'cashing in' on her 'paper profit'"³¹⁸ In the beginning of 1918, the conquests of the Central Powers were in the West (Belgium and part of France), the East (part of Russia), the Southeast (Serbia, Montenegro and Roumania) and the Southwest (part of Italy). They were apparently willing to give up one or two of these conquests to preserve the rest.³¹⁹

It was impossible for the allies to accept such a peace, and allow an unregenerate Germany to emerge from the war with immense territorial gains. It would not only give her an enormous predominance in Europe but strengthen the power of her imperialistic group. The Junkers might then abandon their pretense of a defensive war and openly boast of their conquests. The world contest of 1914 might even be proclaimed as a continuation of the succession of "glorious" wars which made Germany a world power.³²⁰ Thus, renewed in their prestige, the feudal rulers might snap their fingers at radicals, liberals and socialists, repeating that which **Otto E.L. von Bismarck** wrote to Bernhard von Bulow: "Germany does not look for salvation to Prussia's liberalism but to Prussia's power."³²¹ Therefore, to the Allies, any German victory, either partial or complete was dangerous. It is through fear of this partial German victory that the Allied nations have wisely refused to enter into an unlimited conference with the enemy.³²²

The general conclusion to be drawn from the above considerations is that many philosophers and political and social thinkers consider that peace, which is one of the highest values of humanity, must be genuine and just. In their view, such a peace cannot be oppression imposed and kept by force. They also maintain that peace can only be achieved through understanding among individuals, peoples, nations and States and it must be a peace of righteousness and justice, where basic individual and collective human rights are recognized and strictly observed by every State in the world. Such a peace cannot countenance and perpetuate slavery, or be a dominating and oppressive *status quo*, but must be a condition, in which international changes can be made peacefully.

³¹⁷ *Ibid.*, p. 213.

³¹⁸ *Ibid.*, p. 213.

³¹⁹ *Ibid.*, pp. 213–214.

³²⁰ *Ibid.*, p. 214.

³²¹ *Ibid.*, p. 214.

³²² *Ibid.*, pp. 214–215.

International Liability for Injurious Consequences of Acts Not Prohibited by International Law (the “Liability Draft”)¹

MALGOSIA FITZMAURICE

1. The ILC “Liability” Drafts

The issue of liability for environmental harm *sine delicto* occupied the International Law Commission (the “ILC”) for 25 years during which it produced several sets of Draft Articles on so-called “International Liability for Injurious Consequences of Acts Not Prohibited by International Law” (the “Liability Drafts”). The main question which has arisen in connection with this work of the ILC is whether there exists in international law the basis for a separate regime of liability which is conceptually different from the general regime of state responsibility for wrongful acts, i.e. acts which are in breach of an obligation imposed by international law. The ILC left out expressly from its draft on state responsibility the problems of acts which were not prohibited by international law. This doctrinal distinction resulted in the ILC pursuing study of two separate topics, the first of state responsibility and the second of state liability. The first one relates to responsibility for wrongful acts; and the second one to acts which are not, in themselves, wrongful under international law – and this latter topic gave rise to the Liability Draft. Professor Baxter who was the author of the first of the Liability Drafts (and a conceptual father of the whole concept within the ILC), limited the Draft to the environmental field and to the physical consequences of the activities which “cause, or create a risk of causing

¹ Quentin-Baxter's Special Report on International Liability “Schematic outline,” *YBILC* 64 (1981-II) and Special Rapporteur Barbosa Several Drafts. The most important *Sixth Report*, U.N. Doc./A/CN.4/428 (1990) The present author shall only outline the main problems of the liability since there is a body of literature on the subject and for the time being the ILC discontinued the work on this topic. See for example: M. Akehurst: “International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law,” 16 *NILR* 3 (1985); A. Boyle: “State Responsibility and International Liability for Injurious Consequences of Acts not prohibited by International Law: A Necessary Distinction,” 39 *ICLQ* 22 (1990); N. Hornbach: “The Confusion about State Responsibility and International Liability,” *Leiden Journal of International Law (LJIL)* 47 (1990); M. Fitzmaurice: “International Environmental Law as a Special Field,” 25 *NethYBIL* 201-218 (1994); I. R. Pinto-Dobering: “Liability for the Harmful Consequences of Instances of Transfrontier Pollution not Prohibited by International Law”, *ÖZÖRV*, p. 80; J. Barbosa: “Liability,” *RCADI* 295 (1994); R. Lefebvre: *Transboundary Environmental Interference and the Origins of State Liability* (1997), pp. 189-229.

transboundary harm.”² The conceptual basis of the whole topic was the subject of strong, if not damning, criticism, on the basis that the concept was groundless both from the theoretical and practical points of view. This resulted in many changes being made in the Draft Articles by the Special Rapporteur Barbosa and in the final re-shaping of the topic by the ILC (see below). The most fundamental theoretical distinction introduced by the ILC Liability Draft was abandonment of the distinction underlying the concept of primary and secondary obligations, i.e. obligations to act in accordance with rules of international law and of consequences flowing from the breach of those rules. In the Liability Draft, the ILC had attempted to construe a concept which was referred to as the “compound primary norm.” This norm was construed to contain four individual duties: to prevent, to inform, to negotiate and to make reparation. The compound primary norm was considered to be a primary obligation; it was not, unlike the duty to compensate under the responsibility regime, based on the commission of a wrongful act. In order to bring liability draft in line with the responsibility draft, it was considered, however, that the breach of the last element of the norm – i.e., the duty of reparation – was a breach of an international obligation, and thus a wrongful act.

The reasoning behind the separation of the ILC Drafts may be summarised as follows: some environmental activities which cause damage are not prohibited, thus they do not constitute a wrongful act, in fact some of them are even beneficial. Nevertheless, in case of damage done to another state, a new regime seemed to be in order to enable the harmed state to obtain some relief. Another perception of some members of the ILC was for responsibility to be equated with fault or *culpa*. From this, it was inferred that the state responsibility regime was unable to support strict (*sine culpa*) liability and, because to introduce such a liability with respect to environmental damage was one of objectives of the ILC, a separate regime was thought to be necessary.

The reasoning presented by the ILC was met with a very critical reception from international lawyers. The critics of the Draft, based their arguments on the fact that the concept of an obligation of states regarding environmental damage done to other states was already firmly rooted in the customary law regime of state responsibility. This long standing principle was first articulated in the *Trail Smelter* arbitration, where it was said that “(...) no State has the right to use or permit to use of its territory in such a manner as to cause injury by fumes to the territory of another or the properties or persons therein, when the case of serious consequences and injury is established by clear and convincing evidence.”³ This principle was endorsed by the ICJ in the *Corfu Channel* case.⁴ Likewise, Principle 21 of the Stockholm Declaration also emphasises the responsibility of states to ensure that “activities within their jurisdiction or control do not cause damage to the environment of other States or beyond the

² Preliminary Report of Quentin-Baxter (1980-II) p. 248.

³ *Trail Smelter Arbitration*, text in: 33 *AJIL* 182 ff. (1939); and *AJIL* 684 ff. (1941).

⁴ In this case, the Court stated that it is “every State’s obligation not to allow knowingly its State territory to be used for acts contrary to the rights of other states,” *ICJ Reports* 22 (1949).

limits of national jurisdiction.” This Principle was modified further in the Rio Declaration (Principle 2).

Based on the above-mentioned considerations, the separation of the two regimes does not seem to be fully doctrinally justified; and this is, indeed the prevailing view expressed in literature. Out of numerous publications on the topic, two may be cited, those of Professors Brownlie and Boyle. Brownlie, basing his argument on the *Trail Smelter* case, treats the separation of the topics as “fundamentally misconceived.” According to him, state responsibility does, in fact, also relate to harm caused by lawful activities. The distinction between lawful and unlawful activities is, therefore, without purpose and lacks support in either state practice or in jurisprudence. What is crucial is the content of the rule.⁵ A similar criticism is made by Boyle, according to whom, “(...) the notion that activities incurring responsibility for harm are unlawful and prohibited can be seen as misconceived and oversimplified; the elements of harm, knowledge and control are drawn directly from comparable use in State responsibility context.”⁶ It cannot be denied that in the case of the *Trail Smelter* case (and this leads us to a more general conclusion), the operation of the plant was lawful but pollution which resulted from this operation was not, and was subject, therefore, to the responsibility regime. A more convincing doctrinal justification for a separation of regimes was submitted by Boyle. Although the Commission’s earlier efforts incurred his very critical comments, its later 1996 and 1998 conceptual summations of the problem, contained in Draft Articles, were met with more positive response from this author. According to Boyle, the need for liability regime arises from the deficiency of contemporary international law which “does not make states absolute guarantors of the safety of activities taking place within their jurisdiction and control.”⁷ Compensation of other relief for harm resulting from certain permissible activities is not foreseen under the responsibility regime. Under several treaty regimes states have only a limited obligations with respect to notification, consultations and a general duty of risk management in relation to activities which involve hazards. These types of obligation have a due diligence character. They are based on good faith. From this it follows that if a state acted in good faith with the standard of due diligence, it is not liable to pay compensation in case of transboundary environmental harm, both in cases of unforeseeable and foreseeable harm (which could not be prevented having taken all possible measures). Thus under the law as it stands at present, a state which is a victim of such a harm, is left without a proper means of redress towards a state of origin. The only possibility to enable a harmed state to obtain any relief was to shift liability of the state of origin from due diligence obligation to non-fault, strict type of liability.

⁵ I. Brownlie: *State Responsibility*, Part One (1983), p. 23

⁶ A. Boyle: “State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?,” 39 *ICLQ* 22 (1990).

⁷ A. Boyle: “Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited,” in: A. Boyle and D. Freestone (eds.): *International Law and Sustainable Development, Past Achievements and Future Changes* (1999), pp. 61–87, at p. 76

Special Rapporteur Barbosa, in order to take account of much doctrinal criticism which had been made, changed the conceptual basis of Quentin-Baxter's Draft, developing extensively, in his own Drafts, the principles which relate both to state responsibility and state liability. Unlike his predecessor, Barbosa envisaged the possibility of state responsibility arising in two cases, namely: when a state does not perform the primary obligations of prevention, information and negotiation; and when it does not perform the duty of relief including compensation (the only case when state responsibility was foreseen in Quentin-Baxter's Draft). However, as a result of all these changes, Barbosa blurred still further the theoretical differences between the two drafts (i.e. on state responsibility and on liability), and effectively obliterated the difference between primary and secondary obligations. Another point of confusion was related to the problem of relief for damage. Barbosa's Drafts take a different stand on the question of relief for significant harm (or as it was phrased in earlier drafts "appreciable" harm).⁸ Barbosa, however, maintained the distinction between harm caused by lawful and harm caused by unlawful activities by varying standard of compensation or other relief on the basis of the principle of balance of interests, which limits the level of compensation. Under the responsibility doctrine for an internationally wrongful act, a state is under an obligation, *inter alia*, to pay compensation, as one of the means of relief. According to Barbosa's Draft, a breach of a primary obligation in the liability regime causes the same outcome, putting into doubt the necessity of existence of two separate regimes. We may add that if a state does not fulfil the duty of compensation or other relief under the Liability Draft, it is also committing an internationally wrongful act, thus giving rise to state responsibility. On the basis of the theory contained in Barbosa's Draft, the liability for environmental damage (wrongful act – primary norm) changes into state responsibility (secondary norm). Notwithstanding the doctrinal differences, in both cases the final result will be the same. The only difference will be the amount of compensation (as a means of relief), lower in case of lawful acts. From what has been said above concerning the Liability Draft, it is hard to imagine how this Draft could enrich the responsibility regime.

It has to be stressed, however, that Barbosa, importantly, took the view that the question of liability should be settled through liability regimes concluded specifically for this purpose. States have the choice between a civil liability regime and a state or state-to-state liability regime. The liability regime *sensu stricto* was envisaged by him as a residual regime, which was supposed to function as a "safety net." In case of transboundary harm not arising from an internationally wrongful act, the state of origin should be bound to negotiate in good faith with affected state or states in order to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully accounted for. As mentioned above, failure to fulfil the obligation of reparation would give rise to state responsibility. In his later drafts Barbosa, was altogether in favour of civil liability, in contrast to his earlier drafts where he preferred state liability. This change in preference derived from his conviction that

⁸ For example, in 1989, Draft Articles 8 and 9, UN Doc. A/CN.423.

the liability question is best dealt with by the way of domestic or private law remedies. Thus according to Barbosa, civil liability should be primary and state liability should be residual. On this basis, state liability would replace civil liability in cases where the private person is unable to fully compensate for it, or if that person cannot be located or identified. The victims should be entitled to choose between domestic channels and diplomatic channel to pursue their claim. It must be stated, however, that this mixed approach to liability (civil/state) presented by Barbosa did not allay his critics. In his tenth report, Barbosa, returned to the concept of state liability. He stated that states should not be held liable for harm covered by the Draft Articles unless they committed a wrongful act. In relation to this, he noted the following possible situations in which state liability might arise: (a) a situation where there is no state liability for wrongful act (b) a situation where the state bears both strict liability and responsibility for a wrongful act; (c) a situation where there is strict liability on the part of a state, but it is subsidiary to the operator's civil (also strict liability) for the payment of compensation in respect to incidents resulting from the dangerous activity; and (d) a situation where there is state liability for a wrongful act, but such liability is subsidiary to the operator's civil liability for harm caused by the dangerous activity. This treatment of the topic, however, again met with certain reservations.

Taking into account all possible different variations of state liability, Barbosa, finally took the view that such liability arose in the context of the obligation of prevention of risk. He came to the conclusion that this type of obligation was an obligation of due diligence; and that this obligation came into being only after injury had occurred, and primary effects were to aggravate the legal and material position of the source state. Barbosa specified that states which are engaged in activities involving a risk of transboundary harm should notify, consult and negotiate a mutually accepted regime to govern such activity. In elaboration of the concept of regimes of prevention, Barbosa identified at least six different elements: (i) Prior authorisation of an activity which involves risk of transboundary harm (such an authorisation could constitute evidence of knowledge of a state within the meaning of "knowledge" as defined in the 1949 *Corfu Channel* case); (ii) Risk assessment, which would require every state to undertake an assessment to determine the extent and nature of the risk of the activity, including the impact of the activity on persons and property; (iii) The principle of notification and information; (iv) The principle of consultation. Such consultations should aim at balancing the interests of all states concerned. In case of failure of consultations and negotiations, the state of origin would be free to proceed with activity in question on its own, but on the basis of taking unilateral measures of prevention and of making the necessary arrangements for reparation regarding any transboundary harm which occurred; (v). The principle of unilateral preventive measures which oblige a state of origin to take all the appropriate measures to prevent and to minimise the role of transboundary harm; (vi) The due diligence standard is applicable in relation to the principle of prevention. and would be commensurate with the degree of risk of transboundary harm involved in each and every activity.

The Liability Draft is, however, not entirely without merit. It must be stressed that the Draft has introduced some positive and valid innovations: it strives towards a stricter liability standard; it covers conceptually both the results of unforeseeable accident and of continuing polluting activities; and it introduces the concept of balance of interest in relation to responsibility for environmental harm. The liability regime protects the victims of pollution which occurs through accident, whereas if the regime of state responsibility was to be applied unmodified, the victim might be left without any claim.

Finally, during the 48th Session (1996) of the ILC, a Working Group on this topic succeeded in drawing up a set of 22 Articles which although not formally adopted by the Commission, was submitted to the UN General Assembly for comments. As will be explained below, the 1996 Barbosa's Draft took into account critical remarks on his earlier drafts. Although the presentation of the 1996 Draft was a very welcome event, the remarks of Professor McCaffrey (a former member of the Commission) illustrates succinctly and correctly the prevalent attitudes to this project: "[a]mbassador Julio Barbosa has struggled mightily during his tenure to educate the Commission as to the nature of the topic, but many members appear to have been either reluctant to tackle the subject or entirely mystified by it."⁹

The Draft Articles are arranged in three chapters: Chapter I – General Provisions (Articles 1–8); Chapter II – Prevention (Articles 9–19); Chapter III – Compensation or Other Relief (Articles 20–22). The Draft articles do not follow the principle of absolute or strict liability, as this is not yet fully developed in international law. Article 1 defines the types of activity to which the Draft Articles are applicable. It states that they apply to "activities not prohibited by international law which involve risk of causing transboundary harm (...) through their physical consequences." By such activities the Commission understands, for example, activities conducted by nuclear powers. The inclusion of lawful activities which do not involve risk of causing transboundary harm that nevertheless cause such a harm seems to be controversial. This was recognised in the Report of the ILC. Article 5 of the Draft defines the circumstances which give rise to liability. It says that "[i]n accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in Article 1 and shall give rise to compensation or other relief." McCaffrey points out that it may be inferred from this Article that liability arises from the harmful transboundary effects but it does not specify who is liable – the state of origin or the operator. Chapter III, however, provides for both private and inter-state remedies. Liability involves the provision of remedies such as compensation and other relief, for example, restoration. Most importantly, Draft Article 5 limits the concept of liability by stating that liability may only arise in accordance with the present articles.¹⁰ Chapter III – Compensation or other Relief contains Article 20 – Non-discrimination; Article 21 – The Nature and Extent of Compensation or Other Relief

⁹ S. McCaffrey: "The International Law Commission (ILC)," 7 *YIEL* 395 (1996).

¹⁰ *Ibid.*, pp. 396–397.

and Article 22 – Factors for Negotiations. Article 20 provides for equality of access to “judicial and other proceedings” in the state of origin. Article 21 imposes an obligation to negotiate on both the state of origin and the harmed state, if either state so wishes, as to the nature and the extent of compensation or other relief for significant transboundary harm “(...) having regard to the factors set out in Article 22 and in accordance with the principle that the victim of harm should not be left to bear the entire loss.” A novel feature of Barbosa’s Draft is that, contrary to the Draft on State Responsibility, there is no obligation to discontinue the harmful activity, to restore the *status quo ante* or to compensate fully for harm, but only, according to Article 21, an obligation to compensate “in accordance with the principle that the victim of harm should not be left to bear the entire loss.”¹¹

The level of compensation will depend on various factors listed in Article 22 of the Draft.¹² Article 22 puts forward a non-exhaustive list of 10 factors to be taken into account in the inter-state negotiations. These factors include, *inter alia*, the extent to which the state of origin: complied with its obligations of prevention under Chapter II of the Draft; exercised due diligence in preventing or minimising the damage; knew or had means of knowing that the activity covered by the draft was being or was about to be carried out in its territory or under its jurisdiction or control; benefits from this activity; and has taken measures to assist the affected state in limiting its harm. Additional factors to be taken into account include the extent to which the affected state shares the benefit of the activity; whether assistance to either state is available from or has been provided for by other states or an international organisation; how much compensation is reasonably available or has been provided for to injured persons; to what extent the law of the injured state provides for compensation or other relief for similar harm; and the standards of protection applied in relation to comparable activity by the affected state and in regional and international practice.

The differences in the nature and extent of relief measures available as between the responsibility and the liability regimes reflect the character of acts from which they arise: from illegal acts in case of responsibility and from legal ones in case of liability. The latter possibility incurs less strict type of relief measure. There is, how-

¹¹ Report of the Working Group on the 1996, *Draft Rep. of the ILC* (1996), GAOR (51st session) UN Doc. A/51/10/ Annex 1, p. 235.

¹² Article 22: Factors for negotiations: “in the negotiations referred to article 21, the states concerned shall take into account *inter alia* the following factors: (a) in the case of activities referred to in Article 1(a), the extent to which the State of origin has complied with its obligations of prevention referred to in Chapter II; (b) in the case of activities referred to in article 1(a), the extent to which the State of origin has exercised due diligence in preventing the damage; (c) the extent to which State of origin knew or had means of knowing that an activity referred to in article 1 was being or was about to be carried out in its territory or otherwise under its jurisdiction or control; (d) the extent to which the State shares the benefit of the activity; (e) the extent to which assistance to either State is available from or has been provided by third States or international organisations; (f) the extent to which compensation is reasonably available to or has been provided to injured persons, whether through proceedings in the courts of the State of origin or otherwise; (g) the extent to which the law of the injured State provides for compensation or other relief for the same harm; (h) the standards of protection applied in relation to a comparable activity by an affected State and in regional and international practice; (i) the extent to which the State of origin has taken measures to assist the affected State in minimising harm.”

ever, in my view, an unresolved question of cases where a state fails to observe the requirement of due diligence in relation to regulation and control. Professor Boyle states that, in such cases, the “consequences must necessarily be different (...),”¹³ presumably because breach of the norm of due diligence is less serious than, for example, breach of norms relating to illegal fishing. The question thus may be posed whether the obligation of due diligence is an independent primary norm of international law, breach of which gives rise to state responsibility which in turn entitles a state to be granted the classical means of relief, such as compensation; or whether it is a norm of a subsidiary character, breach of which does not give a rise to state responsibility but incurs some liability to provide limited relief – i.e. at a lower level than in the event of acts which breach international law – and which appears to depend on the degree of due diligence exercised. This appears to be evidenced by Article 22 of the Draft which lists due diligence as one of the factors to be considered while negotiating the limits of compensation and other relief.

Another matter for consideration concerns the character of liability which is based on the standard of due diligence. The confusion as to the legal effects of breach of the due diligence obligation derives from the general lack of full understanding of its role in the structure of state responsibility. There are many schools of thought as to the character of this obligation in the context of both liability *ex delicto* and of liability *sine delicto*.¹⁴ In fact, the question how breach of the due diligence norm affects relief under international law and what is its link with the liability regime is a question which calls generally for deeper study.

¹³ Boyle, *supra*, note 7, p. 78

¹⁴ In relation to liability *ex delicto* there are doubts as to the role of due diligence. Some authors appear to accord to it the same role as the one which is played by fault (or *culpa*) in subjective doctrine of state responsibility, thus exonerating from liability. (see e.g., B. Smit: *State Responsibility and the Marine Environment, The Rules of Decision* (1987) p. 17) Some on the other hand see the concept of due diligence as only mitigating to a certain degree the harsh effects of liability *ex delicto* in various areas of international law, e.g., transboundary environmental interference. (R. Leifer, *supra*, note 1, p. 62) Taking into consideration the imprecise language of the ILC and the mystery surrounding due diligence, it is, however, difficult to support with a view, without any doubt, that the 1996 Draft is based on strict liability. Yet another comment has to be made. The assumption that the result of breach of an obligation to protect the environment a strict variety, influences the type of international obligation, i.e. whether it is an obligation of conduct (1966 Draft Articles on State Responsibility) or of result which may be divided into two obligations of achieving a particular objective (Art. 21) and of prevention, i.e. an obligation to prevent an occurrence of certain event. Different types of obligations presuppose different determination of their violations. The main distinction between these obligations is that obligation of conduct requires a state to adopt a particular course of conduct. Thus there is a breach of an international obligation when a state does not pursue the prescribed conduct. The failure to observe this type of obligation does not depend on the occurrence of injurious consequences. If a state, however, failed to comply with an obligation of result, it did not brought about the particular situation which was required by an obligation. Breach of obligation of prevention of certain event occurs only if by the conduct adopted the state does not achieve the required result. It is assumed by some that this obligation is that of due diligence character. See e.g., Ago, 1 *YBILC* 5 para. 9 (1978). He stated that the occurrence of event must be due to state's negligence; see also Barbosa (1986), p. 160, International Law Commission (1988), p. 123.

2. The ILC “Prevention” Draft

Already the 1996 Draft has showed a tendency to move in the direction of the problems of prevention which culminated in the 1998 Draft (see below). The provisions concerning prevention are contained in Chapter II, Articles 9–19 of the Draft. This approach reflects the provisions of the new generation of conventions on environmental matters which contain also certain rules on liability for harm, such as the 1997 United Nations Convention on the Law the Non-navigational Uses of International Watercourses¹⁵ (hereinafter the 1997 Watercourse Convention). They also draw on all classical cases of environmental law and on recognised principles such as Principle 21 of the Stockholm Declaration. Thus, the provisions of the Draft mirror other instruments in that they base the regime of prevention on the principle of prior authorisation (Article 9); risk assessment (Article 10) and general transparency as regards activities involving risk. Professor Boyle mentions, however, three main problems with the 1996 Draft. To start with, he observes that the 1996 Draft provides for an obligation of compensation for all activities causing significant harm (Articles 1 and 5 of the Draft). The solution adopted differs from that adopted in other environmental treaties in that it neither lists such activities, nor limits the obligation to compensate to ultra-hazardous activities or those which pose foreseeable risk. The wide scope of the obligation to compensate may prove to be an inhibition on states to accept the Draft. Secondly, equitable compensation subject to negotiations may prove to be “too uncertain, and too flexible to provide reasonably clear and workable rules for negotiations (...)”¹⁶ Furthermore, the same author contends that in case of the failure of negotiations on compensation, there is no mechanism provided to offer adequate adjudication. Finally, he ponders what is the legal character of the non-fault liability – whether it is a new concept of international law or a concept which has entered already the body of general international law. According to this author, the ILC contention that it is the law is not supported adequately by a sufficient number of examples from general practice.¹⁷

The ILC decided to follow the prevention issue and at its forty-ninth session, resolving to undertake study of the topic “Prevention of Transboundary Damage from Hazardous Activities” (M.S. Rao, the Special Rapporteur).¹⁸ The liability topic was temporarily suspended waiting responses from states to the Draft. Although we have to admit that the ILC valiantly struggled with the Liability Draft, its future seems to be very unclear for the reasons (doctrinal and practical) explained above. The Special Rapporteur on the Prevention topic, Mr. Rao, has stated in his First Report that the topic of liability was rather poorly defined both in judicial practice and doctrine, “it was controversial and invited conflicts which sprang, *inter alia*, from differing interpretations of the matter under different systems of national law and entailed clashing

¹⁵ Text in: 36 *I.L.M.* 700 (1997).

¹⁶ Boyle, *supra*, note 7, p. 78.

¹⁷ *Ibid.*, p. 78.

¹⁸ UN Doc. A/52/10, at 131 (1997).

with theories with respect to risk, liability, abuse of rights and breaches of good-neighbourliness, (...) such clashes significantly clouded the question as to what regime was applicable at the international level. Even if the crux on the matter of the problem was defined in terms of primary rules, the fact remained that of *sic utero tuo* (...) was very difficult to interpret in positive international law.”¹⁹ Thus, considering that twenty five years passed on the liability topic, without achieving a common understanding even as to the most basic elements of the concept, it appears that the ILC took the right stand in focusing on the regime of prevention which is already well established in environmental law and has great practical importance. This duty of prevention was stressed by the International Court of Justice in the 1996 advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case.²⁰ The Court observed “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction or control respect the environment of other States or areas beyond national control is now part of the *corpus* of international law relating to the environment.”

At the fiftieth and the fifty first sessions of the ILC, Mr. Rao presented his first²¹ and second Reports.²² The Commission adopted on first reading 17 Draft Articles on prevention of transboundary damage from hazardous activities.²³ The Governments are invited by the ILC to submit their comments on the Articles by 1 January, 2000. The fundamental principles adopted in the Draft Articles are those of due diligence, good faith and co-operation which are placed on states and are of a continuous nature. The basic obligation is that of prevention.

The scope of the Draft is outlined in its Article 1 – Activities to which the present draft articles apply – which states that “[t]he present draft articles apply to activities not prohibited by international law which involve risk of causing significant transboundary harm through their physical consequences.” One of the members of the Commission explains that there are four criteria contained in this definition:²⁴ first, it relates to lawful acts – in contrast to state responsibility which refers to wrongful acts; secondly, it relates to the “state of origin” (as defined in draft Article 2d: “State of Origin means the State in the territory of which, or otherwise under the jurisdiction or control of which, the activities referred to in draft Article 1 are carried out”) and declares that the activities which are the subject matter of the draft must take place in territory or jurisdiction or control of the state of origin; thirdly these activities must

¹⁹ Special Rapporteur R a o, *First Report on Prevention of Transboundary Harm Form Hazardous Activities*, International Law Commission, 50th session, (1998) A/CN.4/487 (both reports of R a o available on Internet www.un.org/law/ilc/reports/1998 and 1999) (hereinafter R a o’s *First Report* and R a o’s *Second Report*), para. 13.

²⁰ “Advisory Opinion of 8 July 1996,” *ICJ Reports* 15, para. 29 (1996).

²¹ R a o’s *First Report*, note 18.

²² R a o’s *Second Report*, note 18.

²³ Report of the International Law Commission on the work of its fiftieth session, 20 April–2 June 1998, 27 July–14 August 1998, GA Official Records, Fifty-third, Suppl. No. 10 (A/53/10). p. 18; see also B. S i m m a: “The Work of the International Law Commission at its 50th Session (1998),” *Nordic JIL*, pp. 431–486, pp. 432–444.

²⁴ S i m m a, *supra*, note 23, p. 436.

result in “risk of causing significant transboundary harm” (excluding harm incurred under normal operation and harm to global commons, and to the territory of a state where these activities are conducted); and fourthly, it states that significant transboundary harm must be caused by the physical consequences of activities under consideration.

The standard adopted in relation to risk and harm is significant. Risk is defined in draft Article 2 as encompassing a low probability of causing disastrous harm and high probability of causing other significant harm. Harm includes harm to persons, property or the environment. One of the most fundamental obligations is contained in draft Article 3: “[s]tates shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm.” This obligation departs from the one in the previous draft in that it relates to prevention not to the situation *ex post facto* when harm has already occurred, since the ILC took the stand that that situation related to the liability topic.²⁵ According to the Commentary (paragraphs 5–10) this is an obligation of due diligence (“all appropriate measures”) and structured as an obligation of conduct rather than result. The states thus must take the precautionary approach and this duty would also include upgrading of the input of technology in the activity and adequate monitoring and management.²⁶ The costs of prevention are borne as a principle by the operator and the state of origin.

Draft Article 4 introduces an important procedural obligation of co-operation: “[s]tates concerned shall co-operate in good faith and as necessary seek assistance of one or more international organisations in preventing, or in minimising the risk of, significant transboundary harm.” A similar procedural obligation is contained in draft Article 11 – Consultations on Preventive Measures between states in order to prevent risk of causing significant harm. As Simma comments, this article aims at striking a balance: it “provides neither a mere formality which the State of origin has to go through, with no real intention of reaching solution acceptable to the other States, nor does it provide for a right of veto for the State that is likely to be affected.”²⁷ Article 12 of the draft presents a non-exhaustive list of factors which states are to take into

²⁵ *Ibid.*, p. 436.

²⁶ *Ibid.*, p. 437.

²⁷ *Ibid.*, p. 440; Draft Art. 11:1. “The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solution regarding measures to be adopted in order to prevent, and minimize the risk of, significant transboundary harm; 2. States shall seek solutions based on an equitable balance of interests in the light of Article 12; 3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of States likely to be affected in case it decides to authorise the activity to be pursued, without prejudice to the rights of any State likely to be affected.”

²⁸ These factors include: a. the degree of risk of significant transboundary harm and of the availability of means of preventing such harm and minimising the risk thereof or of repairing the harm; b. the importance of the activity, taking into account its overall advantages of social, economic and technical character for the State of origin in relation to the potential harm for the states likely to be affected; c. the risk of significant harm to the environment and the availability of means of preventing such harm and minimising the risk thereof or restoring the environment; d. the degree to which the State of origin and, as appropriate, the states likely to be affected are prepared to contribute to the costs of prevention; e. the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carry-

consideration while balancing their interests.²⁸ Although the factors in question do not have equal importance, no single factor is considered to be conclusive in establishing the balance of interests. The Commission has drawn to a considerable degree on the 1997 Watercourse Convention. For example, Article 13 (Procedure in Absence of Notification)²⁹ which covers the situation in which a state has reasonable grounds to believe that an activity planned or carried out by another state may pose a risk of causing significant transboundary harm, although it did not receive notification to this effect. This Article corresponds with Article 18 of the 1997 Watercourse Convention. Other examples are Article 16³⁰ (Non-discrimination) which corresponds with Article 32 and 17 (Settlement of Disputes) which mirrors Article 33.³¹

Article 11 in conjunction with Article 12 is considered by some authors as constituting the core of the whole Draft. Article 11 sets up the manner of conducting consultations. The Commission clearly have been influenced by the jurisprudence of the ICJ, in particular the *Gabcikovo-Nagymaros* case,³² as well as the above-mentioned the 1997 Watercourse Convention. The duty to inform, consult and negotiate is assumed by some authors to be a part of the fabric of international customary law.³³ This view is supported by many international hard and soft law documents, such as

ing out the activity elsewhere or other means or replacing it with an alternative activity; f. the standards of prevention which States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

²⁹ 1. "If a State has a reasonable grounds to believe that activity planned or carried out in the territory or otherwise under the jurisdiction or control of another State may have a risk causing significant transboundary harm, the former State may request the latter to apply the provision of Article 10. The request shall be accompanied by a documented explanation setting forth the grounds; 2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide notification under Article 10, it shall so inform the other State within a reasonable time, providing a documented explanation setting up the reasons for such a finding. If the finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations in the manner indicated in Article 11. 3. During the course of consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimise the risk, when appropriate, to suspend the activity in question for a period of six months unless otherwise agreed."

³⁰ Art. 16: "Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of activities within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress."

³¹ Art. 17: "1. Any dispute concerning the interpretation or application of the present draft articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties, including submission of the dispute to mediation, conciliation, arbitration or judicial settlement; 2. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of one of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be considered by the parties in good faith."

³² Art. 11: "1. The States concerned shall enter into consultations, at the request of any of them, with a view of to achieving acceptable solutions regarding measures to be adopted in order to prevent, and minimise the risk of, significant transboundary harm; 2. States shall seek solutions based on an equitable balance of interests in the light of Article 12; 3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of States likely to be affected"; *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgement of 25 September 1997, <http://www.icj-cij.org/docket/his/hisjudgement/hisjudcontent.html>.

³³ Boyle, *supra*, note 7, p. 80.

the Rio Declaration and the above-mentioned 1997 Watercourse Convention. Article 11, paragraph 2 introduced the principle of balancing of interests (“States shall seek solution based on equitable balance of interests in the light of Article 12”).³⁴ It may be observed that this principle is all which was preserved from the Quentin-Baxter Draft and, for that matter, of the original concept. The fact remains, however, that, according to professor Boyle, the ILC was unable to substantiate the established existence of the balancing of interest principle on the basis of international cases. Boyle claims that even in cases which resulted in the adoption of an equitable solution, states were not consciously striving to achieve an equitable solution as a legal obligation. The same author submits that “[t]hey are probably much more convincingly explained as cases in which for whatever reason the parties found that their interests were better served by negotiating compromise outcomes than by insisting on their strict legal rights.”³⁵ Nonetheless, the ILC’s inclusion of this principle has some support in modern international practice – e.g., the 1997 Watercourse Convention – which is also based on balancing of interests procedure in order to achieve an equitable solution. Boyle, however, presumes this principle may be still a progressive development rather than codification of international law. Thus, it may be inferred from the ILC’s Draft that the authorisation of activities which pose a risk of transboundary harm is permissible only if the parties have engaged in negotiations in good faith in order to reach an equitable solution with the states concerned. This suggests that “the law will in effect have come close to requiring the equitable solution of land territory in much the same way that it presently requires states to utilise watercourses of the high seas equitably,”³⁶ which in turn may limit state sovereignty to manage their own resources. The same author submits that such a solution may result in bringing more “bite” into the law concerning prevention of transboundary harm as to giving more influence, than at present, to a potentially affected state, to modify the planned activities. The requirement of balancing of interests loses its usefulness, however, in cases where the risk can be avoided by exercising due diligence and following existing legal requirements. The balancing of interests may also be advisable in cases where the state of origin lacks the economic capacity to fulfil the economic standards of diligence. All

³⁴ Art. 12 (Factors involved in an equitable balance of interests) “In order to achieve equitable balance of interests as referred to in paragraph 2 of Article 11, the States concerned shall take into account all relevant factors and circumstances, including: (a) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm and minimising the risk thereof of repairing of the harm; (b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected; (c) the risk of significant harm to the environment and the availability of means preventing such harm and minimising the risk thereof or restoring the environment; (d) the degree to which the State of origin, and as appropriate, the States likely to be affected are prepared to contribute to the costs of prevention; (e) the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity; (f) the standards of prevention which the States are likely to be affected apply to the same or comparable activities and the standards in comparable regional or international practice.”

³⁵ Boyle, *supra*, note 7, p. 81.

³⁶ *Ibid.*, p. 81.

the possible advantages of the balancing of interest procedure vanish if it strengthens indeed the position of an affected state. It may not be so if all the factors listed in Article 12 are taken into account. Thus the end result will depend on relations between states. Thus, Boyle says, it may be that the elusive balancing of interests test be better put to rest while a choice exists between it and a strong and detailed rule of law, in cases it already exists.³⁷ Thus in conclusion, the draft has departed doctrinally altogether from the paradigm of state responsibility, and instead, has focused on prevention, which is reflected in new formulations of the draft articles. The new draft is based in part on new generation of international agreements, as the above mentioned 1997 Watercourse Convention.

Apart from the doubts expressed by professor Boyle, however, there may some other legal issues which will require attention from the Commission. For example, what is going to happen if a state does not follow preventive measures (substantive and/or procedural). Does it incur state responsibility, and if so how is its responsibility influenced by the underlying principles of balancing of interests and due diligence taken together into consideration with the other factors such as those enumerated in Article 12 of the Draft. The views were expressed in the debate on the report of the ILC in the Sixth Committee as to the consequences of breaches of duty of diligence. According to the representatives of the United Kingdom and Austria, a breach of the duty of diligence could give rise to consequences provided for in the ambit of state responsibility. Moreover, it is not clear whether, the obligation of prevention is one of conduct or of result. And again whether the failure to comply results in triggering of state responsibility.³⁸ Thus, it is obvious that the topic still causes confusion and that states are unsure how link the duty of prevention (if at all) with that of states responsibility.

3. Some Reflections on the Principle of Prevention as envisaged by the ILC³⁹

As presented above, the topic of liability for environmental damage which results from acts not prohibited by international was divided by the ILC into two issues: prevention and remedial measures. Prevention, it was decided, is to be considered first. The most fundamental difference in the ILC's approach to the duty of prevention in the 1996 Draft and the new 1998 Draft (see above) is the difference in the nature of the legal obligation. In 1996 Draft, prevention could have been interpreted as having the character of soft law (as evidenced by the commentary to Article 22)⁴⁰

³⁷ Boyle, *supra*, note 8, pp. 82–84; see also Ph. Okowa: "Procedural Obligations in International Environmental Law," 72 *BYBIL* 276 (1996).

³⁸ Rao's *Second Report*, p. 2.

³⁹ See in-depth on the principle of prevention: J. Vessey: "The Principle of Prevention in International Law," 3 *ARIEL* 181–207 (1998).

⁴⁰ L. de la Fayette: "The ILC and International Liability: A Commentary," 6 *Review of European Community & International Environmental Law (RECIEL)* 327 (1997).

whereas in the 1998 Draft Article 3 it is a hard law obligation, central to all the other Articles: "States shall take all appropriate measures to prevent, or to minimise the risk of, significant transboundary harm." As also mentioned above, this Article as re-drafted deals with the prior duty of prevention of risk of transboundary harm, not with the effects of harm once it occurred. Further, as also stated above, this obligation is conditioned by several elements such as: due diligence (from this follows probably that it is an obligation of conduct not of result). Another (unresolved) problem is whether the duty of due diligence encompasses the precautionary approach; the principle of common but differentiated responsibility (and related to this principle the question of standards); the polluter-pays principle; and the duty of environmental impact assessment – not to mention other principles which may be pertinent such as those of capacity-building and good governance. All these problems require some degree of further elucidation.

The Draft contains some other Articles pertinent to the issue of prevention. These include Article 7 (Authorisation)⁴¹ and Article 8 (Impact Assessment)⁴² and some indirectly such as Article 9 (Information to Public).⁴³ The Commentary explains that that impact assessment has the purpose of determining the extent and the nature of the risk involved in the activity which calls for the preventive measures to be taken. The assessment should balance the risk with the possible harm it may cause. The obligation contained in Article 9 corresponds with the new approaches to environmental law-making which has the purpose of wide involvement of the public in relation to activities by which they are likely to be affected. The principle of prevention was at this time codified in Principle 21 of the Stockholm Declaration⁴⁴ and later modified by Principle 2 of the Rio Declaration.⁴⁵ The issue of prevention, however, goes further back than the Stockholm Declaration. It was not until 19th century, however, that states had the potential to cause transboundary environmental harm.

⁴¹ Art. 7: "1. The prior authorisation of a State is required for activities within the scope of the present draft articles carried out in its territory or otherwise under its jurisdiction or control as well as for any major change in an activity so authorised. Such authorisation shall also be required in case a change is planned which may transform an activity into one falling within the scope of the present draft articles; 2. The requirement of authorisation established by a State shall be made applicable in respect of pre-existing activities within the scope of the present draft articles; 3. In case of failure to conform to the requirements of the authorisation, the authorising State shall take all actions as appropriate, including where necessary terminating the authorisation."

⁴² Art. 8: "1. Any decision in respect of the authorisation of an activity within the scope of the present draft articles shall be based on an evaluation of the possible harm caused by that activity."

⁴³ Art. 9: "States shall, by such measures as are appropriate, provide the public likely to be affected by such an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views."

⁴⁴ "[S]tates have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond their jurisdiction."

⁴⁵ "[S]tates have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction."

It may be said that the early notion of the obligation of prevention arose from the obligation to respect territorial integrity and sovereignty of other states, not from environmental considerations. States had the traditional duty to “protect within their territory the rights of other States, in particular their right to integrity and inviolability in peace and war.”⁴⁶ The other principle which may underline prevention in international law is the principle of good neighbourliness, which is expressed sometimes by the maxim *sic utero tuo alienum non laedas*. This principle is contained in Article 74 of the UN Charter: “[m]embers of the United Nations also agree that their policy (...) must be based on the general principle of good neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.” It may be observed that these principles were embodied in the award in *Trail Smelter* Arbitration and the Judgement in the *Corfu Channel* case (see above). The most authoritative formulation of this concept was embodied in Principle 21 of the Stockholm Declaration. As drafted therein, it consists in reality of two separate principles: the first reiterates state sovereignty (states have sovereign control over their natural resources) and the second imposes a limitation on sovereignty which is expressed by state’s duty to take notion of the environment of other states and areas outside their jurisdiction (not to cause damage by acts within their jurisdiction or control).⁴⁷ The principle of prevention is the one contained in the second part of Principle 21. It may be said that Principle 21 is firmly founded on the traditional premise of territorial integrity of states and this principle also includes the right of to inviolability of the environment within this territory.⁴⁸ The reading of this principle does not indicate whether it took into consideration different standards and the generally separate position of developed and developing states. Although *prima facie* it would appear that the obligations are not differentiated, Principle 21 must be read together with Principle 23: “[w]ithout prejudice to such criteria as may be agreed upon by the international community, or standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost

⁴⁶ *Island of Palmas* case, 2 *Hague Ct. Rep.* 2d (Scott) 84, 93 (Perm. Ct. Arb. 1928).

⁴⁷ M. P a l l e m a e r t s: “From Stockholm to Rio: Back to the Future?,” in: Ph. S a n d s (ed.): *Greening International Law* (1993), pp. 1, 2.

⁴⁸ V e s s e y, *supra*, note 38 pp. 188. The same author cites a “Report of the Intergovernmental Working Group on the Declaration on Human Environment: Draft of a Preamble and Fundamental Principles for the Draft Declaration on Human Environment, Preparatory Committee for the UN Conference on the Human Environment,” Annex I, at 13, in: Doc./A/CONF.48/PC.12(1971), cited in: V e s s e y, *supra*, note 38, p. 188: “Declaration [should] also concentrate upon principles relating to the rights and responsibilities of states (...) According to that approach it is a fundamental principle of international law that the concept of state sovereignty includes the right to territorial integrity and the right to maintain that integrity in a whole and unbroken condition. The principle that sovereignty also includes the right to environmental integrity and the right to maintain that integrity in a wholesome and unimpaired condition is not so clearly recognised. There is, however, a conceptual relationship between the right to maintain territory in its state of wholeness and the right to maintain the natural environment within that territory in a state of wholesomeness. The impairment by another state of the environment of a state constitutes an impairment or an interference with the sovereignty of state. Thus it is logical legal basis for the recognition of the sovereign right of a state to preserve its environment (...)”

for the developing countries.” This principle clearly indicates that standards are not identical.

The Rio Declaration (see above) changed the balance of the Stockholm Declaration. It took into account the question of development and its character is anthropocentric.⁴⁹ Principle 2 (see above) reflects fully these developments and thus modifies the obligations in relation to prevention. It may be interpreted that the formulation of Principle 2, shifts the balance from prevention to resource exploitation.⁵⁰ This interpretation is justified on the basis of the whole content of the Rio Declaration and especially in the light of Principle 7 (common but differentiated responsibility, see above). This principle is present in many conventions, such as the 1968 African Conservation Convention, the 1972 World Heritage Convention, the 1979 Convention on Long-Range Transboundary Air Pollution,⁵¹ the 1985 Vienna Convention on Protection of Ozone Layer,⁵² the 1992 Climate Change Convention and the 1992 Biodiversity Convention. The relevant formulations in the recent Conventions indicate that the obligation of prevention is relative, not absolute. For example in the 1985 Ozone Protection Convention in its Preamble confirms Principle 21 but at the same time takes into “account the circumstances and particular requirements of developing countries.” The Climate Change Convention reiterates Principle 2 of the Rio Declaration but conditioned upon the principle of common but differentiated responsibility and states explicitly that “[r]ecognising that States should enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular to developing countries.” This conclusion is strengthened by the special position of developing states in relation to their international obligations and by the sharing of financial burdens with developed states, as evidenced e.g., by the Montreal Protocol.

Finally, it must be remembered that this a due diligence obligation and for that reason cannot be absolute. It is appropriate to remind that the Court adhered to this principle in the 1996 *Nuclear Weapons* Advisory Opinion when it said that “[t]he environment is not an abstraction but represents the living space, the quality of life and the health of human beings, including generations inborn. 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.”

⁴⁹ See, D.A. W i r t h: “The Rio Declaration on the Environment and Development,” 29 *GalR* 614 (1995).

⁵⁰ W i r t h, *supra*, note 49, pp. 623–624.

⁵¹ 18 *I.L.M.* 1442 (1979).

⁵² 26 *I.L.M.* 1629 (1987).

4. Some General Principles of the Modern Approach to Environmental Protection

The Precautionary Principle

One of the pillars of prevention is the precautionary approach.⁵³ There is already a plethora of publications on the subject of this principle.⁵⁴ In this study, therefore, only its main features will be presented. The precautionary approach derived from the lack of scientific accuracy in prediction of the assimilative capacity of the environment. This approach has entered numerous municipal and international documents, in the latter case of both a hard law and soft variety, thus prompting speculation whether it has already entered the body of international customary law. Formulations of this principle in national⁵⁵ and international⁵⁶ documents vary a great deal. The

⁵³ For the in-depth study see: L. Š o l j a n: "The General Obligation to Prevent Transboundary Harm and its Relation to Four Key Environmental Principles," 3 *ARIEL* 209–232 (1998).

⁵⁴ H. H o h m a n n: *Precautionary Legal Duties and Principles of Modern International Environmental Law* (1994); D. F r e e s t o n e: "The Precautionary Principle," in: R. C h u r c h i l l and D. F r e e s t o n e (eds.): *International Law and Global Climate Change* (1991), pp. 23 ff.; J. C a m e r o n and J. A b o u c h a r: "The Status of Precautionary Principle in International Law," in: D. F r e e s t o n e and E. H e y (eds.), in: *The Precautionary Principle in International Law* (1996), pp. 29–52; *idem*, "The Precautionary Principle: A Fundamental Principle of Law and Policy for Protection of the Global Environment", *Boston College of International and Comparative Law* (1991), pp. 1–27; J. C a m e r o n: "The Status of the Precautionary Principle in International Law," in: O' R i o r d a n and J. C a m e r o n (eds.): *Interpreting the Precautionary Principle*, pp. 262–289; A. N o l l k a e m p e r: "The Precautionary Principle in International Environmental Law" in: 22 *Marine Pollution Bulletin* 1070–1110 (1991); E. H e y: "The Precautionary Approach, Implications of the Revision of the Oslo and Paris Conventions," *Marine Policy* 244–253 (July 1991); *idem*, "The Precautionary Concept in Environmental Policy and Law," IV *Georgetown International Environmental Law Review* 257–478 (1992); O. M c I n t y r e and Th. M o s e d a l e: "The Precautionary Principle as a Norm of Customary International Law," 9 *JlEnvir.L* 221–241 (1997); D. B o d a n s k y: "Remarks on New Development in International Environmental Law," in: *Proceedings of the American Society of International Law (85th Annual Meeting)* (1991), pp. 413–417

⁵⁵ E.g. for the first time this principle was applied in Germany in 1976 as a *Vorsorgeprinzip* ("[e]nvironmental policy is not fully accomplished by warding off imminent hazards and the elimination of damage which has occurred. Precautionary environmental policy requires furthermore that natural resources are protected and demands on them made with care") as a fundamental principle of environmental policy, at present formulated as follows: "[t]he principle of precaution commands that the damages done to natural world (which surrounds us all) should be avoided in advance and in accordance with the opportunity and possibility. *Vorsorge* further means the early detection of dangers to health and environment by comprehensive, synchronised research, in particular about the cause and effect relationships (...) it also means acting when conclusively ascertained understanding by science is not yet available. Precaution means to develop, in all sectors of the economy, technological processes that significantly reduce environmental burdens, especially those brought about by the introduction of harmful substances (...)" (BMI 1984, 53). In Belgium: Flemish Region 1996 Decree (Art. 1.2.1 para. 2). In this legislation, precautionary principle is one of the factors of balancing of social issues. In Federal legislation, mostly unknown, only in the draft bill on the protection of the marine environment (to be approved), L. L a r s e n: "The Precautionary Principle in Belgian Jurisprudence: Unknown, Unloved?," *European Environmental Law Review* 74–82 (March 1998). In the UK: the 1990 White Paper incorporates precaution and other documents. The White Paper: 1.18 "(...) [w]here there are significant risks of damage to the environment, the government will be prepared to take *precautionary* action to limit the use of potentially dangerous materials or the spread of potentially dangerous pollutants, even when the scientific knowledge is not conclusive, if the balance of likely costs and benefits justifies it. The precautionary principle applies particularly where are the good grounds for judging either that action taken promptly at comparatively low cost may avoid more costly damage later, or that irreversible effects may

precautionary principle features in many soft law documents,⁵⁷ out of which the most authoritative is Principle 15 of the Rio Declaration, which states as follows: “[i]n order

follow if action is delayed” (Germany and the UK). Cited in: C a m e r o n and A b o u c h a r, in: F r e e s t o n e and H e y, *supra*, note 54, pp. 38–39. In the US: it is widely applied, for example a number of statutes exist that do not allow use of chemicals which have been shown to cause cancer, unless it can be proved that “the amount of chemical in question poses no ‘significant risk’,” F.B. C r o s s: “Paradoxical Perils of the Precautionary Principle,” 53 *Wash. & Lee L. Rev.* 851, 853 (1996), e.g., *Proposition 65 List of Carcinogens and Reproductive Toxicants* (State of California), which makes a mere speculation that a particular chemical has a cancerous effect enough to discontinue it unless it can be proved that it is harmless (or not cause particular harm) by the possessor-user/manufacturer of the chemical.

⁵⁶ E.g., Bamako Convention on Ban of the Import into Africa and Control of Transboundary Movement and Management of Hazardous Waste Within Africa, 29 January 1991, 30 *I.L.M.* 773 (1991), Art. 4(3f): “[e]ach Party shall strive to adopt and implement the prevention, precautionary approach to pollution problems which entails, *inter alia*, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm The parties shall cooperate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production methods rather than the pursuit of a permissible emissions approach based on assimilative capacity assumptions.” The 1997 Montreal Protocol on Substances that Deplete Ozone Layer, 1987 *I.L.M.* 1550 (1987), para. 6 of the Preamble: “[t]he Parties are (...) determined to protect ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it (...)”; the Helsinki Convention on the Protection of and Use of Transboundary Watercourses and International Lakes, 31 *I.L.M.* 1312 (1992), Art. 2 (5): “[t]he precautionary principle, by virtue of which action to avoid the potential transboundary impact of release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a casual link between those substance, on one hand, and the potential transboundary impact, on the other hand; this principle was recognised in many marine environment protection conventions, such as: OSPAR Convention: PARCOM recommendation 89(1989): provides that preventive measures must be taken when there are “reasonable grounds for concern (...) even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects”; this procedure was implemented by means of the Prior Justification Procedure of the Oslo Commission, whereby substances may only be introduced if it has been indicated with an acceptable margin of uncertainty that they may not cause harm to the environment. Where this requirement is impracticable, it might be applied as the more general level of application of the best available technology or practice; the 1992 Helsinki Convention on the Protection of the Environment of the Baltic Sea Area, Art. 3(2): provides that preventive measures are to be taken “when there is a reason to assume” that harm might be caused “even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects”; the 1992 Climate Change Convention Art. 3(3): “[p]arties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects”; the 1992 United Nations Convention on Biological Diversity does not expressly apply or refer to the principle but it says in its Preamble that the contracting parties are “[a]ware of the general lack of information and knowledge regarding biological diversity” and further that “where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such a threat”; the 1992 Treaty on European Union (TEU) amended Article 130R (2) of the Treaty of Rome to include the requirement that “Community policy on the environment (...) shall be based on the precautionary principle (...)” it has been added to several other guiding principles of the Community law-making, upon which the Community policy on the environment is based under this Article, including polluter-pays-principle, the preventive principle and the principle of integration.

⁵⁷ E.g., Declaration of the Second International North Sea Conference on the Protection of the North Sea (London Declaration): “(...) in order to protect the North Sea from possibly damaging dangerous substances, a precautionary approach which is necessary, which may require action to control inputs of such substances even before a casual link has been established by absolute clear evidence,” paragraph VII, *London Declaration*, London, November 1987, text in: D. F r e e s t o n e, T. I j l s t r a: *The North Sea: Basic Documents on Regional Environmental Co-operation*, p. 3; Declaration of the Third International Conference on the Protection of the North Sea (The Hague Declaration): “(...) will continue to apply precautionary principle, that is to take action to avoid potentially damaging impacts of substances that are persistent, toxic and likely to bioaccumulate even where there is no scientific evidence to prove a casual link between emissions and effects,” text in: D. F r e e s t o n e and T. I j l s t r a, *op. cit.*, p. 40.

to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

On an international level, the obligation is expressed both as mandatory – “shall” – and as non-mandatory – “should.” Even Principle 15, which employs a mandatory formulation, wakens its impact by stating that precautionary principle is to be “widely applied by states according to their capabilities.” On a national level, it also varies, as to content, cost effectiveness, *etc.* Thus it can be argued that the definition of the precautionary principle on a national level – namely that it “asserts that [the] government should take precautions to protect public health and the environment, even in the absence of clear evidence of harm and notwithstanding the costs of such actions”⁵⁸ – is fully supported (see e.g., the formulation used in the UK White Paper: “low costs” of adhering to precautionary principle). Taking all the above into consideration, i.e., whether precaution is “a recommendation, an obligation, or some intermediate duty”,⁵⁹ and what substantive obligations it entails, it is difficult to argue that this principle already entered the body of international customary law.

The substance of the precautionary principle, at present is not altogether clear; for example, what is the degree of certainty acceptable in identifying activities covered by it. There is no one fixed standard and it varies from one environmental situation to another, involves many factors, one of them being the gravity of harm addressed.⁶⁰ Thus, “the estimated risk and effects in case the risk materialises (...) are to be balanced against the costs of eliminating or reducing the risk.”⁶¹ Although in the jurisprudence of some states, such as India, it was pronounced that the precautionary principle is “accepted as part of the law of the land”⁶² and this was as well postulated by some authors,⁶³ we may only draw three common features of this principle, namely: (i) regulatory inaction threatens non-negligible harm; (ii) there exists a lack of scientific certainty on the cause and effect relationship; and (iii) under these circumstances, regulatory inaction is unjustified.⁶⁴ The view that the precautionary principle as a norm of customary international law, is supported by some authors on the basis of earlier state practice which applied implicitly this principle such as the 1982 moratorium on

⁵⁸ Cross, *supra*, note 55, p. 851.

⁵⁹ J. Hickey, Jr. and V.R. Walker: “Refining the Precautionary Principle in International Environmental Law,” *Va. Envtl. L. J.* (1997), p. 437.

⁶⁰ *Ibid.*, pp. 448–450.

⁶¹ J. Ebbesson: *Compatibility of International and National Environmental Law*, (1996), p. 120

⁶² E.g., *Vellore Citizens’ Welfare Forum AIR 1966 SC 2715* (1996) 5 SCC 647, cited in M. Anderson: “International Environmental Law in Indian Courts,” 7 *RECIEL* 26 (1998), see for other cases, *ibid.*, p. 26.

⁶³ Hohmann relies on soft law documents which endorse this principle, *supra*, note 54, pp. 335–336; Cameron and Abouchar rely, *inter alia*, on various on varied document including the 1987 American Law Institute (Third) Restatement in International Law and the 1989 ILC Draft Articles on State Responsibility, in Freestone, *supra*, note 54, pp. 35–36.

⁶⁴ Cameron and Abouchar, *supra*, note 54, p. 45.

commercial whaling by the International Whaling Commission.⁶⁵ This argument is not very convincing, since the moratorium was based on the grounds of scientific evidence. The same author put forward an original argument that uncertainty should not be an obstacle to the principle's legal character as a norm of international customary law, since self-determination, although vague in its contents, is a norm of customary law. Thus the question may be posed whether the above common elements sufficiently fulfil the standards of general practice required for the formation of customary international law for the precautionary principle to become the part of customary law – or whether other elements, such as cost and risk assessment, must be more generally and uniformly accepted as well, to meet the conditions.

There is another important feature i.e., the reversal of the burden of proof, that has been confirmed by widespread practice.⁶⁶ The effectiveness of this principle has, however, also been challenged. Such challenge takes into account particular features of international environmental law, such as the inevitability of the production by society of a certain amount of waste which enters the environment; the state of science – which does not guarantee conclusive proof of the effects (detrimental or not detrimental) of waste-generating activities; and finally the fact that no-waste generating human activity is free of risk in regards to its environmental consequences. Taking into account all these factors, the following conclusions may be drawn: “[t]he stringency of principles and rules may vary, and may in particular cases lead to an elimination of pollution by certain emissions, but on the whole the elimination of (risks of) detrimental effects remain a utopian ideal.”⁶⁷ Thus, what the application of the precautionary principle may achieve is to reduce, but not to eliminate entirely, the detrimental effects of pollution.

It may be argued that this principle may have a limiting effect on territorial sovereignty of states. A state may be obliged to take into consideration the precautionary principle if so requested by another state in relation to projects which may have a transboundary effect. This eventuality may only occur if we assume that this principle is a part of customary law; or in cases of international conventions when the obligation is of a mandatory character.

The importance of the precautionary principle was raised in some recent cases before the ICJ. For example, in the *Gabcikovo-Nagymaros* case, Hungary relied on this principle in its pleadings. It said as follows: “[s]tates shall take precautionary measures to anticipate, prevent or minimise damage to their transboundary resources and mitigate adversary effects. Where there are threats of serious or irreversible dam-

⁶⁵ D. Freestone: “The Road to Rio: International Environmental Law After the Earth Summit,” 6 *JLEnvirL* 211 (1994).

⁶⁶ See e.g., *Vellore Citizens Welfare Forum case*, in this case the Court laid down the definition of the precautionary principle: “i. environmental measures – by the State Government and the statutory authorities – must anticipate, prevent and attack the causes of environmental degradation; ii. Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; iii. The ‘onus of proof’ is on the actor of the developer/ industrialist to show that his action is environmentally benign.” Cited in: Anderson, *supra*, note 61, p. 27.

⁶⁷ Nollkaemper, *supra*, note 53, p. 107.

age, lack of full scientific certainty shall not be used as a reason for postponing such measures. Art. 2 paragraph 5 (a) of the Convention on Protection and Use of Transboundary Watercourses and International Lakes, signed in Helsinki on 17 March, 1992, as well as the IUCN Draft Art. 6 and Brundtland report, Art. 10 provide support for the obligation in general international law to apply the precautionary principle to protect transboundary source (...)."⁶⁸ Hungary addressed this principle as being a link between the principle of co-operation and the principle which establishes responsibility of a state for transboundary damage. Hungary further claimed that Article 12 (of the then ILC Draft on the Law of Non-Navigational uses of International Watercourses) and Article 3 of the 1991 Espoo Convention on Environmental Impact Assessment in Transboundary Context⁶⁹ on notification of measures which may have possible appreciable adverse effect, represent the law as it then stood. This obligation of notification also includes the duty to consult and negotiate.

The customary law obligation not to cause transboundary harm (as codified in Principles 21 and 3 of, respectively, the Stockholm and Rio Declarations) is underlined by the principle of preventive action which includes an obligation to co-operate with regard to transboundary environmental damage and to seek to prevent, to reduce, limit or control such damage. The Court in the Judgement did not address directly this principle, however, but stated "[t]hat newly developed norms of environmental law are relevant for implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 18 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon means to be specified in the Joint Contractual Plan. By inserting these evolving provisions in the Treaty, the parties recognised necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law (...)." This statement indicates that the Court has shown the possibility for parties to rely on newly developed principles of environmental law, including the precautionary principle, if they find it necessary. In the Nuclear Test II case, New Zealand relied on this principle. It pleaded "(...) that France's conduct was illegal in that it causes, or is likely to cause, the introduction into the marine environment of radioactive material. France being under an obligation, before carrying out its new underground nuclear tests, to provide evidence that they will not result in the introduction of such material to the environment, in accordance with 'precautionary principle' very widely accepted in contemporary international law".⁷⁰ The Court did not address this issue, but it gave rise to many important

⁶⁸ Application of the Republic of Hungary v. Czech and Slovak Republic on the Danube River, reprinted in: P. Sands, R. Tarasofsky and M. Weiss (eds.), *Principles of International Environmental Law*, vol. IIA, *Documents of International Environmental Law* (1994), pp. 693–698.

⁶⁹ 30 *I.L.M.* 802 (1991).

⁷⁰ "Request for Examination of the Situation in Accordance with Paragraph 63 of the Judgement of 20 December 1974 in Nuclear Tests" (hereinafter *Nuclear Tests II*). order of 22 September 1995, *I.C.J. Reports* (1995), p. 288, para. 5 of the Order, p. 290.

statements in individual opinions of the Judges. A very forceful argument for the application of this principle was made by Judge Weeramantry. He assesses this principle as gaining increasing support as part of the international law of the environment. Following the evidential principle of the reverse of the burden of proof, he expected France to submit evidence negating the claims of New Zealand. Judge Weeramantry asserted that New Zealand established *prima facie* its case in the absence of proof by France that the proposed nuclear tests are environmentally safe.⁷¹ and that “[i]t may be that France has material with which it can satisfy the Court on that issue, but no such material has been offered. Having regard to the course of geological events, a guarantee of stability of such an island formation for hundreds of thousands of years does not seem within the bounds of likelihood of possibility”.⁷² Other Judges in this case were more cautious. According to Judge *ad hoc* Palmer, it was difficult to make any statements concerning the status of the precautionary principle without arguments by France addressing this issue.⁷³ He, however, in his capacity as Judge, is of the view both that the precautionary principle should apply and that environmental impact assessment should be carried out in cases where “activities may have a significant effect on the environment”; and that this may be a customary law principle which pertains to the environment. Similarly, Judge Koroma, expressed the view that New Zealand established a *prima facie* case that the marine environment is at risk from the underground tests, based on scientific evidence and that there may be a duty already “not to cause gross or serious damage which can be reasonably avoided.”⁷⁴ Sands in his summation of the pleadings in the *Nuclear Test II* case, assesses that the precautionary principle “remains controversial.”⁷⁵ He admits (although an ardent supporter of this principle himself) that “[t]here has been no uniform understanding of its meaning, amongst state or commentators.”⁷⁶ He rightly points out that a more focused interpretation of this principle requires activities and substances which may be harmful to the environment to be regulated or prohibited even in the absence of conclusive overwhelming evidence available as to the harm or likely harm they may cause to the environment. The more radical feature of this principle – i.e., the change of the burden of proof to a person wishing to carry out an activity to demonstrate that it will not cause harm to the environment – finds little support in contemporary international law.⁷⁷ Thus it may be stated that the precautionary principle is an expression of and a result of an interaction between science and technology and the law, in, as Hey phrases it “the proactive regulatory

⁷¹ Dissenting Opinion of Judge Weeramantry, *I.C.J. Reports* (1995), p. 345.

⁷² *Ibid.*, p. 348.

⁷³ Dissenting Opinion of Judge Palmer, *ibid.*, p. 412.

⁷⁴ Dissenting Opinion of Judge Koroma, *ibid.*, p. 378.

⁷⁵ Ph. Sands: “Pleadings and the Pursuit of International Law: Nuclear Test II (*New Zealand v. France*),” in: A. Anghie and G. Sturgess (eds.): *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998), pp. 601–631, p. 623.

⁷⁶ Sands in: Anghie, *supra*, note 75, p. 623.

⁷⁷ Sands in: Anghie, *supra*, note 75 p. 624. He gives an example of OSPAR Convention, Annex II, Art. 3(3)(c); see also EC Directive 91/271 (urban waste water). Art. 6(2), OJ L 135, 30 May (1991), p. 40.

stage.”⁷⁸ The manner in which precautionary principle is formulated in various legal instruments is very different. This proves what was already said above that there is not one uniform concept of this principle. It also evidences that the development of science and technology influences the formulation of even such vague and uncertain principle as the precautionary one.

The formulations of this principle are conditioned by the regulatory structures they contained in. For example, the above cited author analyses from this point of view the 1972 London Convention⁷⁹ and the 1966 Protocol,⁸⁰ the 1995 Straddling and Highly Migratory Fish Stocks Agreement⁸¹ and the bilateral agreement between Sweden and Denmark for building of a fixed land link across the Great Belt.⁸² The London Convention and its Protocol (not yet in force) are both global instruments. Their normative structures are both very different, however. The London Convention, permitted dumping save with respect to certain explicitly prohibited substances – the “black list” (Article 5 and Annex I); and certain substances with respect to which dumping was to be regulated – “the grey list” (Article 6 and Annex II). The London Convention required the issue of a permit regulating all dumping activities (Article 6) and provided for a general obligation of monitoring of the condition of the sea for the purposes of the Convention (Article 6).⁸³ The 1966 Protocol provides for a very different legal structure. It is based on a so-called reverse list, *i.e.*, dumping is generally prohibited unless in exceptional cases it is permitted (Articles 4(1) and Annex 1 para. 1). Further, the Protocol has many other principles of legal regulation which make it a very advanced regulatory tool. These are as follows: dumping of permitted waste may only be done with a permit (Article 4(2); prior to the issue of a permit, a detailed assessment procedure must be followed (Article 4(2), Annex 2); monitoring is conducted to verify both that the conditions attached to any permit are fulfilled (compliance monitoring) and that the assumptions which were made concerning the effect on human health and on the environment of a permitted dumping activity were correct (Annex 2, para., 16).⁸⁴ The 1996 Protocol expressly embodies the precautionary principle and the principle of preventive measures (they are taken “when there is no reason to believe that wastes or other matter introduced to into the marine environment are likely to cause harm even when there is no conclu-

⁷⁸ E. H e y: “The Protection of Marine Ecosystems, Science Technology and International Law,” *Hague Yearbook of International Law* 76 (1997).

⁷⁹ Text in: “Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter,” 11 *ILM* 1294 (1972).

⁸⁰ 36 *I.L.M.* 1 (1997).

⁸¹ 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

⁸² Information on the project on: <http://www.oreskundkonsotiet.com>.

⁸³ H e y, *supra*, note 78, p. 78; similar system is provided for in the 1972 Convention for the prevention of Marine Pollution by Dumping from Ships and Aircraft. Text of the Convention in F r e e s t o n e and I j l s t r a, *supra*, note 57, p. 91.

⁸⁴ According to Annex 2 para. 18, the monitoring programmes are to provide information underlying decisions on the continuation, modification or revocation of permits.

sive evidence to prove a causal relation between inputs and their effects” (Article 3(1). All these components of the whole system (such as permits, monitoring, impact assessments) “[t]aken together, (...) provide a decision-making process that aims to reduce scientific uncertainty to a minimum and to draw out the technological options available for disposing of the wastes otherwise than at sea.”⁸⁵ The system is based on thresholds which delimit illegality of certain actions.

A similar system was introduced by the 1995 Straddling and Highly Migratory Fish Stock Agreement (not in force yet). This Convention, which provides for global regulation of the conservation and management of the fish stocks in question is based on the principle of enforcing minimum requirements which have to be adopted by states in relation to conservation and management. The regulatory regime is founded on the following principles: fishing on the high seas for the stocks in question is to be authorised by a flag state (Article 18 (2)); a system of “stock specific” or “precautionary reference” points is to be developed (Article 6 (3b), Annex II); conservation and management measures are to be established to secure that fish mortality remains within set reference points (Article 6–3b, Annex II); pre-fixed conservation measures and management measures are to be implemented if reference points have been, or are, at risk of being exceeded (Article 6(4), para. 4 Annex II); monitoring programmes are to be established in order to ascertain the impact of regulated fisheries on the stock in question which associate stocks and their environment (Articles 5(j), 6(3(a)(d), (5) and (6); Annex I, para. 6 Annex II). This Convention embodies express reference to the precautionary principle (Article 6). It says as follows: “[s]tates shall be more cautious when information is uncertain, unreliable or inadequate” (Article 6(2). Article 6(3)(a) obliges states “to adopt improved techniques for dealing with risk and uncertainty.” The same Article provides “that the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.” According to Hey⁸⁶ the crucial factor for the whole regulatory system are precautionary reference points. They are based on “an agreed scientific procedure, which corresponds to the state of the resource and of the fishery, and which can be used as a guide for scientific management” (para. 1 Annex II) and form two different groups: “conservation or limit reference points” and “management or target reference points” (para. 2 Annex II). These points serve a similar purpose as the thresholds provided in the 1996 Protocol (see above). For example, maximum sustainable yield (“MSY”) is to be regarded as the minimum standard for the limit reference points, while the stocks are not over fished, management strategies are to ensure that MSY is not exceeded and that biomass does not fall below a pre-fixed threshold (para. 7 Annex II). In case of over-fished stock, maximum sustainable yield may serve as a rebuilding target (para. 7 Annex II). In cases of a new or exploratory fishery, cautious conservation and management measures such as catch and effort limits, are to be established and remain in force until more information is avail-

⁸⁵ Hey, *supra*, note 78, p. 77.

⁸⁶ *Ibid.*, p. 80.

able allowing for the adoption of a conservation and management regime and, if appropriate, the gradual development of the fishery (para. 6 Annex II).

The subject matter of the agreement between Denmark and Sweden, is the construction of a fixed link (a bridge and a tunnel) across the Great Belt. When completed, the link will not have any detrimental environmental effects on the condition of the Baltic Sea, it is only during the construction period that such effects may occur. To minimise the risk, a monitoring system was established as part of the regulatory system for the construction. It provides for a very extensive system of surveys conducted by a special consultant and paid for by the construction company. The results of a survey will serve as background material for decision-making by all involved parties such as Denmark and concerned private individuals. Thus in conclusion, this author states that in general all thresholds established do not serve the purpose of distinguishing illegal from legal behaviour "but rather the purpose of setting in motion further precautions, in the form of monitoring in a larger area, and that the relationship between law and science and technology has undergone fundamental challenge as a result of the implementation of precautionary principle." This change is probably best illustrated by the manner in which scientific and technological processes and options have been integrated into the law, and in particular into the decision-making process."⁸⁷

A mention must be made of a recent practice of the International Tribunal of the Law of the Sea (ITLOS), i.e., *Southern Bluefin Tuna cases* (New Zealand v. Japan; Australia v. Japan).⁸⁸ In its Order of 27 August 1999 (Requests for Provisional Measures), the ITLOS did not expressly endorse the application of the precautionary principle. It noted, however, that "(...) the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna" (paragraph 77). It further said that "(...) although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock" (paragraph 80); and that although the Tribunal could not conclusively assess the scientific evidence, it concluded there is the need for application of Article 290 provisional measures.

The Applicants strongly argued in favour of the application of the precautionary principle. They said that Articles 64, 116–119 and 300 of the 1982 Law of the Sea Convention must direct any party in the application and implementation of those articles. They pleaded forcefully that the principle "(...) must be applied by States in taking decisions about actions which entail threats of serious or irreversible damage to the environment while there is scientific uncertainty about the effects of such actions. The principle requires caution and vigilance in the face of such uncertainty."

⁸⁷ *Ibid.*, p. 82.

⁸⁸ <http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm>.

It may be added that some of the Judges are also in favour of precaution. Interestingly, for example, Judge Laing in his Separate Opinion observes as to the wording of the Order that "(...) it become evident that the Tribunal has adopted the precautionary approach for approach for the purposes of provisional measures in such a case as the present. In my view, adopting an *approach*, rather than a principle, appropriately imports a certain degree of flexibility and tends, though not dispositively, to underscore reticence about making premature pronouncements about desirable normative structures."⁸⁹

Environmental Impact Assessment

Environmental Impact Assessment ("EIA") has featured in many national and international (hard and soft law) documents.⁹⁰ In 1975, the CSCE Helsinki Final Act requires the "use of legal (...) measures for the protection including procedures for establishing environment impact assessment."⁹¹ The Stockholm Declaration, although not expressly including this obligation, in Principles 14 and 15 refers to the need for rational planning as "an essential tool" for avoiding adverse environmental effects, maximising benefits to all. As early as in 1985, the EC issued a directive on EIA⁹² In 1991, the Espoo Convention included this obligation as the linchpin of the whole document. In the Preamble it is stated that "[t]he parties (...) mindful of the efforts of international organisations to promote the use of environmental impact assessment both at the national and international levels (...) have agreed as follows (...)." This Convention introduces an absolute obligation of EIA procedure. For example Article 2 paragraph 4 is as follows: "[t]he Party of origin shall, consistent with the provisions of this Convention, ensure that affected parties are notified of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact." The Convention requires that the party whose actions or project may cause transboundary harm ensure that an EIA be undertaken while providing full opportunity to the public to participate in the preparation of the document.

Crucial in the realm of soft law is Principle 17 of the Rio Declaration, which states as follows: "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to decision of a competent national authority."

There are numerous other examples of incorporation of a requirement for EIA. For example, the OECD between 1974 and 1986 called for the use of EIA in 11 recommendations. Article 206 of the 1982 LOS Convention provides for its use, as well

⁸⁹ <http://www.un.org/Depts/los/ITLOS/31Laing/htm>, para. 19.

⁹⁰ See e.g., A.T. T i m o s h e n k o: "The Problem of Preventing Damage to the Environment in National and International Law: Impact Assessment and International Consultations," *Pace Envirl. L.R.* 475 (1988); "International Trends in Environmental Impact Assessment," *Int. Aff.* 591-621 (1992).

⁹¹ Text in: L.D. G u r u s w a r m y, G.W.R. P a l m e r, B.H. W e s t o n: *Supplement Documents to International Environmental Law and World Order*, St Paul (1994), p. 215.

⁹² Council Directive 85/33 EEC, 175 *OJEC* 40 (5 July 1985).

as the World Charter of Nature. The World Bank has established as well this procedure in the Operational Directive in 1989.⁹³ It involves the following six steps: screening the proposal; preparing an initial executive project summary; preparing the Terms of Reference for an environmental assessment; preparing the assessment; reviewing the assessment and incorporating its findings into the project and conducting post-project evaluation. There are also many examples at the national level.⁹⁴

In the *Nuclear Test II case*, New Zealand argued that no nuclear tests can be effected without EIA.⁹⁵ The argument submitted by New Zealand was supported by the 1986 Noumea Convention (Article 16), which provides that major projects which might effect the environment EIA must be conducted.⁹⁶ New Zealand claimed that the EIA should focus on, *inter alia*, the topography of the atolls, a shallow seismic testing programme; a comprehensive sampling campaign to investigate the concentration of radionuclides in fish, planktonic organisms, sediments and coralline structures; an epidemiological study; and the potential for radionuclide releases from the site by reference to standards for civil nuclear installations and the strength and radioactive yield of the proposed detonations.⁹⁷ The assessment should be made public in order to allow for systematic, orderly and open debate and with identification of considerations taken into account in effecting the EIA, so can be subject to an independent scrutiny. The process should indicate some consideration of the benefits, and a balancing of benefits against risks.⁹⁸ Judge Weeramantry is a firm supporter of the EIA. In many of his opinions (in *Nuclear Test case II*,⁹⁹ in the *Use of Nuclear Weapons Advisory Opinion*¹⁰⁰ and in *Gabcikovo-Nagymaros case*).¹⁰¹ he observed that this

⁹³ "The World Bank Operational Directive 4.00 Annex A: Environmental Assessment," in: Ph. S a n d s, R. T a r a s o f s k y, M. W e i s s (eds.): *Documents in International Environmental Law* (1994), pp. 1323–1331.

⁹⁴ E.g., Canada, EIA began at the federal level with the establishment in the 1973 of the Environment Assessment and Review Process (EARP) and the provincial level with enactment of 1975 of Ontario's Environmental Assessment Act; Gambia, the 1987 National Environmental Management Act; India, Constitution (42nd Amendment) Act (1977), the Environment (Protection Act); the Netherlands, Introduction of the EIA by amendment to the General Environmental Protection Act of 1970; The Netherlands formally adopted EIA in 185, appointing a special commission of independent experts to review EIAs. The Dutch Law on EIA supplemented the General Environmental Protection Act of 1979; the USA, the United States National Environmental Policy Act ("NEPA"). Generic regulations are contained in 40 C.F.R. pts.1500–1517 (1991). State agencies have issued independently "little NEPA" statutes, all information from Robinson, pp. 611–616.

⁹⁵ See in-depth, S a n d s in: A n g h i e, *supra*, note 75, pp. 619–623; CR/95/20, pp. 10–25.

⁹⁶ S a n d s in: A n g h i e, *supra*, note 75, p. 620 and the 1986 Noumea Convention: 2. Each Party shall, within its capabilities, assess the potential effects of such projects on the marine environment, so appropriate measures can be taken to prevent any substantial pollution of, or significant and harmful changes within the Convention Area. 3. With respect to the assessment referred to in paragraph 2, each Party shall, where appropriate, invite, (a) public comment according to its national procedures; (b) the Parties that may be affected to consult with and submit comments.

⁹⁷ CR/95/20, para. 81, cited in S a n d s in: A n g h i e, *supra*, note 75, p. 621.

⁹⁸ Paras. 85 and 85, cited *ibid.*, p. 621.

⁹⁹ Dissenting Opinion, *supra*, note, p. 344.

¹⁰⁰ Legality of the Threat or Use of Nuclear Weapons (request by the United Nations General Assembly of 8 July 1996), *I.C.J. Reports* (1996) p. Judge W e e r m a n t r y's Dissenting Opinion, *I.C.J. Reports*, p. 140.

¹⁰¹ Case Concerning The Gabcikovo-Nagymaros Project, *I.C.J. Reports*, Separate Opinion of Vice-President Judge W e e r m a n t r y, http://www.icj-cij.org/iccj/www/ido...his_judgement_970925_werraman.htm.

principle was gathering strength and international acceptance and has reached the level of general recognition, which warrants it to be recognised by the Court. He pointed out a very important element of the EIA, namely that it "(...) means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact that the EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences."¹⁰² The same question as in the case of the precautionary principle may be asked, namely whether the EIA has entered the body of customary international environmental law. In the view of the present author, the case of the EIA is stronger. It features in many international environmental documents and numerous national laws. It is in fact the very fundamental of contemporary environmental law and the heart of prevention.

5. Some Tentative Conclusions

As evidenced above, the topic of liability for environmental damage has proved to be a daunting task for the International Law Commission and after a valiant struggle it decided to move on to the issue of prevention. Certain problems remain, however. It is very difficult to isolate the matters which were pertinent for liability from the matters which concern prevention. For example, what are the components of the obligation of prevention; what is the legal nature of the obligation of due diligence and what are its elements; what is the legal consequence of breach of the duty of prevention and of that of due diligence. We are not even sure what is the primary and what is the secondary rule in relation to obligations of prevention and that of due diligence. There appears, also, to be a permanent confusion as to the link between the principle of due diligence and that of strict liability. It should be assumed that in relation to hazardous activities – i.e., activities which involve risk – the duty of prevention should be based on strict liability. Nonetheless, it was stressed on several occasions by the Commission (including the two Reports of Rao) that the duty of prevention in relation to hazardous activities is one of a due diligence character.

The problem of due diligence was the subject of discussion in the ILC during the negotiations of the 1997 Watercourse Convention, in which the duties of states are based on this obligation. It was in the course of drafting of this Convention that the Special Rapporteur McCaffrey made important pronouncements as to its legal character. He was adamant in stressing that due diligence must not be interpreted as resulting in strict liability of a state for any harm caused by pollution.¹⁰³

¹⁰² Weeramantry: Separate, *supra*, note 101, pp. 14–15.

¹⁰³ *YBILC* (1988), Vol. II (Part One), p. 238, para. 16 document A/CN.4/412 and Add. 1 and 2. McCaffrey identified the following elements of the obligation of due diligence: exercise of the degree of care that could be expected of good government; use of infrastructure with a degree of vigilance adapted to the circumstances; higher the degree of the inadmissible (water) pollution, the greater should be the duty of care to prevent such pollution on the part of the state.

Another outstanding question relates to the presence or absence of significant harm in relation to the establishment of the existence of liability.¹⁰⁴ It is generally accepted in practice and doctrine of international law that strict liability may only be applied to hazardous activities (with the exclusion of the obligation of due diligence). This issue is blurred in the ILC Draft. What in my view is needed is to strictly define which obligations of prevention are those of due diligence and which may involve strict liability.

The general view was expressed that the existence of harm is a prerequisite for liability. As the Special Rapporteur Rao remarked, however, the question of whether liability should flow from the existence of harm or from the conduct reflecting lack of due diligence might be better decided on the grounds of the nature of the activity and the risk posed (which is a daunting task). The assessment of Rao is a correct one. The problem arises, however, how to establish certain general and basic rules (such as the existence of harm as a necessary requirement to cause liability) if each and every situation calls for a different approach.

Another question which in my view cannot be avoided in the prevention topic is who bears the primary liability for prevention; a state or an individual. The attempts of Barbosa to combine the two failed due to the inability to link them together; and to specify what should be the main type of liability and what should be the subsidiary one.

There remain also a mass of other problems, such as that of the legal content and status of the components of the duty of prevention, including the precautionary approach and the requirement for environmental impact assessment. Thus one problem is linked to another and each and every one requires an answer.

¹⁰⁴ See also on this subject extensively J.G. L a m m e r s in: *Pollution of International Watercourses* (1984), p. 348 ff. and 587 ff.

The State Immunity in the Practice of Polish Courts

ANNA WYROZUMSKA

I. The legal institution of state immunity had been developed in international law in the 19th century. The immunity was aimed to secure observance of state's sovereignty in cases when that state's property, its authorities, representatives or its legal acts were confronted with the territorial sovereignty of another state.¹

The jurisdictional immunity of the state has, for a long time, been considered to be absolute. A state could plea the state immunity irrespective of the kind of its activity. The concept of absolute immunity was based on the idea of equality of all states, according to which no state could exercise its sovereign powers towards another state. However, as the time was passing by and the states more and more often got involved in activities of a private-law nature, a revision of the absolute immunity principle has become more explicit. Already in the 19th century, in some western European countries (particularly in Belgium and in Italy), there existed a practice of restrictive interpretation of state immunity and a tendency to exclude certain types of state's activity from its scope. This new concept was based on a distinction of state's activities *de iure imperii* – sovereign acts of the state and state's activities *de iure gestionis* – where the state acts (generally) on the same terms as private individuals (activities not connected with exercise of the state's sovereign powers). After the Second World War, apart from the abovementioned practice of national courts, the states started to conclude bilateral or multilateral treaties containing their renouncements of state immunity for the purposes of, e.g., commercial activity (were also communist states including the USSR and Poland parties to such treaties even though they were strong supporters of the concept of absolute state immunity at that time). One of the first multilateral conventions restricting the state immunity was the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958, which excluded the immunity with reference to government ships operated for commercial purposes.² In 1972 the Council of Europe adopted the European Convention on State Immunity. This convention reflects the rules of international law, which begin to

¹ See: G.M. B a d r: *State Immunity: An Analytical and Prognostic View* (1984); J. B r ö h m e r: *State Immunity and the Violation of Human Rights* (1997); I. P i n g e l - L e n u z z a: *Les immunités des Etats en droit international* (1997); W. C z a p l i ń s k i, A. W y r o z u m s k a: *Prawo międzynarodowe publiczne, zagadnienia systemowe* (1999), p. 197 ff.

² Art. 21. Earlier, in 1926 the Brussels Convention on the immunity of state vessels was signed. That Convention granted the immunity only to naval crafts, state's yachts, ships of the control service and the like.

prevail in the current practice of the states. Its scope, however, is rather narrow.³ Since the 1970s many states have started adopting domestic statutes containing detailed regulations concerning rules of conferring jurisdictional immunities on foreign states before the national courts. All of them are based on the concept of limited immunity, e.g. the USA (*Foreign Sovereign Immunities Act* 1976), the UK (*State Immunity Act* 1978), Singapore (1979), Pakistan (1981), RSA (1981), Canada (1982) and Australia (1985). The efforts of creating a universal instrument in this field was taken up by the International Law Commission (ILC) which, in 1991, adopted the final text of a Draft Convention on Jurisdictional Immunities of the States and their Property. At present, the draft is subject to debate in the VI Committee of the UN GA and to work of a Working Group, set up especially for that purpose by the Committee. Elaboration of a convention which would gain general acceptance appears to be a very difficult task, all the more so as the practice of the states in this field is far from being uniform. Some important problems connected with state immunity still remain deeply controversial, i.e. a concept of state for purposes of the immunity, criteria for determining the commercial nature of a contract or a transaction, definition of a state-owned enterprise and a range of its activities coming within a scope of state immunity, immunity relating to work contracts or application of compulsory measures against another state's property.

However, from the present practice of the states, reflected to a large extent in the ILC draft, some general tendencies can be derived: the jurisdictional immunity is vested in the state and the state's property. The meaning of "the state" in this context is usually interpreted widely, not only referring to the governmental and representative organs of the state, or – in a federal state – its component parts, but also to all subjects exercising the prerogatives of the state authority. It is also accepted that a state cannot plea the jurisdictional immunity before a court of another state if it has committed itself to submit itself to the jurisdiction of that court through a treaty, a clear statement in a written contract or an explicit consent expressed after the dispute arose.⁴

The immunity refers to all sovereign acts of the state (*de iure imperii*). As according to its main purpose, it is to protect the sovereign competencies of the state; however, it does not regard the acts *de iure gestionis* connected with commercial transactions, labour contracts, property, possession and use of things (e.g. renting of buildings), damages of property or person, industrial or intellectual property, partnership [membership, share] in companies or exploitation of ships with aims other than public service of non-commercial nature.⁵ Similarly, e.g. the British act of 1978 states that "the immunity does not regard the contracts to deliver goods or provide services,

³ The Convention was ratified only by Germany (1990), Austria, Belgium, Cyprus, Luxembourg, the Netherlands, Switzerland and the United Kingdom and that does not indicate a wide acceptance among the Member States. The Protocol to the Convention (ratified by 6 states) provides a special European Court for State Immunity, which decides in disputes raised between the states on interpretation and application of the Convention and also in cases submitted by private individuals. Jurisdiction of the Court is optional. The Court was set up on 28 May 1985. Its functions are exercised by the ECHR in Strasbourg.

⁴ Art. 2 of the European Convention of 1972, Art. 7 of the ILC Draft of 1991.

⁵ Arts. 10–16 of the ILC Draft of 1991, Arts. 7–10 of the European Convention of 1972.

loans and any other transaction or activity (commercial, industrial, financial, professional or of any other character), which the state carries out or in any other way is involved in, differently from the exercise of its sovereign rights.” It is then the essential nature of the act that decides on its inclusion into or exclusion from the scope of the immunity – is the act of a public-law or of a private-law nature (this test is of objective character) – and not its motives and purposes.

II. Search for the Legal Basis for State Immunity by the Polish Courts

At the end of the XIX century, when the legal construction of the state immunity developed, it was frequent to derive it from the immunities of diplomatic agents, basing on the analogy – if a diplomat enjoys the immunity as a representative of a state, all the more the freedom from jurisdiction should be granted to the state itself. For example, the Appeal Court in Nancy in its judgement of 31 June 1871 stressed that “the ‘immunity’ of the ambassadors, the ministers and the foreign legates is all the more vested in the governments, which accredited them and on behalf of which they exercise their functions.”⁶ Earlier, on 30 December 1840, the Appeal Court in Brussels stated similarly that “the principles of the law of nations which apply to ambassadors, apply with even greater reason to the states represented by them.”⁷ However, in this case the general prosecutor rightly pointed out to the court, that it based on a false initial proposition. The court assumed something that, as a matter of fact, should have first been proved, namely whether the diplomatic immunities were really based on the principle of representation and whether the ambassador or another member of the mission enjoyed their immunities because they represented the state.⁸ Source of the dispute is to

⁶ *Lauchmann & Cahn v. Heymann, S.*, 1871.129.

⁷ *Société générale pour favoriser l'industrie nationale*, Pas. 1841.II.33.

⁸ The theory of representation indicates that a diplomatic agent represents the state, and since all states are equal, it follows that, according to the principle *par in parem non habet imperium*, the organs of one state should not be subordinated to the organs of another state. This theory, however, gives reasons only for privileges of the internal and external organs appearing in international relations. But it does not explain the privileges of the persons that do not have fully representative character, as i.e. consuls or members of administrative or technical personal, including drivers or cleaners [charwomen]. The Vienna Convention on Diplomatic Relations of 1961, which has almost universal character – ratified by 174 States – refers the term “diplomatic agent” not only to the head of the mission, but to the members of the diplomatic personal as well. Furthermore, the functions of a diplomatic mission are much more extensive than just representation of the sending state and include, for example, conduct of negotiation with the receiving state, protection of interests of the sending state and the like (see: Article 3). In the modern doctrine it is most frequently stated that unlike the immunity of the head of the state, the immunity of diplomatic agents is based on the need to secure for them the freedom to exercise their functions, regardless of the jurisdiction or control of the receiving state (the functional theory). The Vienna Convention is based on that theory, as well as it takes into account the representative character of the head of the mission and of the mission itself (see: supporting reasons of the ILC to the Final Draft Convention 2 *YBILC* 94–95 (1985)). Therefore, it has been stated in the Preamble to the Convention that the purpose of the diplomatic privileges and immunities “lies not in personal profits, but in securing the effective exercising of functions of the diplomatic missions as organs representing the states.” On the basis for diplomatic privileges and immunities see: J. S a l m o n: *Manuel de droit diplomatique* (1994), p. 171 ff.

be sought in the very nature of the diplomatic immunities. Following the change of views on that matter by the doctrine of international law the statements of the French and Belgian courts became unconvincing and was rejected.

Falseness of the thesis presented above, was detected by the Polish courts, which, during the inter-war period and later until 1987 (the date of a judgement of the Polish Supreme Court) clearly distinguished between the diplomatic immunities and the state immunity. The judges were also aware of the restrictive nature of state immunity. Already in 1926, in a case submitted not against a diplomatic or consular agent, but against the treasury of the foreign state (Czechoslovakia) for compensation for an accident caused by a car owned by the defendant,⁹ the Supreme Court (further referred to as SN) gave a clear exposition on the question of *ius standi in iudicio* of a foreign state. It criticised the approach of the court of lower instance, which identified the treasury of a foreign state with “a foreigner” [alien]. SN pointed out that the treasury of a foreign state, that is the state itself, was a legal person,¹⁰ and not a fictitious natural person. The states as legal persons are mutually independent, are not subordinate one to another, however still “their reciprocal relations are governed by international treaties and the law of nations (...) it is not the matter of ‘foreignness’, but of independence, ‘sovereignty’.” If then, one state within the territory of another state violates private [personal] rights of a citizen, the provisions of international law shall apply. Thus, SN further examined to what extent the international law allowed one state to judge another state and concluded, that responsibility for a car accident did not come within the scope of admissible exceptions from the general principle of state immunity.

On 14 December 1948, in the judgement in case *Aldona S. v. Great Britain*,¹¹ SN emphasised that the legal basis of the immunity of a diplomatic agent was different from the legal basis of state immunity. It noticed, having refused the possibility to apply the provisions of the Polish Civil Procedure Code of 1932 regarding aliens (Art. 4) or persons enjoying diplomatic immunities, that the basis of the immunity of diplomatic agents is the principle of freedom of exercising their functions – *ne impediatur legatio*, and the basis of the immunity of foreign states is “the democratic principle of equality of the states, regardless of their size and importance, excluding – in consequence – the jurisdiction of one state over another (*par in parem non habet iudicium*).” SN concluded then: “if there is concurrence of some effects for the immunities, it is to explain with accidental coincidence of some consequences of these immunities; however, the fact that different causes may bring similar effects does not give reason to include the radically different immunity of a foreign state into the scope of the provisions of the Civil Procedure Code on diplomatic immunities,

⁹ Supreme Court (Sąd Najwyższy, SN) Judgement of 2 March 1926, R.133/26, OSP, vol. V, Pos. 418; in the gloss (ibidem) L. Babiński points out 3 earlier judgements of the courts of lower instance concerning the state immunity, see: OSP, vol. V, Pos. 418.

¹⁰ “The state exactly in respect of its property [fortune] (the treasury) serving for realisation of the purposes of the state – is a legal person,” and further: “The treasury of the state and the state, when it is about (...) [a matter of] its property, are just two different terms for designation of one and the same legal person” (*ibid.*).

¹¹ Case C 635/48, see: 4 *PiP* 119 ff. (1949).

namely of Article 5 of the Code. Therefore, the decision on the question of jurisdictional immunity of foreign states should be based directly on the general principles recognised in international relations.”

In 1958, in the case concerning the French Consulate in Cracow, SN concluded similarly: “In the present case the plaintiffs sue the Consulate of the French Republic in Cracow (not the Consul personally), that is the French Republic itself,” and this puts into the foreground the question whether a foreign state does come under jurisdiction of the Polish courts.¹² The Court finally rejected the plaintiffs’ claim, however first, precisely examined the scope of the customary principle of jurisdictional immunity of the state and existence of reciprocity of the French Republic in this matter. It is worth to notice that, if the plaintiffs had sued the consul, the decision of the court could have been different. The case concerned a man killed in a car accident caused by J., who was driving a car owned by the French Consulate in Cracow (and as a matter of fact, according to explanation of the Consulate, by the former consul). Children of the victim claimed for pension before the court.¹³

Also, in the judgement of 25 March 1987 in case *Maria B.-L. v. The Institute of Austrian Culture* in Warsaw, concerning reinstatement to employment, SN rejected the possibility to apply the provisions of the Polish Civil Procedure Code – k.p.c. – (Art. 1111 para. 1 point 1 and 2) regarding diplomatic immunities of a governmental institution of a foreign state – the Institute of Austrian Culture. The head of the Institute was at the same time the cultural councillor of the Austrian Embassy in Poland – that is why the Court considered the question in the light of state immunity. Therefore, it seems striking why, since the 1990s, the Polish Supreme Court has abandoned these fundamental assumptions.

II.1. Return to Analogy with Diplomatic Immunities

Apart from a very odd decision of the District Court of 1992 in case *Elżbieta K. v. The Embassy of Switzerland* (concerning ascertainment and correction of employment certificate), when the court, showing complete ignorance of at least 50 years of development of the international law, rejected the plaintiff’s petition and stated the inadmissibility of judicial proceedings on the grounds of the lack of state jurisdiction because: “The Embassy of Switzerland is, in the light of international law, the territory of a foreign state,”¹⁴ the Polish courts do not refer [appeal] to “exterritoriality”

¹² Judgement of 26 March 1958, 2 CR 172/56, OSP 1959, pos. 160.

¹³ I.e. the Vienna Convention on Consular Relations of 1963, in great measure reflecting the practice of the states, excludes explicit the jurisdictional immunity of consular agents and employees when the complaint submitted by a third party concerns compensation in relation to an accident within the territory of the receiving state, caused by a vehicle, ship or plane, regardless of whether the agent or employee was exercising his official functions or was using the vehicle on private matter at that time (Art. 43 para. 2 point b).

¹⁴ Decision of the District Court for Warsaw–Praga of 16th September 1992, VII P 1232/92. The statement of the Court is based on a fiction, it is namely obvious that the embassy is placed within the Polish territory, where except the exceptions pointed out in the Convention of 1961, the Polish law applies. In case of a crime committed on the premises of the embassy by i.e. a Polish citizen, the Polish, not the Swiss law will apply. It would be quite astonishing, if the court stated that the crime had been committed outside Poland. See judgements [rulings?] of

anymore and they are well acquainted with the idea of sovereignty. Generally, however, they use the *a fortiori* argumentation and recognise the immunity of diplomatic or consular agencies by concluding it from the diplomatic (even in relation to consulates) immunity, with reference to Article 31 of the Vienna Convention on Diplomatic Relations of 1961. In the effect, the legal basis for a decision on the inadmissibility of jurisdiction is Art. 1111 of the civil procedure code, which refers to natural persons who enjoy diplomatic immunities. As it seems, the courts reason as follows: if a representative of a state enjoys the immunity in cases connected with exercising his/hers functions, then when the embassy itself is sued, such case regards the official activities performed by representatives of a foreign state as well, and so it must be accepted that the diplomatic agency, *a fortiori*, comes within the scope of the immunity.

On the 26 September 1990,¹⁵ in the case on a complaint for pay by Andrzej B. and Wiesław B. against The Vehicle Technology Centre in W., in answer to a preliminary question whether jurisdictional immunity of the Agency of Commerce (which was an integral part of the USSR Embassy) also referred to units subordinated to, financed by and acting with that Agency, SN stated that the Vehicle Technology Centre was an organisational unit of the Agency of Commerce of the USSR and concluded that in the present case the diplomatic agency of the foreign state had been sued – and it was an agency enjoying the immunity from jurisdiction of the receiving state. This principle, as SN stressed “recognised and respected by the civilized international community, was consolidated i.e. in Article 31 para. 1 of the Vienna Convention on Diplomatic Relations.” Further SN explained that “the fundamental prerequisite justifying the exclusion of a diplomatic agency from the jurisdiction of the Polish courts is the sovereignty of the sending state, because there exists an obvious and incontestable connection between the jurisdictional immunity of the state and the privileges and immunities of its organs. None of the sovereign and independent states, as subject of the international law, comes under the law of another state.”¹⁶

SN formulates this thesis even more clearly in the decision of 18 March 1998 in case of Marta M. against the General Consulate of the FRG in K.¹⁷ for annulment of the denunciation of an employment contract: “The scope of the immunity from civil and administrative jurisdiction of the receiving state, enjoyed by a diplomatic agent includes the diplomatic agency acting as an employer.” Moreover, in the opinion of the SN the provision of Article 31 of the Vienna Convention on Diplomatic Relations concerning the jurisdictional immunity not only refers to cases coming within the

courts of other states, rejecting the extritoriality doctrine – R. Jennings, A. Watts: *Oppenheim's International Law* (1997), 9th ed., vol. I, part 2–4, p. 1091, n. 4. R. Bierzanek and J. Symonides [*Prawo międzynarodowe publiczne* (1997), p. 182] state that the extritoriality theory “has been completely rejected by the international science and practice, this term though is still in use due to ignorant publicists.”

¹⁵ Resolution of 7 Judges' Chamber Case III PZP 9/90, OSNC 1991, issue 2–3, pos. 17.

¹⁶ If Art. 31 of the Vienna Convention of 1961 should apply, as SN suggests, to a foreign state, then there should also apply the Art. 41, which clearly points out that persons enjoying the diplomatic privileges and immunities „are obliged to obey the laws and measures [provisions] of the receiving state” – the SN thesis is then inaccurate [inexact].

¹⁷ I PKN 26/28, OSNAP 1999, issue 5, pos. 172.

scope of labour law, but also has the effect in the field of consular immunities. According to the Court: "exclusion of labour [employment] cases, where the employer is consul acting as a representative of the sending state, from the scope of the immunity of jurisdiction of the receiving state would undoubtedly threaten the idea of diplomatic immunity." Unfortunately, SN does not explain this statement any closer. Thus, it is not understandable why in opinion of the Court to a consular agent or agency Article 31 of the Vienna Convention of 1961 should apply, and not the Convention on Consular Relations of 1963.¹⁸ As to the identification of the state immunity with the diplomatic immunity, it can only be presumed that SN used the functional interpretation of Article 31. The theses of SN do seem to contain some fundamental deficiencies.¹⁹

It is incontestable that there is a relation between diplomatic or consular immunity and state immunity, as their common purpose is to secure independence, freedom of activity and undisturbed exercising of functions. This does not mean, however, that the functions are identical and that the protection of the activity must be identical. It becomes clear when we compare the scope of immunities enjoyed by the diplomatic agents of the state under the Vienna Convention of 1961 and the scope of immunities enjoyed by the consular agents under the Vienna Convention of 1963. All the more, if the state immunity were the same or almost the same legal institution as diplomatic immunities, then it should be accepted that the state immunity would have identical scope as diplomatic immunities. In this context it must be noticed that Article 31 of the Vienna Convention on Diplomatic Relations (as well as Art. 1111 para. 2 of the civil procedure code implementing that provision) provides for the exclusion of diplomatic immunity for three situations: cases within the scope of the law of property regarding private immovables placed within the territory of the receiving state, unless he/she owns them on behalf of the sending state for the mission's purposes; cases regarding succession, when the diplomatic agent acts as a private person; cases regarding a professional or commercial activity not connected with the official functions. The consequent use of the analogy argumentation requires then, that the state immunity should be excluded in the same categories of cases, i.e. in relation to ownership of immovable property or to commercial activity of the state. Whereas, both the SN resolution of 1990 and the judgement of 1998 are based on the principle of the absolute state immunity – a foreign state does not come under the state jurisdiction at all. Furthermore, if we accepted the existence of a relation between the immunities of the state and of its representatives, then in cases when the representative of a state pleads the immunity, we would have to accept that essentially he/she

¹⁸ The SN ruling multiplies, in general, the position held in this case by the courts of lower instance: the District Court for Cracow-Nowa Huta in Cracow (decision of 22 August 1997, rejecting the claim), with the difference that the district court referred to the Convention of 1963, but "mixed" the diplomatic and consular immunities by accepting – contrary to the international law – a representative (diplomatic) character of a consulate/consular agent, the Province Court – Labour and Social Insurance Court in Cracow (decision of 30 October 1997).

¹⁹ See glosses to the ruling cited above: J. C i s z e w s k i, 5 *Palestra* 202 ff. (1999) and J. S k r z y d ł o, 10 *PiP* 108 ff. (1999).

pleas the state immunity. It follows that it would be the state rather than the diplomatic agent that should be sued before the court. In the effect every activity of a representative or an official of a foreign state would come under the scope of the immunity, contrary to the Vienna conventions of 1961 and 1963.

SN undoubtedly distinguishes between the immunity of a diplomatic agent and the immunity of the mission itself. The Convention of 1961 adopts the same solution, and distinguishes between the rights and duties of the diplomatic agent and the rights and duties of the diplomatic mission. The Vienna Convention provides for a range of privileges and immunities enjoyed by natural persons: by the head of a mission, by the members of its personal, members of their families, by the private servants, such as: inviolability, jurisdictional immunity, realise from social insurance, from public services, exemption from taxation and customs duty etc. The Convention provides for some privileges for the mission itself. Among these privileges and immunities, however, there is no single word about the jurisdictional immunity of the mission.²⁰ If the parties to the Convention had intended to regulate the jurisdictional immunity of a mission (embassy), the Convention would have contained relevant provision, just like it contains a provision on execution procedure regarding the mission's property (Article 22). Article 31, which SN refers to, regards *expressis verbis* the jurisdictional immunity of the diplomatic personal of the mission, and not the mission itself.²¹

Also other international instruments – i.e. the Convention on Consular Relations of 1963, Convention on Special Missions of 1969, Vienna Convention on State Representation in Relations with International Organisations of 1975 – do not regulate the problem of jurisdictional immunity of a consular office or a diplomatic mission. Thus, these conventions do not answer the question whether and to what extent the mission enjoys the jurisdictional immunity. The search for an answer cannot be restricted to those acts; apart from the treaties, the customary law is being developed in this field. The parties to the Vienna Convention of 1961, aware of the existence of loopholes in the act, reserved in the Preamble that “the norm of the international customary law should still operate [be in force] in cases that are not explicit regulated by the provisions of the present Convention.”

²⁰ For example: Art. 20 gives the mission the right to place a flag and an ensign of the sending state on the abode of the mission. Art. 22 states that the rooms of the mission are inviolable, free from search, requisition, seizure or execution, and in para. 3 – that the rooms of the mission, its facilities and other property placed there are excluded from search, requisition, seizure or execution. Art. 24 adds that archives and documents of the mission are inviolable in any circumstances. Art. 25 obliges the receiving state to provide for any facilitation to exercise the functions of the mission. Art. 27 obliges to protect the free communication for all official purposes of the mission. According to Art. 28, all fees charged by the mission while exercising its functions are free from taxes and other charges.

²¹ The position of SN is fundamentally different from i.e. the position of the Constitutional Court of the FRG of 31 January 1969 in case of Yugoslavian military mission. The German court rejected the possibility to apply Art. 31 of the Vienna Convention of 1961 and stressed that “from the fact that, under this provision, an individual representative of a state enjoys the personal immunity, it does not follow that the sending state enjoys the immunity of the same [equal] extent,” 16 *Entscheidungen des Bundesverfassungsgerichts* 27; 65 *International Law Reports* 108.

It is also to be noticed that every time the conventions refer to the rights enjoyed by a mission, it is actually the matter of the rights enjoyed by a foreign state. If the Convention of 1961 protects the archives, diplomatic bag and the like, as these constitute property of the state, the state itself has legal entitlement to enjoy the rights established on the purpose to protect the archives, diplomatic bag, rooms. The mission as such does not have legal personality separate from the legal personality of the state. It represents a “part” of that personality, on the same terms as other organs and institutions of the state.²² In the effect, a mission is not the owner of diplomatic rooms, the tenant of a building, the party to a contract, and the like – it is the state itself, as the actual subject of the international law. The problem does not lie in “extension” of diplomatic immunity of the agents over the mission, as SN in the decision of 1998 states, but has much wider scope (what SN seems to have noticed – trying to include a consulate into the scope of diplomatic immunity). The immunity of a diplomatic mission is only an element of the state immunity. Within the scope of state immunity come also the acts of other organs of the state and the state’s property, and it refers to the civil, administrative and executive jurisdiction as well.

The differences in the nature of diplomatic/consular immunities and the state immunity are nowadays commonly noticed. This tendency is clearly reflected in the European Convention on the State Immunity of 1972. Article 32 of the Convention stresses that “nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them.” The commentary to the Convention contains additional explanation that „the considerations which underlie these privileges and immunities are different from those underlying the present Convention” and that „the Convention cannot prejudice diplomatic and consular immunities, directly or indirectly.” The ILC 1991 draft of a convention on the state immunity is based on the same assumptions.

II.2. The Courts of Lower Instance in Relation to State Immunity

The position taken by SN in 1990 and 1998 threw the practice of the courts into confusion; however, it is worth to stress that not all courts of lower instance agree with that position. Generally, we can distinguish two types of decisions, though in the effect both lead to a statement of the inadmissibility of judiciary proceedings on grounds of the lack of jurisdiction of the Polish courts.

The first group is clearly following the SN resolution of 1990 and in cases where the mission – so actually a foreign state – is sued, the decision is based on Art. 1111 of the civil procedure code regarding diplomatic immunities. In case *Stawomir S. v. The Embassy of the PRCh* regarding wages for the denunciation period and payment for account of social insurance the District Court for Warsaw–Praga in its decision of

²² On the matter of distinction between legal personality and representation of this personality see the discussion in the 34th ILC Session (1982) on Art. 7 of the draft regarding jurisdictional immunities of the state and its property § 14 in: 2, Part Two *YBILC* 18 (1982).

27 April 1998 rejected the claim, because in its opinion, according to Art. 1111 mentioned above, the heads of diplomatic missions accredited in the Republic of Poland, the members of the diplomatic staff and other persons enjoying the diplomatic immunities could not be sued before the Polish courts. Argumentation of the court is typical: since those persons are members of the mission, units entitled to represent the state, including performance of acts of procedural character and taking part in proceedings before the court, the mission itself is also excluded from jurisdiction of the Polish courts.²³ Similarly, the District Court for Warsaw–Praga in case *Barbara J. v. The Embassy of the Kingdom of Belgium* for re-employment²⁴ stated the lack of state jurisdiction on the basis of Art. 1111 para 1 point 1, although the embassy was sued. In case *Maria K. v. The Embassy of the Republic of Austria* for the re-employment and payment wages²⁵ the court did ascertain that Maria K. had been employed, on the basis of a work contract, in the embassy, working in the residence of the ambassador. The court stated, however, that according to the Convention of 1961 both, the embassy and the ambassador enjoy the diplomatic immunity. “Employing of the plaintiff by the office of the Ambassador results in exclusion of the case from the state jurisdiction, in accordance with Art. 1111 para 1 of the code.” Non-distinguishing between the state immunity from the diplomatic immunity leads to such extreme solutions, as this found by the District Court for Warsaw–Praga in the decision on the case *The Foundation of X X Czartoryscy at the National Museum in Cracow v. The Federal Republic of Germany*,²⁶ where the court discontinued the lawsuit, accepting i.e. that generally the delivery of court summons to the ambassador in a case against the state he represents is not legally effective on grounds of the jurisdictional immunity.

The District Court in Warsaw, in case *Mirosława N. v. The Embassy of the United States of Mexico*²⁷ regarding compensation for dissolution of an employment contract, seems to interpret the SN resolution of 1990 in a different way. The case was submitted against the embassy where the plaintiff had worked, however the court, hard to say why, referred only to the bilateral consular convention between the Republic of Poland and the United States of Mexico. That convention did not regulate the question of jurisdiction, so the court concluded (referring to the SN resolution of 1990) “according to the principle of full jurisdictional immunity” the lack of state jurisdiction, however on the basis of Art. 1099 of the civil procedure code and not of Art. 1112, concerning exemption from jurisdiction of the members of the consular post.

The second group of judgements of the courts of lower instance shows that some judges still give priority [precedence; still prefer (...)] to the SN position from the time [period] before 1990 and clearly distinguish between the state immunity and the jurisdictional immunity of a diplomatic agent or a consular officer. In case *Aleksander*

²³ VII P 564/98.

²⁴ VII P 226/93.

²⁵ Decision of 30 May 1996, VII P 572/96.

²⁶ II CO 315/98.

²⁷ District Court for Warsaw–Praga, decision of 25 March 1999, VIII P 2398/98.

*G. v. The Embassy of Portugal*²⁸ for the rent for lease of a real estate the court clearly disagreed with the SN position, that there existed the immunity of the diplomatic mission of a foreign state from jurisdiction of the receiving state, concluded on the basis of Article 31 of the Vienna Convention of 1961. Rejecting that approach, the court gave a precise and convincing argumentation on the question of *ius standi in iudicio* of a foreign state. The court clearly based on the construction of state immunity, that in its opinion, should be concluded from the principle of sovereignty of the states, their mutual equality and independence, with the bases in international treaties and accepted custom.

Similar argumentation is visible in case *Katarzyna J. v. The Embassy of Chile*²⁹ where the court stressed that, though the claim was submitted against a diplomatic post of another state, it was in fact submitted against another state, in the present case against the Republic of Chile, because the Embassy of Chile was a *statio fisci* of the Republic of Chile. The court stated the lack of state jurisdiction on the basis of Art. 1099 of the civil procedure code, however did not refer to Art. 1111 but to the international customary law: "according to the international tradition it is accepted that «equal has no authority and no jurisdiction over equal'." A clear reference to customary law still remains very rare.³⁰ Generally the courts refuse the state jurisdiction on the basis of the provisions of the said code. They state i.e. the lack of jurisdiction over the foreign state – the embassy, because no provision of the Polish law provides for legal personality of such unit and it is not a social organisation in the meaning of Art. 64 of the code, or they exclude the possibility of decision on the case on the basis of other provisions of the code. For example, in the decision in case *Jacek B. v. The Tax Office in Saragossa*,³¹ accepting that the office was a unit of the state treasury of the Kingdom of Spain, which means that the claim was submitted against a foreign state, the judge referred to the provisions of Arts. 1100–1110 of the code listing the cases coming under the scope of state jurisdiction. Those provisions do not point out the cases between a Polish natural or legal person and the organs of a foreign state as coming within the scope of jurisdiction of the Polish common courts. The list of cases underlying the state jurisdiction is detailed and argumentation *a contrario* to Art. 1103 of the code excludes, in the judge's opinion, the judiciary proceedings in this case. The judge accepted then that the defendant, that is Spain, had no "abode" in Poland, no property or property rights and the case did not regard a subject to the dispute placed in Poland or an obligation which came into existence or was to be completed in Poland.

²⁸ District Court for the City of Warsaw, decision of 23 September 1998, III C 309/98.

²⁹ District Court for Warsaw–Praga, decision of 2 October 1997, III P 727/97.

³⁰ The court also referred to customary law in cases: VIII P 2398/98 *Miroslawa N. v. The Embassy of the United States of Mexico*; III C 309/98 *Aleksander G. v. The Embassy of Portugal*; not that clearly in case II C 9888/97.

³¹ Province Court in Warsaw, decision of 15 April 1997, III C 2439/96. A Spanish firm charged J.B. with organising a food transport over the route Spain–Belarus, and did not pay explaining that with the fact of seizure of this amount of money from the firm's account by the Tax Office in Saragossa. J.B. applied for the pay of the sum together with interest either from the Spanish firm or from the Tax Office in Saragossa.

We can only to some extent agree with the court, because the abode of the diplomatic mission of the sued state can be regarded as the abode of the defendant, also the possession of property or property rights in Poland by Spain cannot be excluded; the court did not examine that at all. The court did not refer to the plaintiff's claim that the obligation came into existence or was completed in Poland. Application of Art. 1103 of the civil procedure code in order to accept the jurisdiction of the Polish courts in cases against a foreign state does not seem impossible at all. All the more that SN was not disturbed by the same lack of an explicit provision permitting legal disputes between a natural person and a foreign state when it applied Art. 1111 to such cases. Further the argumentation of the Warsaw court gets even more interesting from the point of view of construing the immunity of a foreign state. In order to strengthen its arguments the court steps over to the decision on the merits. Rightly treats the acts of the tax office (taken up in answer to the plaintiffs activities in Spain) as acts *de iure imperii*, so activities within the scope of the immunity, excluding the Polish jurisdiction. However, there is nothing that justifies the conclusion the court would accept its jurisdiction if the case concerned an act *de iure gestionis*.

Thus, even if the courts qualify the case properly, treating it in the categories of state immunity, and rightly refer to the international customary law, they still accept that this immunity is of an absolute character. A question arises then, why the courts also in this field gave up the judicial practice accepted during the inter-war period, later confirmed by the SN rulings of 1948, 1958 and 1987, all the more not in favour of a modern construction of the immunity but of even more restrictive interpretation of state immunity. We cannot say in any case that the Polish courts before 1987 applied the principle of absolute state immunity.

III. Exceptions from the Principle of Absolute State Immunity

III.1. The Principle of Reciprocity

Already in judgements of the 1920s it is clear that the recognition of the jurisdictional immunity of the state should depend on the character of the act in question and it is obvious that proceedings before the court are admissible when the foreign state resigns its rights. In 1926, in case against the Czechoslovakian state treasury for compensation for a car accident caused by a car owned by the sued treasury, SN stated that "no state can – as a rule – have jurisdiction over another," exceptions, however, could take place "in case of an explicit provision of the law of nations, of voluntary submission and of 'real' jurisdiction," that means disputes within the scope of the law of property regarding real estates owned by a foreign state and placed in the territory of another state.³²

In 1937 SN used, to examine whether a foreign state enjoyed the immunity, the principle of reciprocity concluded from the customary law and from Art. 5 of the civil procedure code of 1932 (that provision concerned the persons enjoying diplomatic

³² See *supra*, note 9.

privileges and immunities, as the present Art. 1111 of the civil procedure code of 1964, and provided for the recognition of the jurisdictional immunity if the sending state also provided for such recognition). In case against the German treasury for compensation for unlawful taxation, SN stated the inadmissibility of the claim basing on the fact that in Germany, there existed a custom that foreign states were not judged before the German courts.³³ As the customary law requires reciprocity, the German State cannot be sued before the Polish courts.³⁴

This construction was further developed in the SN judgement of 1948 in case *Aldona S. v. Great Britain*, cited above. The plaintiff was employed as a typist in the office of a weekly magazine „Głos Anglii” (“The Voice of England”), published in Cracow by the British Foreign Office. Sacked without a proper denunciation and without pay, Aldona S. submitted to the District Court in Cracow a claim against the state treasury of Great Britain for pay of the due contributions. Both, the District Court and SN recognised the immunity of Great Britain. SN stressed that, of all commonly accepted principles of the law applying to state immunity, the most important is the principle of reciprocity between the states following from the basic principle of equality of the states (this principle also applies to diplomatic immunity notwithstanding its different character). “The principle of reciprocity is expressed in recognition or refusal of the jurisdictional immunity by one state towards another in the same extent as the latter state recognises or refuses the immunity towards other states. The lack of reciprocity can follow directly from the explicit provisions of the law, but also from the constant judiciary practice of the courts of the foreign state. So then, in case of any doubts on that matter the courts shall request for opinion of the Ministry of Justice, which gives the said opinion after consultation with the Ministry of Foreign Affairs.” In the result SN stated that Great Britain enjoyed the immunity, because “the English courts since long ago, constantly and restrictively observe the jurisdictional immunity of the foreign states.”

Similarly, SN referred to the principle of reciprocity in the judgement of 1958 in case *Zdzisław, Małgorzata and Anna P. v. J. and the French Consulate in Cracow*. SN had no doubt that, because the French courts always recognised the immunity of a foreign state in cases regarding pension (such as that case), the principle of reciprocity required the Polish courts to recognise the same immunity in relation to France (SN based on the opinion of the Consulate of the Peoples’ Republic of Poland in Paris of 30 October 1957, submitted to the court via the Ministry of Justice). Almost thirty years later, in the judgement of 1987 SN confirmed that “a foreign state under the condition of reciprocity enjoys the jurisdictional immunity according to the principles commonly recognised in the international relations, following generally from the principle of equality of the states.”³⁵

In the 1990s, due to the resolution of 1990 the reciprocity was not mentioned anymore. The District Court for the City of Warsaw in case *Henryk W. v. The Em-*

³³ The court requested the Ministry of Justice for a legal opinion.

³⁴ Judgement of 31 July 1937, C II 413/37, OSP, vol. XVII, pos. 306.

³⁵ Judgement of 25 March 1987, I PRN 55/87.

bassy of Greece noticed that in the context of the provisions of the Vienna Convention of 1961 the principle of reciprocity was losing its importance and in support of such statement was the fact that the SN resolution of 1990, cited above, did not mention the reciprocity principle at all.³⁶ It follows clearly from the judgements of the 1990s, that the courts were rather likely to accept generally the lack of their competence and because of that they did not examine more carefully the question of existence or non-existence of reciprocity.

As to the decisions quoted above, the court examined the reciprocity in case *Katarzyna J. v. the Embassy of Chile* for re-employment,³⁷ as it requested the Ministry of Justice for information whether the Embassy of Chile enjoyed the jurisdictional immunity in Poland. The opinion of the Ministry of 2 June 1997 clearly referred to the principle of reciprocity stressing that “at the present moment there exists a custom to apply the principle of restrictive state immunity in relation to states applying the same conception and to states in relations with that no practice of that character existed.” The opinion was accepted after consultation with the Ministry of Foreign Affairs, which on 26 August 1997 informed the Ministry of Justice that “in individually justified cases The Republic of Chile applies the principle of restrictive state immunity and allows a situation where a Chilean diplomatic post could be a party in the proceedings within the scope of labour law.” However, the court did not refer to the opinion and rejected the claim on the basis of the Art. 1099 of the civil procedure code. It also stressed that the claim against a diplomatic mission of a foreign state was in fact submitted against another state and “according to the international tradition” accepted, unwillingly to notice the eventual inequalities, that “equal has no authority and no jurisdiction over equal.”

The application of the principle of reciprocity nowadays would have its positive effects in strengthening of the construction of restrictive immunity of a foreign state, if the majority of states follow such practice. It is not the ideal solution though and we have no intention to encourage returning to that. First, because recognition of the immunity depends on the actual situation and the judge’s knowledge of the practice of the courts of another state. The court would have to examine, in each case, not only the law of another state but the practice as well, and that’s not easy at all thinking of the possible diversity of application of the legal provisions by the foreign courts. The request for opinion of the Ministry of Justice (i.e. Art. 1116 of the civil procedure code provides for such possibility in reference to Arts. 1111–1115) gives no guarantee for a right decision. In the judgement of 1987, SN was satisfied to recognise the reciprocity with a statement contained in the opinion of the Ministry of Foreign Affairs that “the Austrian authorities treat the Polish Institute in Vienna as a part of the Embassy of the Peoples’ Republic of Poland in Vienna.” The court did not seek an answer to a question whether Austria applied the absolute immunity or did exclude it in some cases regarding employment relations. The Ministry’s information was short and was not based on

³⁶ Decision of 5 December 1997, II C 9888/97.

³⁷ District Court for Warsaw–Praga, decision of 2 October 1997, III P 727/97.

analysis of the practice of the Austrian courts. If that was the case, the opinion would have mentioned that in the 1980s the Austrian courts undoubtedly applied the principle of restrictive immunity. It was the judiciaries of Austria and Germany that first expressed their will to give up the stiff principle of absolute state immunity.³⁸ Already in 1950, in case *Dralle*, the Austrian Supreme Court, having examined the practice of the states, pointed out that “nowadays we can no longer maintain that the judiciary generally accepts the principle of jurisdictional immunity of a foreign state in relation to the acts of private-law character, because the majority of the courts of the majority of the civilised states refuses to recognise the immunity of the foreign state in similar cases.” With that judgement, as I. Seidl-Hohenveldern³⁹ writes, consequent restricting of the scope of the immunity has begun. The examination of the practice should be much more precise than to state whether in 1987 the Austrian courts recognised the immunity in cases concerning re-employment.

Secondly, the application of the principle of reciprocity introduces a lot of uncertainty and relevance to the courts’ practice. In some cases the courts would accept the immunity, in others – they would reject it. This would create real inequality not only between the “equal” states, but also between individuals. Some individuals would be in a better legal position, while others would be denied the possibility of judiciary proceedings. This way, from a theoretic point of view, the immunity would lose its justification.

III.2. Resignation of the State Immunity

The Polish courts had generally no problems with the second exception to the principle of absolute state immunity.⁴⁰ In 1928, in case of the *Commerce agency of the USSR v. Maurycy Fajans Industrial-Commercial Society*, SN had no doubts that opening of legal proceedings against a Polish citizen by a foreign state expresses acceptance of the jurisdiction of the Polish court in the dispute and acceptance of all legal consequences of such proceedings. The state cannot plea the immunity anymore, and above all cannot stop or diminish the means of the debtor’s defence. So a debtor in clause procedure⁴¹ “has the right to sue the creditor in order to overthrow his demands. As a means of defence against the creditor’s demand, such claim has an exceptional character and should be allowed against a foreign state, regardless of whether that state enjoys the immunity as a defendant or is deprived of this right.”⁴²

Also the District Court in Warsaw in 1998, in case *Aleksander G. v. The Embassy of Portugal*, cited above, dealt with the problem of resignation of the state immunity, however in a different form. The court had no doubts that resignation opened the way

³⁸ Compare I. Pingel-Lenuzza, *supra*, note 1, p. 182 ff.

³⁹ “State Immunity: Austria,” 10 *NethYBIL* 97 ff. (1979).

⁴⁰ SN explained the doctrine of resignation of the immunity of a diplomatic agent (in the case – the immunity of a military attaché) in the case *Wanda Montwid-Bialkoźór v. Józef Ivaldi* of 1925, regarding eviction, see: ZO SN 1925, No. 123; OSP, vol. V, No. 342 with the gloss by L. Babiński.

⁴¹ The matter regarded conferring of an executive clause on bills of exchange drawn by the Society.

⁴² ZO SN C 1928 I, No. 28; see: L. Ehrlich: *Prawo Narodów* (1947), p. 100.

for proceedings before national courts [organs] and that it may be expressed by an adequate clause in a private-law contract. The matter of the case regarded a rent contract in which the parties agreed that in case of a dispute the District Court for the City of Warsaw would have competence to judge the case.⁴³ However, in this case the court incorrectly accepted the indisposable character of procedural rights in question and rejected the validity of the competence clause only because the plaintiff took over the rights of the landlord due to a cession contract which the Embassy of Portugal, as the tenant, was not party to.

III.3. Legal Disputes Regarding Real Estate Placed in Poland

During the inter-war period and over the first years after the war the Polish courts generally recognized the principle of exclusion of a foreign state from the scope of state jurisdiction, however, they inclined to make an exception for disputes regarding a real estate.⁴⁴ The doctrine accepted similar position.⁴⁵ L. Ehrlich, i.e., convincingly reasoned that through acquisition of the real property placed in the territory of another state by a private-law contract, and not by international agreement, the state which acquired property came under the jurisdiction of the "territorial" state (*forum rei sitae*), "because a state cannot deprive another state, against its will, of the authority over its territory, what would happen if the state could acquire by a private-law act not requiring the consent of that another state not only the property of a real estate, but also exclude it from the authority [jurisdiction] of the state in territory of which it is placed."⁴⁶ This approach is not followed by the Polish courts in the 1990s. In case *Henryk W. v. the Embassy of Greece*,⁴⁷ concerning suspension of building of a garage, construction of which according to the plaintiff infringed his interests as the owner of neighbouring estate, the District Court for the City of Warsaw concluded that the claim of Henryk W. was leading to interfere with the area of authority exercised by a diplomatic mission over a real estate placed in the receiving state, and on those grounds the court had no jurisdiction to decide on the case.

III.4. Restricted Immunity – Deciding on the Basis of the International Customary Law

Development of the international customary law in the 1980s and 1990s in the field of state immunity was much deeper than the exceptions presented in the judgments cited above. The reason why the Polish courts in the 1990s adopted such strict

⁴³ Aleksander G. claimed for payment of rent for lease of a real estate against the Embassy of Portugal, which used the office rooms on the basis of a lease contract concluded with the "Dipservice" Enterprise in Warsaw – as the plaintiff took over the rights of "Dipservice" due to a cession contract of 25 March 1996. According to the plaintiff the Embassy left the rooms in a poor technical condition, what according to para 4 of the lease contract rises the right to claim for compensation of renovation expenses and rent for time of renovation no longer than for one month, though.

⁴⁴ See: SN judgement of 1926, OSP, vol. V, No. 418.

⁴⁵ See i.e.: Z. C y b i c h o w s k i: *System prawa międzynarodowego* (1923), pp. 103–104.

⁴⁶ L. E h r l i c h, *ibid.*, pp. 98–99.

⁴⁷ Decision of 5 December 1997, II C 9888/97.

interpretation of state immunity may be that they are not aware of that development or just unwilling to accept it. It is much more convenient to accept the lack of jurisdiction than to deal with the complicated details of the state immunity, i.e. in cases within the scope of labour law, to reason why an act is of *de iure imperii* or of *de iure gestionis* character, to decide why deciding on case for compensation for unlawful dismissal is admissible and i.e. for re-employment is not. The courts could, however, make use of the international output in this field including the ICL draft convention. The courts of other states do so and while deciding on a question of state immunity they take the ICL draft as a basis accepting that it reflects the present development of customary law. An important obstacle for recognition of the new tendencies is also lack of regulation of the matter of admissibility of jurisdiction in cases against a foreign state in the civil procedure code. Until 1987 the same lack of explicit regulation in the code had not prevented the courts from deciding on the basis of the construction of state immunity and of the customary law. This can only show that the judges are now less willing to search for new interpretation of the said code.

Undoubtedly, in the light of the legislation in force, the recognition of process ability of a foreign state and admission of jurisdiction of the Polish courts could only be based on acceptance of the customary law. It is worth to notice that in some cases cited above the courts based directly on the customary law, however it was before the Constitution of 1997 entered into force. In one of the cases the court was seeking the basis to apply the customary law with regard to state immunity in the reference to the customary law contained in Art. 1111 para. 1 point 3 of the civil procedure code. According to that provision "other persons enjoying diplomatic immunities on the basis of statutes, treaties or commonly recognized international customs" cannot be sued before the Polish courts.⁴⁸ Accepting, as the court reasoned, that "the state acts in the dominium area as a legal person (the fiscus or the state itself) it can be accepted that this person is the person referred to in Art. 1111 para 1 point 3 of the code." This way of interpretation, although it may be considered as return to a fiction of identifying the state immunity with diplomatic immunity, could become very attractive, especially in the context of barriers provided for by the Constitution of 1997, if only it was made on the basis of the law of restrictive state immunity existing in this field.⁴⁹

Since the law-givers adopted an exhaustive catalogue of the sources of law (see Chapter III of the Constitution of 1997), if it is supposed to be "closed" indeed,⁵⁰ it is

⁴⁸ In the light of the Constitution of 1997, there arises a question of legal effects of the references to the customary law existing in the Polish law. Certainly, it would be exaggeration to reject validity of such reference. In this circumstances it seems possible to accept the idea, maybe a little different from the international practice but justified by the specific regulation of the Polish law, according to which the reference has the effect of indirect (and not direct) applicability of the customary law provisions; see: K. S k u b i s z e w s k i: „Prawo międzynarodowe w porządku prawnym państwa,” in: *Prawo międzynarodowe a prawo wewnętrzne w świetle doświadczeń państw socjalistycznych* (1980), p. 33.

⁴⁹ See: K. P i a s e c k i, in: *Kodeks Postępowania Cywilnego, Komentarz* (1997), vol. II, p. 1301, para. 11.

⁵⁰ In the doctrine there also exists a view that Art. 87 refers only to the written sources of law and does not exclude the international customary law. This interpretation has its disadvantages: direct applicability of the customary law would have to be concluded from Art. 9 of the Constitution: "The Republic of Poland shall observe the international law binding it." First, as to many detailed questions concerning the state

in our view excluded to base a court's decision directly (and exclusively) on the international customary law. Neither Article 87 of the Constitution points out the international custom among the sources of general norms of Polish law, nor Article 188 attributes to the Constitutional Tribunal i.e. a competence to examine the compatibility of the Polish law with the customary law. In situations, when there exists a gap in the legal order (such as in the field of jurisdictional immunity of a foreign state) which rises the necessity to apply the customary law directly, in the Polish legal order from the entry into force of the Constitution of 1997 such direct application is not possible without a broad and – in our view – dangerous (as leading to unpredictable results) interpretation of the constitutional provisions (even if we accepted that Article 87 would refer only to the written law and thus it would not exclude the direct application of customary law). In these circumstances the solution seems to be amendment of the civil procedure code provisions, enactment of a special statute on the immunity of a foreign state or “courageous” interpretation of the existing provisions of the code. Exclusion of direct application of the customary law does not make it impossible to apply a norm of customary law indirectly, as to interpret an existing provision of national law. First, however, the courts must be willing to recognize the developed and developing customary law in the field of the state immunity.

immunity it is often difficult to decide what scope the customary law has and whether it is binding for the Republic of Poland. The point is rather to enable the Polish courts to take part in the process of creation of the customary law. Secondly, it is still hard to explain the lack of adequate competence of the Constitutional Tribunal in Art. 188 of the Constitution. Thirdly, a question arises, why the law-giver refers to the customary law in some statutes enacted when the Constitution had already entered into force (see i.e. the Law on Currencies, statute of 18 December 1998, Dz.U. No. 160/1998, Item 1063, Art. 2 para. 2 point d), when Art. 9 of the Constitution constitutes a sufficient basis for application of the custom. Nevertheless, we see the advantages of the interpretation presented above; in the meanwhile, however, it is not accepted as the exclusively reasonable one.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) Anno 1999: Its Place in the International Legal System, Mandate and Most Notable Jurisprudence

SONJA BOELAERT-SUOMINEN*

Introduction

In Resolution 808 (1993) of 22 February 1993, the Security Council of the United Nations took the decision to establish an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991. Barely three months later, the Security Council adopted the Statute for the International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY), by resolution 827(1993) of 25 May 1993. The first judges were elected on 17 September 1993, and the Tribunal commenced its work in The Hague on 17 November 1993. The ICTY consists of three organs which are independent of each other: the Chambers, the Office of the Prosecutor and a Registry. It has three trial Chambers each made up of three judges, and an Appeals Chamber, made up of five judges. As of May 1999, the ICTY had 729 staff members, 14 seconded personnel and 24 interns from a total of 57 countries. Its budget has risen from \$ 276, 000 in 1993 to \$ 94, 103, 800 in 1999.¹

Pursuant to Art. 1 of its Statute the ICTY has jurisdiction in respect of four categories of „serious violations of international humanitarian law” committed by individuals on the territory of the former Yugoslavia since 1991. On 22 May 1999, the ICTY issued its most significant indictment thus far, when it charged a sitting Head of State and several other high-level officials of the government of the Federal Re-

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¹ *ICTY Fact Sheet*, 12 April 1999, PUJ/FS-43; An overview of ICTY activities, summaries of indictments, judgements and legal developments can be found at the following internet address: <http://www.un.org/icty>; Important judgements are reprinted in *International Legal Materials* (ILM), and *International Law Reports* (ILR); the full set of official judgements in English and French is published by Kluwer Law International under the following title: “International Criminal Tribunal for the Former Yugoslavia/Tribunal Pénal International Pour l’ Ex-Yugoslavie, Judicial Reports/Recueils Judiciaires.”

public of Yugoslavia with war crimes and Crimes against humanity in relation to the conflict in Kosovo.²

The purpose of this article is twofold. In the first part of the article the ICTY will be situated in the international legal system. This will be done in three subsections. Under heading I, the concept of criminal responsibility under international law, as well as the basic features of the law governing the use of armed force will be explained. This will be followed, under heading II, by a discussion of the set-up and work of international criminal tribunals in the past. Against this background, the establishment and activities of the ICTY will be dealt with under heading III. The second part of this article will be devoted to a discussion of some of the significant contributions which the ICTY has made to the development of international criminal law in general and international humanitarian law in particular. The subjects selected for this second part are: (I) The definition of Armed Conflict for the purposes of International Humanitarian Law; (II) The Extent and Nature of the Conflict in the Former Yugoslavia; (III) The Construction of Articles 2 (Grave breaches) and 3 (Violations of the laws or customs of war) of the ICTY Statute by the Appeals Chamber and (IV), the ICTY's jurisprudence on Articles 4 (Genocide) and 5 (Crimes against humanity) of the Statute. By way of conclusion, the ICTY Statute will be compared to the Statute of the prospective permanent International Criminal Court.

Part I. The Place of the ICTY in the International Legal System

I. Criminal Responsibility for Violations of International Law

1. Responsibility of States and Individuals Distinguished

It is a long established principle of international law that every internationally wrongful act of a State entails the international responsibility of that State.³ Apart from the traditional category of State-to-state international wrongs there are certain serious violations of international law which may constitute internationally recognised wrongs. In the *Barcelona Traction* case the International Court of Justice (hereinafter: ICJ) acknowledged the existence of "obligations of a State towards the international community as a whole, which by their very nature (...) 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*."⁴ Thus, the distinctive feature of internationally recognised wrongs is that they have legal implications *erga omnes*, affecting the international community of States as a whole. The types of obligations mentioned by the ICJ in the *Barcelona Traction* case were the

² *The Prosecutor against Slobodan Milošević, Milan Milutinović, Nikola Mainović, Dragoljub Ojdanić and Vlatko Stojiljković*, Case No IT-99-37-I, Indictment of 22 May 1999.

³ This rule forms the cornerstone of the ILC's work on State Responsibility: Draft Articles on State Responsibility, General Principles, Art. 1, adopted in 1979 at its 25th session, Report on 31st session in: 2, Part Two *YBILC* 91 (1979).

⁴ Second Application, *ICJ Rep.* 32 (1970).

prohibition of Genocide, the abolition of slavery and racial discrimination and the outlawing of acts of aggression in international law.⁵

Breaches of the latter norm are probably among the most universally accepted internationally recognised wrongs. The International Law Commission (hereinafter: ILC) has since long suggested that the prohibition to use armed force in international relations is peremptory (*jus cogens*),⁶ and the ICJ has subscribed to this view in the 1986 *Nicaragua* case.⁷ Furthermore, in the ILC's draft on State responsibility, the (aggressive) use of armed force in violation of the UN Charter is qualified as an *international (State) crime*.⁸ According to Art. 19 of the ILC's draft on State Responsibility, an international crime is a wrongful act which results from the breach by a State of "an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole".⁹ The suggestion that there are two types of international State wrongs – crimes and delicts – has aroused great controversy.¹⁰ Nevertheless, most sceptics seem to acknowledge that there may be different categories of violations of primary obligations in international law, which should entail different consequences based on the seriousness of the international wrong. Furthermore, even the most passionate critics appear less reticent to label the use of force by a State in violation of Art. 2(4) of the UN Charter, as a theoretical or potential State crime.¹¹

Apart from State responsibility however, international law increasingly recognises the principle of individual criminal responsibility of the perpetrators of international wrongs. While the questions are undoubtedly linked, it is important to keep the matters of the responsibility of States and of individuals separate. The former deals with the theory and consequences of wrongs committed by the traditional subjects of international law, *i.e.*, States. The latter deals with the interna-

⁵ *Ibid.*, p. 32.

⁶ For a discussion of the ILC's views see: L. H a n n i k a i n e n: *Peremptory Norms (Jus Cogens) in International Law* (1988), pp. 163, 185, 188–189, 284–287.

⁷ *ICJ Rep.* 100, 190 (1986); W. C z a p l i ŋ s k i: "Sources of Law in the Nicaragua Case," 38 *ICLQ* 162 (1989).

⁸ Art. 19(2) and (3)(a); 2, Part Two *YBILC* 92 (1979); *ILC Report* 90–93 (1980), UN Doc. A/35/10.

⁹ Art. 19 gives some examples: aggression, colonial domination, slavery, genocide, apartheid and massive pollution of the atmosphere or of the seas.

¹⁰ I. B r o w n l i e: *System of the Law of Nations: State Responsibility* (1983), vol. I, pp. 32–33; I. F. D e k k e r: "Criminal Responsibility and the Gulf War of 1980–1988: The Crime of Aggression," in: I. F. D e k k e r and H. H. G. P o s t (eds.): *The Gulf War of 1980–1988: The Iran-Iraq War in International Legal Perspective* (1992), p. 249 at 252–253; E. D a v i d: "Comments," *ibid.*, pp. 269–271; A. J. J. d e H o o g h: "The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective," 42 *Austrian JPIL* 183 at 189 ff. (1991), p.; R. H i g g i n s: *Problems and Process. International Law and How We Use It* (1994), pp. 165–169 and literature cited therein; C. A n n a c k e r: "The Legal Regime of Erga Omnes Obligations in International Law," 46 *Austrian JPIL* 131 at 135 ff. (1994).

¹¹ H a n n i k a i n e n, *supra*, note 6, p. 326; D e k k e r, *supra*, note 10, pp. 253–261 and in particular, pp. 254–255; Comments by D a v i d, *ibid.*, p. 271; B r o w n l i e: *International Law and the Use of Force*, pp. 150–154, and specifically, p. 153 (1963); There are scholars of high repute who accept the concept of criminal responsibility of States: O p p e n h e i m's: *International Law, Peace, vol. 1* (Jennings and Watts, ed.) 9th ed. (1996), pp. 533–536, para. 157; P. D u p u y: *Droit International Public* (1993), p. 349.

tional wrongs committed by individuals insofar as they are recognised as subjects of international duties.¹²

The principle of individual responsibility for crimes under international law was clearly established at Nürnberg. As it will be shown in more detail below, Art. 6 of the Nürnberg Charter annexed to the London Agreement of 8 August 1945 provided for individual criminal responsibility for war crimes proper and for what it described as Crimes against humanity, as well as for Crimes against the peace, *i.e.*, for the crime of aggressive war. In a celebrated judgement, the International Military Tribunal at Nürnberg confirmed the direct applicability of international criminal law with respect to the responsibility and punishment of individuals for violations of this law in the following terms: „It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who committ such crimes can the provisions of international law be enforced’.¹³

Since Nürnberg, there has been a clear trend towards the expansion of individual responsibility directly established under international law. Apart from breaches related to the resort to armed force in violation of international law (*jus ad bellum*), individual criminal responsibility under international law has been explicitly affirmed or established amongst other crimes, in relation to, Genocide¹⁴, torture,¹⁵ “Grave breaches” of the Geneva Conventions,¹⁶ and certain means and methods of warfare: chemical weapons, and anti-personnel mines.¹⁷

¹² The ILC Draft Code of Crimes Against the Peace and Security of Mankind, which was adopted in final form in 1996 (GAOR-5st session Supplement No. 10 (A/51/10), clearly sets out the differences between State responsibility and individual criminal responsibility for violations of universally acknowledged norms and prohibitions. According to Article 2 para 1 of the draft code, a crime against the peace and security of mankind “entails individual responsibility.” However, Article 4 adds the following cautionary note: The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.”

¹³ Transcript of Proceedings, p. 16,878; AJ, 41 (1947); see also: O p p e n h e i m’s: *International Law*, *supra*, note 11, pp. 505–506.

¹⁴ In Article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, State Parties “confirm” that genocide (defined in Article II) “is a crime under international law which they undertake to prevent and to punish.” Article VI of this Convention provides that persons charged with genocide shall be tried by a competent tribunal of the State in the territory of which the offence was committed or “by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.”

¹⁵ The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed on 10 December 1984 similarly calls upon States either to prosecute an alleged offender or extradite him to a State which will prosecute him: See Arts. 2, 3, 4, 5, 7 and 14; M. S h a w: *International Law* (1997), pp. 242–243.

¹⁶ See further below.

¹⁷ *Idem*.

At the end of the legal spectrum one finds the ILC Draft Code of Crimes against the Peace and Security of Mankind, which enumerates the following crimes as entailing individual criminal responsibility under international law: aggression (Article 15); Genocide (Article 19); apartheid (Article 20); exceptionally serious war crimes (Article 22); recruitment, use, financing and training of mercenaries (Article 23), international terrorism (Article 24), illicit traffic in narcotic drugs (Article 25), and wilful and severe damage to the environment (Article 26). Many of these suggestions are considered controversial.¹⁸ This has been confirmed by the difficult negotiations surrounding the jurisdiction and the triggering mechanisms for the future International Criminal Court, which will be discussed at the end of this article. A more recent example of the legal and political sensitivities surrounding the concept of universal or “third party” jurisdiction has been offered by the *Pinochet* case in 1998–1999.¹⁹ As is well-known, in 1998, the Spanish authorities have instituted proceedings in the UK to have the former General extradited from the UK to Spain. The charges laid against the General include, *inter alia*, Crimes against humanity such as torture, committed on Chilean territory against victims of various nationalities. At the time of writing, in May–June 1999, these extradition proceedings had not reached their legal conclusion yet.²⁰

2. The Basic Features of the Law Relating to Armed Conflict

The law of war occupies a rather unusual place in the international legal system since the great majority of its norms are binding not only on States but also on their nationals, whether members of their armed forces or not.²¹ Unlike Human Rights treaties, whose provisions are usually cast in general terms suited to application by a court or tribunal, the treaties on the laws of war are designed to be applied by military personnel, and contain detailed and practical provisions.²²

Because of their obvious importance to the ICTY’s mandate, the basic features of the laws regulating armed conflict need to be understood. Beneath, the differences between *jus ad bellum* and *jus in bello* will be discussed. This will be followed by an

¹⁸ Shaw, *supra*, note 15, p. 473.

¹⁹ *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, decisions of 25 November 1998 and 24 March 1999: <http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm>.

²⁰ The original charges against *Pinochet* and other accused included, *inter alia*, acts of Genocide and terrorism that make up the offence of “forced disappearance” under Spanish criminal law, and were based on the passive personality principle (*i.e.*, the (Spanish) nationality of the victims). Later charges were added involving victims of other countries, on the basis of the universality principle; U.K. House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, decisions of 25 November 1998 and 24 March 1999: <http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm>

²¹ Oppenheim’s *International Law*, *supra*, note 11, p. 505, para. 148; *Vice versa*, the laws of war have recognised individuals (mainly enemy aliens) as beneficiary of its provisions practically from its inception: R. Wieruszewski: “Application of international humanitarian law and human rights law: individual complaints,” in: F. Kalshoven and Y. Sandoz: *Implementation of International Humanitarian Law* (1989), pp. 441–458.

²² Ch. Greenwood: “Rights at the Frontier—Protecting the Individual in Time of War,” in: *Law at the Centre – The Institute of Advanced Legal Studies at Fifty* (1999), p. 277 at 283.

explanation of the regulatory differences in international humanitarian law between international and internal armed conflicts. The final part of this subsection will deal with the special features of the Grave breaches regime of the Geneva Conventions and the obligation for States to enact a system of mandatory universal jurisdiction over individual perpetrators of this particular class of war crimes.

A. *Jus Ad Bellum* and *Jus in Bello*

Mankind has long sought to restrain war through law, by prescribing both when war is permissible and what is permissible in war if and when it has begun. The contemporary law of armed conflict still encompasses this classical dichotomy. Any use of armed force in international relations is subject to a two-tier scrutiny of rules regulating the resort to armed force (*jus ad bellum*) on the one hand, and rules governing the use of armed force (*jus in bello*) on the other.²³

The modern *jus ad bellum* consists primarily of the provisions of the UN Charter. Under the collective security system that came into force with UN, war and the use of force have become, in the words of Kelsen, either a delict or a sanction: a delict, if waged in violation of the law; a sanction, if carried out in its defence or enforcement.²⁴ As is clear from the preamble, the drafters of the UN Charter were determined “to save succeeding generations from the scourge of war”. To achieve this end, Art. 2(4) of the Charter replaces the much abused term “war” with the more objective term of “threat or use of force”: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.”

Moreover, exceptions to Art. 2(4) are narrowly circumscribed: the right to use armed force is bestowed on States individually or collectively, but only when acting in self-defence, and until the Security Council has taken the measures necessary to maintain international peace and security under Chapter VII of the Charter.²⁵ The Security Council’s actions under Chapter VII are conditional on the determination of the existence of three events – threat to peace, breach of peace or act of aggression – after which it can make either a recommendation or a binding decision pursuant to Art. 39. The measures which the Security Council can decide upon accordingly are

²³ R. Kolb: “Sur l’origine du couple terminologique *ius ad bellum*/ *ius in bello*,” 827 *ICRC Review* 593–602 (1997).

²⁴ Hans Kelsen cited by H. Rumpe: “The Concepts of Peace and War in International Law,” 27 *German YIL* 429 at 441 (1984).

²⁵ Arts. 53(1) and 107 of the Charter regarding the former enemy States (now all UN members), are generally regarded as ‘extinguished’: M. Greenspan: *The Modern Law of Land Warfare* (1958), p. 28; The legality of use of armed force in other cases than those mentioned in the text, such as humanitarian intervention, rescue of nationals abroad, and anticipatory self-defence, remains controversial: I. Brownlie: “The UN Charter and the Use of Force 1945–1985”, in: A. Cassese: *The Current Regulation of the Use of Force* (1986), p. 491 at 497 ff.; Hännikainen, *supra*, note 6, pp. 335–340; J. Gail Gardam: “Proportionality and Force in International Law,” 87 *AJIL* 391 (1993); Ch. Greenwood: “The Relationship between *ius ad bellum* and *ius in bello*,” 9 *RIS* 221 at 222 (1983).

“measures not involving the use of force” (Art. 41) and “action by air, sea, or land forces” (Art. 42). Art. 48 provides that Chapter VII actions shall be taken by all UN members or by some of them, as determined by the Council, whilst Arts. 52 and 53 of the Charter provide that regional organisations may undertake enforcement actions with Security Council authorisation. As will be seen below, the ICTY owes its establishment to the exercise of Security Council’s authority under Chapter VII of the UN Charter.

The modern *jus ad bellum* (or *jus contra bellum*) is aimed at preventing the outbreak of armed conflict, while the purpose of the *jus in bello* is to moderate or humanise armed conflict. This difference in legal objective leads to a crucial difference: *jus ad bellum* allows the international community to pass judgement on the merits of resort to armed force. Such a judgement is predicated on a distinction between victims and aggressors. By contrast, *jus in bello* applies equally of all parties to an armed conflict, regardless of the legality of their actions under *jus ad bellum*.²⁶

In sharp contrast to the relative simplicity of *jus ad bellum*, *jus in bello* may appear as a daunting list of successive and increasingly elaborate treaty instruments that reflect the many attempts by the international community to restrain the worst excesses of past armed conflicts.²⁷ Traditionally, *jus in bello* treaties have been imperfectly categorised as belonging either to the Hague Law or to the Geneva Law, after the cities in which most of the conventions were negotiated.²⁸ The former tradition is said to be concerned mainly with the conduct of armies in the field whereas the latter with the protection of war victims.²⁹ In accordance with modern practice, the term “international humanitarian law” as used here, refers to the international law applicable to armed conflicts, encompassing provisions of the “Hague type” and the “Geneva type”.

²⁶ In its most recent formulation, Additional Protocol I of 1977 reaffirms and clarifies the principle of the equality of the belligerents before the *jus in bello* as follows: “Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or an other use of force inconsistent with the Charter of the United Nations. Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, *without any adverse distinction based on the nature and the origin of the armed conflict* or on the causes espoused by or attributed to the Parties to the conflict.” (emphasis added).

²⁷ For an historical overview see: Ch. Greenwood: “Historical Development and Legal Basis,” in: D. Fleck (ed.): *The Handbook of Humanitarian Law in Armed Conflicts* (1995), p. 1 at pp. 12–23; On the distinction between (International) humanitarian law and human rights law see K.J. Partsch: “Humanitarian Law and Armed Conflict,” 4 *Encyclopaedia of Public International Law* 216–217 (1982); F. Hampson: “Human Rights and Humanitarian Law in Internal Conflicts,” in: M.A. Meyer: *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (1989), pp. 55 ff.; H. Annika Kainen *et al.*: *Implementing humanitarian Law Applicable in Armed Conflicts: The Case of Finland* (1992), pp. 1–3; Ch. Greenwood: “Rights at the Frontier...,” *supra*, note 11, pp. 279–284.

²⁸ The distinction between Geneva Law and the Hague Law should now be regarded as a mere matter of academic convenience, particularly since the two 1977 additional protocols contain elements of both: see H. McCoubrey: “Jurisprudential Aspects of the Modern Law of Armed Conflicts,” in: Meyer, *supra*, note 27, p. 23 at pp. 45–46; Ch. Greenwood: “Historical Development...,” *supra*, note 27, pp. 9–10.

²⁹ For treaty texts see *inter alia*, D. Schindler and J. Tomán: *The Laws of Armed Conflict* (1988); see also the ICRC’s CD-ROM on International Humanitarian Law or consult the ICRC’s website at <http://www.icrc.org/>.

The 1907 Hague Conventions and the 1949 Geneva Conventions have been largely recognised as customary law.³⁰ The latter are among the most widely ratified international instruments. On 31 May 1999, 185 States were members of the UN. However, by that date, the Geneva Conventions, had attracted 188 ratifications or accessions. Of the 185 Members of the United Nations, only Eritrea, the Marshall Islands and Nauru were not parties to the 1949 Geneva Conventions. Additional Protocol I had been signed by 154 States and Additional Protocol II, by 146. However, a number of important military powers including the United States, India and Pakistan, were not parties to the additional protocols.³¹

Many argue that the overriding majority of the *jus in bello* provisions are peremptory (*jus cogens*) under international law.³² In its 1996 Advisory Opinion on the *Legality of Nuclear Weapons*, the ICJ took note of this argument but found that there was no need for it to address this issue.³³ Nonetheless, the Court observed that the great majority of these provisions had already become customary law, that they reflected the most universally recognized humanitarian principles, and that they constituted “intransgressible” norms.³⁴

B. International and Internal Armed Conflicts

Since the Second World War, the international humanitarian law of the “Geneva” strand, aimed primarily at the protection of victims of war, has been re-affirmed and updated in two major Diplomatic Conferences. The first one, held in 1949, led to the adoption of the present four Geneva Conventions. The outcome of the second one, held from 1974 to 1977, was the adoption of two additional protocols. However, the conferences, dealt with the international and non-international armed conflicts in sharply different ways.

The four Geneva Conventions of 1949 were primarily, if not almost exclusively, enacted to apply to international armed conflicts. Art. 2 common to the four 1949 Conventions gives a broad definition of these conflicts. It applies to: “(...) all cases of declared war or of any other armed conflict which may arise between two or more of

³⁰ ICJ, *Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, General List No. 958, para. 81...; ICJ., *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Merits)* ICJ Rep. paras. 21, 172–190, 218–220 (1986); Th. Meron: “The Geneva Conventions as Customary Law,” 81 *AJIL* 348 (1987); Ch. Greenwood: “Historical Development...,” *supra*, note 27, p. 24.

³¹ Note too that France has ratified only Additional Protocol II, and that the UK has ratified the Additional Protocols only in 1998; Source: ICRC website.

³² Hannikainen: *Jus Cogens*, p. 291; E. David: *Principes de Droit Des Conflits Armés* (1994) pp. 86, 92; N. Levrat: “Les Conséquences de l’Engagement pris par les H.P.C. de ‘faire respecter’ les Conventions humanitaires,” in: F. Kalshoven and Y. Sandoz (eds.): *Implementation of International Humanitarian Law* (1989), p. 263 at p. 266; L. Condorelli and L. Boisson de Chazournes: «Quelques Remarques à propos de l’Obligation des Etats de „respecter et faire respecter” le droit international humanitaire „en toute circonstances”», in: Ch. Swinarski: *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984), pp. 17–20; E. Kwakwa: *The International Law of Armed Conflict: Personal and Material Fields of Application* (1992), p. 150.

³³ ICJ Rep. 257–258, paras. 79, 82 and 83 (1996).

³⁴ *Ibid.*, para. 79 *in fine*.

the High Contracting Parties, even if a state of war is not recognised by one of them. The Conventions 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.”

The Geneva Conventions were innovative in that for the first time in history, a treaty provision was adopted for the regulation of non-international armed conflicts.³⁵ Still, the ensuing regulation was minimal. First, Common Art. 3 defines non-international conflicts in a negative way: “(...) the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties (...)” Furthermore, Parties to such conflicts are required to adhere only to a minimum set of standards: “Persons taking no active part in the hostilities’ and other protected persons must be treated humanely; torture and other forms of physical maltreatment are forbidden, as is hostage taking; sentencing and executions need to comply with minimum due process.

At the time of its adoption in 1949, Common Art. 3 was seen as a kind of “mini-convention” within the Geneva Conventions.³⁶ The unique position of Common Art. 3 and its relationship within the rest of the Geneva Conventions was arguably confirmed by the ICJ when it considered the *Nicaragua Case* in 1986. The Court opined that Art. 3 was declaratory of customary international law, and that it constituted “a minimum yardstick” for both international and internal armed conflicts, in addition to the more elaborate rules applicable to international armed conflicts.³⁷ Traditionally therefore, and leaving Art. 3 aside, the four 1949 Geneva conventions do not apply to internal conflicts. The notion “conflict not of an international character” appears, in equally unelaborated form, in Art. 19 of the Hague Convention on Cultural Property adopted in 1954. It was only with the negotiation in the 1970s of the two Protocols Additional to the Geneva Conventions, that the differences between international and non-international conflicts received explicit clarification in written law.

The first additional protocol of 1977 (AP1), which deals with the protection of victims of international armed conflicts, applies in the first instance to the same type of inter-State conflicts mentioned in Art. 2, common to the 1949 Geneva Conventions. However, this category was – rather controversially – broadened in AP1 Art. 1(4), to include: “(...) armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. Thus, for purposes of international humanitarian law, AP1 assimilates wars of national liberation to international armed conflicts. For its part, AP2 of 1977, which relates ex-

³⁵ L.C. Green: *The Contemporary Law of Armed Conflict* (1993), p. 57.

³⁶ As Art. 3 has been enthusiastically welcomed in 1949, by the Russian Delegation; ICRC (J. Pictet, ed.): *Commentary, Geneva Convention I* (1952), p. 48.

³⁷ (Merits), *ICJ Rep.* 113–114, para. 218 (1986).

PLICITLY to the protection of victims of non-international armed conflicts, builds on Art. 3 of the 1949 Geneva Conventions but is much more restricted in scope. First, it excludes wars of national liberation and similar conflicts (covered by AP1), and second, it sets a minimum threshold for other types of internal conflicts.³⁸

To summarise, the above provisions result in several types of armed conflicts: (1) classic inter-State conflicts, in which armies of two States face each other across State borders; (2) certain wars of national liberation as circumscribed in AP1 of 1977; (3) internal wars or armed conflicts “not of an international character” mentioned in Art. 3 common to the four Geneva Conventions and in Art. 19 of the Hague Convention on Cultural Property; (4) non-international armed conflicts defined in AP2 of 1977; and (5) other internal (armed) conflicts as disturbances and riots which fall below the thresholds of Art. 3 of 1949 and AP2 of 1977. The first two categories constitute international armed conflicts, the third and the fourth non-international or internal armed conflicts.

It is obvious that there is a wide regulatory gap between the two main categories of armed conflict. The numbers speak for themselves: the 1949 Geneva Conventions and the 1977 Protocols alone contain close to 600 articles; of these, only Art.3 Common to the 1949 Geneva Conventions, and the 28 articles of 1977 AP 2, apply to internal conflicts. Furthermore, the law of the Hague tradition – on methods and means of combat and conduct of armies in the field – predating the 1949 Geneva Conventions, was initially meant to apply to classic inter-State wars only.³⁹ The legal dichotomy between international and internal armed conflicts is one of the major problems affecting prosecutions before the ICTY. The manner in which the Trial Chambers and Appeals Chamber have dealt with this question will be discussed in the second part of this article.

C. Individual Criminal Responsibility for Violations of International Humanitarian Law

There is quite a lot of terminological confusion between the concepts of war crimes and Grave breaches. This may partly stem from the fact that many of the violations mentioned as „war crimes” and „Crimes against humanity” in the London (Nürnberg) Charter, have been termed “Grave breaches” in the Geneva Conventions.⁴⁰ It is essential that the terms used in this discussion are precisely defined. In the present article the

³⁸ It applies: “to all armed conflicts which are not covered by Art. 1 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) and which take place in the territory of a High Contracting party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operation and to implement this Protocol.” It states furthermore that, “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” AP2, Arts. 1.1 and 2.2.

³⁹ H. F i s c h e r: “Limitation and Prohibition of the Use of Certain Weapons in Non-International Armed Conflicts,” *International Institute of Humanitarian Law, Yearbook 1989–90* 117 at 125 (1992).

⁴⁰ G r e e n, *supra*, note 35, p. 286.

term violations of the “laws and customs of war” or “war crimes”, unless indicated otherwise, will be used as a generic term referring to violations of international humanitarian law generally.⁴¹ Depending on the consequences stemming from a particular breach of international humanitarian law, there are at least three different classes of war crimes: the category of the Grave breaches of the Geneva Conventions, the category of “other serious violations of International Humanitarian Law”, and the remainder, which may be described as minor violations of International Humanitarian Law.

Grave breaches is a technical term used in the Geneva Conventions of 1949 and the Additional Protocol I of 1977. Only certain violations of the Geneva Conventions of 1949 qualify as Grave breaches.⁴² These are specified grave violations committed wilfully – either intentionally or in reckless disregard of the consequences – and against different groups of protected people by each convention: the injured and sick (GCI), the shipwrecked (GCII), prisoners of war (GCIII) and civilians (GC IV), as supplemented by Additional Protocol I, or against property referred to in these instruments.⁴³ AP I has extended the concept of Grave breaches to certain acts forming part of the conduct of hostilities,⁴⁴ and contains an explicit reference to wilful omissions.⁴⁵

Parties to the Geneva Conventions are under an obligation to “enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed” a grave breach of the Conventions. They are also obliged to search for persons alleged to have committed, or have ordered to be committed, Grave breaches, and to bring such persons, regardless of their nationality, before their own courts. Should a State Party decide not to try a suspect of Grave breaches, the Geneva Conventions demand to hand over the suspect be for trial by another Party making out a *prima facie* case. This obligation is known as the principle *aut dedere aut judicare*.⁴⁶ It is noteworthy that there is no need for a link such as the nationality of the perpetrator nor for any other connecting factor between the suspect and the country in which the suspect is tried. The perpetrators of Grave breaches must be tried, and any State may assert “universal” jurisdiction to do so. In other words, the Grave breaches system confers on States the right to try persons which are non-nationals and to exert jurisdiction over crimes committed outside their territory, or, as the case may be, the duty to extradite the suspect for trial elsewhere. These principles are usually known as aspects of mandatory “universal jurisdiction”.

In the scheme of general international law, the exercise by a State of (criminal) jurisdiction on the basis of the universality principle is an exceptional power.⁴⁷ Traditionally, the main principles on which States may exercise criminal jurisdiction are:

⁴¹ Following *inter alia*, F. H a m p s o n: “Liability for War Crimes,” in: P. R o w e: *The Gulf War 1990–91 in International and English Law* (1993), pp. 241–246.

⁴² Art. 50 of GC I (on the protection of wounded on sick); Art. 51 of GC II (on the shipwrecked); Art. 130 of G III (on POWs) and Art. 147 of GC IV (Civilians)

⁴³ Art. 13 (GC I), Art. 13 (GC II), Art. 4 (GC III), Art. 4 (GC IV), Arts. 8, 44, 45, and 85, paras. 2–4 API.

⁴⁴ Art. 11 (4) and Art. 85.

⁴⁵ Arts. 86–87.

⁴⁶ D a v i d: *Principes...*, *supra*, note 32, p. 643; G r e e n, *supra*, note 35, p. 43.

⁴⁷ S h a w, *supra*, note 15, pp. 470–483.

(1) the principle of *territoriality*, where a State exercises jurisdiction over a crime committed on its territory; (2) the principle of *active nationality* or active personality, where a State exercises jurisdiction over an offender on the ground that the offender is a citizen of the State concerned; (3) the principle of *passive nationality* or passive personality, where a State exercises jurisdiction over the offender on the ground that the victim of the offence is a citizen of the State concerned; (4) the *protective principle*, where a State exercises jurisdiction on the ground that the offence was prejudicial to its vital interests.⁴⁸

The exercise of jurisdiction by one State on the basis of the universality principle constitutes one of the highly charged areas of international relations for it may intrude upon the sovereignty of other States.⁴⁹ For that reason it is generally assumed that States must have consented to the exercise of universal jurisdiction in a particular treaty, or that such exercise must follow from customary international law over a particular category of crimes.⁵⁰ Hence, the ICTY's Appeals Chamber correctly held that the elaborate Grave breaches system of the Geneva Conventions represents a serious limitation of the traditional sovereignty of States.⁵¹ This is *a fortiori* the case when, as is generally assumed, the Geneva Conventions and the Grave breaches system constitute customary international law. Finally, it should be noted that the establishment of the ICTY itself, and its jurisdiction under Art. 2 of the Statute, means that the jurisdictional aspects of the Grave breaches system have been imported into the Tribunal.⁵²

The offences to which the Grave breaches system attaches, are regarded as the most egregious violations of the Geneva Law, leading to individual criminal responsibility of the perpetrators. The question that arises then, is whether and to what extent individual criminal responsibility attaches to other, non-Grave breaches of the Conventions. To answer this question it should be noted that the Geneva Conventions themselves divide violations into "Grave breaches" and "all acts contrary to the provisions (of the Conventions) other than Grave breaches". With respect to the latter category, State Parties

⁴⁸ A. R. C a r n e g i e: „Jurisdiction over Violations of the Laws and Customs of War,” 39 *British YJHL* 402 at 404–406 (1963); S h a w, *supra*, note 15, pp. 458–469.

⁴⁹ For recent criticism on the attempts to establish 'universal' or 'third-party' jurisdiction through the ICC Statute see: R. W e d g w o o d: "The International Criminal Court: An American View", 10 *EJIL* 93 (1999).

⁵⁰ C a r n e g i e, *supra*, note 48, pp. 423–424; S h a w, *supra*, note 15, pp. 470 ff.

⁵¹ "The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute 'grave breaches,' closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for 'grave breaches.' The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts- at least not the mandatory universal jurisdiction involved in the grave breaches system:" Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *The Prosecutor v. Duško Tadić*, Case No. IT-94-AR72, (hereinafter: *Tadić* Jurisdiction Decision), para. 80, pp. 45–46.

⁵² *Tadić* Jurisdiction Decision, *supra*, note 51, para. 81, p. 46.

have the obligation to take measures necessary for the suppression of these acts,⁵³ but the Conventions themselves do not attach any of the specific jurisdictional features of the Grave breaches system to these other breaches of the Conventions.⁵⁴ However, AP I has introduced a new concept in Art. 90 – “serious violations” of the Geneva Conventions and the Protocol – for which the International Fact-Finding Commission may be competent, and which should also be made punishable by belligerents.⁵⁵ Some commentators argue that whilst States are not under a duty to do so, they may assert “universal” jurisdiction over these other, “non-grave” breaches, if considered serious.⁵⁶ This may apply in particular to serious violations of the Hague Law.

Many recent treaty instruments reflect a tendency to establish or confirm individual criminal responsibility in relation to the latter category of war crimes. This is evident from the inclusion of the latter category of crimes into the Statutes of the ICTY (1993)⁵⁷ and the permanent International Criminal Court (1998),⁵⁸ which will be discussed in more detail below. A further illustration are the treaty instruments which obligate States to take the necessary measures to prosecute and penalise individual offenders of prohibitions on certain means and methods of warfare: the 1993 Chemical Weapons Convention,⁵⁹ the revised Mines Protocol to the Inhumane Weapons Convention⁶⁰ and the 1997 Mine Ban Treaty.⁶¹

⁵³ Art. 49 (GC I), Art. 50 (GC II), Art. 129 (GC III), Art. 146 (GC IV).

⁵⁴ Although neither the ICTY nor in particular the ICC Statutes fully reflect the requirements of the universality principle.

⁵⁵ Art. 90 (2) (c) (I); F. H a m p s o n, *supra*, note 41, pp. 243–244, 256.

⁵⁶ T. M e r o n: “International Criminalization of Internal Atrocities,” 89 *AJIL* 569–571 (1995) and “Is International Law Moving Towards Criminalisation?,” 9 *EJIL* 23 (1998); F. H a m p s o n, *supra*, note 41, p. 244; I. B r o w n l i e: *Principles*, p. 308.

⁵⁷ ICTY Statute, Art. 3.

⁵⁸ ICC Statute, Art. 8(2)(b).

⁵⁹ Art. VII of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, stipulates as follows: 1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall: (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity; (b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and (c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law; 2. Each State Party shall co-operate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under para. 1.

⁶⁰ Following the revision of this protocol, in 1996, Art. 14 dealing with compliance, reads in relevant part as follows: 1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control; 2. The measures envisaged in para. 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice; 3. Each High Contracting Party shall also require that its armed forces issue relevant military instructions and operating procedures and that armed forces personnel receive training commensurate with their duties and responsibilities to comply with the provisions of this Protocol.

⁶¹ Art. 9 of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and On Their Destruction, leaves it up to each State to decide on the appropriate measures to prevent and suppress violations of the Treaty: “Each State Party shall take appropriate legal,

What about minor violations of International Humanitarian Law? As mentioned earlier, all States bound by the Geneva Conventions are obligated to take measures necessary for the suppression of all acts contrary to the Geneva Conventions, even if they are minor violations. However, there is no explicit provision in the conventions for any internationally recognised personal criminal responsibility similar to the Grave breaches system of the Conventions. Such minor violations are more likely to be made punishable under domestic criminal law of the States, or to disciplinary proceedings or criminal sanctions under military law.⁶² In general, the effect of the “criminalisation” of these other violations of the Geneva Conventions (leaving the category of the “serious violations” introduced by Art. 90 AP1 aside) will be confined to the domestic sphere of the State enacting such legislation.⁶³ By way of illustration, it should be noted that pursuant to Art. 1 of its Statute, the ICTY only has authority to prosecute “serious violations” of international humanitarian law. Consequently, it is up to individual States to deal with the perpetrators of other, less serious violations of international humanitarian law.

To summarise, the Grave breaches system and the system of mandatory universal jurisdiction over individual perpetrators that accompanies it, does not apply to the provisions of the “Hague-Law” type that were not included in the Geneva Conventions or AP1. For example, it does not apply to the Regulations annexed to the Hague Convention IV of 1907, however serious the violation might be. Nevertheless, violations of the law on the conduct of hostilities, even if not listed as a grave breach, may still represent a serious violation of international humanitarian law and an internationally recognised wrong. Furthermore, even if there is at present no duty to do so, any State may arguably assert jurisdiction over the perpetrators of such offences.

Finally, it will be seen further on in this article, that the ICTY Appeals Chamber broke new ground when it asserted unequivocally that individual criminal responsibility exists for violations of the laws applicable to internal armed conflicts.⁶⁴ This had not previously been asserted by any international or national tribunal.

II. International Criminal Tribunals of the Past

The foregoing indicates that certain serious violations of international humanitarian law, regardless of the source (Geneva-law or Hague-law) may constitute internationally recognised wrongs. Whilst third States are not under a duty to do so, they may decide to exercise jurisdiction over such violations. Put differently, any State has arguably the right to exercise jurisdiction over at least a core set of serious violations of international humanitarian law, provided that these are recognised internationally

administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity by a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.”

⁶² F. H a m p s o n, *supra*, note 41, p. 245; D a v i d, *Principes...*, *supra*, note 42, p. 564;

⁶³ *Ibid.*, p. 564.

⁶⁴ *Tadić* Jurisdiction Decision, *supra*, note 51, paras. 128–137, pp. 68–70.

as international wrongs.⁶⁵ In similar vein, it was seen earlier that the norms enshrined in the UN Charter prohibiting the resort to armed force in international relations are regarded as obligations *erga omnes* and as peremptory (*jus cogens*) in international law. There is little dispute that violations of these norms need to be qualified as universally recognised international wrongs.

The ensuing international norms are unusual in the sense that, unlike most other rules of international law, they apply to individuals, imposing obligations upon individuals as such and not merely upon the State responsible for their actions. Still, there are differences between the addressees of these obligations. The *jus ad bellum* for example, is addressed to the leaders of a State, that is, both the civilian and military policymakers. In comparison, the scope of addressees under the *jus in bello* is much wider. It imposes obligations not only upon the government of a belligerent, but also upon the senior officers of its armed forces, upon all servicemen, regardless of their rank, and upon the entire civilian population.⁶⁶

The cornerstone of international criminal law consists of the principle of individual responsibility and punishment for crimes under international law. Pursuant to this principle, States may exercise jurisdiction over individual perpetrators of (serious) violations of international law. If States may exercise such jurisdiction individually, they may also exercise this jurisdiction collectively, or set up special institutions for the prosecution of such crimes. This is the theoretical basis which lies at the heart of the establishment of international criminal tribunals, although, as will be discussed in this article, the legal basis on which the ICTY has been established is different.

For the present purposes, an international criminal tribunal can be loosely defined as a multinational institution which prosecutes individual offenders for violations of international law and is capable of imposing criminal sanctions. Instead of letting each State prosecute international offences, international criminal tribunals conduct such prosecutions through appropriate international structures.

1. The Earliest International Criminal Tribunals

The earliest evidence of an institutionalised international criminal prosecution can be found in the XVth century. In 1474, France, Austria, the Swiss cantons and the cities of the Upper Rhine instituted criminal proceedings against the bailiff of Haute Alsace and of Brisgau.⁶⁷ The accused, Pierre d'Hagenbach, was charged, *inter alia*,

⁶⁵ See for instance in relation to violations of Common Article 3 of the Geneva Conventions: D a v i d: *Principes...*, *supra*, note 42, p. 645; Th. M e r o n: "International Criminalization..." *supra*, note 56, pp. 554 at 556, 569–571 and "Is International Law Moving..." *supra*, note 56, p. 23; Z e i l e s s e n: "War Crimes under the Jurisdiction of the Tribunal of the Former Yugoslavia," 3 *ARIEL* 89–90 (1998); R. M u e l l e r s o n: „International Humanitarian Law in Internal Armed Conflicts," 2 *Journal of Armed Conflict Law* 109 at 124–125 (1997); R. H i g g i n s: "Time and the Law: International Perspectives on an Old Problem," 46 *ICLQ* 508 (1997); Ch. G r e e n w o o d: "International Humanitarian Law and the *Tadić* Case" (paper on file with author) (1996), p. 27

⁶⁶ Ch. G r e e n w o o d: "The Relationship between..." *supra*, note 25, p. 221 at p. 231.

⁶⁷ E. D a v i d: „Les Tribunaux Pénaux Internationaux," Lecture notes, San Remo 28 May 1998 (on file with author), para. 12.2.

with violations of the natural law, as well as the laws of God and mankind, for having pillaged and massacred the inhabitants of Braschi, a city in Austria of which he was the governor. He was tried before a tribunal of twenty-eight Swiss, Alsatian and German Judges of the Holy Roman Empire. Interestingly, this might be one of the earliest reported cases where the defence of superior orders was raised. The accused claimed to be acting on behalf of Charles of Burgundy. The plea was rejected and the accused was then executed.⁶⁸

Closer to our times are the attempts to prosecute Napoleon Bonaparte in 1815 and the German Emperor Wilhelm II in 1919. By the Convention of 11 April 1814, signed by Austria, Prussia, Russia and Napoleon, the latter had formally agreed to retire the Elba. After he escaped and re-entred France with his army, the Congress of Vienna issued a declaration on 13 March 1815, stating that by having violated the agreement, Napoleon had placed himself outside the "civil and social relations". Had they followed the commendations of Field Marshal Bluecher, Napoleon would have been shot on sight as an "international outlaw." Instead, following his surrender after Waterloo, he was handed over to the British, and deported to St. Helena.⁶⁹ Even if this decision was taken on political grounds, it can be regarded as a type of criminal sanction imposed for a violation of an international legal obligation by an individual.

After the end of the first World War, provisions were included in the Treaty of Versailles of 1919 aimed at punishing individuals for violations of the *jus ad bellum* and *jus in bello*. First, the Commission set up by the Preliminary Peace Conference made a recommendation that a special organ be set up to deal with the breaches of the law of nations and international good faith, and in particular the breaches upon the neutrality of Luxembourg and Belgium. The tribunal envisaged in Art. 227 of the Versailles Treaty was to be judicial in character, empowered to prosecute the German Emperor for violations of the obligation not to resort to war in international relations.⁷⁰ However, these provisions remained a dead letter. The USA never signed the Treaty and had also opposed to putting a Head of State on trial.⁷¹ Holland, where the Kaiser had taken refuge, refused to extradict him, on the grounds that the charges, as

⁶⁸ W.D. B u r n e t t: "Command Responsibility and A Case Study of the Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom At Shatila and Sabra," 107 *Military Law Review* 71 at 77-78 (1985).

⁶⁹ G r e e n, *supra*, note 35, pp. 2-3.

⁷⁰ Following this recommendation, Art. 227 of the Treaty of Versailles stipulated that: "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formally German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan. In its decision, the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligation of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed"; see also: G r e e n, *supra*, note 35, p. 4

⁷¹ Both Japan and the US disagreed with the suggestion that officers would be tried on the basis of the principle of command responsibility: B u r n e t t, *supra*, note 68, pp. 81-82.

phrased, did not exist under Dutch law⁷² and that in any case, they were politically motivated.⁷³ Wilhelm II died in exile in Holland in 1941.⁷⁴

The Versailles Treaty did also contain provisions for the prosecution of Violations of the laws or customs of war. Pursuant to Articles 228 and 229, the Principal Allied and Associated Powers sought the trial “before military tribunals” of persons accused of “having committed acts in violation of the laws and customs of war” and required Germany to hand over any persons so accused. Those suspects would be tried before international military tribunals constituted of members of the military tribunals of the interested Powers. The Allied provided a list of 896 persons accused of war crimes to be tried in accordance with Art. 228 of the Versailles Treaty. The List included such high-rank officers as the son of the Kaiser, Count Bismarck, and Marshalls Von Hindenburg and Ludendorf. The German Cabinet strenuously objected, warning the Allies that Army Leaders would resume hostilities if the demand was pressed. The German Government offered instead to try some of the accused before its own courts. However, it accepted only 45 cases as possibly genuine, to which the Allies consented. In the end, indictments were issued against 12 accused before the Supreme Court of Leipzig. The ensuing sentences were rather mild: they resulted in 6 acquittals and 6 symbolic sentences of maximum 4 years.⁷⁵ Nevertheless, this so-called “Leipzig” jurisprudence laid down important principles of international criminal law which are of continuing relevance today, in particular, the rejection of the defence of superior orders. Major Benno Crusius was found guilty of ordering the execution of wounded prisoners of war and sentenced to two years of confinement. The other case where the principle of superior responsibility was at issue was the 1921 case of *The Llandovery Castle*, in which officers of a U-boat were sentenced for “contrary to international law”, firing upon and killing survivors of an unlawfully torpedoed hospital ship. The Court found that the commanders of the U-boat 86, Patzig, contrary to instructions of his superiors, ordered to torpedo a British Hospital Ship, and subsequently gave the order of firing at the survivors of the sunken ship. As the whereabouts of Patzig were unknown to the Court, the case was chiefly concerned with the determination of the liability of the two officers of the watch in relation to the firing incident.⁷⁶ The latter two received the heaviest sentences meted out by the Supreme Court of the Reich at Leipzig: each were sentenced to 4 years imprisonment. Other Leipzig cases which lead to convictions are the *Heymen, Mueller and Neumann* cases of 1921, in which the defendants were found guilty of ill-treating prisoners of war contrary to the German Penal Code and Military Penal Code.⁷⁷

⁷² A principle now known as the requirement of “double criminality.”

⁷³ David: “Les Tribunaux...,” *supra*, note 67, para. 12.2.

⁷⁴ P. Tavernier: “L’Expérience des Tribunaux pénaux internationaux,” pour l’ex-Yougoslavie et pour le Rwanda’, 828 *ICRC Review* 647 (1997).

⁷⁵ David: “Les Tribunaux...,” *supra*, note 67, para. 12.3.

⁷⁶ W.H. Parks: “Command Responsibility for War Crimes,” 62 *Military Law Review* 1 at 13 (1963); Burnett, *supra*, note 68, p. 83; Bing Bing Jia: “The Doctrine of Command Responsibility in International Law,” *NILR* 336–337 (1998).

⁷⁷ Green, *supra*, note 35, p. 33; Parks, *supra*, note 76, p. 13; Burnett, *supra*, note 68, pp. 83–84.

2. The Trials Following the Second World War

The ICTY and its sister tribunal, the International Criminal Tribunal for Rwanda (ICTR)⁷⁸ are very often compared to the Military Tribunals set up after the Second World War. Although there are valid parallels to be drawn, such comparisons are often misguided. There are similarities in the subject matter jurisdiction, but the legal foundations on which the tribunals rest are fundamentally different. The circumstances in which the Nürnberg and Tokyo Military Tribunals were created are unique, and have never been repeated since. They were set up by the four principal Allied Powers following the end of hostilities in Europe and in Asia and the Pacific. Their establishment was preceded by the complete surrender by Germany and Japan, and these vanquished nations' consent to jurisdiction by the victorious nations. Each of the constituent Allied Powers possessed jurisdiction to prosecute the German defendants on their own. In view of these conditions, a more apt description of the post Second World War Tribunals, therefore, is that they were *multinational* rather than *international*.⁷⁹

The International Military Tribunal (hereinafter: IMT) of Nürnberg was created by the London Agreement of 8 August 1945, which contained its Statute in annex.⁸⁰ It was concluded between the USA, France, the UK and the USSR, but was open to any UN Member State. Nineteen other States acceded. The Charter of the IMT of Tokyo, by contrast, did not come about as a result of a formal treaty. In a move which is reminiscent of the way the ICTY and the ICTR have been established, it was "proclaimed" by the Supreme Commander of the Allied forces, based on a series of international instruments and declarations pertaining to the end of the war in the East and the surrender of Japan.⁸¹

The main foundations of the international criminal law after the Second World War pursuant to the Charters of the Tribunals of Nürnberg and Tokyo can be summarised as follows. First, the types of possible charges encompassed both violations of the *jus ad bellum* and *jus in bello*. Art. 6 of the Nürnberg Charter conferred jurisdiction over (a) Crimes against peace, (b) War crimes and (c) Crimes against humanity.⁸²

⁷⁸ The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, was established by Security Council resolution 955 of 8 November 1994. Its jurisdiction encompasses Genocide (Art. 2), Crimes Against Humanity (Art. 3), and Violations of Common Art. 3 and Additional Protocol II (Art. 4); For a discussion of its work see e.g., C. C i s s é: „The End of a Culture of Impunity in Rwanda,” 1 *YIHL* 161 ff. (1998).

⁷⁹ Ch. G r e e n w o o d: „The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia,” 2 *Max Planck Yearbook of United Nations Law* 97 at 100 (1998); But see C a r n e g i e, *supra*, note 48, p. 414, who casts doubt on the validity of the claim that the Allied Nations were just exercising collectively, what they could do separately, in establishing the Nürnberg Tribunal.

⁸⁰ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945.

⁸¹ D a v i d, „Les Tribunaux...,” *supra*, note 67, para 12.8–9.

⁸² Art. 6 provided in part as follows: (a) “Crimes against peace:” namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or

Secondly, the Charter and the subsequent jurisprudence led to the confirmation of the existence of individual criminal responsibility for violations of *jus ad bellum* and *jus in bello*: not only of the authors themselves, but also of the co-authors, accomplices, and their responsibility for acts as well as omissions.⁸³ Thirdly, traditional principles of international criminal law such as the absence of Head of State immunity, and the rejection of superior orders as a defence were also set in stone.⁸⁴ Fourth, the range of punishments was wide. Art. 27 of the Nürnberg Charter provided that the “Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.”⁸⁵ The IMT at Nürnberg pronounced 12 death sentences.⁸⁶ It sentenced three accused to life imprisonment, four to prison sentences of 10 to 20 years,⁸⁷ and acquitted three accused.⁸⁸ The Tokyo Tribunal pronounced 7 death sentences,⁸⁹ 16 life sentences,⁹⁰ one prison sentence of 7 years⁹¹ and one of 20 years.⁹²

The pace at which these trials were conducted is remarkable. The Nürnberg Trial started on 20 November 1945, and all pleadings were finished by 31 August 1946. The sentences were pronounced on 1 October 1946. The Tokyo Trials against 28 former leaders of Japan started on 3 June 1946 and ended on 12 November 1948.⁹³ However, it should be remembered that only major war criminals, previously identified by a Committee of Chief Prosecutors of the Signatory Powers, were brought before these two tribunals. There was an obvious division of labour between these Tribunals – established for the sole purpose of prosecuting major war criminals – and other tribunals empowered to deal with the majority of other cases. These other tribunals came in a variety of forms. Whilst they all applied international law (*jus ad bellum* and *jus in bello*), they cannot be considered truly international tribunals for they lacked a multinational structure. Some military tribunals were created by the

participation in a common plan or conspiracy for the accomplishment of any of the foregoing; (b) “War crimes:” namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) “Crimes against humanity:” namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

⁸³ Cfr. Art. 6 of the Nürnberg Charter.

⁸⁴ Arts. 7 and 8 of the Nürnberg Charter.

⁸⁵ See also, corresponding art. 16 of the Tokyo Charter.

⁸⁶ Goering, Von Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Franck, Frick, Streicher, Sauckel, Jodl, Sess-Inquart, Bormann.

⁸⁷ Hess, Funk, Raeder.

⁸⁸ Schacht, Von Pappen, Fritzsche.

⁸⁹ Dohihara, Hirota, Itagaki, Kimura, Matsui, Muto and Tojo.

⁹⁰ Araki, Hashimoto, Hata, Hiranuma, Hoshino, Kido, Koiso, Minami, Oka, Oshima, Sato, Shimada, Suzuki, Kaya, Shiratori and Umezu.

⁹¹ Shigemitsu.

⁹² Togo.

⁹³ B u r n e t t, *supra*, note 68, p. 115.

occupying powers specifically for the purpose of prosecuting war criminals in their zone of occupation. For instance, several prosecutions were conducted as a result of the Allied Control Council Law No. 10, which came into force on 20 December 1945. Its purpose was to give effect *inter alia*, to the London Agreement of 1945 and the Nürnberg Charter and to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.⁹⁴ Furthermore, nothing prevented individual States from empowering their municipal courts to try perpetrators of war crimes apprehended on their territory. Nobody has kept a tally of the total number of trials held after the second world war, but the series of Law Reports issued on these cases refer to more than 1700.⁹⁵

III. The ICTY: Manner of Establishment, Jurisdiction and Caseload

Introduction

The circumstances in which the ICTY has been established are very different from those under which the IMTs were set up after the second world war. The ICTY was set up in 1993, in a period during which the conflict in the Former Yugoslavia was still going on.

It should be recalled that Slovenia and Croatia proclaimed their independence on 25 June 1991.⁹⁶ The Yugoslav People's Army (JNA) forces moved against Slovenia on 27 June 1991. A peace agreement was reached on 8 July 1991. Fighting in Croatia started in July 1991 between Croatian military forces on the one side and the JNA, paramilitary units and the "Army of the Republic of Srpska Krajina" on the other. Major assaults on Vukovar and Dubrovnik took place before the end of 1991. Macedonia has thus far not been the scene of any fighting. It sought international recognition as an independent republic from December 1991 onwards, but because of difficulties surrounding its name, it was only admitted to the UN in April 1993 under the provisional name of FYROM.⁹⁷ Bosnia and Herzegovina proclaimed its independence on 6 March 1992. Serb forces spread the fight to that republic around that date or shortly thereafter.

The two remaining Yugoslav republics, Serbia and Montenegro, claimed on 27 April 1992 that they continued the legal personality of the former Yugoslavia, and

⁹⁴ *Law Reports of Trials of War Criminals*, vol. XV, UN War Crimes Commission (1949), p. 39.

⁹⁵ For a discussion and overview of the jurisprudence of these municipal courts see *ibid.* The following figures are cited, by way of example: 809 US war crimes trials, 524 British, 256 Australian, 254 French, 30 Dutch, 24 Polish, 9 Norwegian, 4 Canadian, 1 Chinese.

⁹⁶ For a chronology of the conflict consult for instance, L. Silber and A. Little: *Yugoslavia: Death of a Nation*, 2nd ed. (1997); W. Zimmerman: *Origins of a Catastrophe: Yugoslavia and Its Destroyers – America's Last Ambassador Tells What Happened and Why* (1996); C. Rogel: *The Breakup of Yugoslavia and the War in Bosnia* (1998); M. Glenn: *The Fall of Yugoslavia* (1996), pp. 129–130.

⁹⁷ See R. Rich: "Recognition of States: The Collapse of Yugoslavia and the Soviet Union," 4 *EJIL* 38–53 (1993); I. Janev: "Legal Aspects of the Use of Provisional Name for Macedonia in the United Nations System," 93 *AJIL* 155–160 (1999).

are since known as the FRY.⁹⁸ Shortly thereafter, on 19 May 1992, the JNA allegedly completed its withdrawal from the territory of Bosnia and Herzegovina. In the summer of 1992, news about the establishment of concentration camps started to reach the outside world. By the end of that year, 6,000 UNPROFOR troops were sent to Bosnia. The Vance-Owen plan was agreed in January 1993. Shortly afterwards, the ICTY was established via the mechanism of Security Council Resolutions, taken under Chapter VII of the UN Charter, as a measure aimed at restoring international peace and security.⁹⁹ Its work commenced in November 1993. The marketplace bombing in Sarajevo took place in February 1994. In May 1995, the Croatian army re-captured areas in Slavonia. In July 1995, the safe area of Srebrenica was taken over by the Serbs; Croatia captured the Krajina area in August 1995. Active hostilities ceased with the signing of the Dayton peace agreement in December 1995.

While the wars were being waged in Slovenia, Croatia and Bosnia and Herzegovina, the situation in Kosovo was tense. In the mid-1990s a faction of the Kosovo Albanians constituted the Kosovo Liberation Army (UCK/ KLA). The latter group fought the Serbian police forces since mid-1996. According to the recently released Milošević indictment, the conflict started to escalate seriously from February 1998 onwards. The Security Council was seized of the matter, and as a result of international negotiations OSCE verifiers were deployed throughout Kosovo in the autumn and winter of 1998. This failed to stop the hostilities. In one incident, on 15 January 1999, 45 unarmed Kosovo Albanians were murdered in the village of Račak. In mid-March 1999, the intense peace negotiations conducted under international auspices in Rambouillet (France), collapsed. On 24 March 1999, NATO began launching air strikes ("operation Allied Force") against the FRY. According to the ICTY Prosecutor, the FRY and Serbia have since intensified their systematic campaign of persecutions, deportation and murder waged against the ethnic Albanians in Kosovo.¹⁰⁰

1. Legal Basis, Legitimacy and Jurisdiction

As indicated above, the international instrument by which the ICTY was established is not a treaty. It was created by the UN Security Council pursuant to a Resolu-

⁹⁸ However, the legal status of this claim is still controversial: Rich, *supra*, note 97, p. 53; see also: M. C r a v e n: "The Genocide Case, The Law of Treaties and State Succession," 68 *BYIL* 127-164 (1998); In the recent case brought by the FRY against 10 NATO Countries before the ICJ, many of the defendants relied on the (controversial) argument that the FRY is not a member of the UN. The ICJ decided however, that there was no need for it to decide this question: ICJ, *Legality of Use of Force*, ICJ General List No. 99/25, Request for Provisional Measures, decision of 2 June 1999.

⁹⁹ Likewise, the companion tribunal for Rwanda (the ICTR) was also established via the mechanism of a Security Council Resolution as measure taken under Chapter VII. However, the ICTR was set up after the armed conflict in Rwanda was largely over, following the take-over of the country by the former rebels. The subsequent discussion will be devoted mainly to the ICTY, although parallels will be drawn regularly with the ICTR.

¹⁰⁰ *The Prosecutor against Slobodan Milošević, Milan Milutinović, Nikola Mainović, Dragoljub Ojdanić and Vlastko Stojiljković*, Case No. IT-99-37-I, Indictment of 22 May 1999, paras. 23-37.

tion 827(1993) of 25 May 1993, adopted under Chapter VII of the UN Charter, in order to contribute to the maintenance of international peace and security on the territory of the former Yugoslavia. It was preceded by a series of resolutions taken under the same chapter,¹⁰¹ culminating in Resolution 808 (1993) of 22 February 1993, by which the Security Council decided to establish the ICTY and request the Secretary-General to prepare a Statute.¹⁰²

A. Background and Legitimacy

a) The Resolutions of the Security Council and the Commission of Experts

Shortly after the discovery of what appeared to be concentration camps in Bosnia and Herzegovina, the Security Council adopted resolution 764 (1992) of 13 July 1992. This reaffirmed that all parties to the conflict were bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of Grave breaches of the Conventions are individually responsible in respect of such breaches. Shortly thereafter, in resolution 771 (1992) of 13 August 1992, the Security Council expressed grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina. The Council strongly condemned any violations of international humanitarian law, including those involved in the practice of "ethnic cleansing", and demanded that all parties to the conflict in the former Yugoslavia cease and desist from all breaches of international humanitarian law. It called upon States and international humanitarian organizations to collate substantiated information relating to the violations of humanitarian law, including Grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make this information available to the Council.

A further significant step was taken when the Security Council by resolution 780 (1992) of 6 October 1992, requested the Secretary-General to establish an impartial Commission of Experts to examine and analyse the information as requested by resolution 771 (1992), together with such further information as the Commission may obtain through its own investigations or efforts, of other persons or bodies. By a letter dated 9 February 1993, the Secretary-General submitted to the President of the Security Council an interim report of the Commission of Experts (S/25274), which concluded that Grave breaches and other violations of international humanitarian law had been committed on territory of the former Yugoslavia, including wilful killing, "ethnic cleansing", mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary ar-

¹⁰¹ For good documentary sources consult S. Trifunovska (ed.): *Yugoslavia Through Documents. From its Creation to its Dissolution* (1994); D. Bethlehem and M. Weller: *The 'Yugoslav' Crisis in International Law: General Issues* (1997).

¹⁰² See Report of the Secretary-General, pursuant to para. 2 of Security Council Resolution 808 (1993), presented 3 May 1993, (S/25704), paras. 4–11.

rests. In its report, the Commission suggested that the establishment of an *ad hoc* international tribunal by the United Nations would be consistent with the direction of its work.

It was against this background that the Security Council adopted resolution 808 (1993) on 22 February 1993. The Security Council expressed once again grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuation of the practice of "ethnic cleansing". Pursuant to this resolution the situation was qualified as a threat to international peace and security. The Security Council stated that it was determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them. Furthermore it stated its conviction that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.¹⁰³

In accordance with the request of the Security Council, the Secretary-General and his legal service prepared a report on the establishment of an *ad hoc* international tribunal, as well as a draft Statute. According to this report, the Secretary-General took into account suggestions put forward by Member States, the report of the committee of jurists submitted by France (S/25266), the report of the commission of jurists submitted by Italy (S/25300), and the report submitted by the Permanent Representative of Sweden on behalf of the Chairman-in-Office of the Conference on Security and Cooperation in Europe (CSCE) (S/25307). The Secretary-General also sought the views of the Commission of Experts established pursuant to Security Council resolution 780 (1992) and made use of the information gathered by that Commission.¹⁰⁴

b) Legal Basis and Legitimacy

Security Council resolution 808 (1993) declared that an international tribunal would be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. It did not, however, indicate how such an international tribunal was to be established. As indicated by the Secretary-General, the approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty by which the States parties would establish a tribunal and approve its Statute. However, the treaty approach was not regarded as suitable: it would require considerable time to establish an instrument and then to achieve the required number of ratifications to enter into force. Even then, there could be no guarantee that

¹⁰³ Furthermore, in resolution 820 (1993) of 17 April 1993, the Security Council condemned once again all violations of international humanitarian law, including in particular, the practice of "ethnic cleansing" and the massive, organized and systematic detention and rape of women, and reaffirmed that those who commit or have committed or order or have ordered the commission of such acts will be held individually responsible in respect of such acts.

¹⁰⁴ Report of the Secretary-General, S/25704, para. 13.

ratifications would be received from those States which should be parties to the treaty if they were to be truly effective. In the light of this, the Secretary-General believed that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. He argued in his report that such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.¹⁰⁵

The legitimacy of the way the Tribunal was established has been widely commented upon.¹⁰⁶ It was examined in depth by the ICTY's Appeals Chamber in the *Tadić jurisdiction* case.¹⁰⁷ The defendant *Duško Tadić* had argued, *inter alia*, that the Security Council had exceeded its powers under Chapter VII, because that Chapter did not authorise the Council to create a judicial tribunal as a measure to address a threat to international peace and security. In reply, the Appeals Chamber held that Chapter VII in general and Art. 41 in particular conferred on the Security Council abroad, although not unlimited, discretion regarding the measures which are appropriate to address a threat to international peace and security. It further reasoned that since the Council had already determined that the war crimes perpetrated in the former Yugoslavia were exacerbating a threat to international peace and security and the concept of individual criminal responsibility has long been seen as one of the means by which international law seeks to deter, or prevent repetition of, war crimes, the establishment of the Tribunal could not be said to have been manifestly outside the scope of the Council's powers under Chapter VII.¹⁰⁸

B. Jurisdiction

In the following sections the jurisdiction *ratione loci*, *ratione temporis*, *ratione personae* and *ratione materiae* of the ICTY will be discussed. It will be seen that the latter's jurisdiction is broader and at the same time, narrower than that of the Second World War Tribunals.

a) Geographical Jurisdiction

World War II engulfed many nations and ended up covering large parts of the globe. There was no obvious restriction to the competence *ratione loci* of the Tribunals after the Second World War. By contrast, the ICTY's competence is geographically limited. The Statute confers jurisdiction to try offenders for offences committed on the territory of the former Yugoslavia only.¹⁰⁹

¹⁰⁵ *Ibid.*, paras. 18–30.

¹⁰⁶ See for instance, A. P e l l e t: "Le Tribunal Criminel International pour L'Ex-Yougoslavie," 98 *RGDIP* 12–32 (1996); E. D a v i d: "Les Tribunaux..." *supra*, note 67, para. 12.16–12.25; Ch. G r e e n w o o d: "The Development of International Humanitarian Law..." *supra*, note 79, pp. 99–109; S. M u r p h y: "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia," 93 *AJIL* 57 at 63–64 (1999).

¹⁰⁷ *Tadić Jurisdiction Decision*, *supra*, note 51, pp. 5–24.

¹⁰⁸ *Ibid.*, paras. 28–40.

¹⁰⁹ Art. 1 of the ICTY Statute reads as follows: The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed on the territory

Before its break-up, the SFRY comprised 6 republics. What is now known as the Federal Republic of Yugoslavia (FRY), only comprises the rump of what used to be the Socialist Republic of Yugoslavia (SFRY): that is Serbia (including Kosovo of course) and Montenegro. At the time of writing, in May–June 1999, there were several press reports speculating on the spread of the Kosovo crisis to Macedonia (Former Yugoslav Republic of Macedonia – FYROM). In addition, there have also been genuine clashes between FRY troops and Albanian forces. Since Macedonia used to form part of the SFRY, the ICTY would undoubtedly be competent to try violations of the laws of armed conflict committed on the territory of the FYROM, in the hypothesis that the Kosovo crisis would spread to that territory. Similar conclusions would follow if the Kosovo conflict would spread to the other republics which emerged after the collapse of the SFRY, *i.e.*, the Republics of Croatia and Slovenia, and of course, the Republic of Bosnia and Herzegovina also. On the other hand, according to the letter of the ICTY Statute competence *ratione loci* would be more difficult to establish for hostilities involving Albania territory. However, a definitive judgement would depend on a close examination of the facts of a particular event and the ability (of the Prosecutor) to convince the Tribunal that there is a sufficient territorial link with the former SFRY for the ICTY's exercise of jurisdiction.

Another question is the limitation inherent in Art. 8 of the Statute, according to which the territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, "including its land surface, airspace and territorial waters." Disregarding the difficulties of defining what is meant by "national airspace",¹¹⁰ Art. 8 would seem to exclude acts of war committed in the maritime zones not covered by the term "territorial waters". One can only speculate on the reasons why this formulation was chosen. The most obvious explanation is that there are very few indications that the conflict in the SFRY had a major naval component outside the territorial waters of the belligerents. There were some hostilities around the waters of Dubrovnik,¹¹¹ but these were probably confined to the internal and coastal waters of the SFRY. Furthermore, whilst there may very well have been military operations in the territorial seas of the SFRY, there have probably been no hostilities involving shelling in that jurisdictional zone.

The second reason why the drafters may have omitted including any maritime zones apart from the territorial waters (which are usually understood to cover internal waters) is that the law for armed conflict at sea, including its scope of application, may have been perceived, rightly or wrongly, as unsettled. Although there have been worthwhile unofficial initiatives, leading recently to the *1994 San Remo Manual on*

of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute. This is clarified in Article 8 as follows: The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

¹¹⁰ See for instance, S h a w, *supra*, note 15, p. 382.

¹¹¹ R o g e l, *supra*, note 96, p. 25; G l e n n y, *supra*, note 96, pp. 129–130.

International Law Applicable to Armed Conflict at Sea,¹¹² much of the law of naval warfare consists of customary law and is in need of codification. This has become more urgent with the coming into force, in 1994, of the 1982 UN Convention on the Law of the Sea.¹¹³ The extent to which the new jurisdictional zones (including the "Area" and the Exclusive Economic Zone) introduced by the ("peacetime") law of the sea intersect with the law of armed conflict remains to a certain degree the subject of controversy.¹¹⁴

In any event, it follows from the restrictions *ratione loci* included in the Statute's Articles 1 and 8 that the ICTY would, at first sight, not be competent to deal with the consequences of acts of warfare conducted outside the territorial waters of the SFRY. However, if those acts of warfare affect civilians or civilian objects on land, part of the Geneva Law aimed at the protection of civilians may still be applicable via the mechanism enshrined in Additional Protocol I of 1977.¹¹⁵ Therefore, while the term "territorial waters" in the ICTY Statute would seem to exclude ship-to-ship and ship-to-air activities outside that maritime jurisdictional zone it may not bar jurisdiction in case civilians or civilian objects on land are affected. The same applies *mutatis mutandis* to air warfare.

b) Temporal Jurisdiction

Articles 1 and 8 of the ICTY Statute indicate that there is also a temporal limitation to the jurisdiction of the ICTY. The Tribunal can only be seized of cases involving offences committed in the SFRY since 1 January 1991. The concise recapitulation of the chronology of the conflict above, demonstrates that the *dies a quo* mentioned in the Statute leaves enough margin to charge violations of the laws of armed conflict

¹¹² Adopted in 1994 under the auspices of the International Institute of Humanitarian Law, and published by Cambridge University Press (1995).

¹¹³ As is well-known, the convention entered into force only on 16 November 1994, one year after it had obtained the necessary 60 ratifications, and after substantial amendments had been agreed in July 1994, regarding Part XI on deep seabed mining: Agreement Relating to the Implementation of Part XI of the Convention, GA Res. 48/263 of 29 July 1994, adopted by a vote of 121 in favour, none against and seven abstentions, into force since 28 July 1996; *Frestone & Mangone: The Law of the Sea Convention: Unfinished Agendas and Future Challenges*, 10 *IJML* 1995, Special Issue, No. 2.

¹¹⁴ During the negotiations for the 1982 UNCLOS, State delegates had honoured a long tradition of reticence about discussing military uses of the seas: R.W.G. de Mural: «The Military Aspects of the U.N. Law of the Sea Convention», 32 *NILR* 78–79 (1985); However, State practice and *opinio juris* would seem to indicate that the area in which acts of naval warfare may be performed, comprises: 1) the territory of the parties to the conflict accessible to naval forces; 2) inland waters, archipelagic waters, and territorial sea of the parties to the conflict; 3) the high seas including the exclusive economic zones; and 4) the airspace over these land and sea areas. W. Heintschel von Heinegg: "The Law of Armed Conflict At Sea," in: Fleck, *supra*, note 27, p. 405 at 409.

¹¹⁵ Art. 49, subparas. 3 and 4 of this protocol stipulate as follows: "The provisions of this section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air. The provisions of this section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities."

from the very beginning of the armed hostilities in the SFRY.¹¹⁶ However, as will be explained below, the decision of the tribunal on its competence *ratione temporis* is narrowly linked with the definition of armed conflict. Except for the charge of Genocide (Art. 4), the Prosecutor needs to prove for each category of charges, that there was a sufficient nexus between the alleged offence and an armed conflict.

Furthermore, there is little doubt that the conflict in Kosovo which at the time of writing, involved the FRY, the KLA and NATO countries, and which was being waged mainly on the territory of the FRY, falls within the jurisdiction of The Tribunal. Nevertheless, it may be difficult to pinpoint the exact date on which the armed conflict in Kosovo started. The FRY side will undoubtedly claim that the FRY operations in Kosovo against the KLA were simply aimed at suppressing an internal terrorist movement, and that the ensuing hostilities did not rise to the threshold level of armed conflict required for the application of International Humanitarian Law. Whatever the merits of such claims, it will be more difficult for the FRY to deny the status of armed conflict to the hostilities currently putting NATO against the FRY. There is little doubt that *Operation Allied Force*, which commenced on 24 March 1999 reached the level of armed conflict necessary to trigger the application of international humanitarian law.

Finally, it should be noted that there is no express end to the competence *ratione temporis* of The Tribunal in its Statute. However, since the Tribunal was set up as a measure for the restoration of international peace and security, it would be up to the Security Council to decide that the ICTY has served its purpose.¹¹⁷ Another way in which the Tribunal's jurisdiction might – conceivably – end, is when there are no longer any serious violations of international humanitarian law that would need to be prosecuted before the ICTY.

c) *Personal Jurisdiction*

Pursuant to Art. 6 of its Statute, the ICTY has jurisdiction only over natural persons pursuant to the provisions of the present Statute. It is noteworthy that Art. 9 of the Nürnberg Charter enshrined a procedure under which the IMT could declare certain groups or organisations criminal. If such a declaration was issued, Art. 10 allowed the competent national authorities of any Signatory State to bring individuals to trial for membership of these groups or organisations. In such cases the criminal nature of the group or organization was considered proved and was no longer required. In execution of these provisions, the IMT declared the following organisations criminal: the Leadership Corps of the Nazi Party; the Gestapo; the SD (the State

¹¹⁶ The Report of the Secretary General on the establishment of the Tribunal shows that the date of 1 January 1991 was deliberately chosen, so as not to prejudice the characterisation of the conflict and in order to capture the widest possible range of violations of International Humanitarian Law: S/25704, para. 16, p. 17; see also: P e l l e t, *supra*, note 106, para 23, pp. 32–33.

¹¹⁷ Ch. G r e e n w o o d: "The Development of International Humanitarian Law..." *supra*, note 79, p. 106; In fact, some feared that the SC would decide that the ICTY's task would come to an end with the conclusion of the Dayton/Paris agreements in December 1995: P. T a v e r n i e r, *supra*, note 74, pp. 653–654.

Security Service); and the SS.¹¹⁸ A group of French jurists had suggested that a similar provision, with some safeguards, could be envisaged for the ICTY.¹¹⁹ The suggestion was rejected by the Secretary-General for reasons that are less than fully clear.¹²⁰ By the same token, the Statute does not even allow for the prosecution of legal persons other than natural persons, such as corporate entities or States. Again, the latter question is still controversial under current international law.¹²¹ However, it should not be overlooked that the other fora or tribunals may be competent to examine the responsibility of States for violations of the laws of armed conflict. A good example are the cases which are currently pending before the ICJ: the *Genocide Case* brought in 1993 by Bosnia and Herzegovina against the FRY,¹²² and the *Legality of the Use of Force Case*, brought in 1999 by the FRY against ten NATO countries.¹²³

An important element of the competence *ratione personae* (personal jurisdiction) of the ICTY, and of international criminal law in general, is the principle of individual criminal responsibility. Art. 7 of the ICTY Statute addresses several aspects of this issue.¹²⁴ The first subparagraph of this article indicates that all persons who participated in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible. The second subparagraph enshrines the principle that heads of State, government officials and persons acting in an official capacity should not be entitled to rely on the plea of immunity. This provision draws upon the precedents following the Second World War. The text of the article contains two further provisions. First, it affirms that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, and secondly, that it will not be a factor mitigating punishment.

As is clear from the Nürnberg jurisprudence, the concept of superior responsibility is as very important tenet of international criminal law. It is enshrined in Art. 7(3) of the ICTY Statute. This stipulates that a person in a position of superior authority

¹¹⁸ Judgement of the International Military Tribunal-Nuremberg, 1 October 1946; For a discussion of subsequent national trials see *Law Reports*, *supra*, note, pp. 150–154.

¹¹⁹ P e l l e t, *supra*, note 106, pp. 39–40.

¹²⁰ Report of the Secretary General, S/25704, para 51; P e l l e t, *supra*, note 106, para. 30, pp. 39–40.

¹²¹ M. C a s i l l o: “La compétence du Tribunal Pénal Pour la Yougoslavie,” 98 *RGDIP* 77–80 (1994).

¹²² *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina), General List No. 91.

¹²³ *Legality of Use of Force*, (FRY against 10 NATO Countries), ICJ General List No. 99.

¹²⁴ Art. 7 of the Statute, entitled “Individual criminal responsibility” stipulates as follows: 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Arts. 2 to 5 of the present Statute, shall be individually responsible for the crime; 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment; 3. The fact that any of the acts referred to in Arts. 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof; 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

should be held individually responsible, not only for giving the unlawful order to commit a crime under the Statute, but also for failing to prevent a crime or to deter the unlawful behaviour of his subordinates. Under the ICTY Statute, this imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them. The mirror side of superior responsibility can be found in Art. 7(4). This provision indicates that acting upon an order of a Government or a superior cannot relieve the perpetrator of the crime of his criminal responsibility and should not be a defence. Obedience to superior orders may, however, be considered a mitigating factor, should the International Tribunal determine that justice so requires. For example, the International Tribunal may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice.

Finally, the International Tribunal must decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations.¹²⁵ This brings us to the next issue, which is the subject-matter jurisdiction of the ICTY.

d) Subject-Matter Jurisdiction

Pursuant to Art. 1 of the Statute the Tribunal has jurisdiction in respect of four categories of „serious violations of international humanitarian law” committed by individuals in the territory of the former Yugoslavia since 1991: Grave breaches of the Geneva Conventions (Art. 2); Violations of the Laws and Customs of War (Art. 3); Genocide (Art. 4) and Crimes against humanity (Art. 5).¹²⁶ These provisions determine the scope of the jurisdiction of the Tribunal, but they are not meant to change the substantive law which the Tribunal is required to apply.

As indicated by the Secretary-General’s report on the establishment of the Tribunal, out of respect for the principle of legality,¹²⁷ the Security Council intended the Tribunal to apply existing international humanitarian law, not to create new offences under international law.¹²⁸ Therefore, the Tribunal has to examine in each case whether it has jurisdiction, pursuant to the terms of its Statute, to try a particular charge. Whether the conduct charged should be considered unlawful under the applicable rules of international law at the time the alleged offences were committed, and whether that

¹²⁵ Secretary-General’s Report, S/25704, paras. 53–58.

¹²⁶ For a closer examination of these provisions, see further below.

¹²⁷ Which encompasses the principles known as *nullum crimen sine lege* and *nulla poena sine lege*; The importance of this principle of legality, and in particular of its temporal aspects, have been confirmed in Arts. 22 and 23 of the 1998 Rome Statute of the International Criminal Court: A/Conf. 183/9 of 17 July, 1998; Art. 22 deals with the principle of *nullum crimen sine lege*; Art. 23 with *nulla poena sine lege* and Art. 24 with non-retroactivity *ratione personae*; see further below; The principle of legality is also included in Art. 15(1) of the International Covenant of Civil and Political Rights and in Art. 7(1) the European Convention on Human Rights.

¹²⁸ Doc. S/25704, paras. 29, 34.

conduct leads to individual criminal responsibility are questions that cannot be answered by examining the Tribunal's Statute.¹²⁹ The answer to those questions must be found in existing international humanitarian law, whether treaty-based or customary.¹³⁰ The importance of respect for the principle of legality has been confirmed by the ICTY Trial Chambers in several cases.¹³¹

Compared to the Statutes of the Nürnberg and Tokyo Tribunals, the subject-matter jurisdiction of the ICTY is broader in some respects, and narrower in others. Unlike the Second World War Tribunals, the ICTY (nor the ICTR for that matter) is not empowered to deal with violations of *jus ad bellum*. On the other hand, the category of violations enumerated in the ICTY Statute is certainly larger than the comparable ones enshrined in the Statutes of the IMTs. One reason is that many categories of crimes included in the ICTY Statute were non-existent in treaty provision at the end of the Second World War. The Statute includes, in Art. 2, the Grave breaches provisions which were enacted through the Geneva Conventions in 1949. Art. 3 of the Statute consists of an open-ended formulation of the laws and customs of war. The Crime of Genocide, included in Art. 4 of the ICTY Statute was only laid down in treaty form in 1948. Finally, the description of the category of Crimes against humanity in Art. 5 is much larger than the offences laid down in Art. 6(c) of the Nürnberg Charter. In the second part of this article the seminal jurisprudence of the ICTY on the interpretation of the subject-matter jurisdiction of the Statute will be dealt with in more detail.

C. The Division of Labour between National Jurisdictions and the ICTY

Pursuant to Art. 9(1) of the Statute, the ICTY and national tribunals have concurrent jurisdiction. However, Art. 9(2) stipulates that the ICTY shall have primacy over national courts. Furthermore, since the ICTY (and the ICTR) tribunals were set up under Chapter VII of the UN Charter, all UN Member States are required to cooperate with the Tribunal.¹³² They are obligated to arrest suspects and surrender them to the Tribunals for trial. Moreover, States may not rely upon their internal law as a justification for failing to comply with their international obligations in this respect. Therefore, if the ICTY has made a request for assistance to a State, the latter is bound to comply, regardless of whether it has enacted the necessary legislation and regard-

¹²⁹ Ch. Greenwood: "The Development of International Humanitarian Law....," *supra*, note 79, p. 112; In the same sense: C. Zeileisen: "War Crimes under the Jurisdiction of the Tribunal of the Former Yugoslavia," 3 *ARIEL* 64–65 (1998).

¹³⁰ Based on Th. Meron: "International Criminalization....," *supra*, note 56, pp. 544 at 562–563, and „Is International Law Moving...?," *supra*, note 56, pp. 18 at 24–25; Ch. Greenwood: "The Development of International Humanitarian Law....," *supra*, note 106, pp. 111–112; In the same sense: Zeileisen, *supra*, note 129, pp. 64–65.

¹³¹ *Čelebići* Judgement, pp. 152–153, paras. 415–419; *The Prosecutor v. Kvočka et al.*, Decision on Preliminary Motions Filed by Mlado Radić and Miroslav Kvočka Challenging Jurisdiction, 1 April 1999, Case No.: IT-98-30-PT, p. 11, para. 22.

¹³² This follows from Arts. 25 and 103 of the UN Charter, and several SC Resolutions on the matter: Resolution 827, para. 4.

less of whether *e.g.*, its municipal laws authorise extradition or surrender of suspects in the subject matter at hand.¹³³

On the other hand, in establishing the ICTY, it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. The Secretary-General believed that national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures. Articles 9 and 10 of the Statute reflect this goal. Art. 9 stipulates that there is concurrent jurisdiction of the International Tribunal and national courts. However, as indicated before, this is subject to the primacy of the International Tribunal. At any stage of the procedure, the International Tribunal may formally request the national courts to defer to the competence of the International Tribunal. Art. 10 of the Statute reflects the principle of *non-bis-in-idem*. It states that a person shall not be tried twice for the same crime. Given the primacy of the ICTY, the principle of *non-bis-in-idem* would preclude subsequent trial before a national court. However, Art. 10 stipulates also that the principle of *non-bis-in idem* should not preclude a subsequent trial before the International Tribunal in the following two circumstances: (a) the characterization of the act by the national court did not correspond to its characterization under the Statute; or (b) conditions of impartiality, independence or effective means of adjudication were not guaranteed in the proceedings before the national courts. Should the International Tribunal decide to assume jurisdiction over a person who has already been convicted by a national court, it should take into consideration the extent to which any penalty imposed by the national court has already been served.¹³⁴

Before discussing the jurisprudence of the ICTY in more detail, it may be useful to provide an account of the ICTY's work thus far.

2. Caseload

A. Arrest Warrants and Indictments

a) Overview

Since the ICTY's inception, 89 individuals have been publicly indicted in 26 indictments. Initial arrest warrants have been issued against all the accused. Since 1997, the ICTY Prosecutor has pursued a strategy aimed at high-level offenders (the so-called "big fish") and at issuing indictments under seal. The first time the use of sealed indictments came to light was in the cases of Slavko Dokmanović, arrested on 27 June 1997, and Milan Kovacević, arrested on 10 July 1997.¹³⁵ Of the 27 accused in custody by 9 June, 1999, four accused had been arrested by national authorities, ten by international forces (SFOR), and 13 have voluntarily surrendered.¹³⁶ Six ac-

¹³³ Ch. Greenwood: "The Development of International Humanitarian Law...", *supra*, note 75, pp. 106–107.

¹³⁴ Secretary-General's Report, paras. 64–68.

¹³⁵ P. Tavernier, *supra*, note 74, p. 658.

¹³⁶ Source: ICTY Public Information Unit, 9 June 1999

cused died,¹³⁷ charges were dropped against 18 other, and one is serving his sentence. One accused was acquitted on all charges, and another was recently acquitted on two of three charges brought against him, having completed his sentence on the remaining charge. Of the persons accused, 26 are currently in custody, while one, Milan Simić, was provisionally released on grounds of ill-health.¹³⁸

The Office of the Prosecutor has made a deliberate effort to devote resources to investigate alleged offences in an even-handed manner.¹³⁹ Of the publicly named indictees, a small number were Muslim, around 15 were Croats and the largest number were Serbs. The vast number of offences committed in the SFRY conflict and the limited resources of the OTP have led, necessarily, to a selective approach. The emphasis thus far has been on investigations related to persons of particular importance or to particularly atrocious incidents or to persons alleged to be responsible for particularly heinous acts. At the same time, particularly in the beginning of the ICTY's work, opportunism, the availability of evidence, or of the accused themselves, have occasionally affected decisions to conduct investigations.¹⁴⁰

b) Rule 61 Proceedings

The only effective proceedings which were held in the two first years of the Tribunal's existence were Rule 61 proceedings. These were basically an apology for the helplessness of the Tribunal in not being able to carry out its duties, owing to the attitudes of certain States that did not want to co-operate with the Tribunal.¹⁴¹ Rule 61 Proceedings are public hearings in which a panel of three judges, as opposed to the single judge who originally confirmed the indictment, examines an indictment and the supporting evidence tendered by the Prosecution, including witness testimony. If the Trial Chamber determines that there are reasonable grounds to believe that the accused committed the crimes, it confirms the indictment on the basis of the evidence presented and may choose to issue an international arrest warrant, addressed to all States, not just to the State in which the accused is believed to reside. The President of the ICTY may also notify the Security Council if the Trial Chamber finds that the failure to serve the original arrest warrant on the indictee was due to a failure or refusal of a State to co-operate with the Tribunal.

Under the ICTY Statute, trials *in absentia* are not possible. As indicated by the Secretary-General's Report, there was a widespread perception that trials *in absentia* should not be provided for in the Statute as this would not be consistent with Art. 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence".¹⁴² Rule 61 hearings, therefore,

¹³⁷ Alilović, Dukić, Drljaca, Dokmanović, Kovačević, Miljković.

¹³⁸ Source: ICTY Public Information Unit, 9 June 1999.

¹³⁹ W. F e n r i c k: "The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia," 3 *JACL* 198 (1998).

¹⁴⁰ *Ibid.*, p. 199

¹⁴¹ Ch. G r e e n w o o d: "The Development of International Humanitarian Law....," *supra*, note 75, pp. 97-98.

¹⁴² Report, S/25704, para. 101.

cannot be equated with trials *in absentia*. However, as lawyers representing Radovan Karadžić found out, the indictee is not allowed to be present or even to be represented at such a hearing.¹⁴³ If the indictee is subsequently arrested, he will be tried before a different Trial Chamber. Further to six Rule 61 proceedings, eight international arrest warrants have been issued, currently outstanding against the following accused: Dragan Nikolić, Milan Martić, Mile Mrškić, Miroslav Radić and Veselin Sljivancanin, Ivica Rajić, Radovan Karadžić, Ratko Mladić and Blagoje Simić.¹⁴⁴

c) The Milošević Indictment

As indicated before, the most important indictment in the Tribunal's history was confirmed on 22 May 1999. According to an announcement made by Judge Louise Arbour, the OTP's Chief Prosecutor on 27 May 1999, an indictment¹⁴⁵ and arrest warrant¹⁴⁶ had been issued against five individuals: Slobodan Milošević, the President of the Federal Republic of Yugoslavia (FRY), Milan Milutinović, the President of Serbia, Nikola Mainović, Deputy Prime Minister of the FRY, Dragoljub Ojdanić, Chief of Staff of the Yugoslav Army and Vlajko Stojiljković, Minister of Internal Affairs of Serbia. This indictment and the ensuing arrest warrant are notable on several counts. First, the indictment is the first in the history of this Tribunal to charge a Head of State during an on-going armed conflict with the commission of serious violations of international humanitarian law. Secondly, the indictment and the arrest warrants were sent simultaneously to the Federal Minister of Justice of the FRY, to all UN Member States, and to the Confederation of Switzerland. Thirdly, in an equally unprecedented move, the United Nations Member States were also ordered to make inquiries to discover whether any of the accused had assets located in their territory and, if so, to freeze such assets until the accused are taken into custody.¹⁴⁷ Finally, it is the first indictment issued in relation to the conflict that engulfed Kosovo in 1999.

B. Overview of Completed, Pending and Future Trials

a) Cases Completed at Trial and Appeals Level

Drazen Erdemović

At the time of writing, several cases were completed at the trial level, but only one had reached the final stage.¹⁴⁸ Drazen Erdemović, a Bosnian Croat fighting on the Bosnian Serb side, had been part of an execution squad which may have killed more than 1200 unarmed Muslim civilian men. The accused according to his own admissions, was probably responsible for up to 100 of these killings. At first he pleaded

¹⁴³ Murphy, *supra*, note 106, p. 58.

¹⁴⁴ ICTY Fact Sheet, 9 June 1999.

¹⁴⁵ *The Prosecutor against Slobodan Milošević, Milan Milutinović, Nikola Mainović, Dragoljub Ojdanić and Vlajko Stojiljković*, Case No. IT-99-37-I, Indictment of 22 May 1999.

¹⁴⁶ Warrants of Arrest and Orders for Surrender against all the accused, Case No. IT-37-I, of 24 May 1999.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22.

guilty to a Crime Against Humanity and was sentenced to 10 years' imprisonment by Trial Chamber I, on 29 November 1996. He appealed claiming that his guilty plea had been misinformed, and that he had wanted to rely on the plea of duress as a complete defence. The Appeals Chamber ruled on 7 October 1997 that the guilty plea of the defendant had indeed not been informed. The case was remitted to another Trial Chamber. The accused subsequently entered a new plea on 14 January 1998, in which he pleaded guilty on war crimes. On 5 March 1998, Trial Chamber II sentenced the accused to five years imprisonment. In August 1998, Drazen Erdemović was transferred to Norway where he is serving his sentence.

b) Cases Completed at Trial Level

Duško Tadić

On 7 May 1997, Trial Chamber II rendered its judgement and opinion in the case of Duško Tadić, a Bosnian Serb.¹⁴⁹ The accused was charged with Grave breaches, Violations of the laws or customs of war and Crimes against humanity for offences committed in the Omarska camp in the Prijedor Region in 1992. From about 25 May 1992 to about 30 August 1992, Serb forces which had seized power in the Prijedor district collected and confined more than 3000 Bosnian Muslims and Bosnian Croats from the area in the administrative centre of an iron ore mine, a few kilometres from the predominantly Serb village of Omarska. The Omarska camp housed many of the local Muslim and Croat elite, including political, administrative and religious leaders, academics and intellectuals, business leaders and others, who led and influenced the non-Serb population. The prisoners were held under armed guard, in brutal conditions. They were murdered, raped, sexually assaulted, severely beaten and otherwise mistreated. For example, one of the four buildings of the compound was known as the „red house”: most of the prisoners who were taken to it did not leave it alive. The victims were Muslims and Croats. The Trial itself lasted from 7 May 1996 to 28 November 1996, after which the Trial Chamber found the accused guilty on 11 counts of Violations of the laws or customs of war and Crimes against humanity. Out of 31 counts, the Accused was found – not guilty on 20 counts (9 murder counts because of insufficient evidence and 11 counts declared inapplicable) and – guilty on 11 counts (persecution and beatings). More broadly, and in particular for the victims of the armed conflict in the Prijedor area, the verdict represented the first ever judicial condemnation of the „ethnic cleansing” policy. It was the result of a thorough and meticulous consideration of a voluminous quantity of testimonial and written evidence: during the six month-long trial of the Accused, 125 witnesses were called and 473 exhibits were tendered by the Prosecution and the Defence. Duško Tadić was sentenced to 20 years imprisonment. Both the Prosecutor and the Defence appealed, and the case has recently been argued before the Appeals Chamber, the verdict of which is eagerly awaited.

¹⁴⁹ *Prosecutor v. Duško Tadić*, Case No. IT-94-1.

Čelebići Camp

On 16 November 1998, Trial Chamber II rendered judgement in the *Čelebići Camp* case, which involved 4 Muslims charged with committed Grave breaches and Violations of the laws or customs of war in connection with events alleged to have occurred at a detention facility in the village of Čelebići (Konjic municipality, central Bosnia and Herzegovina) in 1992. This facility was a former JNA barracks, which had been taken over by Muslim and Croat forces early in the conflict in the municipality. From about April 1992 to December 1992, part of the facility was used by the Muslim and Croat side to house members of the Serb population who had been captured in military operations in the area. The detainees were found to have been held under conditions in which they were “stretched both psychologically and physically to the very limits of human endurance” due to lack of adequate food, water, medical care, sleeping and toilet facilities, and due to constant psychological torment. They were also subject to acts of physical mistreatment and killings.¹⁵⁰ This was the first multi-defendant trial in the history of the Tribunal. It commenced on 10 March 1997 and ended on 15 October 1998. The accused Delalić (who was acquitted of all charges by the Trial Chamber) was alleged to have exercised authority over the camp in his role as co-ordinator of the Bosnian Muslim and Bosnian Croat forces in the area, and later as Commander of the First Tactical group of the Bosnian Army. He was charged solely with responsibility under Art. 7(3), and was found by the Trial Chamber not to have been in a position of command responsibility over the prison-camp and its personnel. The accused Mucić (who was found criminally liable on the basis of superior responsibility) was alleged to have been commander of the camp until November 1992. He was convicted of certain offences under Art. 7(3). The accused Delić was alleged to have been deputy commander of the camp until November 1992, and commander of the camp thereafter. He was found criminally liable for certain offences under Art. 7(1), but was found not liable under Art. 7(3). The accused Landzo was alleged to have been a guard in the camp at all relevant times. He was charged with responsibility under Art. 7(1) for certain crimes, in respect of killings and mistreatment of detainees, and the subjection of detainees at the camp to inhumane conditions. He was convicted of some of these crimes and acquitted of others. Zejnil Delalić was acquitted and immediately released, the others (Zdravko Mucic, Hazim Delic and Esad Landzo) received prison sentences from 7 to 20 years having been found guilty of respectively, 11, 13 and 17 counts of Grave breaches and Violations of the laws or customs of war. Both the Prosecutor and the Defence have appealed.

Anto Furundzija

Two smaller cases have also come to a conclusion at the Trial level. One, against *Anto Furundzija*, involved charges based on Art. 3 of the ICTY Statute concerning events in the Lasva Valley.¹⁵¹ The trial focused on charges of rape and torture of

¹⁵⁰ *Judgement*, paras. 1112–1119.

¹⁵¹ *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1.

a single female Moslem civilian victim, by a member of the special unit of Bosnian Croat Military Police, known as the “Jokers” in Vitez, in or around 15 May 1993. The accused, a local commander of the Jokers called Anto *Furundzija*, was found guilty on two counts of Violations of the laws or customs of war and was sentenced to 10 years imprisonment. The judgement, rendered on 10 December 1998, is also being appealed by the Defendant.

Zlatko Aleksovski

The second (partial) acquittal in the Tribunal’s history happened on 7 May 1999. It involved the defendant Zlatko Aleksovski who was arrested on 8 June 1996 in the Republic of Croatia by the Croatian police acting pursuant to an arrest warrant issued by the Tribunal.¹⁵² Zlatko Aleksovski was the commander of the prison facility at Kaonik, near Busovača, prior to becoming the Head of the District Croatian Defence Council (HVO). The accused was charged, both as an individual and a superior, with two counts of Grave breaches of the 1949 Geneva Conventions and one count of Violations of the laws or customs of war concerning events in the Lasva Valley. A majority of the Trial Chamber found Zlatko Aleksovski not guilty on the two counts of Grave breaches of the 1949 Geneva Conventions (Art. 2 of the Statute of the Tribunal) with which he was charged, and guilty as an individual participant (pursuant to Art. 7(1) of the Statute of the Tribunal) and as commander (pursuant to Art. 7(3) of the Statute) on Violations of the laws or customs of war (Art. 3 of the Statute). The Trial Chamber consequently imposed a sentence of two years’ and six months’ imprisonment, but considered that Zlatko Aleksovski was entitled to credit for time served for a period of two years, 10 months and 29 days. The Trial Chamber therefore ordered his immediate release, notwithstanding any appeal. The Prosecution will wait for the judges’ written reasons before deciding whether to appeal the decision.

Slavko Dokmanović

Another notable case is one which involved Slavko Dokmanović, a Croatian Serb.¹⁵³ According to the Prosecutor, on 20 November 1991, two days after the fall of Vukovar to the JNA, soldiers of the Belgrade-based Guards Brigade, a JNA unit, and Serb paramilitary troops removed 261 non-Serb men from Vukovar hospital and transported them to a farm building in Ovcara, where they were allegedly beaten for several hours. Afterwards, they were transported in groups of 10–12 to a site between the Ovcara farm and Grabovo, where JNA and paramilitary soldiers allegedly shot and killed them. The men, who have never been seen since, were buried in a mass grave at Ovcara. The victims included wounded patients, hospital staff and soldiers who had been defending the city. Dokmanović was indicted for his role in these events. The charges against him included Grave breaches, Violations of the laws or customs of war and Genocide. He was arrested following a ruse used by UNTAES,¹⁵⁴

¹⁵² *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14.

¹⁵³ *Prosecutor v. Slavko Dokmanović*, Case No. IT-95-13.

¹⁵⁴ The United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium.

and brought to trial. Unfortunately, he committed suicide after the trial had been completed and before a decision was rendered.

Milan Kovacević

Milan Kovacević, a Bosnian Serb, died of natural causes in custody before his trial finished.¹⁵⁵ He was accused of atrocities committed in the Prijedor region. According to the indictment, Milan Kovacevic was the Vice-president of the Serbian Democratic Party (SDS)'s Crisis Staff of the Municipality of Prijedor. According to the Prosecutor, Milan Kovacević played a key role in the crimes that occurred in the Municipality of Prijedor, as the Vice-president of the Crisis Staff. It was claimed that between 29 April and 31 December 1992, the Crisis Staff had authority and control over: the attacks on the non-Serbs villages and areas; the seizure and detention of the Bosnian Muslim and Bosnian Croat populations; the establishment and operation of the detention camps; and, the deportation or forced transfer of the Bosnian Muslim and Bosnian Croat population out of the Municipality of Prijedor.

c) Ongoing Trials

Tihomir Blaskić

Several cases involve Bosnian Croats accused of atrocities committed in the Lasva Valley in Bosnia and Herzegovina. One of these is the trial of a Bosnian Croat General, Tihomir Blaskić, who was the former chief of Staff of the Bosnian Croats.¹⁵⁶ His trial started on 24 June 1997 and should be finished by the summer. Blaskić, who is said to have been a Regional Commander of the Croatian Defence Council (HVO) prior to becoming its Chief of Staff, is charged with Crimes against humanity, Grave breaches of the Geneva Conventions and Violations of the laws or customs of war. He is alleged to have planned and executed a systematic campaign of bombarding, attacking and destroying towns, villages and hamlets in the Lasva Valley region of central Bosnia, directed against its predominantly Muslim population. General Blaskić surrendered himself into the custody of the International Tribunal on 1 April 1996.

Other Lasva Valley cases

On Monday 6 October 1997, ten former members of the political and military bodies of the then Croatian community of Herceg-Bosna surrendered themselves into custody of the International Criminal Tribunal for the former Yugoslavia (ICTY). They were indicted on 10 November 1995, as a result of an investigation by the Office of the Prosecutor of the ICTY into the „persecution on political, racial and religious grounds of the Bosnian Muslim population” of the Lasva Valley Region (Central Bosnia) in 1993. The ten accused are charged in two separate indictments („Kordic and others” and „Kupreskic and others”). According to the indictment, the crimes the accused are charged with were carried out on „such a large scale and

¹⁵⁵ *Prosecutor v. Milan Kovacević*, Case No. IT-97-25.

¹⁵⁶ *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14.

widespread basis, and implemented in such a systematic fashion” that they have „effectively destroyed or removed almost the entire Muslim civilian population in the Lasva Valley”. The crimes referred to in the indictment include, but are not limited to: the bombardments and attacks of numerous undefended towns, villages and dwellings, which caused the death of more than 100 Bosnian civilians in the Lasva Valley area and in the city of Zenica, and which wounded many others – the internment of Bosnian Muslims who were subject to cruel interrogations, physical or psychological abuse, or used for forced labour (digging of trenches) or as human shields – the attacks, bombardments and destruction of Bosnian Muslim businesses, buildings, personal properties and livestock, in order to kill, terrorise or demoralise the Bosnian Muslim population. Hundreds of civilians were killed or wounded in numerous locations such as Ahmici and Vitez. The cases of *Aleksovski* and *Furundzija*, discussed above, also involve charges related to the Lasva Valley. Two trials concerning events in the Lašva valley are currently ongoing. The trial of Kordić and Cerkez,¹⁵⁷ which started on 12 April 1999, and the Trial of Kupreskić and others,¹⁵⁸ which involves 6 defendants and started on 30 November 1998.

Goran Jelesić

Then there is the trial of Goran Jelesić, who was detained by SFOR forces on 22 January 1998, and transferred to Tribunal.¹⁵⁹ Goran Jelesić was indicted on 21 July 1995 along with Ranko Cević in the “Brčko indictment”. According to Prosecutor, beginning on about 30 April 1992, Serb forces from Bosnia and elsewhere in the former Yugoslavia fought to obtain control of Brčko, a town and municipality in the Republic of Bosnia and Herzegovina. Serb troops forcibly expelled Croat and Muslim residents from their homes, and with the assistance of local Serb authorities held them at collection centres, where many were killed, beaten and otherwise mistreated. During most of May 1992, Goran Jelesić acted as a commander of Luka camp and called himself the „Serb Adolf”. He is accused of the systematic killing Muslim detainees at the Laser Bus Company, the Brčko police station and Luka camp. He introduced himself as the “Serb Adolf”, said that he had come to Brčko to kill Muslims and often informed the Muslim detainees and others of the number of Muslims he had killed. He pleaded guilty to 31 counts of Crimes against humanity and Violations of the Laws and Customs of War, but contests the counts of Genocide. His trial on the basis of Genocide began on 30 November 1998.

d) Trials in Preparation

There are now a few trials in the pipeline which involve camp cases. In one multi-defendant cases, Kvočka and others, four Bosnian Serbs are charged with offences in the notorious Omarska, Keraterm and Trnopolje camps in Bosnia and Herzegovina.¹⁶⁰

¹⁵⁷ *Prosecutor v. Dario Kordić and Mario Cerkez*, Case No. IT-95-14.

¹⁵⁸ *Prosecutor v. Kuprekić et al.*, Case No. IT-95-16.

¹⁵⁹ *Prosecutor v. Goran Jelesić*, Case No. IT-95-10.

¹⁶⁰ *Prosecutor v. Kvočka et al.*, Case No. IT-95-30.

Kunarać¹⁶¹ and Krnojević¹⁶² are two other cases in which Bosnian Serbs are charged with offences committed in camps, in and around the region of Foča. Muslim women in Foča (south-eastern Bosnia and Herzegovina) were, according to the Prosecutor, subjected to a brutal regime of gang rape, torture and enslavement by Bosnian Serb soldiers, policemen and members of paramilitary groups after the takeover of the city in April 1992. These two cases form part of a major indictment issued by the International Tribunal dealing specifically with sexual offences. The indictment charges Dragan Gagović, Gojko Janković, Janko Janjić, Radomir Kovać, Zoran Vuković, Dragan Zelenović, Dragoljub Kunarać and Radovan Stanković with Crimes against humanity, Grave breaches of the Geneva Conventions and Violations of the Laws or Customs of War. The indictment is of major legal significance as it was the first time that sexual assaults have been diligently investigated for the purpose of prosecution under the rubric of torture and enslavement as a crime against humanity.

Another multi-defendant trial is soon to start. The case of Simić *et al.*, deals with deportation and ethnic cleansing in the Bosanski Samač area.¹⁶³ This was one of the first ones to fall under Serb control upon the proclamation of independence by Bosnia and Herzegovina in March 1992.

One of the “bigger fish” arrested recently is General Radislav Krstić, a Bosnian Serb General indicted for his role in the massacres following the take-over of the Srebrenica safe haven in July 1995.¹⁶⁴ The Prosecutor believes that close to 7000 Muslim men were killed in its aftermath. The indictment of 2 November 1998, charges the General with 2 counts of Genocide, and several counts of Crimes against Humanity: 1 count of extermination, 2 counts of murder and 1 count of persecutions.

e) The First Kosovo Indictment

Finally, there is the outstanding indictment against President Milošević and the four other high-level accused issued on 22 May 1999.¹⁶⁵ The indictment alleges that, between 1 January and late May 1999, forces under the control of the five accused persecuted the Kosovo Albanian civilian population on political, racial or religious grounds. By the date of the indictment, approximately 740,000 Kosovo Albanians, about one-third of the entire Kosovo Albanian population, had been expelled from Kosovo. Thousands more are believed to be internally displaced. An unknown number of Kosovo Albanians have been killed in the operations by forces of the FRY and Serbia. Specifically, the five indictees are charged with the murder of over 340 persons identified by name in an annex to the indictment. Each of the accused is charged with three counts of Crimes against humanity (deportation, murder and persecutions) and one count of Violations of the laws or customs of war (murder).¹⁶⁶ In addition,

¹⁶¹ *Prosecutor v. Dragoljub Kunarać*, Case No. IT-96-23.

¹⁶² *Prosecutor v. Milorad Krnojević*, Case No. IT-97-25.

¹⁶³ *Prosecutor v. Milan Simić et al.*, Case No. IT-95-9.

¹⁶⁴ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33.

¹⁶⁵ *Prosecutor v. Milošević et al.*, Case No. IT-99-37-I.

¹⁶⁶ Press Release, The Hague, 27 May 1999, JL/PIU/403-E.

the indictment charges each of the accused not only with individual criminal responsibility on the basis of Art. 7(1) of the Statute, but also on the basis of their superior authority pursuant to Art. 7(3) of the Statute.¹⁶⁷

In what follows, an account will be provided of some notable decisions on points of law, rendered by the ICTY thus far. The issues selected for second part of this article concern primarily the interpretation by the ICTY Trial Chambers and Appeals Chamber of the articles 2, 3, 4 and 5 of the Statute.

Part II. The Contribution made by the ICTY to International Criminal Law

It is indisputable that several of the decisions of the ICTY Trial Chambers and the Appeals Chamber have made important contributions to the development of international criminal law in general and international humanitarian law in particular. The secondary literature on this jurisprudence is flourishing.¹⁶⁸ What follows is a discussion of a few selected questions. Under (I) and (II) the Tribunal's interpretation of the definition of (international) armed conflict and its application to the situation in the SFRY will be examined. Headings (III) and (IV) are devoted to an analysis of the Tribunal's jurisprudence on its subject-matter jurisdiction.

I. The Definition of Armed Conflict

The decisions of the ICTY indicate that Articles 2, 3 and 5 of the Statute, either by their terms or by virtue of the customary rules which they import, proscribe certain acts when committed in connection with an armed conflict.¹⁶⁹ Therefore, if charges are brought under these articles, the Prosecution needs to prove that an armed conflict existed at all relevant times in the territory relevant to the indictment, and secondly, that there is a link between the alleged offences and this conflict.¹⁷⁰

The test for the existence of armed conflict formulated by the Appeals Chamber in the *Tadić* jurisdiction decision was formulated in very broad terms as follows: "(...) an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State."¹⁷¹ Applying this test to the facts of the case, the Appeals Chamber concluded that: "Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer

¹⁶⁷ Indictment, *Prosecutor v. Milošević et al.*, Case No. IT-99-37-I, paras. 81–89.

¹⁶⁸ F e n r i c k, *supra*, note 139, pp. 197; C h. G r e e n w o o d: "The Development of International Humanitarian Law..." *supra*, note 75, pp. 97 ff.; Z e i l e i s s e n, *supra*, note 129, p. 47; M u r p h y, *supra*, note 106, pp. 57 ff.

¹⁶⁹ *Inter alia*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *The Prosecutor v. Duško Tadić*, Case No IT-94-AR72, pp. 36–37, paras. 67–69, pp. 72–73, paras. 138–142 (hereinafter: *Tadić* Jurisdiction Decision).

¹⁷⁰ Opinion and Judgement, 7 May 1997, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, para. 559, pp. 201–202 (hereinafter: *Tadić* Opinion and Judgement).

¹⁷¹ *Tadić* Jurisdiction Decision, *supra*, note 169, p. 37, para. 70.

of 1992 when the alleged crimes are said to have been committed, and persists to this day (...). These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between government forces and organised insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed – a factual issue on which the Appeals Chamber does not pronounce – international humanitarian law applies.”¹⁷² The test devised by the Appeals Chamber was adopted and applied subsequently by the Trial Chambers in the *Tadić*, *Čelebići* and the *Furundzija* cases.¹⁷³ In its decision on the merits of the *Tadić* case, the Trial Chamber held that, until the Dayton Peace Agreement¹⁷⁴ was concluded and notwithstanding the various cease-fire agreements entered into in various parts of BiH, no general cessation of hostilities had occurred there or elsewhere in the territory of the former Yugoslavia.¹⁷⁵ This was subsequently confirmed in the *Čelebići* case in which the Trial Chamber found, *inter alia*, that it was evident: “that there was no general cessation of hostilities in Bosnia and Herzegovina until the signing of the Dayton Peace Agreement in November 1995.”¹⁷⁶

Hence, the jurisprudence of the ICTY on the application of the “armed conflict” test to the facts on the ground is fairly unanimous. It can probably no longer be seriously disputed that the hostilities in the SFRY, at least until the conclusion of the Dayton accords, reached the threshold level of armed conflict necessary to trigger the application of international humanitarian law, and in particular of the Geneva Conventions.¹⁷⁷ This does not mean of course, that the Defence will concede this point. In the *Furundzija* case, for example, the Trial Chamber noted that the Defence refused to concede that a state of armed conflict existed at the relevant time, although it had called no evidence to counter the submissions of the Prosecution. The Defence counsel only admitted that there had been an attack by the HVO on civilians.¹⁷⁸ Applying the above test to determine the existence of an armed conflict, the Trial Chamber dismissed the Defence objections in a cursory manner in that it found “on the clear evidence in this case, that at the material time, being mid-May 1993, a state of armed conflict existed between the HVO and the AbiH.”¹⁷⁹

¹⁷² *Ibid.*, pp. 37–38, para. 70.

¹⁷³ *Tadić* Opinion and Judgement, *supra*, note 170, p. 202, para. 561 and p. 204, para. 566; Judgement, 16 November 1998, *The Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, p. 79, para 209 (hereinafter: *Čelebići* Judgement); Judgement, 10 December 1998 in the *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1T, pp. 24–25, para. 59 (hereinafter: *Furundzija* Judgement).

¹⁷⁴ General Agreement on Peace for Bosnia and Herzegovina, concluded in Dayton, Ohio, November 1995.

¹⁷⁵ *Tadić* Opinion and Judgement, *supra*, note 170, pp. 204–205, para. 566.

¹⁷⁶ *Čelebići* Judgement, *supra*, note 173, p. 72, para. 186, p. 81, para. 215.

¹⁷⁷ Leaving the classification of the character of the conflict (whether it was international or internal), aside for the moment.

¹⁷⁸ *Furundzija* Judgement, *supra*, note 173, p. 24, para. 58.

¹⁷⁹ *Ibid.*, p. 25, para. 59.

However, to prove a particular charge under either Art. 2, 3 or 5 of the ICTY Statute, it is not sufficient for the Prosecutor to demonstrate the existence of an armed conflict. For a crime to fall within the ICTY jurisdiction, it must be shown that there is a sufficient nexus between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.¹⁸⁰ The settled jurisprudence of the ICTY indicates that a sufficient nexus would exist between a crime and an armed conflict if the relevant crime was committed in the course of fighting or, for example, the take-over of a town during an armed conflict.¹⁸¹ However, it is not essential for the nexus to be so direct. The Appeals Chamber has clearly indicated that the nexus required is only a relationship between the conflict and the acts, not that the acts occurred in the midst of a battle.¹⁸² It was stated that it is sufficient to prove that “the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”¹⁸³ Similarly, it was held by the Tadić Trial Chamber that it “would be sufficient to prove that the crime was committed in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties. It is not, however, necessary to show that armed conflict was occurring at the exact time and place of the proscribed acts alleged to have occurred, as the Appeals Chamber has indicated, nor is it necessary that the crime alleged takes place during combat, that it be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to a conflict (...). The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict as a whole.”¹⁸⁴

In summary, the ICTY jurisprudence indicates that the geographical and temporal frame of reference for the required link between the alleged offences and the armed conflict in the SFRY is broad. It is sufficient for the Prosecutor to prove that the crime was committed in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties. It is not necessary to show that armed conflict was occurring at the exact time and place of the alleged crime, nor is it necessary that the alleged crime takes place during armed combat, or that it was part of a policy, or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act was in actual furtherance of a policy associated with the conduct of war, or in the actual interest of a party to the conflict.¹⁸⁵

¹⁸⁰ See further in *Tadić* Opinion and Judgement, *supra*, note 170, pp. 207–208, paras. 572–575.

¹⁸¹ *Čelebići* Judgement, *supra*, note 173, p. 74, para. 193.

¹⁸² *Tadić* Jurisdiction Decision, *supra*, note 169, p. 37, para. 69.

¹⁸³ *Ibid.*, p. 38, para. 70.

¹⁸⁴ *Tadić* Opinion and Judgement, *supra*, note 170, para. 573.

¹⁸⁵ *Tadić* Jurisdiction Decision, *supra*, note 169, pp. 36–38, paras. 68–70; *Tadić* Opinion and Judgement, *supra*, note 170, pp. 207–208, para. 573; *Čelebići* Judgement, *supra*, note 173, p. 74, paras 193–195.

II. The Extent and Nature of the Conflict in the SFRY

A. Introduction

The legal definition of “war” has always been a hotly debated issue in the literature.¹⁸⁶ Yet, such debates are of little relevance for the application of modern international humanitarian law. Most of the rules of international humanitarian law extend even to those international armed conflicts which the parties do not regard as wars.¹⁸⁷ Art. 2, Common to the Geneva Conventions, indicates that the threshold for their application is very low in that they apply to “all cases 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 of them, and even 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.”

Whilst Common Art. 2 does not give a definition of the term “armed conflict,” a description of the term can be found in the ICRC Commentary to the Conventions, which takes a very broad view of what constitutes an “international armed conflict”. Accordingly, there is no need for a formal declaration of war, nor for the recognition of the state of war, as preliminaries to the application of the Convention. The occurrence of de facto hostilities is sufficient. Pursuant to the ICRC Commentary, “any difference arising between the two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.”¹⁸⁸

The clarification given by the ICRC Commentary was cited as authoritative, *inter alia*, by the ICTY Trial Chambers in the *Tadić* case¹⁸⁹ and in the *Čelebići* case.¹⁹⁰ Hence, at least in the eyes of the ICTY, an international armed conflict exists as soon as there are hostilities involving the use of armed force between two or more States. Thus, in the ICTY’s view, to determine whether or not there is an armed conflict pursuant to the Geneva Conventions, the situation “on the ground” is much more important than the claims made by parties. There is support for such a low threshold in State practice. The US, for example, considered that an armed conflict triggering the application of international humanitarian law had come into being between itself and Syria when Syrian anti-aircraft batteries in Lebanon shot down a United States naval aircraft in 1983 and captured the pilot.¹⁹¹

¹⁸⁶ Ch. Greenwood: „The Concept of War in Modern International Law,” 36 *International and Comparative Law Quarterly* 238 ff. (1987).

¹⁸⁷ Ch. Greenwood: „Historical Development and Legal Basis’ (1995), p. 8, para. 102.

¹⁸⁸ ICRC (Pictet, J., ed.), *Commentary, Geneva Convention IV* (1960), pp. 20–21.

¹⁸⁹ *Tadić* Opinion and Judgement, p. 206, para. 569; pp. 43–44, paras. 118–119 and p. 227, para. 607.

¹⁹⁰ *Čelebići* Judgement, *supra*, note 173, p. 79, para. 208.

¹⁹¹ III *Digest of United States Practice in International Law* 3456 (1981–88).

B. The *Tadić* Jurisdiction Decision

It was demonstrated earlier in this article that international and internal armed conflicts have been treated differently in international humanitarian law. In view of this *two-box regulatory system*, the question of the character of the conflict in the SFRY is of paramount importance.

At various times, the following main groups, entities or States have faced each other as belligerents on the territory of the SFRY: a) the SFRY which was succeeded on 27 April 1992 by the FRY, and was engaged in armed conflict against one or more of Slovenia, Croatia and Bosnia; b) Croatia was engaged in armed conflict against the SFRY, the so-called Republic of Serbian Krajina (RSK), the FRY, and Bosnia; c) Bosnia was engaged in armed conflict against the SFRY, the FRY, the Republika Srpska (RS), Croatia, the HVO (the Bosnian-Croat entity), and the Bosnian Muslim faction controlled by Fikret Abdic; d) Slovenia was engaged in armed conflict with the SFRY;¹⁹² Since the escalation of the conflict in Kosovo, the following parties need to be added: f) the FRY engaged in armed conflict against the KLA and the NATO.

In the *Tadić* jurisdiction decision the Appeals Chamber ruled that the conflicts in the former Yugoslavia had both internal and international aspects, and that the Security Council members who adopted the Statute were well aware of this.¹⁹³ In other words, the Appeals Chamber decided that there were potentially several distinct conflicts and it refused to accept that all of these should automatically be regarded as a single armed conflict, wholly international in character.¹⁹⁴ The Chamber went on to lay down a general framework for the classification of the armed conflicts in the former Yugoslavia.¹⁹⁵ More specifically, the Appeals Chamber held that the "conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army («JNA») in hostilities in Croatia, as well as in Bosnia and Herzegovina at least until its formal withdrawal on 19 May 1992."¹⁹⁶

It was left up to the Trial Chamber to determine whether the activities of the Bosnian Serbs in Prijedor in May–August 1992, when the alleged crimes by the accused Duško Tadić took place, were, as a matter of fact, part of the international armed conflict between Bosnia and Herzegovina and the Federal Republic of Yugoslavia. The Appeals Chamber specified that this would be so if it could be proved that the Federal Republic of Yugoslavia had been directly involved.¹⁹⁷

¹⁹² F e n r i c k, *supra*, note 139, p. 220.

¹⁹³ *Tadić* Jurisdiction Decision, *supra*, note 169, pp. 39–43, paras. 72–77.

¹⁹⁴ *Ibid.*, p. 39, para. 72.

¹⁹⁵ *Ibid.*, pp. 39–43, paras. 72–77.

¹⁹⁶ *Ibid.*, p. 39, para. 72.

¹⁹⁷ *Ibid.*, p. 39, para. 72.

C. The Subsequent Trial Chamber Decisions

On the basis of the above framework, several Trial Chambers subsequently determined the character of the conflict in the period relevant to the respective indictments. Starting with the *Tadić* case, in its Opinion and Judgement of 7 May 1997 the Trial Chamber decided that the armed conflict in Bosnia and Herzegovina from the beginning of 1992 until 19 May 1992 was international. It found that there was from the beginning of 1992 until 19 May 1992, a state of international armed conflict in at least part of the territory of Bosnia and Herzegovina. According to the Trial Chamber, this “was an armed conflict between the forces of the Republic of Bosnia and Herzegovina on the one hand and those of the Federal Republic of Yugoslavia (Serbia and Montenegro), being the JNA (later the VJ) on the other (...) the level of intensity of the conflict, including the involvement of the JNA or the VJ in the conflict, was sufficient to meet the requirements for the existence of an international armed conflict for the purposes of the Statute.”¹⁹⁸ However, the majority of the Trial Chamber, with the Presiding Judge dissenting, held that for the period after 19 May 1992, the victims of the alleged crimes could not be considered protected persons under the Geneva Conventions on the grounds that they were in the hands of the Bosnian Serb Army (VRS) which, in the majority’s view, was not sufficiently controlled by the Federal Republic of Yugoslavia (FRY).¹⁹⁹ The majority applied the “effective control” test that it derived from the “Military and Paramilitary Activities in and Against Nicaragua”²⁰⁰ to determine whether the actions of the Bosnian Serb armed forces could be imputed to the FRY after May 1992.

The Prosecutor believes that this finding was made in error and is currently appealing this judgement before the Tribunal’s Appeals Chamber, *inter alia*, on this particular point.²⁰¹ There are two main reasons why the Prosecutor regards the *Tadić* Trial Chamber’s decision as defective. First, the Prosecutor believes that the Trial Chamber misinterpreted the facts of the case. The evidence which was presented to the Trial Chamber shows, in the Prosecutor’s opinion, that an international armed conflict existed between the Republic of Bosnia and Herzegovina and the SFRY/FRY until 19 May 1992, and that thereafter the FRY’s armed forces, the Yugoslav Army (VJ), continued to be sufficiently involved in an armed conflict with the Bosnia and Herzegovina. Secondly, the Prosecutor contends that the *Tadić* Trial Chamber erred in relying on principles of State responsibility, derived from the 1984–1986 *Nicaragua* case before the ICJ, to determine the characterisation of the conflict in the SFRY. In order to characterise the character of the conflict as an international armed con-

¹⁹⁸ Opinion and Judgement, 7 May 1997, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, p. 206, para. 569; The elements on which this decision is based can be found in the text of the *Tadić* Trial Chamber’s Judgement, pp. 203–207, paras. 563 through 571, with a summary in para. 570.

¹⁹⁹ *Ibid.*, p. 227, para. 607.

²⁰⁰ Merits, Judgment, *ICJ Rep.* 14 (1986) (Nicaragua case).

²⁰¹ The Prosecution, designated as the Cross-Appellant, filed its Notice of Appeal on 6 June 1997; Brief of Argument of the Prosecution, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeals Chamber, 12 January 1998.

flict, the Prosecutor believes that it is only necessary to show that there are hostilities involving two or more States. It should not be required to show that all acts occurring that conflict should be imputable, in accordance with principles of State responsibility, to one or another of these States. As indicated before, the *Tadić* case was recently argued at the Appeals stage, and at the time of writing, the Appeals Chamber is still considering its decision.

After the notice of Appeal was filed in the *Tadić* case, the *Čelebići* Trial Chamber rendered a judgement which largely supports the arguments made by the Prosecution. In its Judgement of 16 November 1998, the *Čelebići* Trial Chamber explicitly rejected the *Tadić* Trial Chamber's decision on the characterisation of the conflict for the period beyond 19 May 1992. The *Čelebići* Trial Chamber did not believe that the alleged withdrawal by JNA troops from Bosnia and Herzegovina on 19 May 1992 was genuine, and considered that it would be wholly artificial to sever the period before 19 May 1992 from the period thereafter for the purposes of international humanitarian law. It found that "(...) the international armed conflict occurring in Bosnia Herzegovina, at least from April 1992, continued throughout that year and did not alter fundamentally in its nature."²⁰²

The above-mentioned holdings have been confirmed also in several Rule 61 proceedings of this Tribunal and by at least three judgements rendered by national courts. In the *Nikolić* Rule 61 decision, rendered shortly after the Appeals Chamber decision on jurisdiction in the *Tadić* case, Trial Chamber I concluded on the basis of the Prosecution evidence that the armed conflict in the territory of Bosnia and Herzegovina was international in character, not only in the "spring of 1992", but also for the period covered by the indictment in that case, *i.e.*, from late May 1992 to late September 1992.²⁰³ Likewise, in the *Karadžić and Mladić* decisions, also rendered pursuant to Rule 61 of the Rules of Procedure and Evidence, the Trial Chamber considered on the strength of the Prosecution evidence, that the JNA involvement in the conflict in Bosnia and Herzegovina was such that the latter should be regarded in its entirety as an international armed conflict.²⁰⁴

In addition to the above cases before the ICTY, there are at least three judgements delivered by national courts which support the international character of the conflict both before and after 19 May 1992.²⁰⁵

²⁰² Judgement, 16 November 1998, *The Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, p. 88, para. 234; The elements on which the latter holding of the decision is based can be found in the text of the Judgement, pp. 80–88, paras. 212 through 234

²⁰³ Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, *The Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-R6, pp. 14–17, paras. 27–30.

²⁰⁴ Review of Indictment Pursuant to Rule 61, 11 July 1996, *The Prosecutor v. Radovan Karadžić and Ratko Mladić*, Cases No. IT-95-5-R61 & No. IT-95-18-R61, pp. 49–50, para. 88.

²⁰⁵ Germany: Bayerisches Oberstes Landesgericht, 3 St 20/96, Judgment of 23 May 1997 (*Public Prosecutor v. Novislav Djajić*), pp. 108–113; Germany: Oberlandesgericht Düsseldorf, IV-26/96, 2 StE 8/96, Judgment of 26 September 1997 (*Public Prosecutor v. Nikola Jorgić*), pp. 158–159; Switzerland: Military Tribunal, Division 1, Lausanne, 19 April 1997 (*In re G.*), p. 8.

D. Assessment

The legacy of the *Tadić* case means that if the Prosecution wishes to bring charges under Art. 2 of the Statute, it has the burden of proving, among other elements, (a) that there was an international armed conflict in the sense of Art. 2 common to the Geneva Conventions; and (b) that the crimes must be directed against persons or property protected under the provisions of the relevant Conventions.²⁰⁶ This tends to lengthen the trial proceedings greatly, since a large number of witnesses and experts may need to be called. It is hoped that when the Appeals Chamber rules on the appeal against the Trial Chamber's Opinion and Judgement of 7 May 1997 in the *Tadić* case, scarce OTP resources can be used elsewhere. Meanwhile, the Prosecution has sought ways to simplify matters by make use of various procedural techniques, provided for in the ICTY Statute.

In relation to some cases, the decision was taken to drop charges based on Art. 2 of the Statute.²⁰⁷ What often remained were charges based on Art. 3 of the Statute, and more precisely, on Art. 3 Common to the Geneva Conventions. For these type of charges, the character of the armed conflict is unimportant. In other cases, the Prosecutor has tried to use the vehicle of "Judicial Notice". In the *Bosanski Samać (Simić et al.)* case, for example, the Prosecutor filed a pre-trial motion in which the Trial Chamber was asked to take "Judicial Notice" of the international character of the conflict for the period on which all Trial Chambers seemed to agree thus far: that is, the period between the date of Bosnia and Herzegovina's independence (6 March 1992) and the alleged withdrawal of the JNA (19 May 1992).²⁰⁸ The Prosecution submitted that the international character of the conflict in Bosnia and Herzegovina in the said period was a fact of common knowledge, or at the very least a fact of common knowledge within the province of the ICTY. Hence, the Prosecutor was of the view that the Trial Chambers should no longer require proof of this fact but should take judicial notice thereof in accordance with Rule 94 (A). In the alternative, the Prosecution submitted that the decisions of this Tribunal in the *Tadić* and *Čelebići* cases, which were discussed above, fell within the ambit of Rule 94 (B) of the Rules of Procedure and Evidence. Consequently, after hearing the Parties, Trial Chambers should decide to take judicial notice of the adjudicated fact of the international character of the armed conflict in Bosnia and Herzegovina for the said period.

In response to these and other attempts (also by the Defence) there have been a string of decisions in which Trial Chambers have confirmed that the determination of the character of the conflict in the former Yugoslavia is a mixed question of law and fact, which can only be decided after the issue has been fully debated during the

²⁰⁶ *Tadić* Jurisdiction Decision, *supra*, note 169, paras. 81, 84.

²⁰⁷ *Furundžija, Jelesić, Kunarać and Kupreskić* cases for example.

²⁰⁸ Pursuant to Rule 94 (A) of the Rules of Procedure and Evidence, a Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof. Rule 94 (B) of the Rules of Procedure and Evidence stipulates that at the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

merits phase of the trial.²⁰⁹ At the same time, the ICTY judges have clearly signalled their intention to attach substantial weight to the principles of equality of arms and judicial fairness, which in their view, should override the demands of judicial economy.²¹⁰ While this may be laudable principle for the conduct of war crimes trial in general, the question must be asked whether an objective background factor such as the character of the conflict should be subject to a complete review in every single case before the Tribunal. The character of the conflict would seem to constitute an objective fact, which, regardless of its importance for the qualification of their crimes, does not constitute a personal element to the accused.

Finally, it is one thing for the Trial Chambers to posit, in the abstract, that the character of the conflict is a "mixed question of law and fact", that can only be decided after both parties have had the full opportunity to adduce evidence either proving or rejecting the international character of the conflict. It is quite another matter if, as is the case now, Trial Chambers construe an identical mix of law and fact in opposite ways. This seems *par excellence* the type of contradiction the Appeals' Chamber should resolve. This would not only serve the interests of the Prosecution, but also of the Defence. Because of the different penal consequences which may follow from the application of Articles 2 and 3 of the ICTY Statute, it would be unfair to the accused to let contradictory judgements on the character of the same conflict stand.

What is the way forward? There may be ways to speed to judicial process up, whilst simultaneously preserving the rights of the Defence. One possibility was recently offered by the *Čelebići* Trial Chamber, which suggests that the whole issues of the character of the conflict in the SFRY should be treated as a rebuttable presumption in favour of the international character of all conflicts of which the Trial Chambers may be seized. The *Čelebići* Trial Chamber decided that it must be presumed that conflict it was seized of was an international one, but that the Defence must be allowed to prove the contrary in relation to a particular conflict at issue.²¹¹

²⁰⁹ See, for instance, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, 4 April 1997, Decision Rejecting a Motion of the Defence to Dismiss Counts 4, 7, 10, 14, 16 and 18 Based on the Failure to Adequately Plead the Existence of an International Armed Conflict; Decision on Defence Motion to Strike Counts 4, 5, 8, 9, 10, 11, 13 and 15, 6 July 1998, *The Prosecutor v. Milan Kovačević*, Case No. IT-97-24 – PT; *Čelebići* Judgement, *supra*, note 173, pp. 77–78, para. 205; *Prosecutor v. Simić et al.*, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, IT-95-9-PT, 25 March 1999; see also: Dissenting Opinion by Judge Patrick Robinson of the Appeals Chamber in *Prosecutor v. Zlatko Aleksovski*, Case No. IT-94-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999.

²¹⁰ *Prosecutor v. Kvočka et al.*, Decision on Prosecutor's Motion for Judicial Notice of Adjudicated Facts, IT-98-40-PT, 19 March 1999; *Simić et al.* Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, IT-95-9-PT, 25 March 1999.

²¹¹ "Before proceeding any further, the Trial Chamber deems it necessary to address the possibility that there may be some confusion as to the parameters of this concept of an "international armed conflict." We are not here examining the Konjic municipality and the particular forces involved in the conflict in that area to determine whether it was international or internal. Rather, should the conflict in Bosnia and Herzegovina be international, the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities, unless it can be shown that the conflicts in some areas were separate internal conflicts, unrelated to the larger international armed conflict. Should the entire conflict in Bosnia and Herzegovina

III. The Appeal's Chamber Construction of Articles 2 and 3 of the Statute

A. Construction of Article 2

In the *Tadić* case, which was the very first case to come to a full trial at the ICTY, the jurisdictional scope of the Tribunal's Statute was debated in depth, both before the Trial Chamber and in the interlocutory appeal on the jurisdiction before the Appeals Chamber. In reply to various challenges, the Appeals Chamber interpreted the jurisdictional scope of the articles relevant for this discussion.

Art. 2 of the Statute, entitled "Grave breaches of the Geneva Conventions of 1949" stipulates that the ICTY "shall have the power to prosecute persons committing or ordering to be committed Grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages."

In its decision of 2 October 1995 on jurisdictional matters in the *Tadić* case, the Appeals Chamber held that the Trial Chamber had misinterpreted the scope of that article, when it decided that the character of the conflict was irrelevant for the purpose of that provision. In the Appeals Chamber's view, although Art. 2 of the Statute makes no reference to the type of conflict, the substantive law which this provision empowers the Tribunal to apply, it is the Geneva Conventions of 1949, which determine the concept of Grave breaches. Furthermore, the Appeals Chamber stressed that the Geneva Conventions link the concept of Grave breaches to that of protected persons or protected property, terms which are defined in such a way that they can exist only in an international armed conflict.²¹²

However, the Appeals Chamber indicated also that a change in customary law may be occurring so that the Grave breaches system may eventually operate regardless of whether the armed conflict is international or internal.²¹³ The Chamber discussed some of the factors indicating a possible change in State practice and doctrine. First, the Appeals Chamber refers to its analysis of substantive law applicable to internal armed conflicts, intimating that the traditional dichotomy between international and internal armed conflicts is becoming increasingly blurred. It also notes the contention made by the Government of the United States in an *amicus curiae* brief

be considered internal, the provisions of international humanitarian law applicable in such internal conflicts apply throughout those areas controlled by the parties to the conflict, until a peaceful settlement is reached": *Čelebići* Judgement, *supra*, note 173, p. 79, para. 209.

²¹² *Tadić* Jurisdiction Decision, *supra*, note 169, p. 46, para. 81.

²¹³ *Ibid.*, p. 47, para. 83.

before the Chamber, according to which the Grave breaches provisions of Art. 2 of the Statute apply to international and internal armed conflicts. The Chamber also points to the provisions of the German military manual pursuant to which Grave breaches apply to violations of Common Art. 3. Another indicator cited by the Chamber is the agreement made on 1 October 1992²¹⁴ by the warring parties in Bosnia and Herzegovina “clearly made within the framework of an internal armed conflict”, to apply the Grave breaches provisions. Finally, the Chamber also cites the judgement rendered on 25 November 1994 by a Danish court in the case of *Refik Sarić*, in which the Grave breaches provisions of the conventions were – on the face of it – applied without an examination of the character of the conflict. This judgement is viewed as an indication that some national courts are also taking the view that the Grave breaches “system” may operate regardless of whether the armed conflict is international or internal.²¹⁵

The latter suggestion was seized on in two subsequent decisions rendered by Trial Chambers. In its judgement of 16 November 1998, the *Čelebići* Trial Chamber opined that there was a possibility that customary law had already reached the stage of development referred to by the Appeals Chamber.²¹⁶ Furthermore, in a recent decision of 2 March 1999 in the *Kordić and Čerkez* case, the Trial Chamber took note of the dicta of the Appeals Chamber and the *Čelebići* Trial Chamber on this question.²¹⁷

There is a distinct doctrinal trend favouring the application of substantive humanitarian law to internal armed conflicts.²¹⁸ In addition, there is undeniably evidence of a growing State practice and *opinio juris* on the need to “criminalise” violations committed in internal armed conflicts. However, most of the evidence in this regard relates to the recognition of the individual criminal responsibility for violations of substantive law applicable to internal armed conflicts.²¹⁹ As will be seen immediately below, the *Tadić jurisdiction* decision was a definite trend-setter in this regard.

²¹⁴ The date of the agreement mentioned in paragraph 83 at p. 47 of the jurisdiction decision is most probably wrong; the decision itself refers to an earlier discussion at p. 40, para. 73, where the agreement is dated 22 May 1992.

²¹⁵ *Tadić Jurisdiction Decision*, *supra*, note 169, pp. 47–48, para. 83.

²¹⁶ *Čelebići Judgement*, *supra*, note 173, p. 76, para. 202.

²¹⁷ *Prosecutor v. Kordić and Čerkez*, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, Case No. IT-95-14/2-PT, T. Ch. III, 2 Mar. 1999, p. 11, para. 15.

²¹⁸ Consider for instance the following statement by the managing editor of the new Yearbook of International Humanitarian Law: “With the increase in the number of internal and internationalised armed conflicts is coming greater recognition that a strict division of conflicts into internal and international is scarcely possible, if it ever was, and that the distinction between grave breaches and other war crimes is becoming increasingly blurred and irrelevant from a practical point of view – although it still exists (sic) juridically – especially given the trend towards recognising that war crimes committed in internal armed conflicts can give rise to individual criminal responsibility, and that grave breaches might also be committed in internal armed conflicts (with reference, *inter alia*, to the Appeals Chamber decision in the *Tadić Jurisdiction* case): A. M c D o n a l d: „The Year in Review,” 1 *JIHL* 113 at 121 (1998).

²¹⁹ A good introduction to State practice and *opinio juris* are the Correspondents’ Reports on several countries which can be found in 1 *YIHL*; see also: Th. M e r o n: „International Criminalization of Internal Atrocities,” 89 *AJIL* 554 ff. (1995); Th. G r a d i t z k y: „La Responsabilité Pénale Individuelle pour Violation

B. Construction of Article 3

Art. 3, entitled "Violations of the laws or customs of war" stipulates that the ICTY "shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property."

In sharp contrast to its strict interpretation of Art. 2 of the Statute, the Appeals Chamber gave an expansive interpretation of Art. 3 of the Statute. This provision was construed as a residual basis of jurisdiction that may be invoked when more specialised provisions of the Statute do not apply. Thus the "laws or customs of war", referred to Art. 3 of the Statute were held to constitute a general and residual clause covering all violations of humanitarian law not falling under Art. 2 or covered by Arts. 4 and 5, more specifically: (1) violations of the Hague law on international conflicts; (2) infringements of provisions of the Geneva Conventions other than those classified as "Grave breaches" by those Conventions; (3) violations of Common Art. 3 and other customary rules on internal conflicts and (4) violations of agreements binding upon the parties to the conflict, considered qua treaty law, *i.e.*, agreements which have not turned into customary international law.²²⁰

The other major contribution by the ICTY to the further development of international law applicable to internal armed conflict came as a result of the answers given by the Appeals Chamber to the questions of substance and criminality. In an important sense, the *Tadić* Jurisdiction decision on these points was foreshadowed by the decision of the Security Council to include violations of Common Art. 3 and Additional Protocol II in the Statute of the ICTR.²²¹ Furthermore, the municipal law of some countries already provided for individual criminal responsibility for certain offences committed in the latter type of conflicts.²²²

Nonetheless, the *Tadić* jurisdiction decision broke new ground for it asserted in unequivocal terms that individual criminal responsibility exists for violations of the

du Droit International Humanitaire applicable en Situation de Conflict Armé Non International," 829 *ICRC Review* 29 ff. (1998); E. D a v i d: "La Loi belge sur les crimes de guerre," 28 *RBDI* 668-671 (1995).

²²⁰ *Tadić* Jurisdiction Decision, *supra*, note 169, p. 51, para. 89.

²²¹ Art. 4 of the Rwanda Statute; Report of the Secretary-General pursuant to para 5 of SC Res. 955 (1994) at p. 2 para. 12 (S/1995/134); L. M o i r: "The Implementation and Enforcement of the Laws of Non-International Armed Conflict," 3 *Journal of Armed Conflict Law* 163 at 164 (1998); C. C i s s é, *supra*, note 78, p. 167; Th. G r a d i t z k y, *supra*, note 219, p. 50; Z e i l e i s s e n, *supra*, note 129, pp. 83-85.

²²² *Inter alia*, the Belgian law of 16 June 1993 concerning repression of grave breaches ("infractions") of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 8 June 1977, entered into force on 5 August 1993; E. D a v i d, *supra*, note 219, pp. 668-671; See also: the new Spanish penal code enacted on 23 November 1995 follows in the footsteps of the Belgian legislator: Código Penal, Law 10/1995, of 23 November, abstracted in 1 *JHIL* 636-640 (1998); see also: G r a d i t z k y, *supra*, note 219, p. 29 ff.

laws applicable to internal armed conflicts. This had not previously been asserted by any international or national tribunal. On this point the Appeals Chamber decision was warmly received internationally and it has since exerted considerable influence. The question whether this recognition of individual criminal responsibility violates the principle of legality is not that difficult to answer, at least not in the opinion of Professor Greenwood who argues that if “violations of the international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why, once those laws came to be extended (albeit in attenuated form) to the context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of clear indications to the contrary”.²²³

The last point in this regard is the question of the substantive contents of the law applicable to internal armed conflicts. Here also, the *Tadić* jurisdiction decision is of paramount importance. The Appeals Chamber confirmed the earlier opinion rendered by the ICJ in the *Nicaragua* case, that the norms enumerated in Common Art. 3 of the Geneva Conventions, form part of the body of substantive customary international law applicable to all types of armed conflict.²²⁴ In addition, the Appeals Chamber took the opportunity to explore to what extent rules relating to conduct of hostilities which traditionally belong to the Hague Law sphere, might now be binding for parties to internal armed conflicts as well. The Chamber concluded that there had now developed a body of customary international law regulating the conduct of hostilities in internal armed conflicts, the principal features of which were: (a) rules relating to the protection of civilians and civilian objects; (b) a general duty to avoid unnecessary harm; (c) certain rules on means and methods of warfare, in particular a ban on the use of chemical weapons and perfidious means of warfare; (d) protection of certain objects, such as cultural property.²²⁵ The Appeals Chamber cautioned however, that: (1) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal armed conflicts; and (2) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of the rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.²²⁶ The rules on conduct of hostilities were not material to the *Tadić* case, and the opinion of the Appeals Chamber is therefore, at least on this part of the law applicable to internal armed conflicts, *obiter dicta*. Nevertheless, they may play a part as evidence of *opinio juris* in the formation of new rules of customary international law.

The academic literature is divided over the approach which the Tribunal has taken in interpreting the scope and the relationship between Arts. 2 and 3 of the Statute. Whilst some consider the net results awkward,²²⁷ others have expressed disappointment with the Appeals Chamber’s decision in that an opportunity to further the cause

²²³ Ch. Greenwood: “International Humanitarian Law and the *Tadić* Case” (paper on file with author) (1996), p. 26; David: *Principes...*, *supra*, note 32, pp. 644–649.

²²⁴ *Tadić* Jurisdiction Decision, *supra*, note 169, para. 102, pp. 56–57.

²²⁵ *Ibid.*, paras. 96–127, pp. 53–68.

²²⁶ *Ibid.*, para. 126, p. 67.

²²⁷ Murphy, *supra*, note 106, p. 68.

of international humanitarian law would have been missed.²²⁸ However, it should be noted that the detractors' criticism is often directed at different parts of the Appeals Chamber decision, and it would certainly be an overstatement to conclude that the decision on the jurisdictional scope of Arts. 2 and 3 has been criticised across the board.²²⁹ A great deal of the faultfinding, it seems, is reserved for the Appeals Chamber and Trial Chamber's analysis of the nature of the conflict in the former Yugoslavia, which has been discussed above.²³⁰

C. Narrowing of the Regulatory Gap

In subsequent decisions of the ICTY (and the ICTR), the trend set by the Appeals Chamber in the *Tadić* case has been confirmed and continued. The Trial Chambers have faithfully abided by the two-box regulatory system, but they have also issued decisions which show that the substantive content of the crimes mentioned under Arts. 2, 3, and 5 of the Statute may be fairly similar. The net result of this jurisprudence is a "rapprochement" of the substantive regulatory content of war crimes committed in international and internal armed conflict.

For instance, the term "wilful killing" is used by the provisions on Grave breaches in the Geneva Conventions – Arts. 50, 51, 130 and 147 – whereas the concept of "murder" is used in Common Art. 3 of the Geneva Conventions and in Art. 5(a) of the Tribunal's Statute. However, the Trial Chambers in the *Čelebići* and *Akayesu* cases confirmed that there is no qualitative difference between these terms such as to render the elements constituting these offences materially different.²³¹

Similarly, the *Čelebići* judgement indicates that the umbrella charge of "inhuman treatment" of the Grave breaches provisions of the Geneva Conventions, which can be charged under Art. 2 of the Statute, carries the same meaning as the charge of "cruel treatment" under Common Art. 3 of the Geneva Conventions, which can be charged under Art. 3 of the Statute.²³²

The Trial Chambers in the *Čelebići* and *Furundžija* cases contain also significant contributions to the prohibition of torture under international law. They confirmed that torture is prohibited by a general rule of international law, both in internal and international armed conflicts.²³³ They also confirmed that the prohibition of torture is absolute and non-derogable in any circumstances, and that is not only considered

²²⁸ Th. Meron: „Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout,” 92 *AJIL* 237–238 (1998).

²²⁹ The following authors, for example agree with the Appeals Chamber's characterisation of the conflicts as encompassing aspects of international and internal armed conflicts: R. Muellerson: „International Humanitarian Law in Internal Armed Conflicts,” 2 *Journal of Armed Conflict Law* 109 at 111–112 (1997); Ch. Greenwood: „International Humanitarian Law...,” *supra*, note 223, pp. 9–13; Zeileisen, *supra*, note 129, p. 61.

²³⁰ Th. Meron: „International Criminalization...,” *supra*, note 219, pp. 554 at 555;

²³¹ *Čelebići* Judgement, pp. 154–155, paras. 421–422; see also: *Prosecutor v. Akayesu, Judgement*, Case No. ICTR-96-4-T, T. Ch. I, 2 Sep. 1998, p. 238, paras. 589–590 (hereinafter: *Akayesu* Judgement).

²³² *Čelebići* Judgement, *supra*, note 173, pp. 161–162, paras. 442, 443, p. 194, para. 544.

²³³ *Ibid.*, p. 163, para. 446; *Furundžija* Judgement, *supra*, note 173, p. 53, para. 139.

a norm of customary law, but constitutes a norm of *jus cogens*. Furthermore, their decisions also indicate that the Prosecution is justified to rely on the wider definition of torture contained in the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the “Torture Convention”), which is regarded as reflecting customary international law.²³⁴

In similar vein, the ICTY Trial Chambers have made unparalleled contributions to the criminalisation of rape in international law. Based on an extensive analysis of international and domestic legal rules, the *Furundzija* Trial Chamber pointed out that international criminal rules currently punish not only rape but also any serious sexual assault falling short of actual penetration.²³⁵ It was also held that these norms are applicable in any armed conflict. Likewise, the Trial Chamber in the *Čelebići* case considered it indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators.²³⁶ The ICTY jurisprudence indicates that rape should be considered the most serious form of sexual abuse, and that it is forbidden by customary international law in any circumstances. At the same time, the Trial Chambers have also made clear that it makes no difference to the prohibition of the norm whether the victim was female or male, and that a person can be guilty of rape, even if he did not physically commit the act himself.

IV. The ICTY’s Jurisprudence on Articles 4 and 5 of the Statute

A. Genocide

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms that Genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished. The Convention is today considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951. The ICTY Statute incorporates the relevant provisions of the Genocide Convention. Art. 4, entitled Genocide, reads as follows: “1. The International Tribunal shall have the power to prosecute persons committing Genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article. 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. 3. The following acts shall be punishable: (a) Genocide; (b) conspiracy

²³⁴ *Čelebići* Judgement, *supra*, note 173, pp. 165–167, paras. 452–459; *Furundzija* Judgement, *supra*, note 173, pp. 55–64, paras. 143–162.

²³⁵ *Furundzija* Judgement, *supra*, note 173, p. 73, para. 186.

²³⁶ *Čelebići* Judgement, *supra*, note 173, p. 172, para. 476.

to commit Genocide; (c) direct and public incitement to commit Genocide; (d) attempt to commit Genocide; (e) complicity in Genocide.”

In the scheme of international criminal law, Genocide is the ultimate crime. The difficulty for the Prosecutor is that it needs to prove that the acts in question were carried out with the so-called “*dolus specialis*”, *i.e.*, with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such”.²³⁷ In the *Karadžić* and *Mladić* Rule 61 Decision, the Trial Chamber held that the intent necessary for Genocide need not be clearly expressed but could be inferred from surrounding circumstances, such as “the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.”²³⁸

The jurisprudence of the ICTY on the Crime of Genocide is today, rather sparse. Further useful ICTY jurisprudence will no doubt emerge from the the current trial against Goran Jelesić. By contrast, the elements of the Crime of Genocide have been examined in depth by the ICTR Trial Chamber, which rendered judgement on 2 September 1998 in the *Akayesu* Case. The ICTR Trial Chamber confirmed that the Genocide Convention is undeniably considered part of customary international law,²³⁹ and that the crime of Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*.²⁴⁰ The *Akayesu* Trial Chamber further held that the crime of Genocide does not imply the actual extermination of a group in its entirety, but covers any one of the acts enumerated the Rwanda Statute,²⁴¹ provided that it is committed with the specific intent to destroy, “in whole or in part”, a national, ethnical, racial or religious group, as such.²⁴²

Finally, the *Akayesu* decision confirmed the ICTY jurisprudence insofar as it was held that: “(...) in the absence of a confession from the accused, his intent can be inferred from a number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.”²⁴³

²³⁷ Art. 4(3) of the ICTY Statute and Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948; Advisory Opinion of the ICJ in the Nuclear Weapons Case, *ICJ Rep.* 226 ff. (1996), para. 26.

²³⁸ *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-5-R61 and IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, pp. 53–54, para. 95.

²³⁹ *Akayesu* Judgement, *supra*, note 231, para. 495

²⁴⁰ *Ibid.*, paras. 497–498

²⁴¹ Article 2(2)(a) through 2(2)(e) [= ICTY Statute, Art. 4(2)(a)–(e)].

²⁴² *Akayesu* Judgement, *supra*, note 231, paras. 497–498.

²⁴³ *Ibid.*, para. 523; see also para. 524, quoting ICTY decisions.

B. Crimes Against Humanity

Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict on the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called “ethnic cleansing” and widespread and systematic rape and other forms of sexual assault, including enforced prostitution. As indicated before, Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.

Art. 5 of the ICTY Statute, entitled Crimes against humanity, stipulates that the ICTY “shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.” This article is drafted in a manner which is in some respects more restrictive than customary international law, but which also omits reference to some of the requirements of Crimes against humanity. The first case in which the scope and contents of this article was examined in depth is the *Tadić* case. In the merits phase of this case the Trial Chamber examined the requirements of Art. 5 and elaborated in detail on the definition of Crimes against humanity.²⁴⁴

Based on this judgement and customary international law, if charges under Art. 5 of the Statute are brought, the Prosecutor must prove, *inter alia*, that the acts or omissions were committed during an armed conflict, although the character of the conflict (whether international or internal) is irrelevant. As noted by in the *Tadić* Opinion and Judgement, the inclusion of the condition that Crimes against humanity be committed “in armed conflict” is no longer required by customary international law.²⁴⁵ It is a limitation inserted by the drafters of the Statute, which is temporal, rather than substantive in character, as indicated by the term “when” committed in armed conflict’. Accordingly, the terms “in armed conflict”, indicate that it is not necessary to show that there is any connection with a war crime nor that there is any substantive connection to an armed conflict.²⁴⁶

The Prosecutor must also prove that the crimes were committed against a civilian population on a “widespread” or “systematic” basis. It was noted in the *Tadić* judgement that the term “population” does not mean that the entire population of a given State or territory must be victimised by the alleged acts in order for the acts to constitute Crimes against humanity. Rather, the word “population” in this context implies

²⁴⁴ *Tadić* Opinion and Judgement, *supra*, note 170, pp. 232–255.

²⁴⁵ *Ibid.*, pp. 236–237, para. 627.

²⁴⁶ *Ibid.*, p. 239, para. 632.

crimes of a collective nature and is meant to exclude single or isolated acts which, although possibly constituting war crimes or crimes against national criminal law, do not rise to the level of Crimes against humanity. The term "population" therefore signifies that the acts alleged must be undertaken as part of a widespread or systematic basis.²⁴⁷ The *Tadić* Trial Chamber also held that individuals who at one time performed acts of resistance may in certain circumstances be victims of Crimes against humanity.²⁴⁸ This may be supported, *inter alia*, by the *Barbie* case, the *Vukovar Hospital Decision* and the Commission of Experts Report.²⁴⁹

Furthermore, the jurisprudence of the ICTY and the ICTR has confirmed the Prosecutor's position, that it only needs to prove that the campaign or attack waged against the population was either widespread *or* systematic.²⁵⁰ As for the meaning to be accorded each of these terms, the Trial Chambers in the *Tadić* and *Akayesu* cases held that "widespread" refers to the number of victims whereas "systematic" signifies the existence of a pattern or methodical plan.²⁵¹ In brief, what these sources indicate is that "widespread" implies large scale, whereas "systematic" implies policy or planning. Moreover, the "widespread or systematic" requirement does not signify that a single act by a perpetrator can not constitute a crime against humanity. Indeed, in the *Vukovar Hospital Decision* and in the *Tadić* judgement, the Trial Chambers held that a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails criminal liability and that an individual perpetrator need not commit numerous offences to be held liable.²⁵²

It should be noted that the concept of "attack" under Crimes against humanity cannot be equated with the technical term "attack" under the laws of war. Under the latter, the term attack refers to conduct of hostilities and falls within the scope of the Hague Law.²⁵³ The term "campaign" could be substituted for the word "attack" in most Crimes against humanity. The term "attack" is not used neither in Art. 5 of the ICTY Statute, nor in Art. 6(c) of the Nuremberg Charter. It has been inserted into Art. 3 of the ICTR Statute and Art. 7 of the ICC Statute, but presumably not with the intent to restrict the scope of this category of crimes only to conduct of hostility. This has been confirmed by the ICTR judgement in the *Akayesu* case.²⁵⁴

²⁴⁷ *Ibid.*, p. 244, para. 644.

²⁴⁸ *Ibid.*, pp. 241–243, paras. 639–243.

²⁴⁹ *Ibid.*, p. 243, para. 643; *Prosecutor v. Mile Mskić, Miroslav Radić, & Veslin Ilijvančanin*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-13-R61, Tr. Ch. I, 3 April 1996, para. 29 (the *Vukovar Hospital Decision*); *Barbie* case, discussed in *Tadić* Opinion and Judgement, p. 242, para. 641; Final Report of the Commission of Experts, UN Doc. S/1994/674, para 78, cited in *Tadić* Opinion and Judgement, *supra*, note 170, p. 242, para. 640.

²⁵⁰ *Ibid.*, p. 245, para. 646; see also Report of the Secretary-General pursuant to para. 2 of Security Council Resolution 808 (1993) and annex thereto, UN Doc. S/25704, para. 48, (hereinafter Report of the Secretary-General); Report of the Committee on the Establishment of an International Criminal Court, U.N. Doc. G.A.O.R. A/50/22 (1995), p. 17; *Akayesu* Judgement, *supra*, note 231, p. 235, para. 579.

²⁵¹ *Tadić* Opinion and Judgement, *supra*, note 170, pp. 246–247, para. 648; p. 250, para. 653; *Akayesu* Judgement, *supra*, note 231, pp. 235–236, para. 580.

²⁵² *Vukovar Hospital Decision*, *supra*, note 249, para. 30.

²⁵³ Cf. Art. 49(1) of Additional Protocol I.

²⁵⁴ *Akayesu* Judgement, *supra*, note 231, p. 236, para. 581.

The *Tadić* Trial Chamber also ruled that all Crimes against humanity under Art. 5 must be committed on discriminatory intent.²⁵⁵ This particular ruling is presently subject to appeal by the Prosecutor.²⁵⁶ In the appeal the Prosecutor points out that customary international law does not include a general requirement of “discriminatory intent” for Crimes against humanity,²⁵⁷ but distinguishes between two categories of Crimes against humanity, the “murder type” and the “persecution type”, and requires discriminatory grounds only for the latter.²⁵⁸

Finally, the nexus to armed conflict included in Art. 5 of the Tribunal’s Statute demands that the perpetrator must know of the broader context in which his acts were committed. However, the knowledge of the accused or the subordinate may be factually implied from the circumstances.²⁵⁹ At the same time however, the *Tadić* judgement also held that the acts of the accused (or a subordinate) which constitute Crimes against humanity may not be taken for purely personal reasons unrelated to the armed conflict, although personal motives may be present.²⁶⁰ The Prosecutor has appealed this particular aspect of the *Tadić* judgement before the Appeals Chamber.

Part. III. Comparison with the Statute of the International Criminal Court

The Rome Statute of the International Criminal Court that was adopted by the United Nations Diplomatic Conference in Rome on 17 July 1998.²⁶¹ Compared to the ICTY and the ICTR which are *ad hoc* institutions that have per definition a finite life span, the ICC, once operational, will be a permanent international criminal tribunal.

According to Art. 5(1), the following crimes will come within the jurisdiction of the Court: (a) The crime of Genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression. Art. 5(2) reflects the difficult compromise that was struck on the controversial issue surrounding the competence of the future ICC over *jus ad bellum* breaches.²⁶² It states that the “Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise

²⁵⁵ *Tadić* Opinion and Judgement, *supra*, note 170, pp. 248–250, paras. 650–652.

²⁵⁶ *The Prosecutor v. Duško Tadić, Brief of Argument of the Prosecution (Cross-Appellant)*, Case No. IT94-1-A, App. Ch., 12 January 1998, pp. 67–77.

²⁵⁷ This is confirmed, *inter alia*, by the Nürnberg Charter, the Judgement of the Nürnberg Tribunal, Control Council Law No. 10, Tokyo Charter, the Memorandum of the Secretary-General on The Charter and Judgement of the Nürnberg Tribunal, the I.L.C. Draft Code of Crimes Against the Peace and Security of Mankind.

²⁵⁸ *Tadić* Opinion and Judgement, *supra*, note 170, p. 249, paras. 651–652.

²⁵⁹ *Ibid.*, pp. 252–254, paras. 656–659.

²⁶⁰ *Ibid.*, 254, paras. 658–659.

²⁶¹ A/CONF.183/9 of 17 July 1998; see <http://www.un.org/icc>.

²⁶² See also: A. Z i m m e r m a n n: “The Creation of a Permanent International Criminal Court,” 2 *Max Planck Yearbook of United Nations Law* 169 at 198–204 (1998); M. A r s a n j a n i: „The Rome Statute of the International Criminal Court,” 93 *AJIL* 22 at 30 (1999).

jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

The ICC Statute can also be seen as advancing the “criminalisation” of offences committed in internal armed conflicts.²⁶³ However, this progress needs to be set against the fact that the Statute confirms the existence of the “two-box approach” in international humanitarian law, that its jurisdictional clauses do not fully reflect the principle of universality,²⁶⁴ and that the treaty contains plenty of reminders to the principle of legality and, more importantly to the non-retroactivity of the ICC Statute.

The ICC Statute is significant for it reaffirms and develops the substantive law applicable to internal armed conflicts (Art. 8(2)(c) and (d)). “War crimes” are defined as encompassing violations committed in international and internal armed conflicts.²⁶⁵ However, the structure and content of Art. 8 confirm that there is still a recognisable regulatory gap between international and internal conflicts.²⁶⁶ It also maintains, at least to a certain degree, the distinction between Geneva-type provisions and Hague-law type provisions. With respect to international armed conflicts, the Geneva law is dealt with in Art. 8(2) (a). This refers to persons and property protected by the Grave breaches provisions of the Geneva Conventions. The Hague law is dealt with in Art. 8(2)(b) which enumerates 26 violations, adding that these are only applicable in international armed conflicts.

Art. 8(2)(c) and 8(2)(e) give the ICC jurisdiction over war crimes committed in internal armed conflicts. The inclusion of jurisdiction over such conflicts received wide support from a large number of countries but was fiercely opposed by certain delegations.²⁶⁷ Subparagraph (c) incorporates the provisions of Common Art. 3 of the Geneva Conventions. Hence, the Statute confirms the existence of individual criminal responsibility for violations of the corresponding humanitarian standards, regardless of the characterisation of the conflict. Subparagraph (e) gives the ICC jurisdiction over 12 other “serious violations of laws and customs applicable in armed conflicts not of an international character, within the established framework of international law (...)”. The range of violations listed represents without doubt a very significant development in treaty-based law applicable to non-international armed conflicts. However, the ICC Statute does not even include a general prohibition of

²⁶³ Note that the ICC can also be seen as advancing the criminalisation of violations committed in international armed conflicts, namely of the Hague – Law type provisions: M c D o n a l d, *supra*, note 218, p. 149.

²⁶⁴ The question of universality was not even discussed at the plenary sessions of the conference. The ICC Statute establishes what has been termed ‘third-party’ Jurisdiction: R. W e d g w o o d, *supra*, note 49, p. 99; see also: G. H a f n e r *et al.*: “A Response to the American View as Presented by Ruth Wedgwood,” in: *ibid.*, p. 108 at 115–120.

²⁶⁵ Note that the general definition of war crimes in Art. 8 (1) can be seen as restrictive, for it adds that war crimes are within the jurisdiction of the Court „in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”

²⁶⁶ Judge Cassese views this as a regrettable ‘retrograde’ feature of the ICC Statute: A. C a s s e s e: “The Statute of the International Criminal Court: Some Preliminary Reflections,” 10 *EJIL* 144 at 150 (1999).

²⁶⁷ Z i m m e r m a n, *supra*, note 262, pp. 196–198; M c D o n a l d, *supra*, note 218, p. 149; Ph. K i r s c h and J.T. H o l m e s: “The Rome Conference on an International Criminal Court: The Negotiating Process,” 93 *AJIL* 7 (1999); A r s a n j a n i, *supra*, note 262, pp. 32–35.

the use of inherently indiscriminate weapons in internal armed conflicts. It is setback for the formation of general customary law on the prohibitions of the use of certain inhumane weapons in internal armed conflicts.²⁶⁸

The jurisdiction of the prospective Court was one of the most contentious issues at the Rome Conference. The first controversy surrounded the question of the entitlement to refer situations to the Court. Three basic models – with various alternatives in between – were under consideration: whether entitlement to refer situations to the Court should be vested in States parties, the Security Council and/or the prosecutor *proprio motu*.²⁶⁹ The second divisive issue related to the preconditions for the exercise of the Court's jurisdiction. Several proposals were tabled, ranging from universal jurisdiction to the need for consent by various interested States. A first group of countries, which included Germany, took the position that the ICC, once established, should be able to exercise *ipso facto* and without any further requirement its jurisdiction for all of the above-mentioned "core crimes", committed world-wide and regardless of whether the State on the territory of which the crimes were committed was the custodial State, the State of the victim of the crime, or the country of origin of the offender or even some of them cumulatively have consented to the exercise of jurisdiction by the Court. A second group of States wanted to make the exercise of jurisdiction by the ICC dependent on the fact that some or all of the above concerned States have accepted the jurisdiction of the Court. A third group of States, which included France, demanded that all or some of the States concerned needed to consent *ad hoc* in respect of each and every individual investigation. Each of these proposals seemed unacceptable to at least some delegations.²⁷⁰

The difficult compromises which were finally reached over the above questions, are contained in Articles 12 to 19 of the final text, and cover three main issues: the jurisdiction of the Court, the trigger mechanism, and admissibility. These provide, *inter alia*, that the Court can exercise jurisdiction only if either the State of the territory where the crime was committed or the State of the nationality of the accused consents, unless the crime is referred to the Court by the Security Council.²⁷¹ Furthermore, the ICC must satisfy itself that it has jurisdiction in any case referred to it.²⁷² Its jurisdiction is not retroactive to crimes committed before the Statute entered into force for the State in question. Even after that date, the ICC may exercise jurisdiction only with respect to crimes committed after the Statute has entered into force for the State in question, unless that State agrees otherwise.²⁷³ The authority to refer "situations" to the Court is divided among State parties to the Statute, the Security Council and the prosecutor, but in the latter case, States parties to the Statute as well as certain non-States parties need to be informed.²⁷⁴ Moreover, unlike the ICTY and the ICTR, the future ICC will

²⁶⁸ For criticism see A. C a s s e s e, *supra*, note 266, pp. 152–153.

²⁶⁹ K i r s c h and H o l m e s, *supra*, note 267, p. 8.

²⁷⁰ *Ibid.*, pp. 8–9; Z i m m e r m a n, *supra*, note 262, pp. 205–206.

²⁷¹ ICC Statute, Art. 12.

²⁷² *Ibid.*, Art. 19.

²⁷³ *Ibid.*, Art. 11.

²⁷⁴ *Ibid.*, Arts. 13, 15, and 18.

not have primacy over national courts, but will only have the ability to exercise “complementary” jurisdiction.²⁷⁵ This concept is akin to the concept of ‘subsidiarity’, well known within the EU legal and policy framework. The ICC drafters believed that the primary responsibility for enforcing international criminal law should rest with the nation-state.²⁷⁶

Finally, the Statute lays down in explicit terms the individual criminal responsibility of natural persons suspected of any crime within the jurisdiction of the Court (Art. 25). However, this article is preceded by several reminders of the temporal aspects of the principle of legality. Art. 22(1), on *nullum crime sine lege*, provides that a person shall not be criminally liable unless the conduct constitutes, at the time it takes place, a crime within the jurisdiction of the Court. Art. 22(2) adds that the definition of a crime needs to be strictly construed and that in case of ambiguity, the definition shall be interpreted in favour of the defendant. Art. 23 is a reminder of the principle of *nulla poena sine lege*, whilst Art. 24(1) clarifies that no person shall be criminally responsible under the ICC Statute for conduct prior to the entry into force of the Statute.

To conclude this article, it is clear that the unique position that the ICTY (and the ICTR) occupy in the international legal system has been put in relief by the negotiations for a permanent international criminal court. The power which the prospective ICC will have over States is in no way comparable to the power of the ICTY. As seen before, on the basis of its Statute, which is grounded in Chapter VII of the UN Charter, the ICTY has the right to demand co-operation from UN Member States and may request that they hand over of suspects to the Tribunal. By the same token, even if the enactment of the ICC Statute in itself is undeniably a step in the right direction, the result can not be seen as a reflection of the principle of universal jurisdiction for a core set of international crimes.

²⁷⁵ *Ibid.*, Art. 17; See Arsanjani, *supra*, note 262, pp. 27–28.

²⁷⁶ R. Wedgwood, *supra*, note 49, pp. 94–95; G. Hafner *et al.*, *supra*, note 264, pp. 115–116.

ECOWAS Intervention in Liberia and Sierra-Leone: A New Dimension in Regional Security System

MARTIN UZO GASIOKWU

Introduction

ECOWAS – Economic Community of West African States, is an integrative effort of the states in the West African sub-region aimed at establishing a common market. Liberia and Sierra-Leone are both members.

Events have taken place in these two countries necessitating the involvement of ECOWAS. In 1989, a civil war broke out in Liberia threatening the peace and security of the sub-region. In order to prevent self-annihilation of the Liberian people, the ECOWAS leaders met to explore the political solution to the crisis. ECOMOG – The ECOWAS Monitoring Group, a military outfit was constituted for the purpose of keeping and enforcing peace.

Peace has been restored in Liberia with a democratically elected President. But as this was happening, a military junta led by Johnny Koroma seized power in Sierra-Leone (a neighbouring State to Liberia) thereby dethroning the democratically elected government of Ahmed Tejan Kabbah. ECOWAS leaders engaged Johnny Koroma in diplomatic talks aimed at restoring democracy in Sierra-Leone. When all diplomatic efforts failed, ECOMOG was then mandated to move into Sierra-Leone and restore democracy. After a brief encounter with troops loyal to Koroma, ECOMAG prevailed having chased the junta out of Sierra-Leone. On the 10th of March, 1998, Ahmed Tejan Kabbah returned to his post as the President of Sierra-Leone.

In the two cases mentioned, ECOWAS indeed achieved success. The intervention has however raised a serious question of international law, i.e. the authority of ECOWAS – an economic organisation to intervene in the internal affairs of sovereign states.

The aim of this paper is to establish the basis of ECOWAS intervention in the internal affairs of these countries, oblivious of the international law principle of non-intervention in the domestic affairs of sovereign states.

The paper commences with a brief historical survey of the crises, then goes on to analyse the role of ECOMOG with a view to establish its legality. The implications of the intervention for the future are also considered.

ECOWAS: Origin and Aims

The Economic Community of West African States (ECOWAS) was established by a Treaty in 1975. It was an attempt by Africans in the sub-region to re-create the homogenous society that existed before the advent of the colonialists having realised the need for economic co-operation and collective self reliance as a prerequisite condition for development. In 1993 the ECOWAS Treaty was revised and its provisions were substantially enhanced.

The main aims and objectives of the organisation as contained in Article 2(1) of the 1975 Treaty are as follows:

“(...) to promote co-operation and development in all fields of economic activity, particularly in the field of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions and in social and cultural matters for the purposes of raising the standard of living of its people, of increasing and maintaining economic stability among its members and of contributing to the progress and development of the African continent.”

These aims and objectives were reiterated and reinforced by the 1993 Revised ECOWAS Treaty in its Article 3 thus:

“(...) to promote co-operation and integration, leading to the establishment of an economic living standards of its peoples and to maintain and enhance economic stability, foster relations among member states and contribute to the progress and development of the African continent.”

From the foregoing provision, it is clear that the cherished goal of ECOWAS is the establishment of a common market through economic integration of member states.

The Liberian Crisis and the Formation of ECOWAS Monitoring Group (ECOMOG)

The Genesis: from 1870, the True Whig Party of the Negro Americans and their descendants had been in control of the government of Liberia. In 1980, Master Sergeant Samuel Doe killed President William Tolbert in a military coup, seized power and became the first native leader of Liberia. Samuel Doe's rise to power in 1980 was hailed by the natives as their triumph over the American Liberian domination of government. To most of them, although Liberia became independent as early as 1847, the rise of Doe to power was their real independence. The Coup d'etat was however described by a Liberian writer as an act that:

“intensified Liberia's endemic political instability, deteriorated poor government, exacerbated perennial fiscal indiscipline and worsened economic mismanagement, aggravating capital flight.”¹

¹ S.B.B. T a r r: “ECOWAS' ECOMOG Initiative in Liberia: A Liberian Perspective”, 13 *Nigerian Forum* 74 (1993).

On coming to power at age 28, Samuel Doe declared that his ruling party – The Peoples Redemption Council (PRC), seized power to find the answers to the suffering, oppression and exploitation of all citizens. This was however not to be, as in 1982 Doe was accused of nepotism by some prominent Liberians from the Nimba County which constituted the Gios and Manos, a rival tribe in Liberia. He was also accused of vesting only his Khran tribesmen with influential governmental positions. Doe's regime was tampered with mass killings and massacres. In 1985 he sanctioned a raid in which not less than 3,000 Gios and Mano males were killed. In July 1984, a draft constitution was popularly endorsed, the ban on all political parties was lifted, and a civilian government was to be inaugurated in January 1986. Doe stood for and won the Presidential elections amidst wild allegations of riggings in the election.

In November, 1985 the Armed Forces of Liberia composed of Doe's ethnic personnel foiled a coup attempt by the Gio and Mano tribes. The coupists were killed. Politicians and radicals went into hiding. Progressively Liberia became a police state with gross human rights abuses, resulting in economic strangulation. What started as a purely tribal problem escalated into a full scale civil war, in which all the warring factions waged reciprocal tribal vendettas, looted public and private assets and destroyed social infrastructure."² This full scale war started in 1989. The war being fought was now more than a political war to effect a change at the top, and as such needed much more drastic measures to bring the Liberian crisis to an end. With the total state of anarchy which ensued, the Liberian crisis transcended the limits of internal affairs and it seemed that some international action was necessary. The ECOWAS leaders therefore met to explore the political solution to the crisis. A decisive session on the crisis was held in Banjul, the Gambian capital on the 6th–8th August 1990 by the five leaders of the Mediation Committee of ECOWAS and the two ordinary country members."³

ECOWAS felt it was its duty to find the necessary solution to the Liberian crisis, not only because Liberia was a member state of the organisation, but also because instability in any of the countries affected stability of all the other countries and industrial progress could not be super-imposed in an unstable political structure. The ECOWAS also pointed out that the promotion of peace and stability in the preamble of its Treaty still remained an important clause.⁴ At the Banjul Summit, the need to physically bring about a ceasefire as there had been anarchy coupled with the breakdown of law and order was emphasized. As a result, only a collective ECOWAS action could stop the warring factions from destroying Liberia.

At the end of the Banjul meeting, it was announced that a peace keeping force had been raised to restore peace in Liberia and to put a stop to an apparently stalemated war as well as create the required conditions for the national reconciliation and the restoration of democracy in the country. A Special Emergency Fund had also been

² *Ibid.* The warring factions included Doe's soldiers, Charles Taylor's National Patriotic Front of Liberia and Yormie Johnson's Independent National Patriotic Front of Liberia.

³ *The Democrat*, 9 August 1990, p. 1.

⁴ *The Guardian*, 9 August 1990, p. 15.

floated to which all member-states would have to contribute to fund the peace-keeping force known as Economic Community of West African States Monitoring Group (ECOMOG). ECOMOG's mandate was to end the destruction of lives and property, stabilise the situation and maintain an environment conducive for democratic election, and finally to monitor peace when attained.⁵

Peace has finally returned to Liberia, elections have been held and Charles Taylor has been installed as President of Liberia. ECOMOG has achieved success in Liberia though its role also altered the purely economic objectives of ECOWAS.

The Sierra-Leone Crisis

On 25 May, 1997, soldiers led by Major Johnny Paul Koroma seized power in Sierra-Leone. The democratically elected leader President Ahmed Tejan Kabbah was dethroned and Major Koroma was installed Head of State. ECOWAS in a bid to reverse the coup, involved the ECOMOG.⁶ A committee of four was set up in June 1997 comprising the Foreign Ministers of Nigeria, Ghana, Guinea and Cote D'ivoire with the mandate to monitor the implementation of the adopted options geared towards reinstating the deposed President Ahmed Tejan Kabbah.

Three options had been adopted, namely: dialogue, economic embargo and as a last resort, the use of force to reinstate democracy in the country.

The first option – dialogue, collapsed after Koroma made known his intention to remain in power until the year 2001.⁷ International pressure on Koroma to hand over power to Kabbah was to no avail. After dialogue failed ECOWAS resorted to economic blockade, which also was not effective. It was the failure of these two options that resulted in the implementation of the third option which is the use of force to flush out the military regime. On 10 March, 1998, Ahmed Tejan Kabbah returned to his country and was reinstated as the President of Sierra-Leone.

International Law and the Principle of Non-Intervention in Internal Affairs of States

The sovereignty of a State in international law is the ability of a state to have effective control over its territory, devoid of any external intervention from other bodies. A very essential principle recognised in this regard is the principle of non-intervention in the internal affairs of other states. Intervention may be used in a general sense to denote any form of interference. In Oppenheim's view, however, it means specifically, dictatorial interference which impairs the state's independence. According to him intervention is a "dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condi-

⁵ O. A n u k p e O v r a w a h: "The Legitimacy or Otherwise of the ECOMOG Intervention in Liberia", 3 *JUS* 37 (1992).

⁶ *Tell*, No. 25, 23 June 1997.

⁷ *The Guardian*, 20 August 1997.

tion of things.”⁸ Starke,⁹ maintains that the act of intervention must be contrary to the will of the victim state and must by design or by implication impair the political independence of the state. This form of intervention was formerly constructed in meaning to armed intervention, but its bounds have now been extended to cover subtler forms of influence or control including revolutions, financial or military assistance to rebels and any causing of rebellion in the territory of a state.

International and state laws have since forbidden such intervention through laws and declarations made to protect the right of states and to prevent interference. The first of such municipal instruments was **the Constitution of the French Republic of 24 June 1794** which in Article 119 proclaimed that “French people shall not altogether interfere into affairs of other governments and shall not allow other people to interfere into affairs of their government.” Another of such pronouncements was the **Monroe Doctrine** announced by the United States Government (1823). This doctrine had a great bearing on the development of the law of non-intervention. It forbade the principal European powers of the Triple alliance from intervening in the affairs of Spain in a bid to restore her authority over the rebellious colonies of Latin America which had secured independence and recognition by the United States.

The principle of non-intervention was fully recognised by the governments as a rule of international law in the 20th century when the first international conference on non-intervention was initiated. This was the **Drago Doctrine, 1902**, published at the **Hague Peace Conference in 1907**. It adopted conventions on the limitations of the use of force to collect debts warranted by contracts. The first bilateral Treaties based on this principle were prepared by the Russian government in 1902 to be signed with Iran, Afghanistan, Turkey and Mongolia. Its formula stated that:

“each of the high contracting parties shall refrain from intervention into internal affairs of other parties.”

Non-interference was recognised by more and more states as a fundamental rule of international law, sequel to the inter-war period; the actions of the fascist states of Europe, the German and Italian intervention in Spain in 1936–1939, and that of Japan in the Far East in the 1930s. The **Seventh International Conference of American States** on 20 December 1933, in Montevideo, adopted the **Convention on Rights and Obligation of States** between the USA and other Latin American countries. Article 8 states:

“No state has the right to interfere into internal or external affairs of other states.”

The principle of non-intervention is embodied in the United Nations Charter (Art. 2(7)).

⁸ Oppenheim: *International Law* (1975), 8th ed., vol. 1, p. 34.

⁹ J.G. Starke: *Introduction to International Law* (1984), p. 99. Also Hyde: *International Law* (1947), vol. 1, para. 69.

Authoritative interpretations of that principle are provided in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and on the Protection of Their Independence and Sovereignty (1965), the Declaration on Principles of International Law of 1970,¹⁰ and the Helsinki Final Act 1975.

According to the Declaration of 1970, the principle of non-interference constitutes a prohibition of direct or indirect intervention for any reasons in the internal or external affairs of any other state. In accordance with that declaration the substance of that principle includes the following:¹¹

(a) a prohibition of armed intervention or all other forms of interference or attempted threat against the personality of the state or against its political, economic and cultural elements (...)

(b) a prohibition of interference in civil strife in another state (...)

The principle of non-intervention is also entrenched in the charter of regional bodies, such as the Organisation of African Unity (OAU)¹² and the League of Arab States. There are however exceptional cases in which a state has at international law a legitimate right of intervention. The cases are as follows:¹³

(a) collective intervention pursuant to the Article 51 of the Charter of the United Nations. This would be by enforcement action sanctioned by the Security Council, or any action authorized by the General Assembly under the Uniting for Peace Resolution of 3 November 1950,

(b) to protect the rights and interests, and the personal safety of its citizens abroad,

(c) self-defence, if intervention is necessary to meet a danger of an actual armed attack,

(d) in the affairs of a protectorate under its dominion,

(e) if the state subject of the intervention has been guilty of a gross breach of international law in regard to the intervening state, for example, if it has itself unlawfully intervened.

Starke has however cautioned that:

“States must subordinate the exercise of any such exceptional rights of intervention to their primary obligations under the United Nations Charter, so that except where the Charter permits it, intervention must not go so far as the threat or use of force against the territorial integrity or political independence of any state.”¹⁴

The Question of Legality of the ECOWAS Intervention

The intervention of ECOMOG (i.e. ECOWAS) in the internal affairs of Liberia and Sierra-Leone has far-reaching legal and political effects for both countries and

¹⁰ “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with UN Charter” adopted by the General Assembly, 1970.

¹¹ G.I. T u n k i n: *International Law* (1982), p. 40.

¹² Article 2(3), also the ECOWAS Protocol on Non-Aggression, 1978.

¹³ S t a r k e, *supra*, note 9, p. 100.

¹⁴ *Ibid.*

the entire West-African sub-region. Right from the start there had been great censor over the ECOMOG initiative. The legality and expediency of the initiative has been much a subject of controversy, Various critics believe that the principle of respect for internal affairs has been violated. To them, the conflicts in both countries belong more appropriately to the realm of internal affairs. A civil war was fought in Liberia while a coup d'etat was effected in Sierra-Leone. Both fall within the domestic affairs of states.

They are not in any way censored by international law and there are no conventions and treaties to that effect. Consequently, a state's mode of governance, the character of its constitutional arrangement and changes in government whether constitutional or revolutionary have been until recently regarded as domestic affairs of states. Thus, states have always deemed it necessary to maintain neutrality and non-intervention in cases involving internal conflicts of other states. This attitude is in consonance with Article 2(7) of the United Nations Charter which states:

"Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State."

And the United Nations General Assembly Resolution 213(XX) which states:

"No state shall organise, assist, ferment, incite or tolerate, subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state."¹⁵

Article 3(2) of the Organisation of African Unity Charter also subscribes to this position where it provides that member states should affirm and declare their adherence to the principle of non-interference in the internal affairs of member states. In explaining the principle, Aguda T.A. reasoned along the line of Vattal, that the principle is an off-shoot of nations' liberty and independence for each to govern itself as it thinks proper, free from interference and intervention from another. That a nation was supposed to occupy a particular area of land from which it may dispose of as it pleases; provided it does not afterwards encroach on any other state's right. In *U.K. v. Albania (i.e. the Corfu Channel Case)*,¹⁶ the International Court of Justice denounced any pretended right to international law, insisting that whatever the defects in the organisation of international society, respect for the principle of territorial sovereignty is the basis of international law.

The above-stated positions seem to indicate that ECOWAS (ECOMOG) had contravened the norms of international law, by its intervention into the domestic affairs of member states violating both the principles of non-intervention in internal affairs of other states and the rule of sovereignty of states. Further, ECOWAS seemed to have usurped the functions of the more competent organisations such as the Organi-

¹⁵ UN GA Declaration of the Inadmissibility of Intervention in Domestic Affairs of States and Protection of their Independence and Sovereignty, 1965 2131(XX).

¹⁶ 4 ICJ 97, 107, 301, 486, 495 (1949).

sation of African Unity, since it was essentially an economic association and not a political one and therefore had no competence to intervene in a state's internal conflicts.

According to Sanyaola,¹⁷ Aguda views it extremely difficult to see the principle of international law under which ECOMOG's intervention in Liberia for instance could be justified, and that there was nothing in the Treaty creating the community which gave power to any of the member states to intervene in the domestic affairs of other member states even if the affairs were a civil war. Nowhere, he further stated, even in principle of customary international law applicable to intervention is there anything which justified some members of the international community coming together to enter into the territory of another member with the view of installing a new government in the territory of the other. Therefore, ECOWAS' intervention and installation of an interim government at one time in Liberia was not only illegal but also erroneous. Intervention in other countries internal affairs has always been a subject of criticism both by nations and international lawyers. Where the United Nations as a group has intervened, it had always been at the invitation of the government in power in the state. It has been disputed that neither the United Nations, the Organisation of African Unity nor Liberia itself invited ECOMOG, therefore rendering the ECOMOG action an illegal act, not only in the eyes of the United Nations but also the OAU.

The ECOWAS action, it seems, also contravened other norms of international law such as the principle of non-use of force in customary international law. Article 2 of the United Nations Charter and the United Nations General Assembly Resolution 3314 of 1974, Article 3 state:

"The sending by or on behalf of a state of armed bands, groups, unregular or mercenaries, which carry out acts of armed forces against another state of such gravity, amounts to acts of aggression."

Studying the above positions, it may seem that the ECOWAS action of sending ECOMOG Forces into Liberia was totally an illegal and irregular act worthy only to be condemned. However, arguments on the legality has not all been reprievals. Favourable legal implications have also been pointed out.

Professor Umozurike¹⁸ has argued that the domestic jurisdiction principle of respect for internal affairs prevails only as long as the state in question observes all legitimate treaties and respects international customary law. Once these boundaries are transgressed, he argues, the state in question exposes itself to intervention from other states and this may take the form of criticism or physical intervention as deemed appropriate. This action would be legal as long as such intervention is carried out with no other motive than to protect the legitimate interests that were endangered. The right of civil war and non-intervention is not a right to anarchy. ECOWAS is an

¹⁷ K. Sanyaola: "Aguda on ECOMOG: Says Intervention is Wrong", *The Guardian*, 21 November 1990, p. 23.

¹⁸ O. Umozurike: "Liberia: No Sovereign Right to Massacre", *The Guardian*, 10 August 1990, p. 9.

international organisation with a basic mandate of securing economic development generally for the West African sub-region. Liberia is a member of the organisation. When there was virtual breakdown of law and order, the ECOWAS decided to intervene by sending a peace keeping force, thus fulfilling the preamble of the ECOWAS Treaty which advocated for the promotion of peace and stability. It would therefore be correct to ascribe competence and legality to ECOMOG, the process of establishment notwithstanding.

Every state has a right to sovereignty, this is doubtless. However, there is no sovereign right to massacre ethnic groups or indeed any defined group whether aliens or citizens as was done in Liberia.

The Genocide Convention of 1948 has principles which are binding on all states. If treatment of its own citizens degenerates to a level that is revolting to human conscience, that state invites humanitarian intervention on the part of states able and willing to do so, provided such action is strictly limited to the circumstances of the case. The protection of individuals is extremely important. The present state of democratisation also exemplifies and demands that sovereign rights are to be exercised with full participation, and the interest of the people must at all times be paramount. Examples of legitimate intervention in line with this position are found in the Israeli Bravado in Entebe in 1976 and the Nyerere Tanzanian intervention in Uganda in 1978. In the latter case, although Nyerere did not plead humanitarian reasons, yet there was real justification. Liberia is, in peace, bound by the Conventions on Human Rights, especially the African Charter which it ratified on 4 August 1982. In war, it is bound also by humanitarian law. In neither peace nor war should human lives be wantonly destroyed beyond the necessities of the situation. The countries constituting ECOMOG felt the need to obey this law and bring an end to atrocities and the wanton breach of fundamental human rights of the Liberian citizens.

The earlier arguments in favour of non-intervention and the need for neutrality at all times in civil wars cannot go unchallenged because even though internal conflicts even to the full scale of civil strife have been traditionally regarded as domestic affairs of states not to be interfered with, this principle becomes void when such domestic conflicts spill over to threaten international peace and security. There is no doubt that this was the case in West Africa at the time the Liberian crisis was at its peak.

The instability in Liberia could have destroyed economic and industrial progress and affected the stability of all West African States. It can also be pointed out that the ECOWAS decision to send ECOMOG, rather than being a slap, bastardly and hasty decision was adequately provided for in the protocol relating to mutual assistance signed in 1981. The purpose of the ECOWAS defence pact is thus enshrined:

“If armed conflict is engineered and likely to endanger security and peace of the community, the authority of ECOWAS will decide on what line of action to take.”¹⁹

¹⁹ Art. 11.

Specifically Article 15 states:

“Member states are to place at the disposal of the community earmarked units from the existing National Armed Forces.”

This pact acts as a collective defence system and member states of ECOWAS that are aggressed would automatically benefit from collective defence aid of the remaining ECOWAS states. Therefore as to the legality of ECOMOG actions, it can be contended that there exists no indefensible breach of law and positive legal implications have been substantiated. The ECOWAS (ECOMOG) intervention not only has legal implication in the nonce, it also has legal implications which it may account for in future, as the Sierra-Leonian case has shown. ECOWAS intervention in Sierra-Leone can be seen as a continuation of its initiative in Liberia. However, the case of Sierra-Leone may be contrasted with the situation in Liberia which led to the formation of ECOMOG. This is because the events of 25 May 1997, from all indications was a successful military takeover of government. The deposed Head of State had fled the country to Guinea and there was no report of fighting and violence in the course of the takeover or after. Unlike, the situation in Liberia, there was no serious breakdown of law and order to tantamount threat to international peace and security. Be that as it may, ECOWAS is not oblivious of the wind of democratisation blowing all over the world. This feeling has found expression in the Revised ECOWAS Treaty, 1993. Article 4(1) of the Revised Treaty provides that member states affirm and declare their adherence to the:

“promotion and consolidation of a democratic system of governance in each member states (...)”

This presupposes that ECOWAS states will sufficiently embrace democracy in the future. Intervention for the purpose of protecting democracy will be in consonance with the spirit and norms of ECOWAS Agreement. Consequently, when ECOMOG moved into Sierra-Leone, it was described by General Sani Abacha – the Chairman of ECOWAS as being:

“(...) not a blatant interference in the country’s internal affairs but a move to uphold universal principles of democracy.”²⁰

Kofi Anan, the United Nations Secretary General was also reported to have said that “if democracy has been usurped, let us do everything in our power to restore it to its rightful owner – the people.”²¹ The protection of the democratic principle has also been supported by Professor Sagay who noted that:

²⁰ *The Guardian*, 26 July 1997.

²¹ *The Guardian*, 23 June 1997.

“(...) there is now a legal binding principle in international law on the right of every socially and politically organised community on the surface of the earth, to democratic rule of governance. In other words, democracy is now a fundamental human right recognised by international law (...).”²²

This principle was the basis for the intervention and subsequent return to power of President Jean-Bertrand Aristide of Haiti in 1994. ECOWAS intervention in Sierra Leone can thus be supported on this ground.

To further support ECOWAS intervention in Sierra Leone, one may lean on Article 58 of the Revised Treaty, 1993, which provides that:

(1) Member states undertake to work to safeguard and consolidate relations conducive to the maintenance of peace, stability and security within the region;

(2) in pursuit of this objective, member states undertake to co-operate with the community in establishing and strengthening appropriate mechanisms for the timely prevention and resolution of intra-state and inter-state conflicts, paying particular regard to the need to;

(3) employ where appropriate, good office, conciliation, mediation and other methods of peaceful settlement of disputes;

(4) establish a regional peace and security observation system and peace keeping forces where appropriate.

Obviously, a coup d'état that stifles the voice of the people, usurps their democratic right (which has become one of the fundamental human rights) cannot create and consolidate relations conducive to the maintenance of peace, stability and security within the region. A timely intervention to prevent anarchy was in consonance with the spirit of the Revised Treaty.

It is to be noted also that dialogue was the first option adopted by ECOWAS in the bid to convince Major Koroma to return power to the dethroned democratic leader, which action is supported by Article 58(2)(e). A critical analysis of Article 58(2)(f) above will reveal a desire by ECOWAS to establish and maintain peace keeping forces whose functions, in the view of this writer, will be to keep peace, and where necessary enforce it within the region. This provision was adopted in 1993 and by 1997 it became necessary to realise this part of the agreement. It may be argued that a detailed protocol of implementing this peace and security arrangement has not been worked out, it could be upheld that the spirit of the provisions lends credence to ECOWAS action in Sierra Leone.

Conclusion

The intervention of ECOWAS in the Liberian and Sierra-Leonian crises has left behind far-reaching effects and indications. These crises have tested the efficiency

²² Professor I.E. S a g a y: “The Right of Democratic Rule as an International Human Right” in: *Selected Essays in Law* 131–132 (1996).

and promptness of ECOWAS administrative machinery in responding to urgent needs and contingency situations.

The ECOWAS intervention has afforded Liberia a sense of direction with expectant good fruits as can be seen from the presidential election which was successfully conducted on the 19 July 1997, the senseless genocide and extermination that became prominent in Liberia has been brought to an end. In Sierra-Leone, the rape of democracy has also been put to a stop.

It is also observed that ECOWAS, though purely an economic organisation, its involvement in Liberia and Sierra-Leone through the instrumentality of ECOMOG constitutes an expansion of its objectives and indicates also a new dimension in regional security arrangement.

ECOWAS' initiative in Liberia and Sierra-Leone is an indication that the principle of non-intervention in internal affairs of West African States is no longer sacrosanct as there can be no development in the midst of instability. Crisis in one country with spill over effects in others must ordinarily threaten stability and security in such countries.

However, the limitations and hardships encountered in the course of the missions are pointers to the fact that reviews and concrete provisions are necessary for guidance in the future. The following recommendations are therefore proffered:

i) The setting up of an institutionalised collective security system for the West African sub-region. ECOMOG should thus be institutionalised, and its members drawn from all countries that compose ECOWAS. Presently the military personnel and equipment are largely drawn from Nigeria, with contributions from Ghana, Guinea and Cote d'Ivoire. This is not healthy because if there arises a crisis situation in Nigeria, ECOMOG may be handicapped in the absence of Nigerian personnel and equipment.

ii) There should be a proper legal mechanism drawn up to outline the condition under which ECOMOG should operate. This is to avoid the situation where ECOMOG will be accused of treading upon any country's political sovereignty and independence.

iii) A clause should also be inserted in the ECOWAS Treaty stating that any individual or group of individuals that come to power through undemocratic means, i.e. through the use of force and unpopular means will not be recognised by the Organisation. This will make any intervention to unseat a military regime as in the case of Sierra-Leone more acceptable.

iv) If ECOMOG is institutionalised, it should be extensively equipped and prepared to meet contingency situations. This would eliminate a situation whereby the command will be crippled and incapacitated in needy times.

Liberia and Sierra-Leone are and ought to be a moral issue for Africa and Africans. Events in those countries should be looked upon as springboards for the setting up of a common security system for Africa. While not losing sight of the scathing criticisms levied against the whole process of involvement, it should be noted that the choice the ECOWAS leaders made was a courageous one which should be lauded.

International Trade and National Legal Orders: The Problem of Direct Applicability of WTO Law*

CARLOS D. ESPÓSITO

I. Introduction

The analysis of the role of private persons in international trade law can be approached from many different points of view. One essential and rather general problem of the subject is the *access* of private parties to WTO law and institutions,¹ a sphere where they have always been denied an active, direct role and where, at best, they have only been given the possibility of indirect access to the WTO dispute settlement system through more or less discretionary administrative national procedures. Another relevant issue is the *direct applicability* of WTO law, a field that requires the investigation of the nature of the agreements involved and the constitutional frameworks in which they are intended to be applied and enforced.

The purpose of this study is to address these issues in the context of WTO law and practice, paying special attention to its potential direct applicability. Therefore, I will ask whether the new provisions of WTO panels and Appellate Body take into consideration the interests of private persons. The text is divided as follows: Part II is meant to be introductory; it presents the legal background where the relevant problems arise, what I will describe as "the plurality of orders." After a brief account of the WTO's character as an international organization, Part III studies the norms of Marrakesh law which provide enforceable mechanisms at the Member states' level and the practice of the dispute settlement organs, focusing on the previous trends as well as the new features which may lead to the direct applicability of Marrakesh law. Part IV investigates the law and practice of the European Community and the United States of America concerning direct applicability of WTO law, posing the question of whether eventual changes should be expected in the treatment of the problem by domestic courts after the entry into force of the Marrakesh Agreements. I have chosen these WTO Members not only because they are two major trading partners of the Organi-

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¹ See, generally, M. L u k a s: "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements," 29 *Journal of World Trade* 181 (1995). See also B.R. K i l l m a n n: "The Access of Individuals to International Trade Dispute Settlement," 13 *Journal of International Arbitration* 143 (1996).

zation, but because they have established indirect administrative mechanisms especially designed to allow individuals to file complaints on foreign inconsistencies with GATT/WTO law. Finally, I draw some conclusions on the meaning of the potential direct applicability of WTO law vis à vis the policies for and against its adoption.

II. The Plurality of Orders

International trade law simultaneously functions at different, though interconnected, levels. The most general and abstract level operates at the international sphere, whether bilateral or multilateral. At the same time, the domestic level not only gives fundamental input to the law-creation processes that occur at the former level, but also shares a large amount of responsibility in the enforcement of the internationally agreed law. This special relationship explains why international trade law and policy has a "mixed character" of close interaction between national and international institutions. In fact, as Professor Jackson has put it, domestic and international institutions interact in such a way that "each has a strong influence on the other, and it is impossible to understand th[e] subject [of international trade law and policy] fully (...) without noticing and analyzing how these influences operate."²

Thus, every study of international trade law, and especially of the place of individuals within the world trade system, should have the realistic starting point of assuming a pluralistic conception³ of legal orders. Here, such an assumption means that direct applicability may depend not only on international agreements,⁴ but also, and sometimes almost exclusively, on national law.⁵ The dual dependency of direct applicability on international and domestic law stems from the structure of international trade obligations, because international trade obligations are usually created by norms with particular objectives which do not establish the exact means by which the obliges (i.e., usually the States) shall comply with those objectives. In other words, there is a commitment to obey international obligations,⁶ but it is up to the States to determine how they will comply with such obligations. This is an established principle of

² J.H. Jackson: *The World Trading System* (1989), p. 25.

³ The expression is used by G. Morelli, *Nozioni di diritto internazionale* (7th ed. 1967), p. 68. I use the expression to avoid the somewhat unfruitful discussion on dualism and monism at the end of the 20th century. I accept that there are good examples of both systems, particularly if one takes the transformation/implementation of law as the main distinction, but I doubt as to the relevance of the terms without qualifications, probably because I am sceptical of the administrative and judicial enforcement of monism in domestic systems. See H. Schermers: "Some Recent Cases Delaying the Direct Effect of International Treaties in Dutch Law," 10 *Mich. JIL* 266 (1989).

⁴ See, generally, *The Effects of Treaties in Domestic Law* (F.G. Jacobs and S. Roberts eds., 1987).

⁵ On the diversity of constitutional approaches to domestic enforcement of international economic norms, see M. Hilf and E.-U. Petersmann (eds.): *National Constitutions and International Economic Law* (1993); and for a general account from the point of view of public international law see A. Cassese: "Modern Constitutions and International Law," 192 *Recueil des Cours* 331 (1985 III).

⁶ See the advisory opinion of the Permanent Court of International Justice on the "Exchange of Greek and Turkish Populations," 10 *PCIJ*, Ser. B, 20-21 (1925) (making reference to "a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.").

international law that has been respected by GATT 1947 Contracting Parties,⁷ and it continues to be a principle of the present WTO system.⁸ Most recently, one of the most important new organs of the Organization, the Appellate Body, has once again confirmed this general principle in the *Reformulated Gasoline* case,⁹ saying that its recommendation:

“does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests – including the protection of human health, as well as the conservation of exhaustible natural resources – to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*,¹⁰ there is specific acknowledgment to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements.”¹¹

The question is whether Marrakesh law requires establishing methods of direct application of international trade law. The short answer to this question is in the negative. Indeed, the WTO Agreement does not provide for a “general” mode of direct application of WTO law.¹² As we have already seen, this is left to the autonomy of the members of the Organization. Taking this general position for granted, one may be tempted to ask if the Agreements have at least some norms which provide for mechanisms of enforcement or even if there are provisions which could be capable of being directly applied.

⁷ See “Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes,” 27th Supp. *BISD* 200 (1991), Panel Report adopted on 7 November 1990.

⁸ It is important to note that there has not been a rupture of the law of GATT with the creation of the WTO; on the contrary, the WTO Agreement provides in Article XVI:1 that: “Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.” See P. M e n g o z z i: “The Marrakesh Agreements and Its Implications on the International and European Level in: J.H.J. B o u r g e o i s, F. B e r r o d and E.G. F o u r n i e r (eds.): *The Uruguay Round Results: A European Lawyers’ Perspective* (1995), pp. 115, 117–123.

⁹ Appellate Body Report on “United States – Standards for Reformulated and Conventional Gasoline,” *WTO Document WT/DS2/?* (Jan. 29, 1996), adopted by the Dispute Settlement Body on May 19, 1996. On this case see: J. W a i n c y m e r: “Reformulated Gasoline under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora Out of a Chapeau?,” 18 *Mich. JIL* 141 (1996); E. R o b e r t: “L’affaire des normes américaines relatives a l’essence,” 101 *RGDIP* 91 (1997).

¹⁰ Adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994. On trade and environment see, for example, D. E s t y: *Greening the GATT* (1944).

¹¹ Appellate Body Report on *United States – Standards for Reformulated and Conventional Gasoline*, at Part V: Findings and Conclusions. *CF.* the Panel Report in *EC – Hormones* case.

¹² See *infra* Part III.

WTO law is fundamentally treaty law. Therefore, one should determine what kind of treaty law Marrakesh law is. From the point of view of direct applicability one can distinguish among different kinds of international treaties. Let us consider two broad categories of treaties in international law: first, treaties directed exclusively to States; second, treaties directed to both States and individuals. In the first category one should include treaties that are applicable among sovereigns only. Accordingly, States are the subjects that may comply with its provisions and may be held responsible for its breach at the international level. The Antarctic treaty¹³ is an example of this kind, specially when it provides for a suspend sovereignty pretensions in the Antarctic zone. Another example of this kind is constituted by all the treaties concerning the obligations of disarmament. As for treaties directed to states and individuals, the provisions directed to individuals can take different forms – it can merely consider individuals as indirect beneficiaries of a larger system or it can grant individuals specific rights that the state must enforce in its internal legal order. Treaties enforceable in national forums provide for enforcement mechanisms directed to individuals, as happens with some human rights treaties.¹⁴ Of course, these categories are often mixed.¹⁵ One should focus not only on the apparent subjects of international treaties, but also particularly on the wording and purpose of their provisions in order to discover whether individuals appear as mere indirect beneficiaries or as eventual enforcement agents of the rights and obligations provided by the agreement. As to this category, “the issue is whether a treaty provides legal rules capable of enforcement through litigation when private parties contend their rights have been affected, or simply provides rules applicable to sovereign relations.”¹⁶ From my point of view, this is the correct approach to understand the character of the WTO Agreements and their future evolution. But before leaving this section, it is necessary to clarify some starting points, such as the definition of direct applicability, the extent of the plurality of orders, and the place of individuals in the international trade system.

¹³ Antarctic Treaty, signed on December 1, 1959, 402 *U.N.T.S.* 71

¹⁴ I am not trying to say that all human rights norms are self-executing. However, this field of international law illustrates the relationship between international provisions and domestic orders in a unique way, mainly because of the character of human rights treaties, which seek to protect the basic rights of individual human beings. One interesting example is the Advisory Opinion of the Interamerican Court of Human Rights of 29 August 1986, recognizing an internationally enforceable right to reply or to make a correction as provided for in Article 14 of the Interamerican Convention of Human Rights. See E.G. de A r é c h a g a: “Self-Executing Provisions of International Law,” in: *Staat und Völkerrechtsordnung, Festschrift für Karl Doering* (1989), pp. 409, 414–419.

¹⁵ I have limited the classification for the sake of the argument, nevertheless it could be extended. For example, there are treaties that relate to private rights and obligations among private persons, like the Hague Conventions on private international law. See J.H.A. v a n L o o n: “The Hague Convention on Private International Law,” in: *The Effects of Treaties in Domestic Law, supra*, note 4, pp. 223–225.

¹⁶ R.A. B r a n d: “Direct Effect of International Economic Law in the United States and the European Union,” 17 *Northwestern JIL & Business* 556, 559–560 (1996–1997). Also R.A. B r a n d: “The Status of the General Agreement on Tariffs and Trade in United States Domestic Law,” 26 *Stanford JIL* 479, 505–506 (1990) (“one must look at the language of those rules to determine the issue of self-execution”).

First, as to the concept of direct applicability, I am persuaded that it has multiple meanings.¹⁷ It could be a synonym of self-executing treaties, indicating that the treaty's norms do not need any domestic act to be applied by domestic courts. It could also mean that the provisions of a certain treaty are capable of being invoked by individuals at their behest. A third description connects the idea to a problem of allocation of powers. I will use the expression with these different meanings, trying, to the extent possible, to clarify which is the one under examination. The idea of direct applicability as invocability by individuals, nevertheless, is the most directly concerned here.¹⁸

Second, I have said that any study of international trade law should begin with the assumption of the plurality of orders. This assertion is not valid without being qualified, for it has clear limits in my conception of international law. In other words, I am not proposing a "domestication of international law." Let us recall that Professor Trimble has proposed such domestication urging a reconceptualization of public international law.¹⁹ He says that:

"Public international law should be reconceptualized. Instead of being seen as a single, unitary system applicable across the 'world community,' public international law should be imagined as a series of parallel systems, more or less convergent depending on the subject, separately applicable within the various nations of the world. Under this approach public international law resembles private international law, where each state habits own set of choice of law rules (or other independently adopted rules) applicable to 'private' controversies, but where those rules (or other independently adopted rules) applicable to 'private' controversies, but where those rules are similar in content and in fact provide a large measure of uniformity and predictability throughout the world."

The idea of a plurality of orders falls short of that proposed reconceptualization. It is intended to clarify international law's relationship to domestic legal orders,²⁰ and not to diminish or negate the autonomy of the concept of international law.

Third, as regards the place of individuals in international trade law, as already noted, I would like to make clear that they have a secondary role at the institutional

¹⁷ See C.M. V á z q u e z: "The Four Doctrines of Self-Executing Treaties," 89 *AJIL* 695 (1995). Writing about the U.S. legal system, this author maintains that there are four doctrines of self-executing treaties instead of one: the intent-based doctrine, the justiciability doctrine, the constitutionality doctrine, and the private right of action doctrine.

¹⁸ For a general analysis see M. L u k a s, *supra*, note 1.

¹⁹ P. T r i m b l e: "International Law, World Order, and Critical Legal Studies," 42 *Stanford Law Review* 811, 835 (1990). See the response of professor D'Amato in *International Law Anthology* (A. D'A m a t o ed., 1994), p. 403, and the reply of professor Trimble at page 408.

²⁰ More concretely, in the case of international trade law, professors Jackson and Sykes have shown that there are three stages in which domestic legal systems affect the WTO system: negotiation, ratification and implementation. J.H. J a c k s o n and A. S y k e s: "Introduction and Overview," in: *id.*: *Implementing the Uruguay Round* (1996), p. 5.

²¹ I want also to leave no doubts as to my rejection of the actual existence of a general "human right to export" defended by some scholars. See E.U. P e t e r s m a n n: *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).

and legal international level; once directly applicable norms have been established by States, however, the legitimate expectations of the private parties should be taken seriously by their domestic legal orders.²¹ As Meinhard Hilf has recently put it: "The basic protection of fundamental rights within international trade relations is only applicable within a given trade policy. The individual certainly has no right to demand a specific trade policy with regard to foreign markets. However, as soon as the competent authorities establish a specific policy or market-organization, the individual has a right to be treated at least in accordance with the basic rule of non-discrimination."²²

In this study I will argue that the WTO system does not aim at protecting State's interests only, but serves a general public interest in which individuals are seen at least as beneficiaries of the international trade system established by the WTO law. Professor Meinhard Hilf has advanced this idea in the same article quoted in the previous paragraph, suggesting that "[p]erhaps like the European Community, the WTO should be understood as a system serving in the last resort not only its Members, but mainly the individual operators in the markets, who by their use of economic freedoms bring the abstract rules into real application."²³ A recent article written by Ronald Brand has made a similar point, arguing that "[o]ne of the most important and challenging issues in international law is the manner in which we address the relationship between the individual and the international legal system" and that "the concept of direct effect of international economic law carries great significance in the development of th[is] relationship [...]."²⁴

These theses are not identical, but are closely related to the idea strongly defended by Petersmann,²⁵ which I shall call the thesis of *the improvement of the enforcement of international trade law*: the enforcement of WTO law would be greatly improved if individuals were able to bring cases before domestic courts relying on its provisions. Even those scholars who are tolerant with the thesis of the negative enforcement of WTO law in national legal systems seem to accept the doctrinal soundness of this idea.²⁶

²² M. H i l f: "The Role of National Courts in International Trade Relations," 18 *Mich. JIL* 321, 325 (1997).

²³ *Ibid.*, p. 356.

²⁴ R.A. B r a n d: "Direct Effect of International Economic Law..." *supra*, note 16, p. 608.

²⁵ See, for example, E.-U. P e t e r s m a n n: *The GATT/WTO Dispute Settlement System* (1997). At page 8 of this recent book he says: "Political theory, and historical experience (e.g., in the context of EC law and the European Convention of Human Rights), confirm that granting actionable rights to self-interested citizens offers the most effective incentives for a self-enforcing liberal constitution."

²⁶ P.J. K u i j p e r: "The New WTO Dispute Settlement System: The Impact on the Community," in: *The Uruguay Round Results...*, *supra*, note 8, p. 87. See also P.J. K u i j p e r: "The Conclusion and Implementation of the Uruguay Round Results by the European Community," 7 *EJIL* 222 (1995); and P. L e e and B. K e n n e d y: "The Potential Direct Effect of GATT 1994 in European Community Law," 30 *Journal of World Trade* 67 (I-1996) ("Enforcement would be greatly improved if individuals were able to bring cases before domestic courts relying on its provisions.").

III. The International Order and the Legal Character of WTO law

A. The WTO as an International Organization

The WTO²⁷ is an international organization established in 1994 as a consequence of the end of the Uruguay Round negotiations.²⁸ The WTO as an institution, and also as a treaty, represents the end of a successful, long-standing "provisional" legal situation that was started back in 1947 with the Havana Charter and the General Agreement of Tariffs and Trade (GATT).²⁹ The Havana Charter and the proposed International Trade Organization never came into force as a matter of strict law, but the GATT prevailed as the principal international agreement regulating trade among national states. Nevertheless, the General Agreement did not enter into force; it was applied and enforced only on a provisional basis.³⁰

The WTO Agreement, now in force since January 1995, is an example of excellent codification,³¹ combined with reasonable and necessary innovations. The major breakthrough of the Marrakesh Agreement is, of course, the very creation of a new institutional framework for the governance of international trade and related issues.³² This new formal international organization is composed of a Ministerial Conference, which replaces the Contracting Parties and is open to all members of the WTO, the General Council, the Dispute Settlement Body, and several other specialized Councils. There is also a Secretariat headed by a Director General. These institutions shall administer, implement, and supervise all WTO agreements. In addition, they shall be the hosts of future negotiations and agreements.

As to the topic of dispute settlement,³³ the new system has received a most interesting *aggiornamento*, though respecting the core of the norms that guided the GATT 1947 system. Two documents are essential to the present characterization of the dispute settlement system: the Marrakesh Agreement and the Understanding on Rules

²⁷ Agreement Establishing the World Trade Organization, done at Marrakesh, April 15, 1994 (in force since January 1, 1995). For the whole process see, for example, P. D e m a r e t: "The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization," 34 *Columbia Journal of Transnational Law* 125 (1995).

²⁸ For a history of the negotiations see T. P. S t e w a r t (ed.): *The GATT Uruguay Round: A Negotiating History (1986-1992)* (1993). See also J. J. S c h o t t: *The Uruguay Round: An Assessment* (1994). A general description of its outcomes can be found in D. W. L e e b r o n: "An Overview of the Uruguay Round Result," 24 *Col. JITL* 11 (1996).

²⁹ The origins and early history of the GATT have been told in many qualified treatises: in general see J. H. J a c k s o n: *World Trade and the Law of GATT* (1969).

³⁰ Protocol of Provisional Application, IV GATT, BISD 76-77 (1969). See M. N. H a n s e n and E. V e r m u l s t: "The GATT Protocol of Provisional Application: A Dying Grandfather?," 27 *Col. JITL* 263 (1988/89). Today, after the WTO Agreements, this Protocol has only a historical relevance.

³¹ On codification see S. R o s e n n e: "Codification of International Law," in: *1 Encyclopedia of Public International Law* (R. B e r n h a r d t ed., 1992), p. 632.

³² Art. 1 of the WTO Agreement.

³³ See, generally, P e t e r s m a n n, *supra*, note 25; A. L i g u s t r o: *Le controversie tra stati nel diritto del commercio internazionale: dal GATT all'OMC* (1996); M. M o n t a ñ a - M o r a: *La organización Mundial del Comercio y el reforzamiento del sistema GATT* (1997).

and Procedures Governing the Settlement of Disputes³⁴ (DSU), which is an integral part of the WTO Agreement. These documents contain the institutional and normative provisions that make the WTO dispute settlement system significantly different in comparison with the old GATT 1947 system. From an institutional point of view, the system is now well founded within an international organization entitled with legal personality. In addition, a new organ called the Dispute Settlement Body, which is in fact an *alter ego* of the Council, has been created. The DSB has its own rules and presidency, and its functions are, among others, to establish panels at the request of a complaining party and to adopt panel reports. Both the establishing of a panel and the adoption of panel and Appellate Body reports are decisions to be taken automatically, unless the DSB decides by consensus not to adopt the report.³⁵ This procedure, so-called “negative consensus,” is one of the most relevant provisions of the DSU, going even further than the proposed “consensus minus two” formula, which was rejected in the Midterm Agreement on dispute settlement.³⁶

The already mentioned institutional developments of international trade law may be accompanied by a reconsideration of the nature of WTO law and its meaning within the system.³⁷ The character of GATT/WTO law has always been extremely difficult to define from a general point of view.³⁸ In fact, as occurs with most norms, the GATT/WTO rules embody different characteristics and legal values and, in particular the ones we are now concerned with, have plenty of gray attributes – some of them constitute vague obligations, a few are said to be potentially self-executing³⁹ norms, others reflect imprecise legal principles and many of them display a sort of soft law character. For all these reasons, substantive GATT/WTO law has been characterized as a code⁴⁰ rather than a precise regulatory system.

The system as a whole promotes negotiation,⁴¹ because it is “based on the principle of negotiations undertaken on the basis of reciprocal and mutually advantageous arrangement,” and therefore, GATT/WTO norms usually permit a great range of bargaining.⁴²

³⁴ Annex 2.

³⁵ See Art. 16 DSU.

³⁶ See R.E. Hudec: *Enforcing International Trade Law* (1993), p. 231.

³⁷ G.R. Shelle: “Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization,” 44 *Duke LJ* 829 (1994/95).

³⁸ For example, see P. Hallström: *The GATT Panels and the Formation of International Trade Law* (1994), pp. 102–113.

³⁹ J.H. Jackson, *supra*, note 29, p. 12. Professor Jackson says in this page that “One of the reasons that makes GATT an interesting object of scrutiny (...) is that it was intended to contain precisely formulated legal rules, sometimes termed ‘contractual,’ which were to be directly applied without further elaboration.” But see J.H. Jackson: “Status of Treaties in Domestic Legal Systems: A Policy Analysis,” 86 *AJIL* 310 (1992).

⁴⁰ See A.H. Qureshi: *The WTO: Implementing International Trade Norms* (1996), specially chapter 2 called “The WTO Code.” See also O. Long: *Law and Its Limitations in the GATT Multilateral Trade System* (1985).

⁴¹ See Art. 3.7 DSU: “A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.” On this subject, see the contribution of Elisa Baroncini to the 1997 Session of the Centre of Studies and Research of the Hague Academy of International Law.

⁴² This is true of the norms and the GATT 1947 system, as is well shown by the problem of the role of *de facto* agreements. See F. Roessler: “Law, De Facto Agreements and Declarations of Principles in Economic Relations,” 21 *GYBIL* 27 (1978).

Nevertheless, one should not misunderstand this fact, for it does not mean that activities that are deemed GATT-illegal can always be “negotiate away;” the susceptibility of negotiation must respect the mandatory principle that among the many possible outcomes, only those solutions consistent with the GATT/WTO norms are allowed.⁴³ This has to be read together with the new characteristics of the WTO dispute settlement mechanism, in which the operation of the rule of negative consensus will lead almost automatically to the adoption of panel and Appellate Body reports which are commonly considered as being internationally binding obligations⁴⁴ when adopted.

The WTO as an international organization is the product of compromise between ideals and realistic goals. It is an idealistic compromise because it aims at stopping economic wars and limiting unilateralism. Notwithstanding these aims, it has the realistic objective of ensuring predictability, security and confidence in international trade law. These aims to a large extent represent a package deal which tries to reconcile the very important objective of achieving speedy solutions to international trade disputes and constituting an alternative to unilateralism.

With these objectives in mind, one should recall that the system does not necessarily aim at being democratic in a general sense. It is true, however, that the WTO has dramatically improved some democratic features of the system. One very interesting example is the role of transparency in the new system. This is reflected not only in the norms of the Marrakesh law,⁴⁵ as the duty to notify mutually agreed solutions evidences, but also in the practice of the dispute settlement organs.⁴⁶ Nevertheless, the WTO Agreement does not provide for judicial review over the validity of law making acts by their organs.⁴⁷ Moreover, regarding the place of individuals in the system, as already noted, it does not provide for a general access to WTO institutions to defend legal rights or to challenge the legality of institutional law making acts. International law has relatively recently admitted individuals as subjects of its provisions. This change stemmed from an ideological conviction to protect human rights after the Second World War.⁴⁸ In the context of the World Trade Organization, however, a preliminary question should be addressed: why should this public international organization allow private parties access to its institutional bodies? One possi-

⁴³ E.-U. Petersmann: “The GATT Dispute Settlement System as an Instrument of the Foreign Trade Policy of the EC” in: N. Emiliou and D. O’Keefe (eds.): *European Community External Trade Law After the Uruguay Round* (1996) (critiquing the European Court of Justice’s Bananas Judgment of 5 October 1994 against Germany’s application for the annulment of Title IV of the EC’s Council Regulation 404/93 on the common organization of the market of bananas [case C-280/93, *Germany v. Council* (1994) ECR I-4973].

⁴⁴ J.H. Jackson: “The WTO Dispute Settlement Understanding – Misunderstanding on the Nature of Legal Obligation,” 91 *AJIL* 60 (1997). For a different view, see J.H. Bell: “The WTO Dispute Settlement Understanding: Less is More” 90 *AJIL* 416 (1996).

⁴⁵ See Demaret, *supra*, note 27, p. 135.

⁴⁶ *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, AB-1996-3, Section IV. Transparency is present also in the general institutional practice of the WTO, as is evident from the publication in the Internet of all the reports, news and documents, without any delay. It is true, however, that the mutually agreed solutions are not usually published, the case of *Japan-Taxes on Alcoholic Beverages* being the only exception to this rule. For an overview see <http://www.wto.org/two/dispute/distab.htm>.

⁴⁷ E.-U. Petersmann, *supra*, note 25, p. 62.

⁴⁸ A. Cassese: *International Law in a Divided World* (1986), pp. 75, 99–103.

ble answer is provided by the thesis of the improvement of the enforcement of international trade law and the consequent limitation of governments' discretionary powers.⁴⁹ Another answer could be based on the improvement of the protection of the very rights of individuals and the strengthening of the principle of the rule of law.⁵⁰ What needs to be stressed is that the new dispositions reflect a concern that transcends the interests of States. The above mentioned duty of notification of mutually agreed solutions and the idea of public interest in the decisions of WTO Institutions and Member States are clear indications of this fact.

In the next two sections I will consider, first, some examples of enforcement mechanisms of rights by individuals provided in WTO norms and, second, the practice of the Panels and Appellate Body in order to see how these organs take into consideration the interests of private parties.

B. Norms Providing for Enforceable Mechanisms at the National Level

The WTO Agreements provide several examples of norms directed toward private parties. Perhaps the most interesting case is the TRIPS agreement, but it is not the only one. Other related examples are Article X:3 of GATT 1994, Article 13 of the Anti-Dumping Agreement, Article 23 of the Subsidies Agreement, and Article 4 of the Agreement of Preshipment Inspection. The following is not intended as a thorough analysis of these norms, but as a simple overview in order to support the hypothesis that the WTO Agreements have a place for private parties in their general structure.

Article X of GATT 1994 is entitled "Publication and Administration of Trade Regulations"⁵¹ and constitutes an expression of the already mentioned principle of transparency.⁵² In its third paragraph, the norm provides for a uniform, impartial, and reasonable administration of all the "laws, regulations, judicial decisions and administrative rulings of general application" covered by the Article. Remarkably, this Article states in the subsection (b) of the same paragraph that:

"Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts."

⁴⁹ See P e t e r s m a n n, *supra*, note 21.

⁵⁰ Lukas has made this point: "The rule of law in international trade will be supported if as many economic actors as possible have the right to access the enforcement mechanism." See M. L u k a s, *supra*, note 1, p. 199.

⁵¹ See GATT, *Analytical Index: Guide to GATT Law and Practice* (Updated 6th Edition, 1996), pp. 293-312.

⁵² Cf. Art. 3.6 of the Dispute Settlement Understanding, providing for the notification of mutually agreed solutions to the DSB and the relevant Councils and Committees.

Article 13 of the Anti-Dumping Agreement provides that:

“Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities for the determination or review in question.”

Article 23 of the Subsidies Agreement, entitled “Judicial Review,” provides as follows:

“Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determinations or review in question, and shall provide all interested parties who participated in the administrative proceedings and are directly and individually affected by the administrative actions with access to review.”

Article 4 of the Agreement of Preshipment Inspection⁵³ is called “Independent Review Procedures,” and aims at solving the trade distortions that stemmed from the fact that “most governments that employ preshipment inspection firms have no established appeals process to which exporters can apply.”⁵⁴ In harmony with the whole WTO system, this Article calls for the encouragement of mutually agreed solutions between preshipment inspection entities and exporters. Nevertheless, it also provides that “either party may refer the dispute to independent review.” Accordingly,

“Members shall take such reasonable measures as may be available to them to ensure that the following procedures are established and maintained to this end:

(a) these procedures shall be administered by an independent entity constituted jointly by an organization representing preshipment inspection entities and an organization representing exporters for the purposes of this Agreement;

(b) the independent entity referred to in subparagraph (a) shall establish a list of experts as follows:

⁵³ M.E. Doz i e n: “Non-Tariff Measures,” in: *The GATT Uruguay Round...*, *supra*, note 28, pp. 699–801; H.S. K i b o l a: “Pre-shipment Inspection and the GATT,” 23 *Journal of World Trade* 48 (2-1989); W. v o n R a a b: “Pre-shipment Inspections: Improved Administration of an International Trade Regime,” 25 *Journal of World Trade* 87 (5-1991). As regards the documents, see Agreement on Preshipment Inspection, in *Uruguay Round of Multilateral Negotiations: legal Instruments embodying the Results of Multilateral Trade Negotiations done at Marrakesh on 15 April 1994*, vol. 27, pp. 22313–22332. For the EC, see Council Regulation (EC) No. 3287/94 of 22 December 1994 on pre-shipment inspections for exports from the Community, in: P. R a w o r t h: *Foreign Trade Law of the European Union* (1995), p. 464. See also WTO, *Preshipment Inspection Body Becomes Operational*, Geneva, 1996 (Press/47) (<http://www.wto.org/wto/Pressrel/press47.html>).

⁵⁴ E d o z i e n, *supra*, note 53, p. 741.

(i) a section of members nominated by an organization representing preshipment inspection entities;

(ii) a section of members nominated by an organization representing exporters;

(iii) a section of independent trade experts, nominated by the independent entity referred to in subparagraph (a).

The geographical distribution of the experts on the list shall be such as to enable any disputes raised under these procedures to be dealt with expeditiously. This list shall be drawn up within two months of the entry into force of the WTO Agreement and shall be updated annually. The list shall be publicly available. It shall be notified to the Secretariat and circulated to all Members;

(c) an exporter or preshipment inspection entity wishing to raise a dispute shall contact the independent entity referred to in subparagraph (a) and request the formation of a panel. The independent entity shall be responsible for establishing a panel. This panel shall consist of three members. The members of the panel shall be chosen from section (i) of the above list by the preshipment inspection entity. The second member shall be chosen from section (ii) of the above list by the exporter concerned, provided that this member is not affiliated to that exporter. The third member shall be chosen from section (iii) of the above list by the independent entity referred to in subparagraph (a). No objections shall be made to any independent trade expert drawn from section (iii) of the above list;

(d) the independent trade expert drawn from section (iii) of the above list shall serve as the chairman of the panel. The independent trade expert shall take the necessary decisions to ensure an expeditious settlement of the dispute by the panel, for instance, whether the facts of the case require the panelists to meet and, if so, where such a meeting shall take place, taking into account the site of the inspection in question;

(e) if the parties to the dispute so agree, one independent trade expert could be selected from section (ii) of the above list by the independent entity referred to in subparagraph (a) to review the disputed in question. This expert shall take the necessary decisions to ensure an expeditious settlement of the dispute, for instance taking into account the site of the inspection in question;

(f) the object of the review shall be to establish whether, in the course of the inspection in dispute, the parties to the dispute have complied with the provisions of this Agreement. The procedures shall be expeditious and provide the opportunity for both parties to present their views in person or in writing;

(g) decisions by a three-member panel shall be taken by majority vote. The decision on the dispute shall be rendered within eight working days of the request for independent review and be communicated to the parties to the dispute. This time-limit could be extended upon agreement by the parties to the dispute. The panel or independent trade expert shall apportion the costs, based on the merits of the case;

(h) the decision of the panel shall be binding upon the preshipment inspection entity and the exporter which are parties to the dispute.”

Finally, the TRIPS Agreement is an outstanding example of the role that private parties are able to play in international trade law. This fact is already recognized in the TRIPS preamble when it says that “intellectual property rights are private rights.” The TRIPS Agreement reflects a common concern in the negotiations about the degree of protection that private parties may have at domestic levels.⁵⁵ Accordingly, the

⁵⁵ See, for example, S. Z h a n g: *De l'OMPI au GATT* (1994), p. 344.

TRIPS Agreement provides for general obligations to establish effective methods of civil, administrative, and criminal protection of intellectual property rights.⁵⁶ An extensive analysis of all these provisions is beyond the scope of this study; I would like to emphasize, however, Members' general obligations as provided in Article 41 of the Agreement. This Article reads as follows:

“1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least their legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.”

The above mentioned norms demonstrate that the Uruguay Round negotiators had in mind enforcement mechanisms that go well beyond the framework of classic interstate rights and obligations. Private parties are protagonists in all these mechanisms, which are established by WTO Members to endow privates a fair degree of protection by independent organs at domestic levels.

C. The Potential Direct Applicability of WTO Agreements from the Point of View of the Practice of Dispute Settlement Organs

In the previous section I have singled out some normative provisions which are concerned with the enforcement of WTO rights and obligations by individuals in a rather direct manner. Now I would like to turn to the practice of the dispute settlement organs, particularly the Appellate Body, to examine their posture towards private parties within the world trade system.

⁵⁶ See Part III of the TRIPS: “Enforcement of intellectual property rights” (Arts. 41–61).

As previously noted, a new institutional context permits the operation of the dispute settlement mechanism within “an integrated system.”⁵⁷ This WTO Dispute Settlement Understanding may have many conciliatory features,⁵⁸ but it is essentially new not only because of its institutional background, but mainly because it incorporates the rule of negative consensus and creates a standing Appellate Body. We will see that the following excerpts of the reports of the Appellate Body could be seen as *obiter dicta*. However, one should be aware that the Appellate Body with its first reports is definitely contributing to build an institution. Therefore, its statements could also be understood as *manifestos*⁵⁹ for the WTO.⁶⁰ It is important to start by remarking that international trade disputes, although not directly led by individuals at the international institutional levels, are usually derived or even initiated by a domestic enterprise.⁶¹ The latter case will be illustrated with the operation of administrative mechanism of enforcement in the next Part IV. The former case, i.e., that of derivation of a dispute, could be illustrated by the *Brazil – Measures Affecting Desiccated Coconut*⁶² case, which concerned:

“a decision to impose a definitive countervailing duty as the culminating act of a domestic legal process which starts with the filing of an application by the domestic industry, includes the initiation and conduct of an investigation by an investigating authority, and normally leads to a preliminary determination and a final determination. A positive final determination that subsidized imports are causing injury to a domestic industry authorizes the domestic authorities to impose a definitive countervailing duty on subsidized imports.”

An analysis of Panel and Appellate Body reports reveals that these organs are aware of how WTO law could affect individuals. I will provide examples from the “jurisprudence” of the Appellate Body.

In the *Japan – Taxes on Alcoholic Beverages* case, the Appellate Body reaffirms the sovereignty of the WTO Members.⁶³ When interpreting Article of GATT, it also said that its interpretation of that Article “is faithful to the ‘customary rules of inter-

⁵⁷ AB-1996-4, at IV.B.

⁵⁸ A remarkable example is the idea of “achieving a satisfactory settlement of the matter,” securing “a positive solution to a dispute” and favoring “mutually agreed solutions” during all the stages of a dispute. See, especially, Art. 3.7 DSU.

⁵⁹ I owe this idea to Professor Paolo Mengozzi.

⁶⁰ Besides, one never knows when an *obiter dictum* may be raised to a pedestal of a system of law. The paragraph on the obligations of *ius cogens* in the *Barcelona Traction* case comes to mind as one of this cases. See “Barcelona Traction Light and Power Company,” *ICJ Reports* 31 (1970).

⁶¹ P e t e r s m a n n, *supra*, note 21, p. xxvii.

⁶² AB-1996-4, at IV.A.

⁶³ Report of the Appellate Body of 4 October 1996 on *Japan – Taxes on Alcoholic Beverages*, AB-1996-2. At Section F: Interpretation of Art. III, it says: “The *WTO Agreement* is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.”

pretation of public international law.” However, it also affirmed the strong character of WTO norms in the following manner:

“WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the ‘security and predictability’ sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.”⁶⁴

This could be understood as an interstate-like statement. nevertheless, it is also true that the ideals of security and predictability will benefit individuals in a substantial manner. An example of this is the principle of transparency of the system. The Appellate Body said in this regard that:

“Article X:2, *General Agreement*, may be seen to embody a principle of fundamental importance – that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures. We believe that the Panel here gave to Article X:2, *General Agreement*, an interpretation that is appropriately protective of the basic principle there projected.”⁶⁵

Another express reference to private parties is made in the same *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear* case,⁶⁶ where the Appellate Body said:

“It is essential to note that, under the express terms of Article 6.10, *ATC*, the restraint measure may be ‘applied’ only ‘after the expiry of the period of 60 days’ for consultations, without success, and only within the ‘window’ of 30 days immediately following the 60-day period. Accordingly, we believe that, in the absence of an express authorization in Article 6.10, *ATC*, to backdate the effectivity of a safeguard restraint measure, a presumption arises from the very text of Article 6.10 that such a measure may be applied only prospectively. This presumption appears to us entirely appropriate in respect of measures which are limitative or deprivational in character or tenor and impact upon Member countries and their rights or privileges and upon private parties and their acts.”

⁶⁴ *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body of 4 October 1996, AB-1996-2, Section H: Art. III.2.

⁶⁵ *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Report of the Appellate Body, AB-1996-3, Section IV.

⁶⁶ *Ibid.*

In the *Coconuts* case⁶⁷ the Appellate Body went further in the use of such language, remarking on the fairness⁶⁸ of the system vis à vis individuals. It said:

“Because a countervailing duty is imposed only as a result of a sequence of acts, a line had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of states and private parties under the domestic laws in force when the *WTO Agreement* came into effect.”

Notwithstanding these general statements and all the changes of the system, and even taking the position that the DSU represents a quasi-judicial system⁶⁹ which downplays the prevalence of some specifically diplomatic elements that have made their way to a new system, it should be clear that “the presence or absence of a dispute settlement system in the agreement does not control the direct effects analysis.”⁷⁰ However, this does not mean that there is no room for interaction. For example, professor Lowenfeld has written that “the value of a dispute settlement system process is not only to resolve current controversies between states: equally, or perhaps even more important, it should serve ammunition in the debates that go on within each member state (and of course within the EC or Union) when a given measure is proposed and objected to on the ground that it is ‘GATT-illegal.’”⁷¹

IV. National Legal Orders and the Many Ways of Compliance with International Trade Law

As noted, national legal orders affect international trade obligations at different stages: especially in negotiating, ratifying and enforcing international commitments. In the following pages I choose two examples of this interaction to see, very briefly, how the problem of direct applicability of WTO has been dealt with. The election of the cases is justified by the fact that both concern major trade partners of the WTO and each reject in different ways the direct applicability of WTO provisions, but also because they have administrative mechanisms of enforcement, an element with possible use as an instrument for private parties.

⁶⁷ *Brazil – Measures Affecting Desiccated Coconut*, Report of the Appellate Body, AB-1996-4, of 21 February 1997, Part E.3.

⁶⁸ C.F. T. F r a n c k: *Fairness in International Law and Institutions* (1995).

⁶⁹ See, e.g., M. M o n t a ñ a-M o r a: “A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes,” 31 *Col. JITL* 103 (1993). See also S h e l l, *supra*, note 37.

⁷⁰ R.A. B r a n d: “Direct Effect of International Economic Law...,” *supra*, note 16, p. 602. This position is not new at all; see, for example, G. B e b r: “Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg,” 20 *CMLRev.* 35, 61 (1983).

⁷¹ P. P e s c a t o r e, W.J. D a v e y, A.F. L o w e n f e l d: *Handbook of WTO GATT Dispute Settlement* (1996), Preface, p. xi.

A. The United States of America⁷²

1. *The Negative Answer of the Implementing Act of 1994*

The Uruguay Round Agreements Act of 1994 is very clear as to the intent of Congress to deny direct applicability to the provisions of the Agreements. It establishes that private litigants cannot use the provisions of the Uruguay Round Agreements to challenge any federal or state law. In this sense, along with a general denial of direct applicability, the Act provides that no other person except the United States "shall have any cause of action or defense under any of the Uruguay Round Agreements."⁷³ The Agreements are not susceptible of being used to challenge "any action or inaction of the United States, any state, or any political subdivision of a state on the ground that such action or inaction is inconsistent"⁷⁴ with WTO law.

2. *Administrative Mechanisms: Section 301 U.S. Trade Act*

It is not my intention here to thoroughly analyze the meaning and evolution of Section 301, introduced by the 1974 Trade Act.⁷⁵ Instead, I would like to remark on an aspect that may be seen as one of the most important normative foundations of this mechanism, i.e., providing a voice for private parties in international trade law.⁷⁶ Having that point in mind, I will pose two questions: First, whether the WTO law is

⁷² See, generally, the excellent article of D.W. Leebroon: "Implementation of the Uruguay Round Results in the United States," in: *Implementing the Uruguay Round*, *supra*, note 20, p. 175. For a discussion of the status of GATT in U.S. domestic law see J.H. Jackson: "The General Agreement on Tariffs and Trade in United States Domestic Law," 66 *Mich. LR* 249 (1967); R.E. Hudec: "The Legal Status of GATT in the Domestic Law of the United States," in: *The European Community and GATT* (Hilf, Jacobs and Petersmann eds., 1986); the articles of R.A. Brand, *supra*, note 16; T.W. France: "The Domestic Legal Status of the GATT: The Need for Clarification," 51 *Wash. & Lee L. Rev.* 1481 (1994).

⁷³ Section 102, URAA, 19 USC s. 3512.

⁷⁴ Section 102(c)(1), URAA, 19 USC s. 3512(c)(1).

⁷⁵ Section 301 of the US Trade Act of 1974, 19 USC §§ 2411–2420 (1994). For analysis and commentary on Section 301 procedures see: J.B. Ello and A.F. Holmer: "GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301," 26 *International Lawyer* 795 (1992); *ibid.*, "Section 301 of the Trade Act of 1974: Requirements, Procedures and Developments," 8 *Northwestern JILB* 633 (1988); *ibid.*, "Section 301: Its Requirements, Implementation and Significance," 13 *Fordham ILJ* 260 (1989–1990); *ibid.*, "The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301," in: J.N. Bhagwati and H.C. Patrick (eds.): *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System* (1990), p. 49; *id.*, "The Post-Uruguay Round Future of Section 301," 25 *Law and Policy in International Business* 1297–1309 (1994); *ibid.*, "US Trade Law and Policy Series No. 10: Significant Recent Developments in Section 301 Unfair Trade Cases," *International Lawyer* 211–232 (1987); A. Puckett and W.L. Reynolds: "Rules, Sanctions and Enforcement under Section 301: At Odds with the WTO?," 90 *AJIL* 675 (1996). J.C. Bliss: "The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response," 20 *Law & Pol'y Int'l Bus.* 501 (1989); A.O. Sykes: "Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301," 23 *Law & Pol'y Int'l Bus.* 263 (1992). See also M. Getlan: "TRIPs and the Future of Section 301: A Comparative Study in Trade Dispute Resolution," 34 *Col. JITL* 173 (1995).

⁷⁶ I am not saying that the Congress had in mind this ground to approve the law. A fact that does not impede to include this or other normative arguments to support or attack that law. For a normative analysis of Section 301 see K.W. Abbott: "Defensive Unfairness: The Normative Structure of Section 301," in: J. Bhagwati and R.E. Hudec (eds.) 2 *Fair Trade and Harmonization* (1996), p. 415.

in open contradiction with Section 301 so as to oblige the U.S. to derogate or modify it. Second, what the limits of that law and its practical consequences are when interpreted as a voice for private parties.

Letting alone antipathetic attitudes toward this administrative mechanism, especially in relation to the rejection of unilateralism and the ambiguity of the idea of "reasonableness" as a possible foundation of the United States Trade Representative's actions, I believe that the law of Section 301 is still valid after the WTO Agreements entered into force. According to what I have said in the second part of this study, Section 301 is not absolutely invalid in international law because the U.S. Administration has alternatives to conform its conduct to international law.⁷⁷ Nevertheless, Article 23 of the Dispute Settlement Understanding, in an effort to strengthen the multilateral system, has limited the discretionary powers of Member States to "seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements," because in these cases "they shall have recourse to, and abide by, the rules and procedures of this Understanding." Therefore, Member States shall respect the procedures set up by the Organization when reacting against inconsistent conduct of other Member State,⁷⁸ and arguably have much more freedom to act against non Member States under general international law.

The Uruguay Round Agreement Act made minimal reforms to Section 301. It affirmed that, unless specifically provided for in the Act, nothing in it shall be construed "to limit any authority conferred under any law of the United States, including Section 301 of the Trade Act of 1974." As Leebron has said, "the only concession made in the United States implementing legislation is to conform the Section 301 timetable to the GATT dispute settlement timetable, so that the United States Trade Representative can await the results of those procedures before making any determinations or imposing any sanctions."⁷⁹

⁷⁷ See *supra*, notes 6–9. See D. Leebron, *supra*, note 28, at 17 (affirming that "there is nothing in Section 301 itself that would require action in violation of Article 23 of the Dispute Settlement Understanding"). In relation to the European Community, Giorgio Gaja has recently said that "whenever the Community or national authorities are bound by a Community act to take conduct which entails the international responsibility of the Community, the act in question appears to be invalid. The act is on the contrary not invalid if it leaves the implementing (Community or national) authority some discretion that could be used in order to avoid committing a wrongful act." G. Gaja: "Some Reflections on the European Community's International Responsibility," in: T. Heuvels and A. McDonnell (eds.): *The Action for Damages in Community Law* (1997).

⁷⁸ The introduction of this norm has been interpreted as an integration of the systems of self-help measures in the WTO system. Besides, one may also ask if the increase in effectiveness that results from this integration in a much more efficient dispute settlement system will feed new discussions about the self-contained character of the WTO regime. On this subject, see M.J. Hahn: *Die einseitige Aussetzung von GATT-Verpflichtungen als Repräsentation* (1996), pp. 158–163; L.B. de Chazournes: *Les contre-mesures dans les relations internationales économiques*, p. 182; P.C. Mavroidis: "Das GATT as 'Self-Contained' Regime," *Recht der internationalen Wirtschaft* (1991), p. 497. For a general international law discussion of the concept, see B. Simma: "Self-Contained Regimes," 16 *Neeth. YBIL* 111 (1985).

⁷⁹ Leebron, *supra*, note 28, p. 17.

As to the second question, I see at least two hurdles to the construction of Section 301 as a means to empower private parties and their rights in international trade law. The first limitation is that Section 301 serves only to attack. Indeed, this mechanism has been set up to contribute to the opening of foreign markets and act against unfair trade practices of foreign governments. Consequently, although those achievements could give a voice to private parties and leave them better off, Section 301 does not reflect a general concern for the protection of individuals within the United States.⁸⁰ The second limitation comes to mind when we realize that individuals are to a large extent at the mercy of the administration's discretionary powers.

3. *The Role of Courts*

Some authors have tried to give examples of interpretation and application of GATT norms in U.S. courts,⁸¹ but their illustrations do not amount to a serious consideration of those provisions by either federal or state courts. The role of U.S. courts in the judicial review of international trade law shows that "as to some matters, the U.S. system may be less rule governed and more discretionary than it would first appear."⁸² This situation is due particularly to doubts about the place of domestic courts in the enforcement of international trade law. There are also general obstacles to a more active role,⁸³ as well as concrete hurdles such as the statutes of implementation of international trade law.

In any event, because of the well established principle that interpretation of domestic law should be consistent with international obligations,⁸⁴ American courts may give general legal effect to Uruguay Round Agreements through an interpretation. Nevertheless, this general interpretative principle is of course limited by any Congressional legislation that may contradict WTO provisions or any authoritative interpretations by WTO organs.⁸⁵

B. The European Community⁸⁶

1. *The Negative Answer of the Implementing Instruments' Preamble*

After the signature of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations on 15 December 1993, the EC Commission made

⁸⁰ Leebron explains how "Congress has sought to minimize the remedies (including defences) available to [private parties] within the United States domestic legal system. *Supra*, note 72, p. 176.

⁸¹ See the studies of R. Brand cited at *supra*, note 16.

⁸² J.H. Jackson, W.J. Davey and A.O. Sykes: *Legal Problems of International Economic Relations* (1995), p. 1219.

⁸³ For example, one potential obstacle is whether the courts should interfere with the United States' President and Congress in foreign affairs.

⁸⁴ See *Restatement (Third) of the Foreign Relations Law of the United States* § 114 (1987), and the cases cited in the Reporters' Notes.

⁸⁵ Leebron, *supra*, note 72, p. 212.

⁸⁶ On the implementation of the Uruguay Round Agreements in the European Community see, generally, the splendid article of P.L.H. Van den Bossche: "The European Community and the Uruguay Round," in: *Implementing the Uruguay Round*, *supra*, note 20, p. 23. See also P.J. Kuiper: "The Conclusion and

its proposal⁸⁷ to the Council under Article 228(3) EC Treaty for the conclusion of those results. After the assent of the European Parliament,⁸⁸ on 22 December 1994, the Council adopted Council Decision 94/800/EC, concerning "the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986–1994)."⁸⁹

In its Decision, the Council took care to insert a preambular declaration to the effect that the WTO Agreements, "by its nature," could not be invoked directly before the courts of the European Community or its Member States. This declaration had been proposed by the Commission,⁹⁰ and was not objected to by the Parliament. The justification of the denial of direct applicability stemmed from the fact that the absence of a negative solution would have put the Community in an unequal and unfavourable situation⁹¹ in comparison with the other major trading partners which had ruled out any kind of invocability by private parties, as we have already seen in the case of the United States of America.⁹²

2. Administrative Mechanism: The Trade Barriers Regulation

In the European Union context, the Trade Barriers Regulation,⁹³ which replaced the New Commercial Policy Instrument,⁹⁴ provides for some rights that permit private parties to complain about illegal trade practices of third countries (non-members of the European Union). Compared to the New Commercial Policy Instrument, the Trade Barriers Regulation improved the system with the incorporation of the third track, admitting individual companies as complainants along with Mem-

Implementation of the Uruguay Round Results by the European Community," *supra*, note 26; C.W.A. Timmermans: "L'Uruguay Round: sa mise en oeuvre par la Communauté européenne," 4 *RMUE* 177 (1994); P. Eeckhout: "The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems," 34 *CMLR* 11 (1997). For an account of the history of the substantive negotiations from the EC point of view, see H. Paemen and L. Bensch: *From the GATT to the WTO: The European Community in the Uruguay Round* (1995). For an extremely suggestive article on several issues about the relationship between WTO and the EC, including the problem of direct applicability, see A.R. Borón: "Pelagatos y Aristogattos de la Comunidad Europea ante el reino de la OMC," 26 *Gaceta Jurídica de la CE* 7 (1996).

⁸⁷ Proposal for a Council decision concerning the conclusion of the results of the Uruguay Round of Multilateral Negotiations, COM(94) 143 final.

⁸⁸ This assent is required by Article 228(3), second paragraph. See the Report on the proposal for a Council Decision concerning the conclusion of the results of the Uruguay Round of multilateral trade negotiations (Rapporteur: Mrs Randzio-Plath), A4-0093/94, PE 208.916/fin. On the supervision of the European parliament over the external competences of the European Communities see, generally, M.A. Robles: *El control de la política exterior por el Parlamento Europeo* (1994).

⁸⁹ Official Journal L 336/1, 23 December 1994. Of course, this is only one of the various implementing legislation adopted by the Council as a consequence of the modifications needed after the conclusion of the Uruguay Round Agreements. See Vandenberg, *supra*, note 86, pp. 84–92.

⁹⁰ COM(94) 143 final.

⁹¹ On the resultant imbalance as a justification, see P.J. Kuijper: "The New WTO Dispute Settlement System: The Impact on the Community," *supra*, note 26, pp. 102–106.

⁹² See *supra*, notes 72–74 and accompanying text.

⁹³ Council Reg. 328//4, O.J. 1994, L 249/1.

⁹⁴ Regulation 264/84, O.J. 1984, L. 252/1.

ber States⁹⁵ and private sectors (European industries). Besides, there has been an indirect improvement by "an external factor: the strengthening of the WTO dispute settlement procedure."⁹⁶ As indicated in respect to the U.S. Section 301, it is not my intention to examine the European administrative mechanism of international trade protection in an exhaustive manner.⁹⁷ On the contrary, I would like to enquire into the possibilities of seeing the Trade Barriers Regulation as a means to channel individual claims. In the case of the Trade Barriers Regulation, unlike that of Section 301, the problem of retaliatory sanctions contradicting international law is not, in principle, an issue. One arrives at this conclusion after noticing that the Trade Barriers Regulation expressly provides that the actions taken under its authority must be in accordance with international law.

As an administrative instrument capable of protecting private interests, the Trade Barriers Regulation – like Section 301 – is limited; it only allows private parties to encourage the Commission of the European Communities to initiate investigations over foreign inconsistencies with WTO law, and the discretionary powers of the Community to press any investigation forward are broad. However, as noted, there are some elements that make the Trade Barriers Regulation an attractive means for individual claims. First of all, it should be noted that the Trade Barriers Regulation, unlike the New Commercial Policy Instrument, allows individual claims (the so-called third track) and not only claims made by European industries and Member States. Second, although the administrative procedural phases established by the Trade Barriers Regulation remain untouched,⁹⁸ the discretionary power of the Community are more limited than the one set up by Section 301 in the U.S. system, because the European Court of Justice has jurisdiction to review the Commission's decision not to open or continue an investigation. This had only occurred once in the *Fediol III* case, in which the Court had to review an individual complaint against the non-admissibility of its petition by a decision of the Commission under the New Commercial Policy Instrument.⁹⁹

⁹⁵ This track has never been used in the practice of the New Commercial Policy Instrument, since Member States seem to prefer other ways to make their cases, like for example Article 113 EC Treaty. See M.M.J. Bronckers: "Private Participation in the Enforcement of WTO Law: The New EC Trade Barriers Regulations," *CMLR* 299–302 (1996).

⁹⁶ *Ibid.*, p. 317.

⁹⁷ For the 1984 and 1994 European procedures, see F. Castillo de la Torre: "The EEC New Instrument of Trade Policy: Some Comments in the Light of the Latest Developments," *CMLR* 687–719 (1993); M.C.E.J. Bronckers: "The Potential and Limitations of the Community's New Trade Policy Instrument," in: P. Demaret, J. Bourgeois and I. van Bael (eds.): *Trade Laws of European Community and the United States in a Comparative Perspective* (1992); M.C.E.J. Bronckers, *supra*, note 95.

⁹⁸ The four phases are: review of the admissibility of the complaint, internal investigation, international dispute settlement, and retaliation.

⁹⁹ Case 70/87, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, [1989] ECR 1781. The Court decided that the Commission proceeded legally.

3. The European Court of Justice and Direct Applicability: Case Law Concerning GATT 1947 and Its Validity After the WTO Agreements

The European Community's legal order is a system governed by a peculiar doctrine of hierarchies that define the interrelationship between EC law and the domestic legal orders of the Member States. As regards international law, such a reality is not exactly the same and, as illustrated by the Court's case law concerning GATT 1947, this fact justifies a substantive case by case study. In particular, Article 228.7 does not indicate the capability of direct application of all kinds of international agreements¹⁰⁰ in an absolute way. Ehlermann¹⁰¹ has expressed this idea elegantly by affirming that "directly effective Community legislation can be invoked by individuals; international agreements, on the other hand, may lack such effect." An example of the latter is the GATT 1947. Indeed, the General Agreement has been denied direct effect by the European Court of Justice since the leading case *International Fruit Company* in 1972. In that case, the European Court of Justice rejected direct effects of GATT's provisions because of "the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties."¹⁰² The progeny of *International Fruit Company* has also been consistent in denying the direct applicability of GATT 1947 provisions,¹⁰³ not only in cases brought about through the reference proceedings of Article 177 EC Treaty, but also in a case where one Member State tried to challenge a Council Regulation through Article 173 EC Treaty.¹⁰⁴ This case-law admits of only two exceptions: first, enforceability will be accepted for those cases in which the Community intends to implement a particular obligation provided by GATT law;¹⁰⁵ second, direct applicability will be honored if an express reference is made to a particular GATT provision by a Community act.¹⁰⁶

¹⁰⁰ See Article 228.7 EC Treaty and case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie*, [1982] ECR 3641.

¹⁰¹ C.D. Ehlermann: "Application of GATT Rules in the EC," in: M. Hilf, F. Jacobs and E.-U. Petersmann (eds.): *The European Community and GATT* (1986), p. 134.

¹⁰² Cases 21-24/72, *International Fruit Company and others v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219, p. 1227.

¹⁰³ Case 9/73, *Carl Schlüter v. Hauptzollamt Lörrach*, [1973] ECR 1135; case 38/75, *Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen*, [1975] ECR; case 266/81, *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze dello Stato*, [1983] ECR 731; cases 267-269/81, *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)*, [1983] ECR 801; cases 290-291/91, *Compagnia Singer SpA and Geigy SpA v. Amministrazione delle Finanze dello Stato*, [1983] ECR 847; case C-80/93, *Germany v. Council*, [1994] ECR I-4973; case C-469/93, *Amministrazione delle Finanze dello Stato v. Chiquita Italia SpA*, [1995] ECR I-4533. For example, in this last case, the European Court of Justice said that the GATT 1947 Agreement does "not contain provisions of such a nature as to confer rights on individuals which they could rely on before national courts in order to challenge the application of conflicting national provisions."

¹⁰⁴ On these proceedings see, generally, H.G. Schermers and D.Waelbroek: *Judicial Protection in the European Communities* (5th ed. 1992).

¹⁰⁵ Case 70/87, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, [1989] ECR 1781.

¹⁰⁶ Case C-69/89, *Nakajima All Precision Co. Ltd. v. Council*, [1991] ECR I-2069. Eeckhout, in a very interesting article, has called this "the principle of implementation..." See P. Eeckhout, *supra*, note 86, p. 56.

The academic debate over the issue of direct applicability in relation to the GATT 1947 is immense, and I will not reproduce its details here.¹⁰⁷ Today, after the conclusion of the Uruguay Agreements, one should pose the question of "(...) whether the provisions of the GATT, as amended by the implementation of the Uruguay Round Agreements, are capable of being directly effective in the EC."¹⁰⁸ In the field of academic discussions, although everyone seems to accept the need to reconsider the problem after the entry into force of the WTO Agreements,¹⁰⁹ the solutions are still divided between those that propose the direct applicability of some GATT/WTO norms¹¹⁰ and those that defend the non-direct applicability of GATT/WTO.¹¹¹

From the point of view of EC law, one of the most important constitutional episodes has been the introduction of the direct effects of Community law,¹¹² and this was clearly a jurisprudential option¹¹³ which began with the leading 1963 case *Van Gend & Loos*.¹¹⁴ While the doctrine of direct effects, so important to EC law, has

¹⁰⁷ The most extensive study of this subject belongs to K.J. Kuilwijk: *The European Court of Justice and the GATT Dilemma: Public Interest versus Individual Rights?* (1996) (suggesting that Arts. I, II, III and XI used as a standard of review in the European Court of Justice). See my review of Kuilwijk's book: C.D. Espósito: "Direct Effect and Direct Applicability of WTO by the European Court of Justice, with a Dantesque Metaphor," *Berkeley JIL* (forthcoming Fall 1998). Apart from the authors cited in *supra*, note 86, see P. Mengozzi: "Les droits des citoyens de l'Union européenne des accords de Marrakesh," 4 *Revue de Marché Unique Européenne* 145 (1994); P. Manin: "A propos de l'accord instituant l'Organisation mondiale du commerce et de l'accord sur les marchés publics: la question de l'invocabilité des accords internationaux conclus par la Communauté européenne," 33 *RTDE* 399 (1997); M. Montañá-Mora: "Equilibrium: A Rediscovered Basis for the Court of Justice of the European Communities to refuse direct effect to the Uruguay Round Agreements?," 30 *Journal of World Trade* 43 (1996); J.A. Garzía López: "Derecho económico internacional y relaciones privadas," 44 *REDI* 443 (1992). See also T. Einhorn: *The Role of the Free Trade Agreement Between Israel and the EEC* (1994); *Id.*, "The Application of WTO Law by the Courts of Law in the EU and in Israel," in: *Essays on European Law and Israel* (A.M. Rabello ed., 1996), p. 1023.

¹⁰⁸ P. Lee and B. Kennedy, *supra*, note 26, p. 68.

¹⁰⁹ J. Everling: "Will Europe Slip on Bananas?," *CMIR* 401 at 422 (1996), note 45. Advocate General Otto Lenz made a similar point in his opinion in the case *Chiquita*, *supra*, note 103, at para. 21: "I should add that these comments relate exclusively to the GATT in question here. What effects the agreement signed on 15 April 1994 setting up the World Trade Organisation could have in this respect need not be discussed here." M. Montañá-Mora has underlined this point, *supra*, note 107, p. 44, note 4.

¹¹⁰ Besides the contributions of Kuilwijk, *supra*, note 107; Petersmann (for example), *supra*, note 25; R. Brótons, *supra*, note 86, and, to a limited extent, Mengozzi, *supra*, note 107, see also M.H. Hahn and G. Schuster: "Zum Verstoß von gemeinschaftlichem Sekundärrecht gegen das GATT: die gemeinsame Marktorganisation für Bananen vor dem EuGH," 28 *EuR* 261 (1993); *ibid.*, "Le droit des états membres de se prévaloir en justice d'un accord liant la Communauté," 100 *RGDIP* 367 (1995).

¹¹¹ See Kuijper: "The New WTO Dispute Settlement System: The Impact on the Community," *supra*, note 26. At p. 104 of this contribution, Kuijper admits that "there might be sufficient reason for the Court to change its view of the direct effect of the GATT after the entry into force of the WTO." However, he concludes that direct effect should not be granted.

¹¹² Professor Petersmann has studied and underlined this aspect of EC law in relation to GATT/WTO in several articles, see E.-U. Petersmann: "Proposals for a New Constitution for the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU," 32 *CMLR* 1123 (1992); *Id.*, "International and European Trade and Environmental Law after the Uruguay Round," *Academy of European Law* 135 (1991).

¹¹³ See P. Pescatore: "Aspects judiciaires del «acervo comunitario»," *Revista de Instituciones Europeas* 351 (1981).

¹¹⁴ Case 26/62, *Van Gend en Loos* [1963] ECR 12.

been denied to GATT, the Court of Justice allows direct effect with other international agreements that are not much more precise and clear than some norms of the GATT. The latter fact has led former judge Pescatore to suggest that it appears that the Court has two approaches to the interpretation of international agreements depending on the kind of agreement that is under review: while GATT has been interpreted contextually, other agreements have been interpreted textually.¹¹⁵ This study does not aim to examine this EC law issue, but I would conclude this section by summing up some ideas on the new elements introduced by WTO law and, most importantly, the alternatives to the European Court of Justice after the entry into force of the Marrakesh law. As regards WTO law, without forgetting all its conciliatory qualities,¹¹⁶ one should accept that it has set up a much more effective system of dispute resolution, a system that has been strengthened by the creation of the Appellate Body and the implementation of the negative consensus for the adoption of Panel and Appellate Body reports. These improvements have been integrated into a new international organization, whose obligations are, in principle, more difficult to derogate from, as the new safeguards agreement demonstrate. These factors, combined with the sufficient precision of some GATT norms,¹¹⁷ could lead the Court of Justice to the conclusion that some WTO norms (and decisions) have direct effects. Nevertheless, the pervasiveness of some normative arguments based on reciprocity, Community preference, equilibrium,¹¹⁸ plus the clear intent of the negotiators of the Uruguay Round and all the institutions of the European Communities, may encourage the European Court of Justice to abide by its precedents in denying direct applicability to GATT provisions. According to Lee and Kennedy, for example, "there is no evidence that it is the generally shared expectation of other WTO Member countries that the Agreement should be directly effective, and the prevailing position in both U.S. and Japan law suggests otherwise. Hence it can be argued that the Court should not grant direct effect."¹¹⁹

In my view, the ECJ's arguments denying direct effect to the WTO/GATT provisions are not unreasonable.¹²⁰ Now, after the Council Decision 94/800/EC, the question

¹¹⁵ He is writing here about the interpretation of the Yaoundé Convention in *Bresciani* and the EEC/Portugal Free Trade Agreement in *Kupferberg*. P. P e s c a t o r e: "Treaty-making in the European Communities," in: *The Effect of Treaties in Domestic Law*, *supra* 184-188. Professor Brand brought my attention to Pescatore's words, see R.A. B r a n d, *supra*, note 16, pp. 591-592. Pescatore also says that "the case-law of the Court is in a state of profound and seemingly hopeless confusion as far as the problem of direct applicability of treaties is concerned." *Ibid.*, p. 184. However, it is arguable that the Court already made that contextual, teleological interpretation as regards the EC Treaties themselves when it first tackled the question of direct effects of EC law in such famous decisions as *Van Gend & Loos* (case 26/62 [1963] ECR 1) and *Costa v. ENEL* (case 6/64 [1964] ECR 585). See J.E. H o c h l e i t n e r: *La posición del Derecho internacional en el Derecho comunitario* (1998).

¹¹⁶ See *supra*, part III.A.

¹¹⁷ See *K u i l w i j k*, *supra*, note 107; and the articles of *H a h n* and *S c h u s t e r* cited at *supra*, note 110.

¹¹⁸ See *M o r a*, *supra*, note 107.

¹¹⁹ *K e e* and *K e n n e d y*, *supra*, note 26, p. 87

¹²⁰ See *E e c k h o u t*, *supra*, note 86.

is whether the EC wants to unilaterally decide that GATT norms grant legal rights to individuals or whether it wants to abide by the general will of the member States and the European Community – expressed through the Council, the Commission, and the Parliament – and deny that GATT grants individuals such rights. Answering this question, the Court should take into account the issue of the allocation of powers¹²¹ within the European Union, and should also consider that direct applicability is not necessarily the only means to contribute to the better compliance of WTO law.¹²²

V. Conclusion

It is evident that individuals can be affected by GATT/WTO law.¹²³ One of the purposes of this study has been to demonstrate that the new context and provisions of the WTO law, although denying individuals access to its institutions, reflect a concern that transcends the mere interests of states and that the practice of the Panels and the newly created Appellate Body also takes into consideration the interests of private parties.

This fact, however, does not mean that WTO norms necessarily should be directly applicable, or that States must recognize the direct invocability of those norms by private parties. At the international institutional level, there is no mandatory provision requiring the direct applicability toward the Member States. With regard to this issue, I believe that one of the greatest barriers to the idea of direct applicability of GATT/WTO norms in domestic legal orders is the intent of the Members of the Organization.¹²⁴ Of course, the difficulty with the intent-based discourse is, perhaps,

¹²¹ For a discussion of self-executiveness as allocation of powers, see C.M. V á z q u e z: "The Four Doctrines of Self-Executing Treaties," 89 *AJIL* 695, 697–700 (1995) (arguing that there are four doctrines of self-executing treaties instead of one: the intent-based doctrine, the justiciability doctrine, the constitutionality doctrine, and the private right of action doctrine).

¹²² See P. E c k h o u t, *supra*, note 86.

¹²³ A problem that I have not consider in this paper is how individuals can affect WTO law causing a distortion of international trade. Restrictive business practices of private enterprises are an example of this case. Of course, one can argue that these practices are not covered by GATT 1994. *Cf.* Art. 9 of GATS, and also Art. 11:3 of the Agreement on Safeguards, providing that "Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1."

¹²⁴ In relation to this problem, one can ask the following question: What is the optimal level of legalization of WTO law? Professors Goldstein and Martin have argued that the optimal level of legalization of GATT falls short of full legalization. See J.G o l d s t e i n and L.L. M a r t i n: "Optimal Legalization in the GATT and WTO: Domestic Politics and Liberalization." Draft prepared for the Conference on Domestic Politics and International Law, June 5–7, 1997, St. Helena, California. On file with C.D. Espósito. See also G.W. D o w n s and D.M. R o c k e: *Optimal Imperfection? Domestic Uncertainty and Institutions in International Relations* (1995). See also, A. S y k e s: "Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts of the Strategic Design of Section 301," 8 *Boston ILJ* 301 (1990) (Arguing that uncertainty about future demands of interest groups at the domestic levels resulted in the weak enforcement norm of GATT 1947). But see P e t e r s m a n n, *supra*, note 25, pp. 52 (comparing it to the "GATT à la carte" system, "the institutions of and decision-making powers of the WTO reflect the goal of inducing countries to take a broader 'systemic view' of their general interests and to avoid mutually harmful, non-cooperative behavior.") and 36–41 on the "prisoner's dilemma" and international trade.

that its limits are not always clear and depend on the context, the substantive norms and the subsequent practice of the organs in charge of WTO law enforcement.

At the domestic level, the question is how the States should comply with international trade obligations. In this context of plurality of orders, States are competent to decide what are the best ways to comply with international trade law. Accordingly, almost all states adopt a negative enforcement solution in relation to private parties. Besides the systemic considerations, that may need some revision, states can still opt for that solution based on policy and right-based considerations,¹²⁵ which could include reciprocity,¹²⁶ respect for the constitutional allocation of power¹²⁷ between governments and parliaments, the principle of equilibrium¹²⁸ in the balance of rights and obligations in international trade relations, and the possible detrimental effects of granting direct applicability.¹²⁹

Notwithstanding all these grounds for denying the direct applicability of WTO law, one should not forget that, on the one hand, some provisions of the Agreements which are of a procedural nature should be transposed to the Member States' domestic legal orders,¹³⁰ and, on the other hand, other provisions of a substantive character have been implemented in the domestic legal orders of the WTO Members. There are also some provisions that can be considered sufficiently precise and clear and could be directly applied if WTO Members allow the possibility. In discussing the issue, one should also have in mind that direct applicability is not the only way to achieve compliance with international trade obligations, and that it is not necessarily an all or nothing problem, because it not only admits of indirect controls through administrative mechanisms which are open to individual complaints, but also allows for the implementing principle¹³¹ and the principle of international law that interpretation should be in conformity with international obligations.

¹²⁵ See J. H. Jackson: "Status of Treaties...", *supra*, note 39. Lee and Kennedy, analysing the issue in relation to the Court of Justice of the EC, seem to adhere to the idea of a denial of direct effect on "quasi-political considerations." *Supra*, note 26, p. 89.

¹²⁶ For the debate on reciprocity toward GATT enforcement in the European Community, P. Mengozzi: "Les droits des citoyens de l'Union européenne des accords de Marrakesh," 4 *RMUE* 145 (1994); *Id.*, "The Marrakesh Agreement and Its Implications on the International and European Level," in: *The Uruguay Round...*, *supra*, note 8; Kujper, *supra*, note 26, p. 106 (arguing that there should be the same internal enforcement of the WTO in each Member country). *Contra* E.-U. Petersmann: "Application of GATT by the Court of Justice of the European Communities" 20 *CMLR* 397, 433 (1983) (arguing that the principle of reciprocity is conceived for a bilateral framework); Kujlik, *supra*, note 107, pp. 110–118, 126–131 (distinguishing two kinds of reciprocity: the reciprocity as an initial balance of obligations and reciprocity in enforcement, which occur at diverse momentum). For a general analysis on reciprocity in the EC, see G. Wils: "The Concept of Reciprocity in EEC Law: An Exploration Into These Realms," 28 *CMLR* 245 (1991).

¹²⁷ C.M. Vázquez, *supra*, note 17, pp. 697–700.

¹²⁸ M. Montañá-Mora, *supra*, note 107.

¹²⁹ Lee and Kennedy, *supra*, note 26, p. 88. These authors give the example of the United States–Japan agreement on cars and talk of a "double jeopardy: a State having already made concessions in other fields may then also be forced to withdraw the measure impugned by its national court."

¹³⁰ See *supra*, section III.B.

¹³¹ Eeckhout, *supra*, note 86; and the reference to the principle of implementation made at *supra*, note 106 and accompanying text.

The WTO will still be significant without being fully operative as regards private parties. In this sense, one should remember that compliance and effectiveness may have different meanings. Thus, in relation to direct applicability, the question is whether the WTO will be a better organization including private parties as subjects of its law who can invoke WTO law before national (and international) courts. Nowadays, domestic systems have broad discretion to decide the issue of direct applicability of international trade provisions. However, as professor Hilf has noted, those legal systems should at least take the rights of the individuals seriously and treat them in accordance with the basic rule of non-discrimination under a given trade law structure.¹³²

¹³² M. H i l f, *supra*, note 22, p. 325.

Les affaires polonaises devant les organes de la Convention Européenne des Droits de l'Homme

CELINA NOWAK

La Pologne a signé la Convention Européenne des Droits de l'Homme, appelée par la suite la Convention ou la CEDH, le 26 novembre 1991. La Convention a été ratifiée le 19 janvier 1993¹. La date de son entrée en vigueur en Pologne, ainsi que celle de la reconnaissance du droit de recours individuel (art. 25 de la Convention dans sa version d'avant le Protocole No 11) et de la juridiction obligatoire de la Cour Européenne des Droits de l'Homme (art. 46 de la Convention), a été établie au 1er mai 1993². Depuis ce jour-là, la Commission Européenne des Droits de l'Homme, jusqu'au 31 octobre 1998, et la Cour de Strasbourg sont compétentes pour examiner les affaires provenant de la Pologne.

a) Le contentieux polonais

Les Polonais ont commencé à écrire à Strasbourg avant même l'entrée en vigueur de la CEDH. En 1992, la Commission Européenne des Droits de l'Homme a ouvert 240 dossiers provisoires pour les affaires polonaises. Ce nombre a augmenté d'une façon significative au cours des années suivantes.

Ainsi, en 1994, la Commission a ouvert 979 dossiers provisoires, dont 161 requêtes ont été enregistrées. En 1995 il y en a eu 1113, et en 1997 leur nombre est passé à 1318. En 1994, la Pologne se situait au troisième rang quant au nombre de dossiers provisoires, en 1996 au quatrième, et de nouveau au troisième en 1997³. Selon les statistiques les plus récentes⁴, 7771 affaires ont été pendantes devant la Cour Européenne des Droits de l'Homme, dont 851 contre la Pologne⁵. Ce chiffre plaçait la Pologne au troisième rang, derrière la Turquie et l'Italie. En 1999 on a ouvert 2898 dossiers provisoires pour les requêtes dirigées contre la Pologne, ce qui l'a placée au deuxième rang⁶.

¹ Pub. à Dz.U. 1993 No 61, poste 284, déclaration gouvernementale – poste 285. La Pologne a ratifié la Convention avec les Protocoles No 3, 5, 8.

² La déclaration gouvernementale pub. à Dz.U. 1993, No 61, poste 286.

³ Ces données sont basées sur les *Annuaire de la CEDH*.

⁴ Toutes les statistiques relatives à l'afflux des affaires polonaises, ainsi que les jugements rendus par la Cour dans les affaires polonaises, sont accessibles sur le site Internet: www.echr.coe.int.

⁵ Ce qui représente environ 10,95% du total.

⁶ Au premier rang, s'est placée l'Italie avec 3652 dossiers. Derrière la Pologne, se sont retrouvées la France et l'Allemagne.

Aucun autre pays de l'Europe centrale et orientale n'est accusé d'autant de violations des droits de l'homme que la Pologne. Les Polonais écrivent à Strasbourg beaucoup plus souvent que les autres nationalités de notre région. De plus, seulement 20% de toute la correspondance en provenance de la Pologne est enregistrée par la Commission (contre 25% pour l'Europe occidentale)⁷.

Le grand nombre des requêtes peut être, en premier lieu, justifié par le nombre de Polonais, qui est d'environ 39 millions. Si on prend en considération la population des pays européens, la Pologne se place au sixième rang. Ainsi, statistiquement, le pourcentage de Polonais qui adressent des lettres à la Cour de Strasbourg est le même que celui des Anglais, des Français ou des Danois, par exemple.

Toutefois, ce qui est très intéressant à noter, c'est l'intensité d'afflux des affaires polonaises⁸. Les sociétés occidentales ont mis plus de temps pour se familiariser avec les organes strasbourgeois et pour leur adresser des requêtes. Par contre, comme nous l'avons constaté, les Polonais ont saisi cette possibilité dès le début.

Ce phénomène se justifie par quelques raisons spécifiques. D'abord, les organes de Strasbourg sont considérés, par une grande partie des Polonais, comme un organisme qui offre une possibilité favorable pour obtenir réparation de tous les dommages, réels ou même présumés. Cela s'explique par l'ignorance de la véritable nature de la protection assurée par les organes de la Convention Européenne des Droits de l'Homme. De même, ces derniers sont souvent traités par les Polonais comme une autre instance d'appel. Les gens se plaignent par exemple des arrêts des tribunaux, qu'ils estiment injustes.

De plus, il est évident que les requêtes contre la Pologne sont plus fréquemment déclarées irrecevables ou, pour différentes raisons, rejetées par la Cour, que celles concernant les autres pays⁹. Il semble que les Polonais écrivent leurs plaintes sans connaître les spécificités de la procédure devant la Commission et la Cour Européenne des Droits de l'Homme. Ils ne savent pas qu'il faut épuiser les voies de recours internes et écrivent à Strasbourg alors que leur affaire est encore pendante devant les organes judiciaires polonais. Ils n'ont pas non plus conscience du délai, prévu par la Convention, pour le dépôt de la requête, ni des conséquences de la reconnaissance du droit de recours individuel ainsi que de la juridiction obligatoire de la Cour à partir d'une date bien déterminée.

Une partie considérable des requêtes polonaises concerne des problèmes de la vie quotidienne. Les gens demandent aux organes de la CEDH de l'aide pour trouver un

⁷ Cf. A. Drzemczewski, M.A. Nowicki: «Europejska Konwencja Praw Człowieka a Polska. Trzy lata po ratyfikacji» («La CEDH et la Pologne. Trois ans après la ratification»), in: *O prawach człowieka w podwójną rocznicę paktów*, op. cit., p. 161.

⁸ Comme exemple, je voudrais souligner que, rien qu'entre le 1er novembre et le 31 décembre 1999, la Cour Européenne des Droits de l'Homme a ouvert 526 dossiers provisoires pour des affaires polonaises, soit environ 11,33%, ce qui a placé la Pologne au troisième rang, derrière l'Italie et la France.

⁹ A titre d'exemple, en 1999 la Cour a accepté 423 requêtes contre l'Italie sur un total de 3652, 112 requêtes turques sur 518 et seulement 3 sur 2898 requêtes polonaises.

¹⁰ A. Drzemczewski, M.A. Nowicki, op. cit., p. 161.

logement, un emploi, obtenir une allocation sociale. Ils demandent une intervention auprès des autorités polonaises pour leurs affaires personnelles¹⁰.

Toutes ces demandes témoignent de l'immense besoin de justice chez les Polonais. Ils espèrent obtenir la réparation des dommages qu'ils ont subis, la restitution des biens dont ils ont été privés par le régime communiste, ou juste une intervention et un signe d'intérêt de la part de la Cour européenne, qui, à leur avis, devraient impressionner les organes polonais. Quand M. de Salvia décrit ce phénomène, elle parle de «l'impatience et la soif de justice» qui «n'ont d'égal que les espoirs qu'ils ont fondés dans notre Europe»¹¹.

Le nombre de requêtes contre la Pologne témoigne du fait que les organes de Strasbourg ont déjà gagné une place importante dans la conscience des Polonais. Bien entendu, les affaires polonaises ne concernent pas seulement des disputes entre voisins. Il y en a de plus en plus qui touchent de vraies violations des dispositions de la Convention Européenne, et que la Commission juge recevables. Sur 1526 requêtes contre la Pologne, enregistrées par la Commission à partir de l'entrée en vigueur de la CEDH en Pologne jusqu'au 30 juin 1998, 31 ont été jugées recevables, dont 5 déférées à la Cour.

b) Les affaires polonaises devant la Cour Européenne des Droits de l'Homme

Jusqu'à présent, la Cour Européenne des Droits de l'Homme a eu l'occasion de se prononcer sur douze affaires contre la Pologne. Dans trois cas, elle a estimé qu'il n'y avait pas eu de violation de la Convention Européenne des Droits de l'Homme. Dans les sept autres, la Cour a trouvé que la Convention avait été violée et, dans six affaires, elle a alloué une satisfaction équitable aux requérants. Dans sept affaires il s'agissait de la violation présumée de l'article 6 de la CEDH, dont six à propos du principe du délai raisonnable. Une des affaires concernait la violation présumée de l'article 10, et quatre-violation de l'article 5.

Avant de commencer à présenter chronologiquement les affaires dirigées contre la Pologne, je voudrais souligner un phénomène, qui est caractéristique des affaires polonaises. Neuf sur douze affaires polonaises – au moins en partie – touchaient au problème du délai raisonnable, aussi bien dans le contexte des décisions prises par les tribunaux, que par le procureur au cours de la procédure préparatoire. Etant donné la situation des juridictions polonaises on peut s'attendre à ce que les requêtes relatives à ce problème soient de plus en plus nombreuses. Examinant ces affaires similaires, la Cour s'est servie des critères établis depuis longtemps, la jurisprudence concernant cette question étant très vaste. Les affaires polonaises s'inscrivent bien dans la ligne de la jurisprudence de la Cour et ne contiennent pas de problèmes nouveaux ou importants. Les jugements les plus intéressants dans les affaires polonaises ne sont pas

¹¹ Cf. M. De Salvia: «L'état des affaires intéressant les PECO devant la Commission Européenne des Droits de L'homme», in: *Quelle Europe pour les droits de l'homme* (1996), p. 405.

ceux relatifs au délai raisonnable. La Cour a rendu ses jugements les plus controversés dans les affaires qui concernaient la liberté d'expression ou la légalité de la détention d'une personne modérément intoxiquée.

Dans la première affaire contre la Pologne devant la Cour Européenne des Droits de l'Homme, il s'agissait de l'article 6 § 1 de la Convention, notamment du principe du délai raisonnable¹². La requérante, Mme Proszak, née en 1926, a été agressée en 1988 par son voisin. Celui-ci fut condamné ensuite à six mois d'emprisonnement et libéré peu de temps après, conformément à la loi d'amnistie. Le 25 octobre 1990, elle a saisi le tribunal de district d'une action civile contre son agresseur, en demandant une somme d'argent au titre de dommages et intérêts. Au cours de la procédure, la requérante a subi deux examens psychiatriques, mais a refusé d'en subir d'autres, ordonnés par le tribunal. En 1994, elle a également demandé la récusation du juge-rapporteur en raison de la durée excessive de la procédure. En 1996, quand elle a transmis au tribunal un certificat médical, indiquant qu'elle n'était pas en mesure d'assister à l'audience, le tribunal a proposé de l'entendre à domicile. Le 16 mai 1996, le tribunal, dans son jugement, lui a donné partiellement raison. Elle a ensuite déposé un appel contre cette décision. Cependant celle-ci a été confirmée par le tribunal régional, qui a également rejeté, le 19 février 1997, un recours en cassation, terminant la procédure.

La Cour a, en premier lieu, rappelé les critères qu'elle utilise pour statuer dans les affaires relatives au délai raisonnable. Elle examine d'abord la complexité de la cause, le comportement du requérant et le comportement des autorités nationales. Comme critère accessoire, elle prend en considération aussi l'enjeu de l'affaire pour le requérant¹³.

Dans l'affaire *Proszak* la période à prendre en considération par la Cour ne commence que le 1er mai 1993. Elle s'étend donc sur trois ans, neuf mois et deux semaines. La Cour a considéré que l'affaire avait présenté une certaine complexité, mais que le comportement de la requérante, notamment la récusation à trois reprises du juge, ses absences, ainsi que son refus de se soumettre à un examen médical, a été à l'origine du retard de la procédure. Le tribunal de district, selon la Cour, a fait de son mieux pour terminer la procédure, il est même allé jusqu'à se rendre au domicile de la requérante.

En conséquence, comme la durée litigieuse ne saurait passer pour déraisonnable, la Cour a décidé que la violation de l'article 6 § 1 de la Convention Européenne des Droits de l'Homme n'était pas établie.

La première affaire polonaise, dans laquelle la Cour Européenne des Droits de l'Homme a conclu à la violation de la CEDH, était l'affaire *Belziuk*¹⁴. L'arrêt a été rendu le 25 mars 1998. Le requérant, né en 1949, a été arrêté le 31 mai 1992 et placé en détention provisoire le 2 juin 1992. Il était soupçonné d'avoir tenté de voler une

¹² Affaire *Proszak c. Pologne*, requête No 25086/94, arrêt du 16 décembre 1997.

¹³ Cf. surtout la jurisprudence citée par M.A. Nowicki dans *Europejska Konwncja Praw Człowieka. Wybór orzecznictwa* (1999), p. 267 et s.

¹⁴ Arrêt *Belziuk c. Pologne* (45/1997/829/1035).

voiture. Après un procès devant le tribunal de district, pendant lequel il n'a pas eu d'avocat et ont été entendus trois témoins à charge, le requérant a été condamné à trois ans d'emprisonnement pour tentative de vol, le 25 novembre 1992.

Le requérant a fait appel devant le tribunal régional. Il a demandé la comparution de trois nouveaux témoins, ainsi qu'à être présent à l'audience du tribunal régional. Le 21 avril 1993, le tribunal régional a rejeté sa demande. Il a jugé sa présence inutile, car il avait eu l'occasion de présenter ses griefs, par écrit, dans son appel.

Le 10 mai 1993, le tribunal régional a rejeté l'appel de M. Belziuk, au cours d'une audience, à laquelle a assisté le procureur, mais non le requérant. Il a jugé inutile les témoignages des nouveaux témoins, en estimant que la culpabilité du requérant avait été prouvée de manière satisfaisante au cours de la procédure devant le tribunal de district.

Dans sa requête à la Commission Européenne des Droits de l'Homme, M. Belziuk a allégué la violation des articles 5, 6, 7 et 14 de la Convention. La Commission a soutenu le grief relatif à l'article 6 §§ 1 et 3c concernant l'équité de la procédure devant le tribunal régional.

Dans sa réponse, le Gouvernement polonais a demandé à la Cour de déclarer l'affaire irrecevable en raison de l'incompétence *ratione temporis*, du non-épuisement des voies de recours internes, et, subsidiairement, l'absence de violation de la Convention.

Pour ce qui est de sa compétence *ratione temporis*, la Cour a noté que la Pologne avait reconnu la juridiction de la Cour à partir du 1er mai 1993. Or elle a considéré que «le fait qui avait pu entraîner le grief du requérant» était l'audience d'appel, tenu le 10 mai 1993. Elle a donc reconnu sa compétence *ratione temporis*. La Cour a également rejeté l'exception relative au non-épuisement des voies de recours internes.

Avant de présenter les appréciations de la Cour sur le fond, il faut souligner que les décisions du tribunal régional étaient conformes à la législation polonaise en vigueur à l'époque. Selon l'article 399 du Code de procédure pénale de 1969, «la cour d'appel tient audience pour l'examen de l'affaire», et, plus loin, selon l'art. 400 § 1 «l'audience a lieu, que les parties soient présentes ou non, mais elle ne peut se tenir en l'absence du procureur». Enfin l'art. 401 dispose que «Lorsqu'une affaire doit être examinée au cours d'une audience, le tribunal peut ordonner la comparution du prévenu en état de détention».

La Cour, dans ses appréciations, a rappelé, en premier lieu, les principes, émanant de sa jurisprudence, et relatifs au principe de l'égalité des armes. «La procédure pénale forme un tout et la protection de l'article 6 ne cesse pas avec le jugement de première instance. Un Etat a l'obligation de veiller à ce que, devant les cours d'appel aussi, les justiciables jouissent des garanties fondamentales énoncées dans cette disposition... Le principe de l'égalité des armes constitue un élément de la notion plus large de procès équitable... La méthode adoptée par [la législation nationale] doit garantir que la partie adverse soit au courant du dépôt d'observations et jouisse d'une possibilité véritable de les commenter».

Dans le cas présent, la Cour a décidé que «le respect du principe de l'égalité des armes et le droit à une procédure contradictoire exigeaient dès lors que le requérant fût autorisé à assister à l'audience et à contester les conclusions du procureur».

La Cour a donc estimé que, «vu la place éminente qu'occupe le droit à un procès équitable dans un société démocratique», dans le cas d'espèce, il y a bien eu une violation de l'article 6 § 1, combiné avec l'article 6 § 3c de la Convention Européenne des Droits de l'Homme. Elle a également rejeté la demande d'une satisfaction équitable de la part du requérant, en estimant que le constat de la violation était une satisfaction suffisante.

L'importance de cette affaire est non négligeable. Pour la première fois dans son histoire, la Pologne a été «condamnée» par une instance judiciaire européenne pour violation des droits de l'homme. Ce fait a sûrement donné du courage aux Polonais, frappant à la porte de Strasbourg. Il faut aussi noter que la législation en vigueur au moment du cas d'espèce a été modifiée au cours de la nouvelle codification du droit pénal et de la procédure pénale en 1997. Aujourd'hui, la présence du prévenu en état de détention dépend toujours de la volonté de la cour d'appel, mais s'il s'agit d'un appel qui n'est pas au profit du prévenu, il doit être présent à l'audience, à moins que le tribunal ne juge suffisante la présence de son avocat. Si le prévenu n'a pas d'avocat, le tribunal désigne un avocat commis d'office¹⁵.

Les deux affaires polonaises suivantes, examinées par la Cour Européenne des Droits de l'Homme, se ressemblent beaucoup. C'est probablement pour cette raison que la Cour les a examinées ensemble, le même jour. Les deux arrêts ont été rendus le 30 octobre 1998¹⁶. Les affaires concernaient la violation présumée de l'article 6 § 1, notamment du principe du délai raisonnable.

Le requérant, dans la première affaire, M. Podbielski, a assigné, le 25 mai 1992, la commune de sa résidence devant le tribunal régional afin d'obtenir le paiement de travaux de construction, que son entreprise avait effectués comme exécution d'un contrat datant du 18 février 1991, ainsi que des pénalités pour inexécution du contrat. Le tribunal a jugé que certaines des clauses du contrat étaient nulles, car contraires au droit civil. Au cours de la procédure d'appel, le requérant a obtenu le paiement, mais non les pénalités. Enfin, par un arrêt du 28 janvier 1994, la Cour Suprême a estimé que les demandes du requérant étaient justifiées et a ordonné au tribunal de première instance d'établir leurs valeurs. Néanmoins, le tribunal régional a diminué celles-ci, contrairement aux dispositions de la Cour Suprême, en rejetant en même temps la demande du requérant de dispense des frais de justice. Le 30 octobre 1998, la procédure relative à la dispense des frais était toujours pendante.

La deuxième affaire, celle de M. Styranowski, concerne le montant de la retraite. Le requérant, né en 1923, a pris sa retraite en mai 1991. Son montant a été calculé sur la base de ses cotisations et de son salaire, qui équivalait à 314% du salaire moyen. Après l'entrée en vigueur de la nouvelle loi sur les pensions de retraite, à partir du 1er

¹⁵ Pour plus de détails, voir mon article sur le principe de l'égalité des armes, in: *PiP*, 1999, No 3, p. 48 et s.

¹⁶ Affaire *Podbielski c. Pologne* (12/1998/915/1127) et affaire *Styranowski c. Pologne* (9/1998/912/1124).

décembre 1991, la retraite du requérant a été réduite, conformément au plafond servant de base au calcul, fixé sur 250% du salaire moyen. Le requérant a saisi le tribunal régional le 17 décembre 1991, se plaignant que le plafond fixé par la loi le privait d'une partie de sa retraite. Le même jour, il a également engagé une procédure d'indemnisation. Il a assisté à une audience, le 14 janvier 1993. Entre-temps il plaidait sa cause par écrit, ne pouvant pas assister aux autres audiences, et demandait à la cour d'examiner l'affaire en son absence. La procédure d'indemnisation s'est terminée par le rejet de son appel, le 16 janvier 1996.

Dans les deux affaires, la Commission Européenne des Droits de l'Homme a constaté la violation de l'article 6 § 1 de la CEDH¹⁷.

Dans les deux cas, la période à prendre en considération par la Cour a débuté non le jour du commencement de la procédure devant les autorités judiciaires polonaises, mais le 1er mai 1993, le jour de l'entrée en vigueur de la Convention en Pologne. Cependant, la Cour a décidé de tenir compte de l'état où la cause se trouvait au 1er mai 1993. Donc, dans l'affaire *Podbielski*, jusqu'au moment de la prise de décision par la Cour, la procédure a duré plus de six ans et cinq mois, dont cinq ans et presque six mois sont à prendre en considération. Dans l'affaire *Styranowski* il s'agissait de la période de quatre ans et un mois, dont deux ans, huit mois et seize jours sont à prendre en considération par la Cour.

Dans les deux cas, la Cour note les enjeux des décisions des tribunaux polonais. Dans l'affaire *Styranowski*, relative à l'action en indemnisation de la réduction de sa pension, la Cour a dû agir vite, étant donné le fait que le requérant était une personne âgée. Pour ce qui est de l'affaire *Podbielski*, la Cour estime que, «vu l'inflation galopante qui sévissait à l'époque, M. Podbielski avait un fort intérêt économique à ce qu'une décision définitive sur sa demande dirigée contre la commune intervînt dans un délai raisonnable».

De même, en se référant aux critères habituels, la Cour a décidé que dans aucune des deux affaires, le comportement des requérants ne saurait expliquer la durée de la procédure au total et les affaires n'étaient pas non plus suffisamment complexes pour la justifier. En conséquence, dans les deux cas, la Cour a statué qu'il y a eu violation de l'article 6 § 1 en ce qu'il n'a pas été statué dans un «délai raisonnable» sur les «droits de caractère civil» des requérants. La Cour a également décidé d'une satisfaction équitable pour le dommage moral – dans l'affaire *Podbielski* la somme de 20 mille zlotys, dans l'affaire *Styranowski* la somme de quinze mille zlotys.

Il faut noter ici que le comportement des autorités judiciaires polonaises, dans les deux cas, considéré comme violant les dispositions de la Convention Européenne des Droits de l'Homme, est un comportement habituel. Malheureusement, les tribunaux en Pologne procèdent de cette manière. Leur engorgement, les insuffisances financières, le manque de locaux, de personnel sont à l'origine de violations de la CEDH de tel type. A mon avis, les affaires *Styranowski* et *Podbielski*, typiques pour la Pologne,

¹⁷ Dans l'affaire *Styranowski* par dix voix contre cinq, dans l'affaire *Podbielski* par treize contre deux.

constituent le début d'une grande série d'affaires relatives au délai raisonnable, comparable avec la vague des affaires italiennes des années 80.

L'affaire suivante, où la Cour Européenne des Droits de l'Homme a statué qu'il y a eu violation des dispositions de la CEDH, est l'affaire *Musial*¹⁸. Contrairement aux affaires citées ci-dessus, elle me semble très intéressante et très importante pour la Pologne. De plus, elle décrit bien l'attitude des autorités polonaises envers les justiciables au cours de la procédure pénale et la procédure d'exécution des peines.

Le 18 octobre 1987, le requérant, né en 1953, soupçonné d'avoir tué sa femme, a, au cours d'une procédure engagée par le procureur régional, été examiné par un collège de deux psychiatres qui a conclu que «vu son état de santé, il ne pouvait pas être tenu pour pénalement responsable». Le 8 février 1988, après le prononcé d'un non-lieu, le tribunal régional a ordonné l'internement du requérant dans un hôpital psychiatrique, en concluant que l'intéressé représentait un danger pour l'ordre public. La décision étant confirmée par la Cour Suprême, le requérant a été interné dans un hôpital psychiatrique le 13 avril 1988.

Le tribunal régional a refusé, à plusieurs reprises, de libérer le requérant. Le 16 mars 1993, l'avocat de l'intéressé a, de nouveau, demandé sa libération, ainsi qu'une nouvelle expertise, par les psychiatres de l'Université de Cracovie. Le tribunal a ordonné une expertise par des psychiatres de l'établissement d'internement, qui ont jugé qu'un examen par d'autres psychiatres était souhaitable. Le 26 avril 1993, le tribunal a donc ordonné l'examen par des experts de l'Université de Cracovie. Le requérant a alors subi un examen médical à l'Université de Cracovie du 31 janvier au 4 février 1994. Le rapport de cet examen a été transmis au tribunal régional le 15 décembre 1994, qui a décidé de maintenir l'internement du requérant. Ce dernier a été finalement libéré le 23 juin 1997, un an après une tentative de suicide.

La Cour a rappelé qu'«un aliéné interné de force dans un établissement psychiatrique pour une période longue ou indéterminée a le droit, selon l'article 5 § 4, de faire examiner par un tribunal à des intervalles raisonnables la „légalité” de sa détention car les motifs qui justifiaient à l'origine son internement peuvent cesser d'exister». La Cour a estimé que l'intervalle d'un an, huit mois et huit jours, entre la demande de mise en liberté et la décision de la cour, était incompatible avec la notion de bref délai de l'art. 5 § 4 de la Convention. De plus, la Cour fait remarquer, que, selon le Code de procédure pénale en vigueur, le tribunal avait des moyens pour discipliner les experts, qui ne respectaient pas leur obligation de soumettre un rapport¹⁹. De plus, en raison d'un tel délai, le tribunal s'était prononcé à partir d'un examen médical, qui avait eu lieu onze mois auparavant et ne reflétait donc pas l'état réel du requérant au moment de sa décision.

En conséquence, la Cour a décidé qu'il y a eu violation de l'article 5 § 4 de la Convention Européenne des Droits de l'Homme, car il n'a pas été statué à bref délai

¹⁸ Affaire *Musial c. Pologne*, requête No 24557/94, arrêt du 25 mars 1999.

¹⁹ Art. 242 § 1 du Code de procédure pénale, combiné avec l'art. 244 § 1, prévoyait que le juge pouvait infliger une amende à un expert qui ne remplissait pas son obligation de soumettre un rapport au tribunal.

sur la légitimité de la détention du requérant. Elle a aussi décidé que la Pologne devait verser au requérant quinze mille zlotys au titre du préjudice moral.

Un des juges a rendu une opinion dissidente, où il a considéré que la période excessive de la procédure devait être imputée aux psychiatres de l'université de Cracovie, et non aux autorités polonaises. Cependant, comme le tribunal a eu des possibilités de discipliner les experts, il apparaît que la durée de la procédure doit être imputée à l'Etat²⁰.

Il faut souligner que la législation polonaise, relative à l'internement psychiatrique en raison du danger de l'intéressé pour l'ordre public, a été modifiée au cours de la réforme de 1997. Néanmoins, il me semble que l'attitude des autorités à l'encontre des justiciables n'a pas beaucoup changé. Les tribunaux, ainsi que les autorités polonaises traitent avec une certaine légèreté les périodes d'emprisonnement ou de la détention provisoire. Ils ne remplissent même pas leurs obligations législatives. Il est vrai que ces autorités ne sont parfois pas en mesure de faire face à toutes les exigences législatives, mais ils devraient, à mon avis, apporter plus d'attention aux affaires, dans lesquelles la vie et la liberté des gens sont en jeu.

L'affaire polonaise suivante²¹ présente, à première vue, un caractère humoristique. Toutefois, après avoir lu le jugement de la Cour, je la trouve intéressante, mais controversée. Les circonstances de l'espèce sont assez simples. Le 2 septembre 1992, le requérant a vu deux gardes municipaux qui sommaient des vendeurs sur la voie publique de quitter une place, sur laquelle la vente aurait été interdite par la municipalité. M. Janowski est intervenu, en indiquant aux gardes que leurs agissements n'avaient pas de fondement juridique, sauf peut-être des instructions verbales du maire. Un groupe de passants a assisté à l'échange de propos entre le requérant et les gardes.

Par la suite, le requérant a été poursuivi par le procureur et, le 29 avril 1993, reconnu coupable d'avoir commis l'infraction d'injure à l'encontre d'agents publics (il les a appelés «goujats» et «idiots»)²². Comme, selon le tribunal de district, il s'agissait d'un acte de hooliganisme²³, M. Janowski a été condamné à huit mois d'emprisonnement assortis d'un sursis de deux ans, ainsi qu'à une amende et au versement d'une somme à une institution caritative. Après une procédure d'appel, le tribunal régional a cassé la peine d'emprisonnement, estimant que l'infraction n'a pas eu le caractère d'hooliganisme. Le requérant a voulu «défendre les vendeurs contre ce qui, à ses yeux, revêtait un caractère illégal de la part des gardes municipaux». Il n'avait, dès lors, pas agi sans motif justifiable, condition préalable requise pour la constitution d'une infraction de hooliganisme.

²⁰ Voir l'opinion dissidente du juge Ridruejo

²¹ Affaire *Janowski c. Pologne*, requête No 25716/94, arrêt du 21 janvier 1999.

²² Cf. l'article 236 du Code pénal en vigueur en 1992 «Quiconque injurie un fonctionnaire dans et à l'occasion de l'exercice de ses fonctions est passible d'une peine pouvant aller jusqu'à deux ans d'emprisonnement, d'une autre peine restrictive de liberté ou d'une amende».

²³ Cf. l'article 59 du Code pénal en vigueur en 1992 «En cas de commission d'une infraction préméditée de hooliganisme, le tribunal inflige à son auteur une peine d'emprisonnement ne pouvant être inférieure à une fois et demie la peine maximale prévue pour ce type d'infraction».

M. Janowski a saisi la Commission Européenne des Droits de l'Homme, en invoquant la violation des articles 3, 6, 7 § 1 et 10 de la CEDH. La Commission, par huit voix contre sept, a constaté la violation de l'article 10.

La tâche de la Cour était de déterminer si «la restriction apportée à la liberté d'expression de M. Janowski répondait à un „besoin social impérieux” et était proportionnée au but légitime poursuivi et, d'autre part, si les motifs invoqués par les autorités nationales pour la justifier étaient „pertinents et suffisants”» dans le sens de l'article 10 et de la jurisprudence de la Cour. La Cour relève donc que le requérant a été condamné pour avoir insulté des gardes municipaux lors d'un incident sur une place publique. «Or, le comportement des intéressés, même s'il ne se fondait pas sur une réglementation expresse du conseil municipal mais sur des considérations d'hygiène et de circulation [les arguments relevés par le Gouvernement polonais], ne justifiait pas de recourir à des attaques verbales injurieuses et insultantes». La Cour est donc convaincue que les motifs invoqués par les autorités polonaises étaient «pertinents et suffisants» aux fins de l'article 10 § 2 et l'ingérence proportionnée au but légitime visé. Par conséquent, la Cour, contrairement à la Commission, n'a pas trouvé de violation de l'article 10 de la Convention.

Cinq juges de la Cour ont donné des opinions dissidentes²⁴. Ils ont relevé que «la jurisprudence polonaise relative à l'article 236 du Code pénal semble offrir une égale protection aux fonctionnaires dans l'exercice de leurs fonctions et à ceux qui abusent de leurs fonctions»²⁵. M. le Juge Casadevall estime que «le requérant, dans les circonstances toutes particulières de l'espèce, n'a pas dépassé les limites de la critique possible des agents municipaux. Ceux-ci, en tant que responsables du maintien de l'ordre public, devaient agir conformément à la loi». Ils considèrent tous que le fait que les gardes aient agi illégalement justifie la critique, quelque peu trop émotionnelle, de la part du requérant. M. le Juge Bonello exprime le mieux ceci : «un régime qui considère l'impertinence verbale d'un individu comme plus répréhensible que les abus illicites de ses fonctionnaires a, selon moi, renversé son échelle de valeurs». Ce qui est encore plus inquiétant, c'est le fait que ledit article du Code pénal n'a pas été changé au cours de la réforme, seules les peines ont été diminuées²⁶.

Une autre requête polonaise a été examinée par la Cour Européenne des Droits de l'Homme en octobre 1999²⁷. Elle a également touché le problème du délai raisonnable. Le 3 mai 1982, le requérant, Edward Humen, a été arrêté par la milice pour avoir pris part à une manifestation à Gdańsk. Ensuite il a été placé en détention provisoire et, le 5 janvier 1983, condamné à seize mois d'emprisonnement pour avoir assisté à une réunion illégale ayant donné lieu à une attaque violente contre des tiers et des

²⁴ Juges Wildhaber, Bratza, Rozakis, Bonello, Casadevall.

²⁵ Opinion dissidente du juge Bonello.

²⁶ Cf. l'article 226 § 1 du nouveau Code pénal «Quiconque injurie un fonctionnaire public... dans et à l'occasion de l'exercice de ses fonctions est passible d'une amende, d'une peine restrictive de liberté ou d'une peine d'emprisonnement jusqu'à un an».

²⁷ Affaire *Humen c. Pologne*, requête No 26614/95, arrêt du 15 octobre 1999.

biens publics²⁸ (le requérant avait scandé des slogans anti-gouvernementaux et avait lancé des pierres, endommageant des véhicules de la milice et des bancs publics). Le 8 juin 1983 la Cour Suprême a confirmé ce jugement.

Le 3 mars 1993 la chambre criminelle de la Cour Suprême a annulé cette décision et a relaxé le requérant, car elle a estimé qu'il avait seulement exercé ses droits civils fondamentaux. A la suite de ce jugement, le 13 avril 1993, M. Humen a demandé au tribunal régional de Gdańsk une indemnité du Trésor public pour avoir été condamné à tort et détenu arbitrairement pendant 249 jours²⁹. Il n'a cependant pas précisé le montant de l'indemnité. Le tribunal lui a alors demandé de le déterminer, ainsi que de faire parvenir au tribunal des preuves relatives aux dommages prétendument subis au cours de sa détention. Le requérant s'est plaint à plusieurs reprises de la lenteur de la procédure. En novembre 1993 le président du tribunal régional l'a informé que la section pénale de ce tribunal avait été saisie de 28 demandes similaires et que la sienne arrivait en 20^{ème} position. M. Humen a, entre-temps, élargi sa demande – il a voulu obtenir également une indemnité mensuelle au titre de la perte de chances. Il a également informé le tribunal que ses dossiers médicaux pouvaient être divulgués seulement sur ordre de cette juridiction.

Au cours de la première audience, en juin 1994, le requérant a déclaré qu'en 1982 il pratiquait une activité commerciale et était membre de la chambre des métiers. Le tribunal a donc ensuite décidé de recueillir les dossiers médicaux, les informations écrites sur les impôts payés par l'intéressé en 1982, les certificats de l'ancien employeur sur le salaire dans le période 1981/82 et celui de la chambre des métiers attestant que le requérant en était effectivement membre. M. Humen s'est encore plaint de la lenteur de la procédure. En décembre 1994 il a été examiné par le neurologue qui a jugé nécessaire de procéder à une tomographie cérébrale. Peu de temps après le requérant, qui était incarcéré dans le cadre d'une autre procédure, n'est pas revenu en prison lors d'une permission et ne s'est donc pas présenté à la tomographie. Quand il a été retrouvé et de nouveau incarcéré, il a refusé de subir cet examen. Dans le même temps le tribunal a appris que M. Humen n'avait pas été membre de la chambre des métiers et n'avait pas non plus pratiqué d'activité commerciale en 1982. Le rapport des experts médicaux a été élaboré sur la base du dossier de M. Humen.

Le 2 juin 1995, au cours d'une audience, le tribunal régional de Gdańsk a décidé d'accorder à l'intéressé une indemnité de cinq mille zlotys. Cette décision fut annulée par la cour d'appel, après une nouvelle procédure, le 6 mars 1996. Le tribunal régional a alors accordé au requérant une indemnité de six mille huit cent zlotys. En octobre 1996 M. Humen a perçu cette somme du service financier du tribunal.

²⁸ Art. 275 § 1 du code pénal de 1969: «Toute personne participant à une réunion publique, dont les participants commettent ensemble une attaque violente contre un tiers ou un bien est punie d'un emprisonnement de six mois à cinq ans».

²⁹ Art. 487 du code de procédure pénale de 1969: «1. Toute personne condamnée qui, à la suite de la rouverture de la procédure pénale à son encontre ou de l'introduction d'un recours extraordinaire, est relaxée ou dont la peine est modifiée en application d'une disposition de fond plus clémente, a droit d'être indemnisée par le Trésor public au titre du préjudice qu'elle a subi pour avoir purgé tout ou partie de la peine infligée».

La Commission Européenne des Droits de l'Homme, saisie par M. Humen en 1994, par huit voix contre six a constaté la violation de l'art. 6 § 1 de la CEDH.

La Cour Européenne des Droits de l'Homme a examiné cette requête sous l'angle des critères décrits ci-dessous. La période à considérer par la Cour a débuté le 1^{er} mai 1993, le jour de l'entrée en vigueur de la CEDH en Pologne. La procédure a donc duré deux ans et presque onze mois. La Cour a constaté que la cause a présenté une certaine complexité, car il a fallu recueillir des expertises médicales, ainsi que des documents relatifs à l'emploi antérieur de M. Humen. Pour ce qui est du comportement du requérant, la Cour a d'abord rappelé que «seules les lenteurs imputables à l'Etat peuvent amener à conclure à l'inobservation du *délai raisonnable*»³⁰. La Cour a donc observé que l'attitude de l'intéressé ne pouvait pas être considérée comme suffisamment diligente par la partie demanderesse. La Cour souligne notamment que M. Humen a refusé de subir un examen médical et a donné des informations inexactes sur certains faits relatifs à son emploi. La Cour constate ensuite que le seul enjeu du litige pour le requérant était l'indemnisation, son honneur étant déjà satisfait par le jugement d'annulation de la Cour Suprême. A l'exception d'une seule période d'inactivité, qui a duré quatorze mois, aucune autre période ne peut être imputable au tribunal polonais.

La Cour a donc conclu que, dans cette affaire, il n'y a pas eu violation de l'article 6 § 1 de la Convention.

La requête suivante a été introduite par un ressortissant polonais, M. Janusz Baranowski, fondateur de la compagnie d'assurance «Westa»³¹. Le 1^{er} juin 1993, il fut arrêté par la police et le jour suivant inculpé d'escroquerie et placé en détention provisoire par le procureur régional de Łódź. Le 30 décembre 1993 le tribunal régional a prolongé sa détention jusqu'au 31 janvier 1994. Le 11 janvier 1994, le procureur a déposé un acte d'accusation devant le tribunal régional. Le 1^{er} février 1994, le requérant a saisi le procureur de district, car le délai de sa détention avait expiré le 31 janvier 1994, ce qui rendait son maintien en prison illégal et dénué de fondement. Il a pourtant été informé par les autorités que sa détention avait été prorogée sur le fondement de l'acte d'accusation et que, d'après la pratique interne, elle était toujours conforme à la loi. Le requérant a déposé quelques demandes de libération, invoquant, parmi d'autres moyens, son état de santé. Il a alors subi des examens médicaux. Ses motions ont été examinées rapidement et, le 24 mai 1994 en première instance et le 5 juillet 1994 en appel, rejetées par les autorités judiciaires. M. Baranowski a été finalement libéré et placé sous contrôle judiciaire en octobre 1996.

La Commission a jugé à l'unanimité qu'il y a eu violation de l'article 5 §§ 1 et 4.

En se référant à la violation présumée de l'article 5 § 1, la Cour a, en premier lieu, rappelé sa jurisprudence relative à la légalité de la détention, en particulier, que le droit interne, dans cette matière, doit être suffisamment précis et prévisible. Dans ce contexte la Cour a donc constaté qu'entre le 31 janvier et le 24 mai 1994 la détention

³⁰ Cf. § 66 du jugement de la Cour, aussi aff. *Proszak c. Pologne*.

³¹ Affaire *Baranowski c. Pologne*, requête No 28358/95, arrêt du 28 mars 2000.

provisoire du requérant ne se basait sur aucune décision judiciaire et que c'était l'acte d'accusation qui avait constitué son seul fondement. La Cour observe que la législation polonaise de l'époque était dépourvue de règles claires concernant la situation des détenus après l'expiration d'une décision de placement en détention, au stade de l'enquête. Elle n'a donc pas rempli l'exigence de « prévisibilité » de la loi et était contraire à la CEDH³².

En ce qui concerne l'article 5 § 4, la Cour a remarqué que la période entre le dépôt de deux demandes de mise en liberté et de la prise de décision par le tribunal, respectivement cinq et trois mois, n'est pas compatible avec la notion du « bref délai » de l'article 5 § 4 de la CEDH.

La Cour Européenne des Droits de l'Homme a donc constaté la violation de l'article 5 §§ 1 et 4 de la CEDH et, en se basant sur son article 41, a accordé trente mille zlotys au requérant pour son dommage moral.

Dans deux affaires polonaises, la Cour a rendu les jugements du 4 avril 2000. La première touche au problème du délai raisonnable³³. La requérante, Mme Janina Dewicka, née en 1911, résidente de Wrocław, a demandé, en 1991, à la Telekomunikacja Polska (compagnie de télécommunications polonaise) d'installer une ligne téléphonique dans son appartement, en se référant à des raisons humanitaires telles que son âge et son invalidité. La compagnie lui a répondu que l'installation était impossible pour des raisons techniques mais qu'elle devrait avoir lieu dans peu de temps. Comme la compagnie ne l'a pas contactée, Mme Dewicka a demandé auprès du tribunal de district d'ordonner à la Telekomunikacja de lui installer le téléphone. Elle a été libérée des frais de justice et on lui a accordé un avocat commis d'office. La première audience a eu lieu en septembre 1993. Le tribunal a constaté qu'une affaire similaire était pendante devant un tribunal d'un autre district de Wrocław et a donc décidé de suspendre la procédure en attendant l'issue de l'autre procès. Celui-ci s'est terminé en octobre 1994. La requérante a alors demandé au tribunal de procéder au plus vite. Une audience a eu lieu en mai 1995. Le tribunal a demandé qu'on lui fasse parvenir le dossier de l'autre affaire. En janvier 1996 il s'est rendu au domicile de la requérante pour l'interroger. Apparemment il a eu des difficultés à communiquer avec la requérante et a alors ordonné à son avocat de présenter un certificat médical, statuant qu'elle était bien en mesure de soutenir sa cause. En avril 1996, le tribunal a reçu un rapport d'un expert en télécommunications, selon lequel Mme Dewicka n'avait pas rempli certaines formalités nécessaires pour l'obtention du téléphone. La requérante a remis en cause l'impartialité de l'expert, qui était, en effet, un employé de la partie défenderesse. En octobre 1996, au cours d'une autre audience, le tribunal a ordonné une nouvelle expertise, aux frais de la requérante. Le rapport d'expertise a été rendu en février 1997. Il a statué que le refus d'installer la ligne était injustifié. En août 1997, le tribunal a rendu un jugement rejetant la demande de Mme Dewicka.

³² Il faut souligner que l'affaire polonaise *Kawka c. Pologne* (requête No 25874/95), pendante devant la Cour Européenne des Droits de l'Homme, est relative à la même question, à savoir la pratique de maintenir un accusé en détention provisoire sur la seule base de l'acte d'inculpation.

³³ Affaire *Dewicka c. Pologne*, requête No 38670/97.

Elle a alors fait un recours devant la cour d'appel, qui lui a donné raison en janvier 1998. Elle a ensuite demandé au tribunal de doter le jugement d'une clause d'exécution, ce qui n'a été fait qu'en mars 1999.

Comme dans chacune des affaires polonaises, la Cour Européenne des Droits de l'Homme a examiné la période à partir du 1^{er} mai 1993, mais a pris en considération la durée de toute la procédure. La Cour a également souligné que la fin de la procédure civile auprès d'un tribunal ne constitue pas celle de la procédure aux termes de l'article 6 § 1 de la CEDH. Il faut encore que le droit accordé au justiciable soit effectif. Alors, dans une affaire comme celle de Mme Dewicka, quand, pour satisfaire ses droits, on doit engager une procédure d'exécution, cette dernière fait partie intégrante de la procédure considérée³⁴. Ainsi la période à examiner par la Cour a duré cinq ans et neuf mois.

La Cour a décidé, en prenant en compte les critères émanant de sa jurisprudence, que la cause n'était pas particulièrement complexe et que le comportement de la requérante n'avait pas influencé le déroulement de la procédure. Par contre, la Cour a souligné l'importance exceptionnelle de ce litige pour Mme Dewicka, étant donné son état de santé et son âge. Selon la Cour, le comportement des autorités nationales serait acceptable s'il s'agissait d'une affaire normale. Cependant, dans l'affaire de Mme Dewicka, leur comportement est à l'origine de la lenteur de la procédure. C'est donc pour cette raison que la Cour a estimé qu'il y avait eu violation de l'article 6 § 1 de la Convention Européenne des Droits de l'Homme. Elle a également alloué à la requérante quinze mille zlotys pour son dommage moral.

Le 4 avril 2000, la Cour Européenne des Droits de l'Homme a statué sur une autre affaire polonaise³⁵. Le jugement a été largement commenté par les médias polonais, car il touchait au problème très controversé des centres de désintoxication. Les faits de l'espèce se présentent simplement. Le 5 mai 1994, le requérant, qui est pratiquement aveugle, s'est rendu avec son chien à un bureau de poste à Kraków pour vérifier ses boîtes postales. Sur place, il s'est rendu compte qu'elles étaient ouvertes et vides. Il a appelé les agents des services postaux, qui ont appelé la police, en indiquant que le requérant était ivre et qu'il dérangeait l'ordre public. Les agents de police l'ont amené au centre de désintoxication où il a passé six heures et demie. Le médecin présent au centre n'a entrepris aucun test sanguin, il a constaté sur la simple base d'un examen visuel que le requérant était «modérément intoxiqué», ce qui justifiait sa détention pendant six heures. M. Litwa a alors déposé une plainte auprès du procureur de district contre les agents de police, qui l'avaient arrêté. Il a également demandé des dommages et intérêts au Trésor public, pour le vol de ses objets personnels. Les deux plaintes ont été rejetées par les tribunaux en 1995 et 1996.

M. Litwa s'est plaint à la Commission Européenne des Droits de l'Homme, en invoquant l'article 5 § 1, l'art. 7 de la CEDH et l'art 1 du Protocole No 1. La Commission n'a soutenu son grief qu'en ce qui concerne l'article 5 § 1 de la Convention.

³⁴ Cf. par exemple les arrêts du 26 septembre 1996 dans les affaires *Zappia c. Italie*, RJD, 1996-IV et *Di Pede c. Italie*, citée par M.A. Nowicki, *op. cit.*, p. 267.

³⁵ Affaire *Litwa c. Pologne*, requête No 26629/95.

En statuant dans cette affaire, la Cour Européenne des Droits de l'Homme a en premier lieu décidé que la détention du requérant au centre de désintoxication avait été compatible avec la notion de la privation de la liberté dans le sens de l'article 5 § 1 de la CEDH. La Cour a ensuite rappelé que l'article 5 § 1 de la Convention énumère toute une liste de situations justifiant la privation de la liberté. Dans son mémoire, le Gouvernement polonais a indiqué l'article 5 § 1 e), qui justifierait le placement du requérant dans le centre.

M. Litwa a soutenu qu'une personne «modérément intoxiquée» ne peut pas être traitée par les autorités de la même façon qu'un alcoolique. La Cour s'est concentrée sur la signification du terme «alcoolique» aux fins de l'article 5 § 1 de la CEDH. Premièrement, elle a observé que la liste comprise dans l'article 5 § 1 de la Convention est exhaustive et qu'elle ne peut pas faire objet d'une interprétation large. La Cour a ensuite noté qu'en interprétant les notions de la Convention il faut leur attribuer d'abord leur signification ordinaire. Alors, un «alcoolique» est une personne dépendante de l'alcool. Néanmoins, la Cour constate plus loin que la détention des «alcooliques», autorisée par l'article 5 § 1 de la CEDH, ne vise pas seulement les personnes qui se trouvent dans un état clinique d'alcoolisme mais aussi celles dont le comportement sous l'influence de l'alcool présente une menace pour le public ou pour elles-mêmes, peu importe le diagnostic médical. Donc, selon la Cour, le placement du requérant au centre a été «légitime» au sens de l'article 5 de la Convention.

Le requérant a invoqué que les employés du centre ainsi que le médecin y présent n'avaient fait aucun test prouvant qu'il était sous l'influence de l'alcool. Le requérant a soutenu que sa détention au centre avait été arbitraire et dépourvu de fondement juridique. Par contre la Cour a constaté que les agents de police avaient suivi la procédure prévue dans la loi du 26 octobre 1982 sur l'éducation en sobriété et la prévention de l'alcoolisme³⁶. La Cour a rappelé les conditions énumérées dans l'article 40 de la loi citée ci-dessous qui sont nécessaires pour placer une personne intoxiquée dans un centre de désintoxication³⁷. Elle a par la suite constaté que dans la situation de l'espèce, il est douteux que le requérant eût effectivement été dangereux pour la vie ou la santé des tiers ou pour la sienne, surtout étant donné sa cécité et la base factuelle triviale de sa détention. Pour être légale au sens de l'article 5 § 1 de la CEDH, la privation de la liberté doit être non arbitraire. Les autorités peuvent donc y faire recours seulement quand les autres moyens, moins drastiques, n'ont pas donné des résultats.

Comme les autorités polonaises n'ont pas d'abord utilisé les méthodes prévues dans l'article 40 de la loi citée ci-dessous, la Cour a constaté que la détention du requérant au centre de désintoxication n'avait pas été légale au sens de l'article 5 § 1 de la CEDH. Elle a donc statué qu'il y avait eu violation de cette disposition de la

³⁶ Pub. à Dz.U. No 32, poste 230 avec les modifications.

³⁷ L'article 40 dispose que si les personnes sous l'influence de l'alcool, dont le comportement dans un lieu public ou dans leur lieu de travail cause un scandale, se trouvent dans les circonstances dangereuses pour leur vie ou leur santé ou représentent un danger pour la vie des tiers, on peut les placer dans un centre de désintoxication ou dans un établissement hospitalier ou les conduire à domicile.

Convention. Elle a aussi alloué au requérant 8.000 mille zlotys pour dommage moral et 15.000 pour les frais.

Un des juges a donné une opinion dissidente³⁸, selon laquelle la notion d'«alcoolique» ne peut pas être interprétée d'une façon étroite. Dans telle situation, la police ne pourrait arrêter les personnes qui ne sont pas dépendantes de l'alcool mais qui, dans un état d'intoxication, peuvent devenir dangereuses pour l'ordre public, pour des tiers ou pour elles-mêmes. Le juge a souligné que les autorités nationales jouissent d'une compétence discrétionnaire en ce qui concerne la privation de la liberté des aliénés ou des alcooliques³⁹. Cependant, elles doivent toujours avoir recours à un médecin. Comme il ne peut pas être contesté que le requérant a été examiné par un médecin au centre, sa détention de six heures n'était pas arbitraire ni, d'autant moins, contraire à la loi et à la CEDH.

Deux juges n'ont pas accepté la motivation du jugement de la majorité⁴⁰. Le juge Bonello a considéré que le trait commun de toutes les catégories des personnes énumérées à l'article 5 § 1 de la CEDH est que souvent ou même constamment elles représentent un danger pour la société. Il serait donc déraisonnable de prétendre que la notion d'«alcoolique» couvre également les personnes accidentellement sous l'influence de l'alcool. Le juge Bonello fait remarquer que dans la première partie du jugement la majorité a exclu l'interprétation large des notions conventionnelles et a considéré que la notion d'«alcoolique» ne concerne pas les personnes sous l'influence de l'alcool. Il est donc surprenant que ce mode de penser ait finalement conduit la majorité jusqu'à élargir cette notion pour y inclure aussi les personnes sous l'influence de l'alcool⁴¹. Cette approche est, selon le juge Bonello, dangereuse et constitue une anomalie. Pour la première fois dans son histoire la Cour Européenne des Droits de l'Homme a renoncé à la tradition de ne pas élargir les notions de la Convention et de ne pas y ajouter de nouvelles exceptions justifiant la privation de la liberté. Cette tendance n'est pas compatible avec la promotion et le renforcement de l'idée de l'état de droit. Le résultat obtenu par la majorité est tout à fait contraire.

Le juge Conforti s'est rangé à l'opinion du juge Bonello. A son avis, il est incompréhensible comment la majorité ait pu conclure qu'il y a eu violation de la CEDH, en statuant que l'article 5 § 1 de la Convention s'applique également aux personnes accidentellement sous l'influence de l'alcool. Le juge souligne le danger de remplacer les décisions arbitraires des autorités nationales par les décisions arbitraires de la Cour Européenne des Droits de l'Homme.

Il faut noter ici que le jugement rendu par la Cour dans l'affaire *Litwa* n'est pas clair. La majorité de la Cour n'a pas été conséquente dans son raisonnement. Les arguments donnés par les juges Bonello et Conforti montrent bien les lacunes dans la motivation du jugement. La Cour a effectivement considéré que l'article 5 § 1 de la CEDH est applicable aux personnes intoxiquées – ce qui a en effet légalisé l'institu-

³⁸ V. opinion dissidente du juge Baka.

³⁹ Cf. affaire *Winterwerp c. Pays-Bas*, arrêt du 24 octobre 1979, Series A, No 33.

⁴⁰ Cf. les opinions des juges Bonello et Conforti.

⁴¹ Voir surtout les §§ 60–62 du jugement.

tion des centres de désintoxication en Pologne et la pratique d'y placer les personnes sous l'influence de l'alcool. C'est pourquoi le jugement rendu par la Cour est tellement surprenant. Il nous fait penser que la Cour n'a pas voulu pénaliser l'institution du centre elle-même, mais a aussi préféré ne pas légaliser les actions des autorités nationales à l'encontre de M. Litwa⁴². Le manque de la détermination au sein de la Cour pour ce qui est du jugement, ainsi que sa volonté de combiner deux idées contraires (d'une part le droit d'un Etat à isoler les personnes dangereuses pour la société et d'autre part, les droits fondamentaux de l'individu) paraissent évidents. Partageant l'opinion du juge Bonello, on pourrait souligner que cette tendance va à limiter d'une façon significative les droits de l'individu.

Deux affaires polonaises ont été rayées du rôle. Toutes les deux touchaient au problème du délai raisonnable. La première requête a été introduite par un ressortissant polonais, Władysław Gładkowski, qui, le 14 octobre 1989, a saisi le tribunal régional de Varsovie d'une action contre l'hôpital central du Ministère de la Justice⁴³. Il demandait une réparation pour défaut de soins médicaux appropriés. Au cours de la procédure, le tribunal a tenu quelques audiences et obtenu quelques rapports d'experts médicaux et comptables.

En 1996, M. Gładkowski s'est plaint à la Commission Européenne des Droits de l'Homme de la durée excessive de la procédure de son affaire civile. La Commission, à l'unanimité, a estimé qu'il y avait eu violation de l'article 6 § 1 de la CEDH. A titre d'exemple, il suffit de noter que les périodes d'inactivité du tribunal ont duré un an ou seize mois. La Commission a observé que la durée de la procédure ne pouvait pas être imputée seulement aux autorités nationales.

L'affaire a été déférée devant la Cour Européenne des Droits de l'Homme en 1999. En mai 1999, l'épouse du requérant a informé la Cour que son mari était décédé en mars 1999. A ce moment-là, la procédure était toujours pendante devant le tribunal de première instance. La veuve a décidé de ne pas poursuivre la procédure devant la Cour. Etant donné ces circonstances et le fait que la Cour n'a pas trouvé de raisons à caractère général, qui justifieraient la poursuite de l'examen de l'affaire – notamment, le respect des droits de l'homme ne l'exigeait pas – elle a rayé l'affaire du rôle en se basant sur l'article 37 § 1 c).

La dernière affaire polonaise qui a été – jusqu'à présent – examinée par la Cour Européenne des Droits de l'Homme, concernait également la durée excessive de la procédure pénale⁴⁴. Le 5 février 1993, le requérant a été placé en détention provisoire par le procureur de district de Kraków. En septembre 1993 le procureur a déposé l'acte d'accusation auprès du tribunal. En dépit de plusieurs demandes de libération, le requérant est resté en détention jusqu'à la fin de la procédure en première instance, c'est-à-dire jusqu'au 28 avril 1995.

⁴² C'est peut-être le fait que le requérant était un handicapé, qui avait été décisif. Il serait intéressant de savoir quel jugement aurait rendu la Cour si M. Litwa n'était pas aveugle.

⁴³ Affaire *Gładkowski c. Pologne*, requête No 29697/96, arrêt du 14 mars 2000.

⁴⁴ Affaire *Wójcik c. Pologne*, requête No 26757/95, arrêt du 23 mai 2000.

M. Wójcik s'est plaint à la Commission Européenne des Droits de l'Homme d'une violation des articles 5 et 6 de la CEDH. La Commission a soutenu à l'unanimité son grief, mais seulement en ce qui concerne la violation de l'article 5.

La Cour a noté que le requérant avait, de manière réitérée, omis de répondre aux lettres qu'elle lui avait adressées. Alors, comme un certain nombre d'affaires polonaises, soulevant le même problème, sont pendantes devant la Cour, elle a décidé, à l'unanimité, de rayer l'affaire du rôle.

Dans une affaire, relative à la durée excessive de la procédure civile – dépassant 18 ans pour décision dans une affaire d'expropriation – la décision a été prise par le Comité des Ministres, qui a constaté la violation de l'article 6 § 1 de la CEDH. Le Comité a surveillé son exécution⁴⁵.

D'après les statistiques citées ci-dessous, au début de 1999, plus de 800 affaires polonaises étaient pendantes devant la Cour Européenne des Droits de l'Homme. Dans le cas de quelques-unes d'entre elles la Cour a déjà tenu des audiences⁴⁶. Une grande partie de ces affaires concerne l'article 6, notamment la question du délai raisonnable⁴⁷ et l'accès au tribunal. De même, plusieurs requêtes se réfèrent à la violation de l'article 5⁴⁸.

Comme il conclut de cet inventaire, six des affaires polonaises sur douze concernaient le problème du délai raisonnable, aussi bien dans le cadre de la procédure pénale que civile. Quatre autres affaires étaient relatives à la durée excessive de la détention provisoire et à la notion du bref délai, aux fins de l'article 5 § 4. Il est probable que cette question, étant jusqu'à présent la spécialité des Italiens, deviendra un jour celle de Polonais. Etant donné le système judiciaire en Pologne et les retards dans les tribunaux, cette perspective semble très proche. La Pologne devra peut-être bientôt faire face à une vague d'affaires similaires, où la justification étatique de la lenteur de la procédure est négligeable et le jugement de la Cour pratiquement évident. L'Italie, voulant éviter la réprobation internationale, a décidé de bénéficier de la possibilité, créée par l'article 39 de la CEDH, de parvenir à des règlements amiables avec les personnes, qui ont déposé des plaintes à son encontre⁴⁹. C'est extrêmement souhaitable du point de vue de l'Etat car la durée de la procédure judiciaire en Italie dépasse souvent dix ans⁵⁰. La Pologne pourra aussi bénéficier de cette possibilité.

⁴⁵ Cf. affaire *Gibas c. Pologne*, requête No 24559/94, résolution intérimaire DH (97) 242, adoptée par le Comité des Ministres le 15 mai 1997.

⁴⁶ Cf. affaire de M. Niedbala, requête No 27915/95 – relative à la violation présumée de l'article 5 §§ 3 et 4, ainsi que de l'article 8; affaire de R. Zwierzynecki, requête No 34049/96 – relative à la durée excessive de la procédure civile.

⁴⁷ Affaires: *Mikulski c. Pologne*, requête No 27914/96, *Kudla c. Pologne*, requête No 30210/96.

⁴⁸ Cf. requête No 25792/94 de M. Trzaska, l'affaire *Jeznach* – la requête porte sur la légalité et les conditions de la détention d'un handicapé de 80 ans, la requête No 27714/95, relative à la régularité de la détention du requérant à la suite de son refus de se soumettre à un examen psychiatrique et la requête No 26751/95, relative aux soins médicaux dispensés à un détenu.

⁴⁹ Cf. par exemple les règlements amiables dans les affaires *Scaruffi, Pesoni, Mangiola, Francesca, Emmolo, Scandela*.

⁵⁰ Cf. affaire *Ceriello c. Italie*, requête No 33620/97, jugement du 26 octobre 1999 – la procédure civile y a duré dix ans et deux mois.

En résumant, il faudrait souligner que dans les affaires polonaises paraissent les difficultés aux quelles la Cour Européenne des Droits de l'Homme devra faire face à l'avenir. La plus importante, d'entre elles, c'est la volonté de concilier les droits de l'Etat et ceux de l'individu. On doit surtout suivre le développement de la jurisprudence de la Cour en cette matière.

Selected Jurisprudence of Polish Supreme Court and Supreme Administrative Court Involving Questions of Public and Private International Law and European Union Law

I. Judgement of the Supreme Administrative Court in Warsaw of 13 March 2000 concerning additional administrative costs charged for customs control over imported goods performed outside the seat of the customs office

The Supreme Administrative Court (hereinafter, the "SAC") annulled the appealed decision of the President of the Supreme Customs Office (hereinafter, the "SCO") of 26 July 1999 No. DPC-VI-988/99/3038 as well as the preceding decision of the Director of the Customs Office of 28 January 1999 No. 14900/03/470-19/1999. Both annulled decisions were charging "Senagpo" Sp. z o.o. (hereinafter, "Senagpo") with its seat in Warsaw with the additional administrative costs.

The appealed decisions were based on the grounds that the customs control of the goods imported by Senagpo was performed by customs officers outside the seat of the customs office. The authorities which issued questioned decisions condemning Senagpo to pay the additional fee amounting to 480 PLN were reasoning that the place in which the control was performed was a different place of control in a sense described in Art. 3 § 1 al. 7 of the Customs Code. Hence, on virtue of Art. 275 § 4 al. 5 of the Customs Code the additional administrative costs charged were justified. The special fee paid by Senagpo was authorized in order to repay customs officers their activity outside their normal place of duty and beyond their working hours. Pursuant to the opinion of President of the SCO, the main rule governing functioning of customs administration authorities is that customs officers, like any other administrative officers are obliged to receive customers in their place of duty and not in the place postulated by their customers.

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Senagpo in its appelation holds that its seat in Warsaw, where the control by customs officers had been performed, is a place recognized by customs authorities as the place where control of goods imported by this company is permitted (hereinaf-

ter, the "recognized place of control"). This place has been granted a statistical number and is subordinated to the Customs District no IX in Błonie.

Art. 275 § 4 al. 5 of the Customs Code refers to two kinds of locations outside the seat of the customs office where customs control may be performed, i.e.: place designated for customs control (hereinafter, the "designated place of control") and recognized place of control. Pursuant to the Guidelines issued by SCO with respect to application of Art. 275 § 4 al. 5 of the Customs Code (Bulletin SCO of 5 August 1999), the interested subject shall submit an appropriate application and shall be charged with additional customs fee only in case when customs control is performed at the recognized place of control.

The appealing party claims that the interpretation of Art. 275 § 4 al. 5 of the Customs Code by SCO is wrong and eventually caused the current practice of SCO consisting of creating many places recognized for control while, at the same time, no designated place of control was founded.

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The SAC shared the point of view of the appealing party. It assumed that the Customs Code introduced an obligation to pay the additional administrative fee in consideration for performance of the acts of customs control in case when: (i) such control is executed on application of the interested party, (ii) the control performed is the official customs control and (iii) the control is performed outside the seat of the customs office as well as beyond working hours of the customs office (Art. 275 § 4 al. 5 of the Customs Code). The additional administrative fee is not related to the ordinary customs control itself since with respect to these acts interested party is charged with the normal customs fee (Art. 275 § 3 al. 1 of the Customs Code).

In the opinion of the SAC the concept of the "activities outside the seat of the customs office" referred to in Art. 275 § 4 al. 5 of the Customs Code is more broad than "outside customs office" as defined in Art. 3 § 1 al. 21 of the Customs Code. Outside the customs office means outside the office itself. The SAC holds that the place where the customs control was performed for the benefit of Senagpo was located in Warsaw, which is in fact the seat of the Warsaw's customs office pursuant to the administrative division of Poland. Hence, control performed by customs officers within the seat of Warsaw's Customs Office, and precisely at the place recognized for control, should not be charged with the additional administrative fee.

Another factor, supporting in the opinion of SAC the standpoint of Senagpo, is that Art. 275 § 4 al. 5 is relevant only in cases when the control performed at the recognized place of control takes place on virtue of the motion submitted by the interested party and as a result of its free will and for its real benefit. The control performed with respect to Senagpo at its recognized place of control was performed outside the customs office due to the lack of necessary technical equipment within the customs office.

Finally, SAC recalls the obligations of Poland under the Association Agreement with the European Communities and their Member States (16 December 1991, entered into force on 1 February 1994) as the additional grounds for its judgement. In its opinion, the obligation of harmonisation of Polish law with the law of European Union is not properly fulfilled by our country in case when the interpretation of internal legal acts by public authorities is contrary to the *acquis communautaire*. It is a well established rule of the European Union's legal system that not only customs duties on imports and exports are prohibited between the Member States but also charges having equivalent effect. The European Court of Justice has many times in its jurisprudence adopted a standpoint that all the additional charges are prohibited, irrespective of their amount and also in case when they do not bring profit to the charging State. The charges having equivalent effect are prohibited even if they do not have the discriminatory character.

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Discussion:

The commented judgement is the important decision in the jurisprudence of the Polish courts. It refers directly to the European Union's law and to the jurisprudence of the European Court of Justice.

Customs Law is a domain of great importance in the Internal Market of the European Union. Hence, Polish practice with respect to this branch of law will be very carefully examined at the moment of evaluation of the accomplishment of Polish preaccession obligations. Such an evaluation shall condition our membership in the European Union.

The rule of European Union law prohibiting application of the additional charges with respect to individuals importing goods from another Member State is a very well established directive for all the public authorities in Member States. Such practice of public authorities in the Member State shall be justified only in case when those charges are bringing real profits to the interested individual. This rule is always taken into consideration when the European Court of Justice evaluates lawfulness of the acts of state authority charging extra financial burden on the subjects involved in import of goods and beneficiaries of certain activities of customs control.

European Court of Justice has defined the charges having equivalent effect as any financial burden imposed on the importer of goods, irrespectively either of the fact in what manner such a charge has been imposed or in what manner the amount of such a charge has been established. Such an extra charge is prohibited because the only reason why it is imposed is that it concerns the goods which have been imported. This additional financial burden increases the price of imported goods having the same effect as the customs duty (Case 2 and 3/62, *Commission v. Belgium*, ECR 1962, p. 867).

These additional charges are prohibited unless the charge imposed is equivalent to the material services provided to the importer and their amount corresponds to their value. Since the additional administrative fee imposed on Senagpo for the reasons remaining beyond its fault and against its will, the normal fee for customs control is charged independently and the company gets no real benefit of this act than it represents the charge having equivalent effect according to the European Union law.

We should welcome with satisfaction the commented judgement of the SAC since it constitutes the proof that Polish courts have properly understood the obligation of harmonisation of Polish law with the *acquis communautaire*, which shall be realised not only by initiatives of legal acts consistent with European law but also by the proper interpretation of the existing provisions.

2. Judgement of the Supreme Court, Civil Chamber, of 20 January 1998, I CKN 345/97, published in Jurisprudence of the Supreme Court no 9/1998, item 137

The Supreme Court ruled in the commented judgement that Art. 12 of the Law of 12 November 1965 on Private International Law (Dziennik Ustaw No. 46, item 290 as amended) (hereinafter, the "PIL") is the provision of general character. Hence, it shall pertain to all legal acts performed under the terms and conditions requiring application of PIL, unless a specific provision of this Law provides for a different rule. Since the PIL does not contain any specific rule pertaining to the power of attorney, it should be assumed that the law governing the form in which the power of attorney may be granted shall be established pursuant to Art. 12 of PIL.

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Supreme Court quashed the appealed decision of the Voivod Court in Rzeszów of 29 October 1996 and the preceding decision of the District Court in Rzeszów of 19 July 1996. The decision of the District Court rejected the application for the inscription into the Land and Mortgage Register of the donation of the ownership of the immovable property located in Poland. Decision of the Court was based on the fact that power of attorney granted to the attorney acting on the behalf of the donatory has been issued in USA in the form required by the local law but not consistent in this respect with the Polish law. Pursuant to the USA legal system, the power of attorney may be issued in the written form with the signature of the mandatory authenticated by the notary. The power of attorney in question not only met those conditions but was also accompanied by the certificat issued by the Polish Consul in USA confirming the conformity of this document with the requirements imposed by local law.

According to the stance adopted by the District Court in Poznań in its decision, the power of attorney which conforms with the USA law requirements but is incon-

sistent with the provision of Art. 99 of the Civil Code in connection with Art. 158 of the Civil Code was null and void. Those provisions of Polish law require the form of a notary deed with respect to the power of attorney authorizing to transfer the ownership of the immovable property located in Poland. In the opinion of the District Court the power attorney granted in such a form could not be valid even if it met the requirements of the local law since Art. 24 § 1 of PIL rules that property right and other rights concerning immovable things are governed by the law of the state where those things are located.

The above decision of the District Court in Poznań has been confirmed by the Voivod Court in Poznań. One of the participants lodged the cassation against the decision of the Voivod Court based on the assumption that the decision in question infringes Art. 12 of PIL.

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Pursuant to the opinion of the Supreme Court, the basic assumption adopted by both Courts ruling previously in this case was false. The Courts of lower level adopted the stand point that, irrespectively of the place where the legal act concerned was performed, i.e. if the power of attorney was granted abroad or in Poland, the declaration of will shall always be performed in the form of the notary deed in case when the act concerns the immovable property located in Poland (Art. 99 of the Civil Code). Consequently, since the power of attorney was granted in the form which did not meet the requirements of Polish law, such power of attorney was, in the opinion of the Court null and void. In result, contract of donation performed by the attorney so authorized could neither lead to the effects desired by the parties, nor give grounds for inscription in the Land and Mortgage Register.

The Voivod Court assumed that Art. 24 § 1 is appropriate for designating legal system applicable to legal acts regarding immovable property. This provision reads that the property right is governed exclusively by the law of the state in which the immovable property is located and does not refer to the form of acts disposing of this property. Pursuant to the Supreme Court both courts dealing previously with the case did not make a difference between two legal systems designated by the collision norms of PIL: the law pertaining to the contents and the law pertaining to the form of the legal act.

According to the Supreme Court, it is Art. 12 of PIL which designates the law applicable to the form in which the power of attorney shall be granted. This provision contains two legal norms. First, pointing at the legal system applicable to the legal act itself (*lex causae*), and the second – ruling that in any case the power of attorney shall be valid if it meets the requirements of the national law of the state where the power of attorney was granted with respect to the form (*lex loci actus*). Consequently, the power of attorney cannot be rendered null and void in case when although it does not fulfil the requirements of the legal system of the state in which

the immovable property is located but it does not meet the requirements of *lex loci actus*, with regard to the power of attorney.

Art. 12 of PIL is the only provision contained in this law which pertains to the problem of the legal act's form. This provision is of general character and refers to all legal acts unless a specific provision of the same law provides for application of another legal system. There are specific provisions of PIL regarding particular form required for accomplishment of some legal acts, like: Art. 15 (the legal form of marriage), or Art. 35 (the form of legal acts *mortis causa*). Since there is no specific regulation in PIL regarding the form of the power of attorney, this legal act falls under the scope of Art. 12 of PIL. Pursuant to this provision legal act accomplished in the form required by the legal system in force in the country in which the act was performed shall be considered valid.

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Discussion:

The problem dealt with by the Supreme Court in the discussed case is of great importance. Especially, lawyers in their legal practice are very often confronted with the necessity to define the form in which the power of attorney shall be granted abroad by their customers in order to be considered valid in Poland and do not threaten the validity of legal acts accomplished by them. This issue becomes even more important when the power of attorney authorizes the attorney to perform the legal act concerning transfer of rights to the immovable property located within Polish territory. Art. 99 of the Civil Code in connection with Art. 158 of the Civil Code require that the form in which the power of attorney's is granted shall be consistent with the form of the act itself, which means that in case of immovable things the power of attorney shall be granted in the form of a notary act.

However, the application of the above mentioned provisions of Polish law should be contemplated only in case when: either Polish law is designated as the only legal system applicable to the power of attorney or their applicability results from the special character of such provisions. The latter possibility refers to such norms which are described in Polish legal writing as the provisions imposing their applicability. Consequently such norms replace provisions of the legal system normally applicable.

Pursuant to Art. 12 of PIL, which is the only provision of this Law pertaining to the form of the power of attorney, it is sufficient to observe either the *lex causae* or *lex loci actus* in order to assure the validity of the power of attorney so granted. This provision speaks in favor of the legal act performed while the subject committing such an act did not meet the requirements of the *lex causae* because he was not conscious of the requirements of the foreign law with respect to the necessary form of the power of attorney.

In the case decided by the commented judgement of the Supreme Court, Polish law was pertaining to the power of attorney as *lex causae* pursuant to the *lex rei sitae*

rule. However, it was not the only legal system which was proper to evaluate the validity of its form. Equally important for evaluation of the form of power of attorney granted in USA were the requirements imposed by local law, which were in fact met. The provisions of the Polish Civil Code quoted above would impose the applicability of the Polish law with respect to the form of the power of attorney – in the form of a notary deed being required by Polish law for all acts concerning the transfer of rights on immovables – only in case when such special character of those provisions results directly from their wording assuring their priority over the foreign law normally applicable in the case.

In fact neither the contents of Arts. 99 and 158 of Civil Code nor the jurisprudence and legal writing attributed such special force to those provisions. Consequently, the form of the power of attorney authorizing to perform an act disposing of the rights to immovable property is regulated by Art. 12 of PIL and it is sufficient if such power of attorney meets, with respect to the form, the requirements of *lex loci actus*.

3. Judgement of the Supreme Administrative Court in Warsaw of 26 August 1999 (V S.A. 708/99) regarding the claim of the Bulgarian citizen against the decision of the Council for the Refugees refusing to grant the status of a refugee

The Supreme Administrative Court (hereinafter, the “SAC”) quashed the decision of the Council for the Refugees (hereinafter, the “Council”) of 1 April 1999 as well as the decision of the Minister of Internal Affairs and Administration (hereinafter, the “MIAA” or the “Minister”) of 19 January 1999, both refusing to grant Mr. Ivan Strogov, Bulgarian citizen of Turkish origin, the status of a refugee in Poland.

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Mr. Strogov arrived in Poland on 20 September 1998. On 19 January 1999 he filed an application with the MIAA requiring to grant him the status of a refugee in Poland. As to grounds for his application he recalled his difficult economic situation related to the fact that being of Turkish origin he could not find a job in Bulgaria and in result he could not support his family.

The MIAA in his decision issued on 19 January 1999 refused to grant Mr. Strogov the status of a refugee in Poland. The Minister adopted a standpoint that the applicant filed his motion four months after being admitted to the Polish territory. In result, his application was filed in breach of the four months term provided for in Art. 37 al. 2 of the Aliens Act of 25 June 1997 (the, “LF”) (Dziennik Ustaw 1997, No. 114, item 739).

Mr. Strogov appealed from the above decision to the Council and claimed that the authority of I instance did not properly examined the facts of his case which, in

his opinion, justified granting him the status of a refugee. Mr. Strogov in his appeal referred to the judgment passed by the SAC on 1 July 1998 where the SAC adopted a position that granting the status of a refugee is not conditional upon observance of the special term within which the application should be filed.

The Council rendered its decision on 1 April 1999. It did not accept the point of view of the appealing party and shared the standpoint of the authority of 1st instance, i.e. upheld the decision refusing to grant a required status to Mr. Strogov. In the SAC's opinion Mr. Strogov violated Art. 37 al. 1 of the LF which obligates all the applicants to file their motions forthwith upon crossing the Polish border. In case when the applicant could not file an appropriate application when entering the Polish territory because of the justified fear for his life or health, then he should be authorized to file an application within the term of fourteen days from that moment. Pursuant to the opinion of the Council the terms described in Art. 37 of the LF are the procedural terms and could have been restituted, but the applicant did not apply for granting him another term for filing the application. Consequently the application was filed in the breach of Art. 37 of the LF. The Council assumed as well that an applicant who did not observe the fourteen days term and the procedural requirements provided for in Art. 37 of the LF did not fulfil the statutory terms and conditions which are obligatory for granting him protection, i.e., he did not prove the serious interest in applying for such protection of the Polish state.

Mr. Strogov appealed from the above decision to the SAC. In his appeal he expressed the opinion that the decision refusing to grant him the status of a refugee in Poland can not be issued without establishing if the terms and conditions required by the Geneva Convention of 28 July 1951 on the Refugees (the, "Convention") were fulfilled or not. The breach of the term for filing of an application can not be considered as the sufficient reason to render the negative decision with respect to granting the status of a refugee.

Answering the appeal of Mr. Strogov the Council reasoned that the non-observance of the statutory term by the appealing party leads to the legal inefficiency of the motion. Consequently, the breach of the procedural norm leads in its opinion to the transformation of the procedural grounds into the material negative condition for refusal. Hence, the Council reasons that the presumption which initially was of procedural character became subsequently "new element creating new material presumption" constituting grounds for refusal.

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In the opinion of the SAC, the appeal by Mr. Strogov is justified. Art. 37 of the LF refers to the procedural requirements, in particular to the statutory term for filing an application. Adoption of the contradictory opinion could in fact lead to the amendment being introduced by Polish LF to the Geneva Convention on the Refugees.

Such amendment would enlarge the catalogue of the conditions which have to be fulfilled by an individual in order to obtain the status of a refugee.

The SAC recalls that procedural terms in Polish law are of dual character. First, they can be stipulated with respect to the party or with respect to the appropriate authority. Second, they can be statutory, i.e., described by the law or delimited by the state authority. The discussed terms identified by Art. 37 al. 1 and 2 of the LF, are statutory ("when crossing the state border" or "within 14 days from that moment") and they are mandatory, which means that these terms can be restituted only in accordance with the provisions of the Code of Administrative Procedure (the, "CAP") (Arts. 58 and 59).

The Council assumed in its decision that the discussed terms were procedural but when upholding the decision of the Minister it concluded that the non-observance of these terms led to the consequences of material character. Subsequently, in the response to the appeal by Mr. Strogov, the Council declared that Art. 37 of the LF created a new material premise for granting the status of a refugee. The SAC concluded that Art. 42 p. 1 of the LF, containing reasons for the negative decision with respect to granting the status of a refugee and was evoked by both decisions in fact does not constitute grounds for refusal. Filing a motion for restitution of the term by the applicant did not constitute the reason to refuse to grant him the status of a refugee.

The SAC did not agree with the other argument presented in the quashed decisions, i.e., that the non-observance of the terms provided for in the Art. 37 of the LF results in the inefficiency of the legal act. The Minister and the Council consider the "legal act" can be understood as the motion for granting the status of a refugee. Such conclusion in opinion of the SAC is not authorized since neither LF nor the Regulation of MIAA of 23 December 1997 on the Procedure and Drafts of Documents Regarding Foreigners (Dz.U. 1998, No. 1, item 1) regulate legal consequences of submission of the application for granting the status of a refugee beyond the terms provided for in Art. 37 of the LF.

As to the CAP provisions regarding this matter, the SAC assumes that there are no appropriate provisions which might be applicable in this respect. In result, the only act which should be considered in order to establish the impact of the late submission of an application on the rights of a refugee is the Geneva Convention on the Refugees.

After examining the respective provisions of the Convention and the rules of Polish Constitution of 1997 (especially Art. 9, 91 and 31 al. 3) the SAC came to the conclusion that in accordance with these new rules of Polish Constitution the right of the foreigner to claim the status of a refugee pursuant to the Convention, becomes one of the civil rights protected by the Constitution and may be limited only by the law and only for the reasons enumerated in the Art. 31 al. 3 of the Constitution. Hence, the law cannot restrict the right of an individual to obtain the status of a refugee beyond the limits resulting from the Convention.

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Discussion:

The part of the SAC reasoning pertaining to the position of international law in the Polish legal system is of special interest since the Polish Constitution of 1997 for the first time reflects this particular problem.

Poland became a party to the Geneva Convention in result of the act of accession in accordance with the provisions of the Vienna Convention of 1969 on the Law of Treaties. The declaration of accession to the Geneva Convention was made by Polish President on 2 September 1991. The declaration of the Polish Government on the accession to the Geneva Convention was made on 26 November 1991. On the following day this declaration was submitted to the Secretary General of UNO. The above declaration was accompanied by the declaration regarding the Protocol on the Status of the Refugees signed on 31 January 1967 in New York. This Protocol extends the application of the Geneva Convention to the applicants who became refugees after 1 January 1951.

Both international acts mentioned above address several matters related to the status of refugees within the territories of the states which are parties to the Convention but they do not pertain to procedure which could be applied in each country with respect to the applications regarding granting of the status of a refugee. Consequently, the issues related pertaining to each national procedure are regulated by the national law of each party.

Art. 91 of the Polish Constitution of 1997 regulates a position of the ratified international treaties in the Polish legal system. These treaties are incorporated into national legal system and they become the sources of law within the Polish territory. After being ratified and published in the official journal the treaty, as a part of the national legal system, is directly applicable, unless its application is conditional upon issuance of the law.

Although Geneva Convention and the Protocol have been adopted by Poland in the way of accession but the declaration of accession was made in the solemn form, including the participation of the Polish President. Consequently it may be assumed that the position of the above mentioned treaties in the Polish legal system is the same as of those acts of international law which have been ratified and hence, they are superior over the laws enacted by the Parliament. However, Art. 91 of the Constitution does not create the constitutional right on the part of a refugee which could authorize him to claim the status of a refugee. These international treaties laws are part of the national legal system and they can be directly applicable if they are self-executing.

In order to evaluate the soundness of the discussed judgment of SAC it is necessary to find out if the provisions of the Convention and of the Protocol are self-executing. The provision of legal act is self-executing if it is clear, complete, unconditional and does not depend on the issuance of the executive legal acts. It seems

difficult to defend the standpoint which considers the provisions of the Convention and of the Protocol as self-executing. Especially, we can not interpret the provisions of these treaties as creating the right to claim the status of a refugee. Each state has the liberty to decide about the procedure which shall be observed by an applicant in order to obtain the status of a refugee. An applicant must have a possibility to address state authorities in view of regulating its stay within the territory of the host state. But it is the right of each state to establish the rules which must be observed by an applicant.

Pursuant to the LF the applicant is authorized to file his application within the terms described by law. It is the right of each state to regulate the stay of foreigners within its territory. The national law should provide for the possibility for each alien acting with due diligence to define the title of its stay in Poland within the terms described by the LF. The refusal of the state to deal with the late application is a legitimate right of the state in case the terms stipulated by law are reasonable and the refugee is capable of gaining the information needed in order to address the appropriate state authority within such time limit. It seems that the tenor of Art. 37 of the LF contains the regulation which corresponds with such conditions.

EWA SKRZYDŁO-TEFELSKA

The Statute on International Treaties of the 14th of April 2000

Chapter 1 General Provisions

Article 1

The present Statute sets out the rules and procedures of conclusion, ratification, approval, publication, application, denunciation and modification of the scope of treaties.

Article 2

For the purposes of the present Statute:

- 1) "international treaty" means an agreement between the Republic of Poland and another subject or subjects of international law, governed by international law, whether embodied in a single instrument or in more related instruments, regardless of its name and regardless of whether it is concluded on behalf of the State, the government or the minister in charge of a department of the governmental administration competent for matters regulated by the treaty in question,
- 2) "conclusion of a treaty" includes: undertaking and conduct of negotiation, adoption of the text of a treaty, consent to sign the treaty and signing of the treaty, if such signing does not result in making the Republic of Poland bound by the treaty,
- 3) "consent to be bound by a treaty" means any act provided by international law, in particular, by the Vienna Convention on the Law of Treaties, done in Vienna on the 23rd of May 1969 (Dz.U. 1990 No. 74, Pos. 439), by which the Republic of Poland becomes a party to the treaty.

Article 3

Unless provisions of the present Statute otherwise provide, the minister competent for foreign affairs shall perform all acts on an international forum concerning conclusion of treaties, consent to be bound by a treaty expressed by the Republic of Poland, operation and denunciation of treaties.

Article 4

Whenever the present Statute refers to a minister, it shall apply to a head of a central organ of the governmental administration accordingly.

Chapter 2 Conclusion of a Treaty

Article 5

1. A minister in charge of a department of the governmental administration competent for matters regulated by a treaty, after clearing the draft of a treaty and the

instructions for negotiation with the minister competent for foreign affairs and with other ministers concerned, shall submit a request for consent to undertake negotiation of the treaty to the Prime Minister.

2. The Prime Minister shall appoint an organ competent to conduct the negotiation and shall decide on the scope of its full powers.

Article 6

1. The organ competent to conduct the negotiation shall submit to the Council of Ministers, after consultation with the minister competent for foreign affairs and with other ministers concerned, a request for consent to sign the treaty and, when appropriate, shall propose reservations formulated by the Republic of Poland to a multilateral treaty.
2. The request referred to in para. 1 shall specify the procedure to express the consent to be bound by the treaty by the Republic of Poland.
3. The Council of Ministers shall express, by resolution, the consent to sign a treaty.
4. The provisions of paras. 1–3 shall apply to treaties, not subject to signature, referred to in Article 13 para. 1, accordingly.

Article 7

The Council of Ministers on a request of the organ competent to conduct the negotiation shall pass a resolution on objection to a reservation formulated by another party to a multilateral treaty.

Article 8

The Council of Ministers, taking into account the particularity of international relations, shall set out, by regulation, the procedure for elaboration of the draft of a treaty and the instructions for negotiation, with due regard to cases in which the organ competent to conduct negotiation may do it without a draft of a treaty or written instructions for negotiation, and forms for the requests referred to in Articles 5–7. The regulation shall set out, in particular, the manner in which supporting reasons accompanying the drafts of treaties should be formulated.

Chapter 3 Full Powers

Article 9

When full powers for conduct of negotiation and adoption of the text of a treaty are required, full powers shall be issued by the minister competent for foreign affairs, on a request of the organ competent to conduct negotiation.

Article 10

When full powers to sign a treaty are required, full powers shall be issued by the Prime Minister, on a request of the minister competent for foreign affairs.

Article 11

The Council of Ministers shall set out, by regulation, the form and time schedule for submission of the requests concerning matters referred to in Articles 9 and 10.

Chapter 4 Ratification and Approval of a Treaty

Article 12

1. The consent of the Republic of Poland to be bound by a treaty shall be expressed by ratification or approval.
2. Ratification is required for treaties referred to in Article 89 para. 1 and Article 90 of the Constitution of the Republic of Poland, and for other treaties which provide for ratification or allow it, and special circumstances justify it.
3. A treaty, which is not subject to ratification, requires approval by the Council of Ministers.

Article 13

1. The consent of the Republic of Poland to be bound by a treaty may also be expressed by signature, exchange of instruments constituting a treaty or by any other means allowed by international law. In such cases the approval referred to in Article 12 para. 3 shall be given by consent referred to in Article 6.
2. The consent of the Republic of Poland to be bound by a treaty may be expressed by means referred to in para. 1, in particular, when:
 - 1) the statute allows for such a procedure and the treaty is within the scope of the statute,
 - 2) a treaty is implementing in nature in relation to a treaty already in force and does not fulfil the prerequisites set out in Article 89 para. 1 and Article 90 of the Constitution of the Republic of Poland,
 - 3) the purpose of the treaty or its annex is to modify a treaty already in force, including annex to such treaty, provided the modification of the treaty or its annex does not fulfil the prerequisites set out in Article 89 para. 1 and Article 90 of the Constitution of the Republic of Poland, or
 - 4) special circumstances require it, and the treaty does not fulfil the prerequisites set out in Article 89 para. 1 and Article 90 of the Constitution of the Republic of Poland.

Article 14

The organ competent to conduct the negotiation or the minister in charge of a department of the governmental administration competent for matters regulated by a treaty, after consultation with the ministers concerned, shall submit a request for ratification or approval of the treaty to the Council of Ministers through the minister competent for foreign affairs acting as intermediary.

Article 15

1. The Council of Ministers shall pass a resolution on submission of the treaty to the President of the Republic of Poland for ratification or shall pass a resolution on approving the treaty.
2. The minister competent for foreign affairs shall submit to the President of the Republic of Poland the treaty for ratification, together with the supporting reasons and with a draft of the instrument of ratification.
3. The submission of a treaty to the President of the Republic of Poland for ratification shall be performed after obtaining the consent referred to in Article 89 para. 1 and Article 90 of the Constitution of the Republic of Poland or after the notification to the Sejm of the Republic of Poland, referred to in Article 89 para. 2 of the Constitution of the Republic of Poland.
4. If, within 30 days from the date of the notification, the Sejm of the Republic of Poland opposes the procedure chosen under Article 89 para. 2 of the Constitution of the Republic of Poland, the Council of Ministers shall express its position on the matter.

Article 16

The Council of Ministers shall, by regulation, set out the forms of the requests referred to in Article 14 and documents prepared, and enclosed to these requests by the minister competent for foreign affairs, taking into account, in particular, that the requests should contain proposed text of reservations or of interpretative declarations formulated by the Republic of Poland or proposed text of objections made by the Republic of Poland to reservations of other contracting parties.

Article 17

The provisions of the present Statute on ratification or approval of a treaty shall apply to accession to a treaty accordingly.

Chapter 5 Publication of a Treaty

Article 18

1. A ratified treaty, together with the governmental announcements relating to it, and the treaty referred to in Article 13 para. 2 point 1, 2 and 3, if it constitutes an implementing agreement to a ratified treaty or modifies a ratified treaty, shall be published without delay, together with the governmental announcements relating to it, in the Official Journal of the Republic of Poland *Dziennik Ustaw*, further referred to as *Dziennik Ustaw*.
2. Publication of a treaty other than the treaty ratified with the prior consent expressed in a statute, referred to in para. 1, shall be ordered by the President of the Republic of Poland on a request of the minister competent for foreign affairs.

3. A treaty other than the treaty referred to in para 1 shall be published without delay together with the governmental announcements relating to it in the Official Journal of the Republic of Poland *Monitor Polski*, further referred to as *Monitor Polski*. Publication shall be ordered by the Prime Minister on a request of the minister in charge of a department of the governmental administration competent for matters regulated by the treaty.
4. In exceptional cases, when required by essential interests of the State such as, in particular, the interests of defense, security of the State and the citizens, the Prime Minister, on a request of the minister in charge of a department of the governmental administration competent for matters regulated by a treaty, may decide not to publish the treaty in *Monitor Polski*.
5. In justified cases, the President of the Republic of Poland or the Prime Minister respectively, may dispense with the publication of an annex or other document attached to a treaty in *Dziennik Ustaw* or in *Monitor Polski*, if such annex or document contains detailed provisions of a technical character, not requiring statutory regulation, referring to a small number of subjects and not concerning the rights of the citizens. In such cases, the governmental announcement, published together with the treaty in *Dziennik Ustaw* or in *Monitor Polski*, shall contain information on access to or publication of the text of the annex or document.

Article 19

The Council of Ministers shall set out, by regulation, the detailed rules on publication and archiving of treaties, taking into consideration, in particular, the accessibility of the texts of a treaty in Polish and in one of its authentic languages.

Chapter 6 Observance of a Treaty

Article 20

1. A minister in charge of a department of the governmental administration competent for matters regulated by a treaty shall be responsible for observance of duties and rights arising for the Republic of Poland from the treaty.
2. The minister referred to in para 1 shall inform the minister competent for foreign affairs about the cases of non-observance or improper implementation of a treaty.

Article 21

When a dispute with other party or parties to a treaty arises, the Council of Ministers, on a request of a minister in charge of a department of the governmental administration competent for matters regulated by a treaty cleared with the minister competent for foreign affairs, shall decide whether to submit the dispute to a court, to arbitration or conciliation.

Chapter 7

Denunciation and Modification of the Scope of a Treaty

Article 22

1. The provisions of Article 14 and Article 15 para. 1 and 2 shall apply to denunciation of a treaty accordingly.
2. The submission of a treaty, ratified with the prior consent referred to in Article 89 para. 1 and Article 90 of the Constitution of the Republic of Poland, to the President of the Republic of Poland for denunciation requires prior consent expressed by statute.
3. Governmental announcements concerning denunciation of a treaty shall be published according to the procedure required for publication of the treaty.

Article 23

A minister in charge of a department of the governmental administration competent for matters regulated by a treaty, after consultation with other ministers concerned, shall submit to the Council of Ministers, through the minister competent for foreign affairs acting as intermediary, a request for:

- 1) extension of the operation of a treaty containing no clause of automatic extension,
- 2) modification, which does not require conclusion of a new treaty, including withdrawal of a reservation formulated by the Republic of Poland,
- 3) suspension or resumption of the operation of a treaty.

Article 24

The Council of Ministers shall set out, by regulation, the form of the request for denunciation of a treaty, forms of the requests referred to in Article 23, and also of documents prepared and enclosed to the request by the minister competent for foreign affairs. The regulation shall set out, in particular, the manner in which supporting reasons accompanying the requests should be formulated.

Article 25

1. The decision on modification of the scope of a treaty, referred to in Article 23, shall be made by:
 - 1) the President of the Republic of Poland, on a request of the Council of Ministers, in case of a ratified treaty,
 - 2) the Council of Ministers, in case of other treaties.
2. Modification of the scope of a treaty ratified with the consent, referred to in Article 89 para. 1 and Article 90 of the Constitution of the Republic of Poland, requires prior consent expressed by statute.
3. Submission of a request concerning the treaty referred to in para 2 to the President of the Republic of Poland shall be performed after obtaining consent expressed by statute.

4. The President of the Republic of Poland shall notify the Sejm and the Senat of the Republic of Poland about completion of the acts regarding the ratified treaty referred to in para. 1.
5. A governmental announcement concerning modification of the scope of a treaty, referred to in Article 23, shall be published according to the procedure required for publication of the treaty.

Chapter 8

Transitional and Final Provisions

Article 26

The provisions of the present Statute shall apply to acts concerning treaties that were commenced but not completed before the day of entry into force of the present Statute.

Article 27

The present Statute shall enter into force on the thirtieth day following the date of its publication.

B O O K R E V I E W S

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J.-Y. CARLIER, D. VANHEULE (ed.), *Europe and Refugees: A Challenge?*, Kluwer Law International, The Hague-London-Boston 1997, pp. 280.

West European states' policy towards refugees provokes, since this question emerged, a series of discussions within lawyers, scholars and ONG circles, not excluding UNHCR. The fact of building it on: exclusive responsibility of one Member State for examining an asylum application, notions of safe third country and safe country of origin, manifestly unfounded applications for asylum, contradicts at the first sight the sense of both existence and observance of Geneva Convention of 1951 relating to the Status of Refugees. Aiming at restricting an access to asylum procedures in EU Member States, it leads to returning of persons seeking international protection from a country where they lodged their applications. In consequence, objections are raised on the inconsistency of the European asylum policy with the provisions of the Geneva Convention.

The reviewed position, which is a fruit of the conference organised in April 1995 by Universities of Antwerp and Namur, constitutes another contribution to a discussion on European asylum policy. It focuses on the above outlined problems. However, not only legal point of view, but, which is an asset, diversity of approaches and interpretations is presented. The publication consists of 13 articles, in both English and French, which are comprised in 3 chapters in a way they present the issues from a general to a detailed approach.

The book begins with three essays of a very general, theoretical nature representing, as it was stressed in the foreward, ethical (the article comprising elements of philosophy, culture and theory of state by Marie-Claire Caloz-Tschopp), sociological (by Daniel Warner) and political (which seems to be of a very ECRE-influenced nature, by Philip Rudge) approach.

The next chapter focuses on the essence of the notion of the refugee. James Hathaway's essay aims at defencing the definition of the refugee as embodied in the Geneva Convention. Dirk Vanhuele gives a detailed account of the conclusions resulting from a research programme carried out in fifteen states, concerning ways of a judicial interpretation of the definition. François Julien-Laferrrière provides a very detailed analysis of the role of organs designated by the states to examine asylum applications. Two approaches are presented in this respect. As far as West European states are concerned, restrictive interpretation of the refugee definition as well as many preconditions as to the access to the examination itself – are the main features of the system. The author contrasts it with a vision of the decisive organs fully independent from the political factors, more humanitarian ones.

The contribution by Philippe Bruycker, opening the last chapter of the book, provides a very detailed and comprehensive analysis of European asylum policy up to the first half of 1996. After he describes the principle of exclusive responsibility for examining of asylum applications, he comments on the implications of entering into force of the Dublin Conven-

tion. He concludes that the main feature of the emerging regional asylum law is a tendency of EU Member States to adapt their legislations to the restrictive standards worked out in the process of intergovernmental cooperation. Next author – Roel Fernhout – makes a study on what basis returning should take place so that the principle of *non-refoulement* is observed. The author analyses three situations of a possible returning: a safe country principle, a principle of exclusive responsibility and readmission. In his short contribution Jens Vedsted-Hansen focuses a reader's attention on the fact that a system which is based on controls on external frontiers on one hand and a limited access to asylum procedures on the other, drastically limits a person seeking asylum right to free movement within the territory of the EU Member States. As a consequence any kind of protection is refused. The next essay refers to the role soft law plays in the system of legal acts of international law concerning refugees on one hand and in European asylum law on the other. The author, Ulrike Brandl, puts forward an argument that conclusions and resolutions of UNHCR or Council of Europe do not determine the states' activities in the area of asylum, unlike legal acts elaborated within JHA Council of EU that influence harmonization of the Member States' internal legislations. Johannes van der Klaauw's study provides a very detailed analysis of the attitude of UNHCR office towards European asylum policy. UNHCR expresses great concern about the restrictions which are the main feature of this law. Visa requirements are considered as an element of the state's immigration policy, but when strengthened by carrier sanctions, they are likely to lead to rejection of an application without even examining the merits. The author concludes that granting mandate allowing the UNHCR to examine whether the decision on rejecting the application was founded or not, would contribute to the strengthening of the credibility of asylum institution as an instrument of the protection of the refugees. The last article focuses on the attitude of non-governmental organisations towards asylum policy. Unfortunately, Lode van Outrive does not seem to be their good representative. Too many mistakes make his essay deprived of any scientific value. It is not true everything began in 1992 (what does a word "everything" mean in this context?). Carrier sanctions are not inconsistent with Chicago Convention of 1944. A decision on establishing CIREA (*Centre for Information, Reflexion and Exchange on Asylum*) was taken in 1992, not in 1993. Last but not least, EURODAC, not EURODOC is the acronym of *European Automated Fingerprint Recognition System*.

New legal acts have appeared since the essays were prepared, first of all – three decisions of the Committee set up by Article 18 of the Dublin Convention (in force since 1 September 1997) concerning provisions for the effective implementation of the Convention. Works continue on a Joint Action concerning temporal protection and on a national plane – the process of adapting internal legislations of the states to the resolutions and recommendations of 1992. Of course, it is the Treaty of Amsterdam which introduces the most fundamental changes, incorporating asylum policy into Community competence (most of the measures are to be taken within two years after the entry into force of the Treaty). As the articles date from 1995, the participants to the conference were unable to take this into account (only one study refers to the possible communitarisation of the asylum policy), so it would be unfair to consider these contributions as outdated. However, everybody should be conscious that at least a part of reproaches expressed in them were easy to refute at that time. In sum, the reviewed book seems to be very equilibrated in formulating reproaches concerning restricted measures adopted in order to diminish the influx of illegal migrants into the EU. A tendency to treat these measures as necessary reality, draws attention. Rhetorics for its own sake, visible in earlier publications, disappears (except in two articles). However, the authors of the critical approach did not pay attention to the fact that European asylum policy is strictly connected with the practice of the Member States. Mainly because the decisions of granting refugee status are taken according to

the provisions of national laws. Moreover, it is national law which specifies conditions of returning as well as lists of safe countries.

This contribution deserves readers' attention mainly because it constitutes a trace in an at least-decade-lasting debate on this aspect of European integration that concerns building of the Internal Market. And taking into account the main goal of this publication, that is "(...) not only (...) raising questions, but also (...) indicating possible directions for the debate and for action (...)," it should be firmly stated that at the present moment fully satisfactory answers can be given to most of these questions.

Katarzyna Strąk

L.-A. SICILIANOS, *L'ONU et la démocratisation de l'État. Systèmes régionaux et ordre juridique universel*, Éditions A. Pendone, Paris 2000, pp. 321 .

The book written by Prof. Sicilianos containing a preface of Mr Boutros Boutros-Ghali is one of the contemporary human rights series. The most interesting of the introductory statements include the emphasis on the connection between democracy and human rights as well as the prediction that the phenomenon of the globalization of economy should be accompanied by some kind of globalization of democracy.

The volume itself is divided into two major sections – one of a theoretical legal character and the other more practical. Thus, the first part elaborates on the neutral attitude of the United Nations towards the political regimes of states within the years of the Cold War resulting from regarded as sacrosanct principles of national sovereignty and non-interference within the internal affairs of state, both of them being based on the notion of the effectiveness of power. The process of gradual retreat from this neutrality started in the 1970s with the wave of democratization of certain states of the Southern Europe, Central and Latin America, some states in Asia and with the dynamics of the changes in Central and Eastern Europe followed by the events of the African continent. On the basis of these political as well as institutional changes the United Nations resigned from its traditional neutrality on the political systems of states stressing the intrinsic link between democracy and human rights.

After presenting the former equivalence of various political arrangements resulting from liberty of states to choose its political system, the author presents the gradual legal development diminishing the scope of this principle. The conceptual changes within the level of the United Nations involved the rise of the principle of self-determination of peoples, especially in its internal aspect and the influence of the political rights giving rise to the expressed on the global conference in Vienna in 1993 link between democracy, development and human rights. Then he introduces the specific regional regulations in Europe and America.

The second part of the book presents the evolution of the operational activities of the United Nations ranging from actions taken in order to install or restore democracy (organisation of the electoral assistance, evolution of the United Nations attitude towards *coup d'état*, system of sanctions) as well as actions aimed at consolidation of democracy, most notably

intended for the preservation of peace and enforcement of the state of law. Democracy is being regarded as a legitimacy factor of the states' power.

The volume, written on a subject widely discussed within the contemporary socio-legal sciences, distinguishes itself with a richness of the analysed legal sources and quoted bibliography as well as with the depth of used legal interpretation. Undoubtedly, it may be regarded as one of the best legal analysis of the issue of democracy in contemporary public international law.

Dobrochna Bach

G. FOX, B. ROTH (eds.), *Democratic Governance and International Law*, Cambridge University Press, Cambridge 2000, pp. 585.

One of the most frequently disputed topics within the contemporary public international law is the question concerning the emergence of the right to democratic form of government. The debate was commenced with the events of the 'third wave of democratization' and forced international lawyers to deal with the issues formerly regarded as lying within the domestic jurisdiction of states and having purely political character, viz. internal constitution of states. This discussion, far from being resolved, seems to be of outmost importance while taking into consideration the possible consequences the right to democratic form government may entail for the whole system of international law.

The book edited by Gregory Fox and Brad Roth – both scholars actively engaged in the debate – presents a compilation of the most significant texts on the subject published within the last decade. These statements have been divided in five groups, according to the different approaches taken on the role of democracy within the international level.

The first part focuses on the normative foundations of a right to political participation bringing texts written by Thomas Franck, Gregory Fox and James Crawford. Having been formulated at the beginning of 1990s, these articles present the origins and development of democratic entitlement, the relationship between the existence of the political rights and the organization of authentic elections, election-monitoring and examine the relevant state practice. Even though the editors decided to present an excerpt of Thomas Franck's book *Fairness in International Law and Institutions* (Oxford 1995) instead of his seminal article "The Emerging Right to Democratic Governance" (*American Journal of International Law* 1992), still these texts may be regarded as a classical literature of the subject.

The second part elaborates on democracy in inter-state relations: on recent practice that uses democratic legitimacy as one of the criteria for recognition of states (Sean Murphy), on regional institutional regulations promoting democracy within the inter-American system (Stephen Schnably) and on the phenomenon of government networks of liberal states (Anne-Marie Slaughter). That last article introduces a thesis of a distinctive legal order within the democratic states, the emergence of a new transgovernmental order in which states are disaggregating. Government institutions of judicial, regulatory, executive or legislative func-

tions tend to act quasi-autonomously with their counterparts abroad and thus generating a specific body of rules outside the scope of traditional international law.

The third part brings articles on the problem of democracy and the use of force. As one of the implications of the right to democratic form of government may be the forcible enforcement of this right together with its possible negative consequences of the politics of imperialism, there are as many as three texts dealing with the issue of a pro-democratic intervention. Then, Michael Reisman while writing on the notion of sovereignty links it with the people not state as the holder of the right to popular government, claiming that democracy is a condition for the realization of human rights. Lastly, the text by John Owen represents an example of the peace-research orientation within the contemporary international relations theory providing evidence supporting the thesis of a relationship between democracy and peace.

The fourth part presents a discussion stimulated by the thorough article written by Gregory Fox and Georg Nolte on intolerant democracies. After the examination of the relevant international and national practice, the authors conclude that states are under no obligation of a legal character to tolerate groups or parties with anti-democratic intentions and may, acting with accordance to a defined procedure, exclude them from the electoral process. The last article by Steven Ratner, deals with the tension between democracy and accountability, presenting the strategies devised by the governments of states in the transition from autocratic rule to democracy for coming to terms with the human rights abuses of prior regimes. As holding individuals responsible for human rights abuses forms part of the rule of law and thus democracy, the dilemma facing these new democratic governments is to decide whether abstaining from accountability for the past is going to promote democracy in the long term.

The fifth part of the book includes critical approaches to the subject. First article, written by Brad Roth, distinguishes within the topic of democracy in international law three different perspectives with a different involvement of legal regulations: popular sovereignty (holding of elections), constitutionalism (set of democratic institutions) and substantive democracy (social empowerment). Two other texts, by Jan Knippers Black and Susan Marks, while conscious of the recent liberal claims of 'the end of history' (Francis Fukuyama), examine the ability of democracy as a political system for a real social empowerment of people within the contemporary conditions of globalization, economic polarization and the changed functions of state ('the vanquished public domain').

Concluding, it must be stressed that the book does not offer a definitive answer to the question of the emergence of the right to democratic form of government in the contemporary international law. Instead, it presents various statements on the subject, bringing them together within the volume. It seems that the choice of the presented authors and articles is representative for the on-going debate, still one may criticize the lack of a text presenting in a more direct way the relationship between a democratic form of government and human rights, pointing out to the linkage between democracy and group rights as well as the principle of self-determination of peoples within its internal aspect. Nevertheless, it is highly probable that the positions presented in this volume will be decisive for the future development of the international law within the subject of democratic governance.

Dobrochna Bach

B. BAUER, *Der völkerrechtliche Anspruch auf Demokratie. Zur Rolle Internationaler Organisationen im weltweiten Demokratisierungsprozeß*, Peter Lang: Frankfurt am Main 1998, pp. 284.

The book on the role of international organizations within the process of worldwide democratization is a published doctoral dissertation from the University of München. The work is divided into five chapters.

The first part aims at elaborating the concept of democracy for the use in international law through the review of related political theories, linkage of democracy with the political human rights and through the role that democracy can play within the interstate legal relations as a factor conducive to stability, peace and security. The second chapter presents the relevant normative regulations of the Art. 25 of the Covenant on Civil and Political Rights, regional legal systems guaranteeing political rights and anti-discrimination rules within the international law. The third chapter elaborates on the role of the United Nations in the process of democratization: within the rules of membership, through the norms of the Chapter VII of the UN-Charter (the case-study of Haiti is presented) and with the United Nations engagement in the process of elections. The fourth part brings the actual presentation of the activities of various actors aimed at democratization: the Council of Europe, OSCE, Organization of American States, Organization of African Unity, the Commonwealth as well as a plethora of non-governmental organizations and institutions of the economic co-operation. The final, concluding chapter deals with the right to humanitarian intervention and with the legal consequences of the wave of democratization.

There is an affluent recent literature on the topic of democracy within the international legal system. The valuable contribution of this volume to the on-going debate is a detailed study on the role and activities of many actors of governmental and non-governmental character supporting the process of democratization. Still, one may be disappointed with the lack of the presentation of the unique engagement and achievements of the Holy See within the subject area, especially as these consist of the global in scope practice and statements presented on the international forum.

Dobrochna Bach

J.-Y. CARLIER, D. VANHEULE, K. HULLMAN, C. PEÑA GALIANO (eds.), *Who is a Refugee? A Comparative Case Law Study*, Kluwer Law International, The Hague-London-Boston, 1997, pp.794.

This book opens our eyes on the problem which has been discussed for several decades as it refers to the issue of the refugees, to which the legal provisions gave a specific character. The specific character consists in the fact that the elements regulating the issue are present in both international law and the states' internal laws. This normative construction gives the impres-

sion of not fully thought over and, first of all, not cohesive enough. In consequence, proposals of improvement of its functioning, put forward by various scientific circles or associations, appear. These proposals result in more or less discussed publications.

One of them is the reviewed book, the result of the common effort of J.-Y Carlier, D. Vanheule, K. Hullman and C. Peña Galiano. It is the title that informs a reader of the purpose of the published position, as well as of the method adopted by the authors. The answer to the question raised in the title is to be found, of course, in the definition of the refugee as embodied in Art.1 of the Geneva Convention. However, when legal acts do not bring explicit definitions, it is indispensable to refer to the jurisprudence (second part of the title).

The book is divided into two parts. The first one consists of fifteen national reports (concerning mainly EU Member States, Switzerland, the USA and Canada) elaborated mostly by the editors of the book. The principal intention of the authors was a presentation, based on a copious selection of the jurisprudence, of an interpretation of the definition of the refugee made by the competent states' authorities. All elements of the definition were put to the analysis (it is surprising how rich in its meaning a word "persecution" is). Generally speaking, the national reports have a transparent structure of the content, uniform for all the papers, which, taking into account the amount of the information, constitutes an enormous convenience for the reader.

The analysis of the jurisprudence is preceded in each case by a more or less detailed description of the asylum procedure. However, as the project was carried out in 1994–1995, the reviewed book has only a historical value in this part. Of course this remark does not refer to all the states, nevertheless it should be noted that only in 1996 Belgium, Spain and UK made amendments to their asylum legislations, and works on the modifications continued in Denmark, Greece and the Netherlands. The effect of the changes is a two-phase procedure. Phase one refers to the access to the territory, phase two consists of the examination of the application in the light of the definition of the refugee.

A review does not allow to present the richness of the jurisprudence (about one thousand five hundred cases are analysed). It should be only pointed out that its casuistic character does not permit to draw a conclusion on the existence of general rules of interpretation of the respective elements of the definition.

A general report, in part two, prepared by J.-Y Carlier, seems to constitute the *clou* of the reviewed position. It consists of the author's proposal of a new way of the interpretation of the refugee definition. Carlier sets out from the observation that the definition is in principle the same in the analysed states, nevertheless the common criteria of its interpretation have not been worked out so far. As "well-founded fear of being persecuted" is its main element, the author puts a question if risk of persecution exists in case of returning to the country of origin. Three supplementary questions, that is: 1) at what point does risk exist?, 2) at what point does persecution exist?, 3) at what point is the risk of persecution sufficiently established?, will enable, according to the author, to give an answer. The questions make up a *Theory of the Three Scales/Levels*. On the basis of the given answers, chances of receiving refugee status by persons submitting applications can be defined. In case of a refusal the competent authority must motivate its decision in the light of the three questions.

The *Theory of the Three Scales*, according to its author, would contribute, thus, to that the decisions be adequately motivated.

Carlier does not restrict himself to a presentation of the thesis of his theory. He points out as well how chances of obtaining the refugee status could be measured. Unfortunately, the final conclusion disappoints, as *minimal* risk is sufficient, persecution (measured with the level of violation of human rights) must be *serious* and the risk of persecution must be *reasonable*.

The way he constructs his reasoning, would indicate rather the offering of definite, imaginable, figurative criteria. In this context one suspects that national reports were written to provide but a background for the *Theory*. How to measure the level of minimal, serious, reasonable as these are considered very relative? In consequence, it is doubtful that we ever see the practical realization of the *Theory*.

Despite some critical comments, the intellectual contribution of the author should be fully appreciated. The report contains a number of valuable remarks as for example the one referring to the proposition of the unification of the case law in the framework of the Council of Europe (taking in account the direct relation between the notion of the refugee and human rights) which would consist in signing of an additional protocol introducing the right to asylum into the list of human rights and the subsequent jurisdiction of the European Court of Human Rights. However, it is the author himself who doubts about this solution.

On the other hand, his speculations on the possibility of the harmonisation of the case law concerning refugees by submitting preliminary rulings to the European Court of Justice, turned out to be right. The provisions of the Amsterdam Treaty guarantee this.

As to the structure of the reviewed position, its value lies, without doubts, in a detailed bibliography which consists of articles and monographies of the general character on one hand and referring to each country on the other. An alphabetical index should deserve our attention too. As the moment of the publication of the book coincided with the adoption of the Joint Position on the harmonized application of the term "refugee," the text of the document as well as a commentary were appended.

Of course, all the reservations expressed through the review do not affect the fact that this work is worth reading. Mainly because it is probably the first position where the case law concerning refugees has been elaborated in such a scrupulous and broad way.

Katarzyna Strąk

