# INTERNATIONAL COURT OF JUSTICE

---

# CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

**THE GAMBIA**

**v.**

**MYANMAR**

PRELIMINARY OBJECTIONS OF
THE REPUBLIC OF THE UNION OF MYANMAR

**Annexes 1-32**

---

**20 JANUARY 2021**

# TABLE OF ANNEXES

## TREATIES

## CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS



## BOOKS, ARTICLES AND COMMENTARIES

**DICTIONARIES**

# TREATIES

# Annex 1

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, *UNTS*, vol. 78, p. 277

*Available at:*

https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf

# No. 1021

## AUSTRALIA, BULGARIA, CAMBODIA, CEYLON, CZECHOSLOVAKIA, etc.

**Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations on 9 December 1948**

*Official texts: Chinese, English, French, Russian and Spanish.*
*Registered* ex officio *on 12 January 1951.*

## AUSTRALIE, BULGARIE, CAMBODGE, CEYLAN, TCHÉCOSLOVAQUIE, etc.

**Convention pour la prévention et la répression du crime de génocide. Adoptée par l'Assemblée générale des Nations Unies le 9 décembre 1948**

*Textes officiels anglais, chinois, espagnol, français et russe.*
*Enregistrée d'office le 12 janvier 1951.*

# No. 1021. CONVENTION[1] ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE. ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 9 DECEMBER 1948

THE CONTRACTING PARTIES,

HAVING CONSIDERED the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946[2] that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

RECOGNIZING that at all periods of history genocide has inflicted great losses on humanity; and

BEING CONVINCED that, in order to liberate mankind from such an odious scourge, international co-operation is required,

HEREBY AGREE AS HEREINAFTER PROVIDED:

---

[1] Came into force on 12 January 1951, the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession, in accordance with article XIII.

The following States deposited with the Secretary-General of the United Nations their instruments of ratification or accession on the dates indicated:

*Ratifications*

| | |
|---|---|
| AUSTRALIA | 8 July 1949 |
| By a notification received on 8 July 1949 the Government of Australia extended the application of the Convention to all territories for the conduct of whose foreign relations Australia is responsible. | |
| *Czechoslovakia | 21 December 1950 |
| ECUADOR | 21 December 1949 |
| EL SALVADOR | 28 September 1950 |
| ETHIOPIA | 1 July 1949 |
| FRANCE | 14 October 1950 |
| GUATEMALA | 13 January 1950 |
| HAITI | 14 October 1950 |
| ICELAND | 29 August 1949 |
| ISRAEL | 9 March 1950 |
| LIBERIA | 9 June 1950 |
| NORWAY | 22 July 1949 |
| PANAMA | 11 January 1950 |
| *PHILIPPINES | 7 July 1950 |
| YUGOSLAVIA | 29 August 1950 |

*Accessions*

| | |
|---|---|
| *BULGARIA | 21 July 1950 |
| CAMBODIA | 14 October 1950 |
| CEYLON | 12 October 1950 |
| COSTA RICA | 14 October 1950 |
| JORDAN | 3 April 1950 |
| KOREA | 14 October 1950 |
| LAOS | 8 December 1950 |
| MONACO | 30 March 1950 |
| *POLAND | 14 November 1950 |
| *ROMANIA | 2 November 1950 |
| SAUDI ARABIA | 13 July 1950 |
| TURKEY | 31 July 1950 |
| VIET-NAM | 11 August 1950 |

* With reservations. For text of reservations, see pp. 314-322 of this volume.

[2] United Nations, document A/64/Add. 1. 31 January 1947.

*Article I*

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

*Article II*

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(*a*) Killing members of the group;

(*b*) Causing serious bodily or mental harm to members of the group;

(*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) Imposing measures intended to prevent births within the group;

(*e*) Forcibly transferring children of the group to another group.

*Article III*

The following acts shall be punishable:

(*a*) Genocide;

(*b*) Conspiracy to commit genocide;

(*c*) Direct and public incitement to commit genocide;

(*d*) Attempt to commit genocide;

(*e*) Complicity in genocide.

*Article IV*

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

*Article V*

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.

*Article VI*

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory

of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

*Article VII*

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

*Article VIII*

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

*Article IX*

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

*Article X*

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

*Article XI*

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation[1] to sign has been addressed by the General Assembly.

[1] In accordance with resolution 368 (IV) (United Nations, document A/1251, 28 December 1949), adopted by the General Assembly at its 266th meeting on 3 December 1949, the Secretary-General was requested to despatch invitations to sign and ratify or to accede to the Convention..."to each non-member State which is or hereafter becomes an active member of one or more of the specialized agencies of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice".

Accordingly, invitations were addressed to the following States on the dates indicated below:

6 December 1949
Albania
Austria
Bulgaria
Ceylon
Finland
Hungary
Ireland
Italy
Korea
Monaco
Portugal
Romania
Switzerland
Hashimite Kingdom of the Jordan

27 March 1950
Indonesia

10 April 1950
Liechtenstein

31 May 1950
Cambodia
Laos
Viet-Nam

20 December 1950
Germany

28 May 1951
Japan

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation[1] as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

*Article XII*

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

*Article XIII*

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *procès-verbal*[2] and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

*Article XIV*

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

*Article XV*

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

[1] See note page 282.
[2] See p. 312 of this volume.

*Article XVI*

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

*Article XVII*

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

(*a*) Signatures, ratifications and accessions received in accordance with article XI;

(*b*) Notifications received in accordance with article XII;

(*c*) The date upon which the present Convention comes into force in accordance with article XIII;

(*d*) Denunciations received in accordance with article XIV;

(*e*) The abrogation of the Convention in accordance with article XV;

(*f*) Notifications received in accordance with article XVI.

*Article XVIII*

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

*Article XIX*

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

**Annex 1**



FOR AUSTRALIA:
POUR L'AUSTRALIE:
澳大利亞：
За Австралию:
POR AUSTRALIA:

Herbert Vere EVATT
December 11, 1948

FOR THE KINGDOM OF BELGIUM:
POUR LE ROYAUME DE BELGIQUE:
比利時王國：
За Королевство Бельгии:
POR EL REINO DE BÉLGICA:

F. VAN LANGENHOVE
le 12 décembre 1949

FOR BOLIVIA:
POUR LA BOLIVIE:
玻利維亞：
За Боливию:
POR BOLIVIA:

A. COSTA DU R.
11 Dbre. 1948

FOR BRAZIL:
POUR LE BRÉSIL:
巴西：
За Бразилию:
POR EL BRASIL:

João Carlos MUNIZ
11 Décembre 1948

FOR THE UNION OF BURMA:
POUR L'UNION BIRMANE:
緬甸聯邦:
За Бирманский Союз:
POR LA UNIÓN BIRMANA:

U So NYUN
Dec. 30th 1949

No. 1021

FOR THE BYELORUSSIAN SOVIET SOCIALIST REPUBLIC:
POUR LA RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE DE BIÉLORUSSIE:
白俄羅斯蘇維埃社會主義共和國：
За Белорусскую Советскую Социалистическую Республику:
POR LA REPÚBLICA SOCIALISTA SOVIÉTICA DE BIELORRUSIA:

С оговорками по статьям IX и XII, изложенными в специальном протоколе, составленном при подписании настоящей конвенции.

К. Киселев
16/XII - 49 г.[1]

FOR CANADA:
POUR LE CANADA:
加拿大：
За Канаду:
POR EL CANADÁ:

Lester B. PEARSON
Nov. 28/1949

[1] With the reservations regarding Articles IX and XII stated in the special *Procès-verbal* drawn up on signature of the present Convention.

K. KISELEV
16/XII/49

Tbese reservations are worded as follows:

"At the time of signing the present Convention the delegation of the Byelorussian Soviet Socialist Republic deems it essential to state the following:

"*As regards Article IX:* The Byelorussian SSR does not consider as binding upon itself the provisions of Article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Byelorussian SSR will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

"*As regards Article XII:* The Byelorussian SSR declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories."

[1] Sous les réserves relatives aux articles IX et XII formulées dans le procès-verbal spécial établi lors de la signature de la présente Convention.

K. KISSELYOV
16/XII/49

Ces réserves sont conçues comme suit:

TRADUCTION - TRANSLATION

«Au moment de signer la présente Convention, la délégation de la République socialiste soviétique de Biélorussie tient expressément à déclarer ce qui suit:

«*En ce qui concerne l'article IX:* La RSS de Biélorussie ne s'estime pas tenue par les dispositions de l'article IX qui stipule que les différends entre les Parties contractantes relatifs à l'interprétation, l'application ou l'exécution de la présente Convention seront soumis à l'examen de la Cour internationale de Justice à la requête d'une partie au différend, et déclare qu'en ce qui concerne la compétence de la Cour en matière de *différends relatifs à l'interprétation, l'application* et l'exécution de la Convention, la RSS de Biélorussie continuera à soutenir, comme elle l'a fait jusqu'à ce jour, que, dans chaque cas particulier, l'accord de toutes les parties au différend est nécessaire pour que la Cour internationale puisse être saisie de ce différend aux fins de décision.

«*En ce qui concerne l'article XII:* La RSS de Biélorussie déclare qu'elle n'accepte pas les termes de l'article XII de la Convention et estime que toutes les clauses de ladite Convention devraient s'appliquer aux territoires non autonomes, y compris les territoires sous tutelle.»

**Annex 1**



FOR CHILE:
POUR LE CHILI:
智利：
За Чили:
POR CHILE:

Con la reserva que requiere también la aprobación del Congreso de mi país.[1]
H. ARANCIBIA LASO

FOR CHINA:
POUR LA CHINE:
中國：
За Китай:
POR LA CHINA:

Tingfu F. TSIANG
July 20, 1949

FOR COLOMBIA:
POUR LA COLOMBIE:
哥倫比亞：
За Колумбию:
POR COLOMBIA:

Eduardo ZULETA ANGEL
Aug. 12, 1949

FOR CUBA:
POUR CUBA:
古巴：
За Кубу:
POR CUBA:

Carlos BLANCO
December 28, 1949

[1] Subject to the reservation that it also requires the approval of the Congress of my country.
H. ARANCIBIA LASO

[1] Avec la réserve que l'approbation du Congrès de mon pays est également requise.
H. ARANCIBIA LASO

FOR CZECHOSLOVAKIA:
POUR LA TCHÉCOSLOVAQUIE:
捷克斯拉夫：
За Чехословакию:
POR CHECOESLOVAQUIA:

With the reservations* to Articles IX and XII as contained in the *Procès-Verbal* of Signature dated to-day.[1]
V. OUTRATA
December 28th, 1949

FOR DENMARK:
POUR LE DANEMARK:
丹麥：
За Данию:
POR DINAMARCA:

William BORBERG
le 28 septembre 1949

[1] Sous les réserves* relatives aux articles IX et XII formulées dans le procès-verbal de signature en date de ce jour.

V. OUTRATA
le 28 décembre 1949

* These reservations are worded as follows:

"At the time of signing the present Convention the delegation of Czechoslovakia deems it essential to state the following:

"*As regards Article IX:* Czechoslovakia does not consider as binding upon itself the provisions of Article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, Czechoslovakia will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

"*As regards Article XII:* Czechoslovakia declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories."

* Ces réserves sont conçues comme suit:

TRADUCTION - TRANSLATION

«Au moment de signer la présente Convention, la délégation de Tchécoslovaquie tient expressément à déclarer ce qui suit:

«*En ce qui concerne l'article IX:* La Tchécoslovaquie ne s'estime pas tenue par les dispositions de l'article IX qui stipule que les différends entre les Parties contractantes relatifs à l'interprétation, l'application ou l'exécution de la présente Convention seront soumis à l'examen de la Cour internationale de Justice à la requête d'une partie au différend, et déclare qu'en ce qui concerne la compétence de la Cour en matière de différends relatifs à l'interprétation, l'application, et l'exécution de la Convention, la Tchécoslovaquie continuera à soutenir, comme elle l'a fait jusqu'à ce jour, que, dans chaque cas particulier, l'accord de toutes les parties au différend est nécessaire pour que la Cour internationale de Justice puisse être saisie de ce différend aux fins de décision.

«*En ce qui concerne l'article XII:* La Tchécoslovaquie déclare qu'elle n'accepte pas les termes de l'article XII de la Convention et estime que toutes les clauses de la Convention devraient s'appliquer aux territoires non autonomes, y compris les territoires sous tutelle.»

**Annex 1**



FOR THE DOMINICAN REPUBLIC:
POUR LA RÉPUBLIQUE DOMINICAINE:
多明尼加共和國：
За Доминиканскую Республику:
POR LA REPÚBLICA DOMINICANA:

Joaquín BALAGUER
11 dic. 1948.

FOR ECUADOR:
POUR L'EQUATEUR:
厄瓜多：
За Эквадор:
POR EL ECUADOR:

Homero VITERI LAFRONTE
11 Diciembre de 1948

FOR EGYPT:
POUR L'ÉGYPTE:
埃及：
За Египет:
POR EGIPTO:

Ahmed Moh. KACHABA
12-12-48

FOR EL SALVADOR:
POUR LE SALVADOR:
薩爾瓦多：
За Сальвадор:
POR EL SALVADOR:

M. Rafael URQUIA
Abril 27 de 1949

FOR ETHIOPIA:
POUR L'ETHIOPIE:
阿比西尼亞：
За Эфиопию:
POR ETIOPÍA:

AKLILOU
11 décembre 1948

No. 1021

**Annex 1**



FOR FRANCE:
POUR LA FRANCE:
法蘭西：
За Францию:
POR FRANCIA:

Robert SCHUMAN
11 déc. 1948.

FOR GREECE:
POUR LA GRÈCE:
希臘：
За Грецию:
POR GRECIA:

Alexis KYROU
29 décembre 1949

FOR GUATEMALA:
POUR LE GUATEMALA:
瓜地馬拉：
За Гватемалу:
POR GUATEMALA:

Carlos GARCÍA BAUER
June 22, 1949

FOR HAITI:
POUR HAÏTI:
海地：
За Гаити:
POR HAITÍ:

DEMESMIN, av.:
Le 11 Décembre 1948

FOR HONDURAS:
POUR LE HONDURAS:
洪都拉斯：
За Гондурас:
POR HONDURAS:

Tiburcio CARIAS JR.
Abril 22, 1949

**Annex 1**



FOR ICELAND:
POUR L'ISLANDE:
冰岛：
За Исландию:
POR ISLANDIA:

Thor THORS
May 14, 1949

FOR INDIA:
POUR L'INDE:
印度：
За Индию:
POR LA INDIA:

B. N. RAU
November 29, 1949

FOR IRAN:
POUR L'IRAN:
伊朗：
За Иран:
POR IRÁN:

Nasrollah ENTEZAM
December 8th, 1949

FOR LEBANON:
POUR LE LIBAN:
黎巴嫩：
За Ливан:
POR EL LÍBANO:

Charles MALIK
December 30, 1949

FOR LIBERIA:
POUR LE LIBÉRIA:
利比里亚：
За Либерию:
POR LIBERIA:

Henry COOPER
11/12/48

No. 1021

**Annex 1**



FOR MEXICO:
POUR LE MEXIQUE:
墨西哥：
За Мексику:
POR MÉXICO:

L. PADILLA NERVO
Dec. 14 – 1948.

FOR NEW ZEALAND:
POUR LA NOUVELLE-ZÉLANDE:
紐西蘭：
За Новую Зеландию:
POR NUEVA ZELANDIA:

C. BERENDSEN
November 25th, 1949

FOR THE KINGDOM OF NORWAY:
POUR LE ROYAUME DE NORVÈGE:
那威王國：
За Королевство Норвегии:
POR EL REINO DE NORUEGA:

Finn MOE
Le 11 Décembre 1948.

FOR PAKISTAN:
POUR LE PAKISTAN:
巴基斯坦:
За Пакистан:
POR EL PAKISTÁN:

ZAFRULLA KHAN
Dec. 11. '48.

FOR PANAMA:
POUR LE PANAMA:
巴拿馬：
За Панаму:
POR PANAMÁ:

R. J. ALFARO
11 décembre 1948.

**Annex 1**



FOR PARAGUAY:
POUR LE PARAGUAY:
巴拉圭：
За Парагвай:
POR EL PARAGUAY:

Diciembre 11/948

FOR PERU:
POUR LE PÉROU:
秘魯：
За Перу:
POR EL PERÚ:

F. BERCKEMEYER
Diciembre 11/1948

FOR THE PHILIPPINE REPUBLIC:
POUR LA RÉPUBLIQUE DES PHILIPPINES:
菲律賓共和國：
За Филиппинскую Республику:
POR LA REPÚBLICA DE FILIPINAS:

Carlos P. RÓMULO
December 11, 1948

FOR SWEDEN:
POUR LA SUÈDE:
瑞典：
За Швецию:
POR SUECIA:

Sven GRAFSTRÖM
December 30, 1949

No. 1021

**Annex 1**



FOR THE UKRAINIAN SOVIET SOCIALIST REPUBLIC:
POUR LA RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE D'UKRAINE:
烏克蘭蘇維埃社會主義共和國：
За Украинскую Советскую Социалистическую Республику:
POR LA REPÚBLICA SOCIALISTA SOVIÉTICA DE UCRANIA:

С оговорками по статьям IX и XII, изложенными в специальном протоколе, составленном при подписании настоящей конвенции.

Зам. Министра иностранных дел
УССР
А. Война
16/XII - 1949 г.[1]

[1] With the reservations regarding Articles IX and XII stated in the special *Procès-verbal* drawn up on signature of the present Convention.

A. VOINA

*Deputy Minister of Foreign Affairs of the Ukrainian Soviet Socialist Republic.*

16/XII/1949

These reservations are worded as follows:

"At the time of signing the present Convention the delegation of the Ukrainian Soviet Socialist Republic deems it essential to state the following:

"*As regards Article IX:* The Ukrainian SSR does not consider as binding upon itself the provisions of Article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Ukrainian SSR will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

"*As regards Article XII:* The Ukrainian SSR declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories."

[1] Sous les réserves relatives aux articles IX et XII formulées dans le procès-verbal spécial établi lors de la signature de la présente Convention.

A. VOINA

*Ministre des affaires étrangères de la République socialiste soviétique d'Ukraine par intérim.*

16/XII/1949

Ces réserves sont conçues comme suit:

TRADUCTION - TRANSLATION

«Au moment de signer la présente Convention, la délégation de la République socialiste soviétique d'Ukraine tient expressément à déclarer ce qui suit:

«*En ce qui concerne l'article IX:* La République socialiste soviétique d'Ukraine ne se considère pas comme liée par les dispositions de l'article IX qui stipule que les différends entre les Parties contractantes relatifs à l'interprétation, l'application ou l'exécution de la présente Convention seront soumis à l'examen de la Cour internationale de Justice à la requête d'une partie au différend, et déclare qu'en ce qui concerne la compétence de la Cour en matière de différends relatifs à l'interprétation, l'application, et l'exécution de la Convention, la RSS d'Ukraine continuera à soutenir, comme elle l'a fait jusqu'à ce jour, la thèse selon laquelle dans chaque cas particulier, l'accord de toutes les parties au différend est nécessaire pour que la Cour internationale puisse être saisie de ce différend aux fins de décision.

«*En ce qui concerne l'article XII:* La RSS d'Ukraine déclare qu'elle ne donne pas son accord à l'article XII de la Convention et estime que toutes les dispositions de la Convention devraient s'appliquer aux territoires non autonomes, y compris les territoires sous tutelle.»

N° 1021

**Annex 1**



FOR THE UNION OF SOVIET SOCIALIST REPUBLICS:
POUR L'UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES:
蘇維埃社會主義共和國聯邦：
За Союз Советских Социалистических Республик:
POR LA UNIÓN DE REPÚBLICAS SOCIALISTAS SOVIÉTICAS:

С оговорками по статьям IX и XII, изложенными в специальном протоколе, составленном при подписании настоящей конвенции.

A. Панюшкин
16.12.49[1]

FOR THE UNITED STATES OF AMERICA:
POUR LES ETATS-UNIS D'AMÉRIQUE:
美利堅合衆國：
За Соединенные Штаты Америки:
POR LOS ESTADOS UNIDOS DE AMÉRICA:

Ernest A. Gross
Dec 11, 1948

[1] With the reservations regarding Articles IX and XII stated in the special *Procès-verbal* drawn up on signature of the present Convention.

A. PANYUSHKIN
16.12.49

These reservations are worded as follows:

"At the time of signing the present Convention the delegation of the Union of Soviet Socialist Republics deems it essential to state the following:

"*As regards Article IX:* The Soviet Union does not consider as binding upon itself the provisions of Article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Soviet Union will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

"*As regards Article XII:* The Union of Soviet Socialist Republics declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories."

[1] Sous les réserves relatives aux articles IX et XII formulées dans le procès-verbal spécial établi lors de la signature de la présente Convention.

A. PANYOUCHKINE
16.12.49

Ces réserves sont conçues comme suit:

TRADUCTION - TRANSLATION

«Au moment de signer la présente Convention, la délégation de l'Union des Républiques socialistes soviétiques tient expressément à déclarer ce qui suit:

«*En ce qui concerne l'article IX:* L'Union soviétique ne s'estime pas tenue par les dispositions de l'article IX qui stipule que les différends entre les Parties contractantes relatifs à l'interprétation, l'application ou l'exécution de la présente Convention seront soumis à l'examen de la Cour internationale de Justice à la requête d'une partie au différend, et déclare qu'en ce qui concerne la compétence de la Cour en matière de différends relatifs à l'interprétation, l'application et l'exécution de la Convention, l'Union soviétique continuera à soutenir, comme elle l'a fait jusqu'à ce jour, que, dans chaque cas particulier, l'accord de toutes les parties au différend est nécessaire pour que la Cour internationale de Justice puisse être saisie de ce différend aux fins de décision.

«*En ce qui concerne l'article XII:* L'Union des Républiques socialistes soviétiques déclare qu'elle n'accepte pas les termes de l'article XII de la Convention et estime que toutes les clauses de ladite Convention devraient s'appliquer aux territoires non autonomes, y compris les territoires sous tutelle.»

**Annex 1**



FOR URUGUAY:
POUR L'URUGUAY:
乌拉圭：
За Уругвай:
POR EL URUGUAY:

Enrique C. ARMAND UGON
Décembre 11 de 1948–

FOR YUGOSLAVIA:
POUR LA YOUGOSLAVIE:
南斯拉夫：
За Югославию:
POR YUGOESLAVIA:

Dr Ales BEBLER
11 Dec. 1948

FOR ISRAEL:
POUR ISRAËL:
以色列：
За Израиль:
POR ISRAEL:

Aubrey S. EBAN
17 August 1949

## *PROCÈS-VERBAL* ESTABLISHING THE DEPOSIT OF TWENTY INSTRUMENTS OF RATIFICATION OR ACCESSION TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

CONSIDERING that article XIII, paragraphs one and two, of the Convention on the Prevention and Punishment of the Crime of Genocide provides that:

> "On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *procès-verbal* and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in article XI.
>
> "The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession."

CONSIDERING that the condition specified in paragraph one has, on this day, been fulfilled;

## PROCÈS-VERBAL CONSTATANT LE DÉPOT DE VINGT INSTRUMENTS DE RATIFICATION OU D'ADHÉSION A LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

CONSIDÉRANT que l'article XIII de la Convention pour la prévention et la répression du crime de génocide stipule, dans ses paragraphes un et deux, que:

> «Dès le jour où les vingt premiers instruments de ratification ou d'adhésion auront été déposés, le Secrétaire général en dressera procès-verbal. Il transmettra copie de ce procès-verbal à tous les États Membres des Nations Unies et aux non-membres visés par l'article XI.
>
> «La présente Convention entrera en vigueur le quatre-vingt-dixième jour qui suivra la date du dépôt du vingtième instrument de ratification ou d'adhésion.»

CONSIDÉRANT que la condition prévue au paragraphe premier a, ce jour, été réalisée;

THEREFORE, the Secretary-General has drawn up this *Procès-Verbal* in the English and French languages.

EN CONSÉQUENCE, le Secrétaire général a dressé le présent Procès-Verbal en langue anglaise et en langue française.

DONE at Lake Success, New York, this 14th day of October 1950.

FAIT à Lake Success, New York, le 14 octobre 1950.

For the Secretary-General:
Pour le Secrétaire général:

Dr. Ivan S. KERNO

Assistant Secretary-General
Legal Department
Secrétaire général adjoint
Département juridique

## RATIFICATIONS WITH RESERVATIONS

### *PHILIPPINES*

WHEREAS, The Convention on the Prevention and Punishment of the Crime of Genocide was approved by the General Assembly of the United Nations during its Third Session on December 9, 1948, and was signed by the authorized representative of the Philippines on December 11, 1948;

WHEREAS, Article XI of the Convention provides that the present Convention shall be ratified and the instruments of ratification deposited with the Secretary-General of the United Nations; and

WHEREAS, the Senate of the Philippines, by its Resolution No. 9, adopted on February 28, 1950, concurred in the ratification by the President of the Philippines of the aforesaid Convention in accordance with the Constitution of the Philippines, subject to the following reservations:

"1. With reference to Article IV of the Convention, the Philippine Government cannot sanction any situation which would subject its Head of State, who is not a ruler, to conditions less favorable than those accorded other Heads of State, whether constitutionally responsible rulers or not. The Philippine Government does not consider said Article, therefore, as overriding the existing immunities from judicial processes guaranteed certain public officials by the Constitution of the Philippines.

"2. With reference to Article VII of the Convention, the Philippine Government does not undertake to give effect to said Article until the Congress of the Philippines has enacted the necessary legislation defining and punishing the crime of genocide, which legislation, under the Constitution of the Philippines, cannot have any retroactive effect.

"3. With reference to Articles VI and IX of the Convention, the Philippine Government takes the position that nothing contained in said Articles shall be construed as depriving Philippine courts of jurisdiction over all cases of genocide committed within Philippine territory save only in those cases where the Philippine Government consents to have the decision of the Philippine courts reviewed by either of the international tribunals referred to in said Articles. With further reference to Article IX of the Convention, the Philippine Government does not consider said Article to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law."

NOW, THEREFORE, be it known that I, ELPIDIO QUIRINO, President of the Philippines, after having seen and considered the said Convention, do hereby, in pursuance of the aforesaid concurrence of the Senate and subject to the reservations above-quoted, ratify and confirm the same and every article and clause thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

DONE in the City of Manila, this 23rd day of June, in the year of Our Lord, nineteen hundred and fifty, and of the Independence of the Philippines, the fourth.

(*Signed*) QUIRINO

*By the President:*
(*Signed*) Felino NERI
Undersecretary of Foreign Affairs

## *CZECHOSLOVAKIA*

TRANSLATION

WHEREAS we have examined this Convention, and the National Assembly of the Czechoslovak Republic has signified its agreement thereto,

NOW, THEREFORE,

We do hereby approve and ratify it, subject to the reservations stated in the Protocol of signature[1] of the Convention.

IN FAITH WHEREOF we have signed this instrument and affixed thereto the seal of the Czechoslovak Republic.

GIVEN at Prague Castle, 24 October 1950.

(*Signed*) GOTTWALD
President of the Czechoslovak Republic

(*Signed*) Zd. FIERLINGER
Minister for Foreign Affairs

[1] See page 303 of this volume.

## ACCESSIONS WITH RESERVATIONS

### *BULGARIA*

TRANSLATION

THE PRESIDIUM OF THE NATIONAL ASSEMBLY OF THE PEOPLE'S REPUBLIC OF BULGARIA,

HAVING SEEN AND EXAMINED the Convention of 9 December 1948 on the Prevention and Punishment of the crime of Genocide,

CONFIRMS its accession to this Convention with the following reservations:

1. *As regards article IX:* The People's Republic of Bulgaria does not consider as binding upon itself the provisions of article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court of Justice at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the People's Republic of Bulgaria will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court of Justice for decision.

2. *As regards article XII:* The People's Republic of Bulgaria declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories.

AND DECLARES its assurance of the application thereof.

IN FAITH WHEREOF has signed the present instrument and has had affixed the seal of the State thereto.

GIVEN at Sofia, on 12 July one thousand nine hundred and fifty.

The President:
(*Illegible*)

The Secretary:
(*Illegible*)

The Minister for Foreign Affairs:
(*Signed*) M. NEITCHEFF

No. 1021

*POLAND*

TRANSLATION

In the name of the Polish Republic, BOLESŁAW BIERUT, President of the Polish Republic,

To all men who may see these presents: be it known that

A Convention for the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly of the United Nations on 9 December 1948:

Having read and examined the said Convention, We accede to it in the name of the Polish Republic subject to the following reservations:

"As regards article IX, Poland does not regard itself as bound by the provisions of this article since the agreement of all the parties to a dispute is a necessary condition in each specific case for submission to the International Court of Justice,

"As regards article XII, Poland does not accept the provisions of this article, considering that the Convention should apply to Non-Self-Governing Territories, including Trust Territories."

We declare that the above-mentioned Convention is accepted, ratified and confirmed and promise that it shall be observed without violation.

IN FAITH WHEREOF, We have issued the present letters bearing the seal of the Republic.

GIVEN at Warsaw, 22 September 1950.

(*Signed*) Bolesław BIERUT

(*Signed*) J. CYRANKIEWICZ
President of the Council of Ministers

(*Signed*) St. SKRZESZEWSKI
for Minister for Foreign Affairs

No. 1021

## *ROMANIA*

TRANSLATION

*As regards article IX:* The People's Republic of Romania does not consider itself bound by the provisions of article IX, which provides that disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute, and declares that as regards the jurisdiction of the Court in disputes relating to the interpretation, application or fulfilment of the Convention, the People's Republic of Romania will adhere to the view which it has held up to the present, that in each particular case the agreement of all the parties to a dispute is required before it can be referred to the International Court of Justice for settlement.

*As regards article XII:* The People's Republic of Romania declares that it is not in agreement with article XII of the Convention, and considers that all the provisions of the Convention should apply to the Non-Self-Governing Territories, including the Trust Territories.

---

# Annex 2

Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by Protocols No. 11 and No. 14, *European Treaties Series*, no. 5 [extract]

*Available at:*

http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680063426

**Annex 2**

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

*European Treaty Series – No. 5*
*Série des traités européens - n° 5*

# Convention for the Protection of Human Rights and Fundamental Freedoms,

# Convention de sauvegarde des Droits de l'Homme et des Libertes fondamentales,

Rome, 4.XI.1950

Text amended by the provisions of Protocol No. 14 (CETS No. 194) as from the date of its entry into force on 1 June 2010.
The text of the Convention had been previously amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) had lost its purpose.
Texte amendé par les dispositions du Protocole n° 14 (STCE n° 194) à compter de la date de son entrée en vigueur le 1er juin 2010. Le texte de la Convention avait été précédemment amendé conformément aux dispositions du Protocole n° 3 (STE n° 45), entré en vigueur le 21 septembre 1970, du Protocole n° 5 (STE n° 55), entré en vigueur le 20 décembre 1971 et du Protocole n° 8 (STE n° 118), entré en vigueur le 1er janvier 1990, et comprenait en outre le texte du Protocole n° 2 (STE n° 44) qui, conformément à son article 5, paragraphe 3, avait fait partie intégrante de la Convention depuis son entrée en vigueur le 21 septembre 1970. Toutes les dispositions qui avaient été amendées ou ajoutées par ces Protocoles ont été remplacées par le Protocole n° 11 (STE n° 155), à compter de la date de son entrée en vigueur le 1er novembre 1998. A compter de cette date, le Protocole n° 9 (STE n° 140), entré en vigueur le 1er octobre 1994, était abrogé et le Protocole n° 10 (STE n° 146) était devenu sans objet.

## Annex 2

**Article 32 – Jurisdiction of the Court**

1 The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2 In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

**Article 33 – Inter-State cases**

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

**Article 34 – Individual applications**

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

**Article 35 – Admissibility criteria**

1 The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2 The Court shall not deal with any application submitted under Article 34 that

a is anonymous; or

b is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3 The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that :

a the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

b the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

4 The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

**Article 36 – Third party intervention**

1 In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

10

# Annex 2

**Article 32 – Compétence de la Cour**

1 La compétence de la Cour s'étend à toutes les questions concernant l'interprétation et l'application de la Convention et de ses protocoles qui lui seront soumises dans les conditions prévues par les articles 33, 34, 46 et 47.

2 En cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide.

**Article 33 – Affaires interétatiques**

Toute Haute Partie contractante peut saisir la Cour de tout manquement aux dispositions de la Convention et de ses protocoles qu'elle croira pouvoir être imputé à une autre Haute Partie contractante.

**Article 34 – Requêtes individuelles**

La Cour peut être saisie d'une requête par toute personne physique, toute organisation non gouvernementale ou tout groupe de particuliers qui se prétend victime d'une violation par l'une des Hautes Parties contractantes des droits reconnus dans la Convention ou ses protocoles. Les Hautes Parties contractantes s'engagent à n'entraver par aucune mesure l'exercice efficace de ce droit.

**Article 35 – Conditions de recevabilité**

1 La Cour ne peut être saisie qu'après l'épuisement des voies de recours internes, tel qu'il est entendu selon les principes de droit international généralement reconnus, et dans un délai de six mois à partir de la date de la décision interne définitive.

2 La Cour ne retient aucune requête individuelle introduite en application de l'article 34, lorsque

a elle est anonyme; ou

b elle est essentiellement la même qu'une requête précédemment examinée par la Cour ou déjà soumise à une autre instance internationale d'enquête ou de règlement, et si elle ne contient pas de faits nouveaux.

3 La Cour déclare irrecevable toute requête individuelle introduite en application de l'article 34 lorsqu'elle estime:

a que la requête est incompatible avec les dispositions de la Convention ou de ses Protocoles, manifestement mal fondée ou abusive ; ou

b que le requérant n'a subi aucun préjudice important, sauf si le respect des droits de l'homme garantis par la Convention et ses Protocoles exige un examen de la requête au fond et à condition de ne rejeter pour ce motif aucune affaire qui n'a pas été dûment examinée par un tribunal interne.

4 La Cour rejette toute requête qu'elle considère comme irrecevable par application du présent article. Elle peut procéder ainsi à tout stade de la procédure.

**Article 36 – Tierce intervention**

1 Dans toute affaire devant une Chambre ou la Grande Chambre, une Haute Partie contractante dont un ressortissant est requérant a le droit de présenter des observations écrites et de prendre part aux audiences.

# Annex 3

International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, *UNTS*, vol. 660, p. 195 [extract]

*Available at:*

https://treaties.un.org/doc/Treaties/1969/03/19690312 08-49 AM/Ch_IV_2p.pdf

# INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

*UNITED NATIONS*
*1966*

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 19

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 20

1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

Article 21

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

Article 22

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Article 23

1. A request for the revision of this Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. Aucune réserve incompatible avec l'objet et le but de la présente Convention ne sera autorisée non plus qu'aucune réserve qui aurait pour effet de paralyser le fonctionnement de l'un quelconque des organes créés par la Convention. Une réserve sera considérée comme rentrant dans les catégories définies ci-dessus si les deux tiers au moins des Etats parties à la Convention élèvent des objections.

3. Les réserves peuvent être retirées à tout moment par voie de notification adressée au Secrétaire général. La notification prendra effet à la date de réception.

Article 21

Tout Etat partie peut dénoncer la présente Convention par voie de notification adressée au Secrétaire général de l'Organisation des Nations Unies. La dénonciation portera effet un an après la date à laquelle le Secrétaire général en aura reçu notification.

Article 22

Tout différend entre deux ou plusieurs Etats parties touchant l'interprétation ou l'application de la présente Convention, qui n'aura pas été réglé par voie de négociation ou au moyen des procédures expressément prévues par ladite Convention, sera porté, à la requête de toute partie au différend, devant la Cour internationale de Justice pour qu'elle statue à son sujet, à moins que les parties au différend ne conviennent d'un autre mode de règlement.

Article 23

1. Tout Etat partie peut formuler à tout moment une demande de revision de la présente Convention par voie de notification écrite adressée au Secrétaire général de l'Organisation des Nations Unies.

2. L'Assemblée générale de l'Organisation des Nations Unies statuera sur les mesures à prendre, le cas échéant, au sujet de cette demande.

Article 24

Le Secrétaire général de l'Organisation des Nations Unies informera tous les Etats visés au paragraphe 1 de l'article 17 de la présente Convention :

a) Des signatures apposées à la présente Convention et des instruments de ratification et d'adhésion déposés conformément aux articles 17 et 18;

Статья 19

1. Настоящая Конвенция вступает в силу на тридцатый день после сдачи на хранение Генеральному секретарю Организации Объединенных Наций двадцать седьмой ратификационной грамоты или документа о присоединении.

2. Для каждого государства, которое ратифицирует настоящую Конвенцию или присоединится к ней после сдачи на хранение двадцать седьмой ратификационной грамоты или документа о присоединении, настоящая Конвенция вступает в силу на тридцатый день после сдачи на хранение его собственной ратификационной грамоты или документа о присоединении.

Статья 20

1. Генеральный секретарь Организации Объединенных Наций получает и рассылает всем государствам, которые являются или могут стать участниками настоящей Конвенции, текст оговорок, сделанных государствами в момент ратификации или присоединения. Любое государство, возражающее против оговорки, должно в течение девяноста дней со дня вышеуказанного извещения уведомить Генерального секретаря о том, что оно не принимает данную оговорку.

2. Оговорки, не совместимые с целями и задачами настоящей Конвенции, не допускаются, равно как и оговорки, могущие препятствовать работе каких-либо органов, созданных на основании настоящей Конвенции. Оговорка считается несовместимой или препятствующей работе, если, по крайней мере, две трети государств-участников Конвенции возражают против нее.

3. Оговорки могут быть сняты в любое время путем соответствующего уведомления, направленного на имя Генерального секретаря. Такое уведомление вступает в силу в день его получения.

Статья 21

Каждое государство-участник может денонсировать настоящую Конвенцию путем письменного уведомления о том Генерального секретаря Организации Объединенных Наций. Денонсация вступает в силу через один год со дня получения уведомления об этом Генеральным секретарем.

Статья 22

Любой спор между двумя или несколькими государствами-участниками относительно толкования или применения настоящей Конвенции, который не разрешен путем переговоров или процедур, специально предусмотренных в настоящей Конвенции,

передается, по требованию любой из сторон в этом споре, на разрешение Международного Суда, если стороны в споре не договорились об ином способе урегулирования.

Статья 23

1. Требование о пересмотре настоящей Конвенции может быть выдвинуто в любое время любым государством-участником путем письменного уведомления, направленного на имя Генерального секретаря Организации Объединенных Наций.

2. Генеральная Ассамблея Организации Объединенных Наций принимает решение о том, какие меры, если таковые необходимы, следует провести в связи с таким требованием.

Статья 24

Генеральный секретарь Организации Объединенных Наций сообщает всем государствам, упомянутым в пункте 1 статьи 17 настоящей Конвенции, следующие сведения:

a) о подписании, ратификации и присоединении, в соответствии со статьями 17 и 18;

b) о дате вступления в силу настоящей Конвенции, в соответствии со статьей 19;

c) о сообщениях и декларациях, полученных в соответствии со статьями 14, 20 и 23;

d) о денонсациях, в соответствии со статьей 21.

Статья 25

1. Настоящая Конвенция, английский, испанский, китайский, русский и французский тексты которой являются равно аутентичными, хранится в архиве Организации Объединенных Наций.

2. Генеральный секретарь Организации Объединенных Наций препровождает заверенные копии настоящей Конвенции всем государствам, принадлежащим к любой из категорий, упомянутых в пункте 1 статьи 17 Конвенции.

В УДОСТОВЕРЕНИЕ ЧЕГО нижеподписавшиеся, должным образом уполномоченные соответствующими правительствами, подписали настоящую Конвенцию, открытую для подписания в Нью-Йорке, седьмого марта тысяча девятьсот шестьдесят шестого года.

tenga objeciones a una reserva notificará al Secretario General que no la acepta, y esta notificación deberá hacerse dentro de los noventa días siguientes a la fecha de la comunicación del Secretario General.

2. No se aceptará ninguna reserva incompatible con el objeto y el propósito de la presente Convención, ni se permitirá ninguna reserva que pueda inhibir el funcionamiento de cualquiera de los órganos establecidos en virtud de la presente Convención. Se considerará que una reserva es incompatible o inhibitoria si, por lo menos, las dos terceras partes de los Estados partes en la Convención formulan objeciones a la misma.

3. Toda reserva podrá ser retirada en cualquier momento, enviándose para ello una notificación al Secretario General. Esta notificación surtirá efecto en la fecha de su recepción.

Artículo 21

Todo Estado parte podrá denunciar la presente Convención mediante notificación dirigida al Secretario General de las Naciones Unidas. La denuncia surtirá efecto un año después de la fecha en que el Secretario General haya recibido la notificación.

Artículo 22

Toda controversia entre dos o más Estados partes con respecto a la interpretación o a la aplicación de la presente Convención, que no se resuelva mediante negociaciones o mediante los procedimientos que se establecen expresamente en ella, será sometida a la decisión de la Corte Internacional de Justicia a instancia de cualquiera de las partes en la controversia, a menos que éstas convengan en otro modo de solucionarla.

Artículo 23

1. Todo Estado parte podrá formular en cualquier tiempo una demanda de revisión de la presente Convención por medio de notificación escrita dirigida al Secretario General de las Naciones Unidas.

2. La Asamblea General de las Naciones Unidas decidirá sobre las medidas que deban tomarse, si hubiere lugar, respecto a tal demanda.

Artículo 24

El Secretario General de las Naciones Unidas comunicará a todos los Estados mencionados en el párrafo 1 del artículo 17 supra:

a) Las firmas, ratificaciones y adhesiones conformes con lo dispuesto en los artículos 17 y 18;

# Annex 4

Vienna Convention on the Law of Treaties, 23 May 1969, *UNTS*, vol. 1155, p. 331 [extract]

*Available at:*

https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf

**Annex 4**

# VIENNA CONVENTION ON THE LAW OF TREATIES

*UNITED NATIONS*
*1970*

## Annex 4



PART I

INTRODUCTION

Article 1
Scope of the present Convention

The present Convention applies to treaties between States.

Article 2
Use of terms

1. For the purposes of the present Convention:
   (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;
   (b) "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;
   (c) "full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;
   (d) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;
   (e) "negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty;
   (f) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" means a State not a party to the treaty;

(i) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 3

International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) the legal force of such agreements;

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Article 30

Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3: INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

# Annex 5

Charter of the Islamic Conference, 4 March 1972, *UNTS*, vol. 914, p. 103 [extract]

*Available at:*

https://treaties.un.org/doc/Publication/UNTS/Volume%20914/volume-914-I-13039-English.pdf

*French version available at:*

https://treaties.un.org/doc/Publication/UNTS/Volume%20914/volume-914-I-13039-French.pdf

## No. 13039

---

## MULTILATERAL

**Charter of the Islamic Conference. Adopted by the Third Islamic Conference of Foreign Ministers at Djidda, on 4 March 1972**

*Authentic texts: Arabic, English and French.*

*Registered by the General Secretariat of the Islamic Conference, acting on behalf of the Parties, on 1 February 1974.*

---

## MULTILATÉRAL

**Charte de la Conférence islamique. Adoptée par la Troisième Conférence islamique des Ministres des affaires étrangères, à Djedda, le 4 mars 1972**

*Textes authentiques : arabe, anglais et français.*

*Enregistrée par le Secrétariat général de la Conférence islamique, agissant au nom des Parties, le 1er février 1974.*

# Annex 5



## CHARTER[1] OF THE ISLAMIC CONFERENCE

IN THE NAME OF GOD THE MERCIFUL, THE COMPASSIONATE

The Representatives of:

The Kingdom of Afghanistan, Algerian Democratic and Popular Republic, State of the United Arab Emirates, State of Bahrain, Republic of Chad, Arab Republic of Egypt, Republic of Guinea, Republic of Indonesia, Iran, Hashemite Kingdom of Jordan, State of Kuwait, Republic of Lebanon, Libyan Arab Republic, Malaysia, Republic of Mali, Islamic Republic of Mauritania, Kingdom of Morocco, Republic of Niger, Oman Sultanate, Islamic Republic of Pakistan, State of Qatar, Kingdom of Saudi Arabia, Republic of Senegal, Republic of Sierra Leone, Democratic Republic of Somalia, Democratic Republic of Sudan, Syrian Arab Republic, Republic of Tunisia, Republic of Turkey, Yemen Arab Republic, meeting in Jeddah from 14 to 18 Moharram, 1392 AH (29 February-4 March, 1972),

*Referring* to the Conference of the Kings and Heads of State and Government of Islamic countries held in Rabat between 9 and 12 Rajab, 1389 (22-25 September, 1969);

*Recalling* the First Islamic Conference of Foreign Ministers held in Jeddah from 15 to 17 Moharram, 1390 (23-25 March, 1970) and the Second Islamic Conference of Foreign Ministers held in Karachi from 27 to 29 Shawal, 1390 (26-28 December, 1970);

*Convinced* that their common belief constitutes a strong factor for *rapprochement* and solidarity between Islamic people;

*Resolved* to preserve Islamic spiritual, ethical, social and economic values, which will remain one of the important factors of achieving progress for mankind;

[1] Came into force on 28 February 1973, i.e. the date by which the following 16 States, representing a simple majority of the States participating on the Third Islamic Conference of Foreign Ministers, had deposited their instrument of ratification with the General Secretariat of the Islamic Conference, in accordance with article XIV:

| State | Date of deposit of the instrument | State | Date of deposit of the instrument |
|---|---|---|---|
| Saudi Arabia | 29 Mar. 1972 | Qatar | 24 Oct. 1972 |
| Bahrain | 29 Jun. 1972 | Pakistan | 29 Oct. 1972 |
| Somalia | 12 Jul. 1972 | Jordan | 19 Dec. 1972 |
| Sudan | 31 Aug. 1972 | Oman | 19 Dec. 1972 |
| United Arab Emirates | 3 Sep. 1972 | Egypt | 20 Dec. 1972 |
| Malaysia | 5 Sep. 1972 | Libyan Arab Republic | 7 Jan. 1973 |
| Guinea | 18 Sep. 1972 | Afghanistan | 2 Feb. 1973 |
| Morocco | 19 Sep. 1972 | Niger | 28 Feb. 1973 |

Subsequently, the following States deposited their instrument of ratification with the General Secretariat of the Islamic Conference, to take effect on the date of such deposit:

| State | Date of deposit of the instrument |
|---|---|
| Mali | 12 Mar. 1973 |
| Tunisia | 12 Mar. 1973 |
| Iran | 9 Apr. 1973 |
| (Confirming the declarations and reservations formulated on the occasion of the adoption of the Charter.) | |
| Kuwait | 5 Jun. 1973 |
| Senegal | 3 Jan. 1974 |

13039

# Annex 5



*Reaffirming* their commitment to the U.N. Charter and fundamental Human Rights, the purposes and principles of which provide the basis for fruitful cooperation amongst all people;

*Determined* to consolidate the bonds of the prevailing brotherly and spiritual friendship among their people, and to protect their freedom, and the common legacy of their civilization founded particularly on the principles of justice, toleration and non-discrimination;

*In their endeavour* to increase human well-being, progress and freedom everywhere and resolved to unite their efforts in order to secure universal peace which ensures security, freedom and justice for their people and all people throughout the world;

*Approve* the present Charter of the Islamic Conference:

### *Article I.* The Islamic Conference

The member States do hereby establish the organization of "The Islamic Conference."

### *Article II.* Objectives and Principles

A) *Objectives*

The objectives of the Islamic Conference shall be:

1. to promote Islamic solidarity among member States;
2. to consolidate co-operation among member States in the economic, social, cultural, scientific and other vital fields of activities, and to carry out consultations among member States in international organizations;
3. to endeavour to eliminate racial segregation, discrimination and to eradicate colonialism in all its forms;
4. to take necessary measures to support international peace and security founded on justice;
5. to co-ordinate efforts for the safeguard of the Holy Places and support of the struggle of the people of Palestine, and help them to regain their rights and liberate their land;
6. to strengthen the struggle of all Moslem peoples with a view to safeguarding their dignity, independence and national rights; and
7. to create a suitable atmosphere for the promotion of cooperation and understanding among member States and other countries.

B) *Principles*

The member States decide and undertake that, in order to realize the objectives mentioned in the previous paragraph, they shall be inspired and guided by the following principles:

1. Total equality between member States;
2. Respect of the right of self-determination, and non-interference in the domestic affairs of member States;

# Annex 5



3. Respect of the sovereignty, independence and territorial integrity of each member State;
4. Settlement of any conflict that may arise by peaceful means such as negotiation, mediation, reconciliation or arbitration;
5. Abstention from the threat or use of force against the territorial integrity, national unity or political independence of any member State.

*Article III.* CONFERENCE BODIES

The Islamic Conference is composed of:

1. the Conference of Kings and Heads of State and Government;
2. the Conference of Foreign Ministers, and
3. the General Secretariat and subsidiary organs.

*Article IV.* CONFERENCE OF KINGS AND HEADS OF STATE

The Conference of Kings and Heads of State and Government is the supreme authority in the organization and holds its meetings whenever the interest of Moslem Nations warrants it to consider issues of vital concern to the Moslem world and to co-ordinate the policy of the organization accordingly.

*Article V.* CONFERENCE OF FOREIGN MINISTERS

*Conference Sessions*

1. (*a*) The Islamic Conference shall be convened once a year or when the need arises at the level of Ministers of Foreign Affairs or their officially accredited representatives. The sessions shall be held in any one of the member States;

(*b*) An extraordinary session may be convened at the request of any member State or at the request of the Secretary-General, if approved by two-thirds of the member States. The request may be circulated to all member States in order to obtain the required approval; and

(*c*) The Conference of Foreign Ministers has the right to recommend the convening of a Conference of the Heads of State or Heads of Government. The approval can be obtained for such a Conference by circulating the request to all member States.

2. The Islamic Conference of Foreign Ministers shall be held for the following purposes:

(*a*) To consider the means of implementing the general policy of the Conference;

(*b*) To review the progress in the implementation of resolutions adopted at previous sessions;

(*c*) To adopt resolutions on matters of common interest in accordance with the aims and objectives of the Conference set forth in this Charter;

(*d*) To discuss the report of the Financial Committee and approve the budget of the Secretariat-General;

# Annex 5



(*e*) 1. The Conference appoints the Secretary-General;

2. The Conference appoints three Assistants to the Secretary-General on recommendation of the Secretary-General; and

3. In recommending his Assistants, the Secretary-General shall take into due consideration their competence, integrity and dedication to the Charter's objectives as well as equitable geographical distribution.

(*f*) To fix the date and venue of the coming Conference of Foreign Ministers; and

(*g*) To consider any issue affecting one or more of the member States whenever a request to that effect is made, with a view to taking appropriate measures in that respect.

3. Resolutions or recommendations of the Conference of Foreign Ministers shall be adopted by a two-thirds majority.

4. Two-thirds of the member States in any session of the Conference of Foreign Ministers shall form the quorum.

5. The Conference of Foreign Ministers decides the basic procedure which it follows and which could be followed for the Conference of Kings and Heads of State and Government, appoints a chairman for each session. This procedure is also applied in subsidiary organs set up by the Conference of Kings and Heads of State and Government and also by the Conference of Foreign Ministers.

### *Article VI.* THE SECRETARIAT-GENERAL

1. The General Secretariat shall be headed by the Secretary-General appointed by the Conference for a period of two years beginning from the date of his appointment; he may be re-appointed for another period of two years only.

2. The Secretary-General shall appoint the staff of the General Secretariat from among nationals of member States, paying due regard to their competence and integrity, and in accordance with the principle of equitable geographical distribution.

3. In the performance of their duties, the Secretary-General, his Assistants, or the staff of the General Secretariat, shall not seek or receive instructions from any government or authority other than the Conference. They shall refrain from taking any action that may be detrimental to their position as international officials responsible only to the Conference. Member States undertake to respect this quality and the nature of their responsibilities, and shall not seek to influence them in any way in the discharge of their responsibilities.

4. The Secretariat-General shall secure communications among member States and offer facilities for consultations and exchange of views and the dissemination of information that have common significance to these States.

5. The headquarters of the Secretariat-General shall be in Jeddah pending the liberation of "Bait UI Maqdis" (Jerusalem).

6. The General Secretariat shall follow up the implementation of the resolutions and recommendations of the Conference and report back to the Conference. It shall also directly supply the member States with the working papers

# Annex 5



and memoranda through appropriate channels, within the framework of the resolutions and recommendations of the Conference.

7. The General Secretariat shall prepare the meetings of the Conference through close collaboration with the host States on administrative and organizational matters.

8. In the light of the agreement on immunities and privileges to be approved by the Conference:

(*a*) The Conference shall enjoy, in the member States, such legal capacity, immunities and privileges as may be necessary for the exercise of its functions and the fulfilment of its objectives.

(*b*) Representatives of member States shall enjoy such immunities and privileges as may be necessary for the exercise of their functions related to the Conference.

(*c*) The staff of the Conference shall enjoy the immunities and privileges necessary for the performance of their duties as decided upon by the Conference.

### *Article VII.* FINANCE

1. All expenses on the administration and activities of the Secretariat shall be borne by member States according to their national incomes.

2. The Secretariat shall administer its financial affairs according to the rules of procedure approved by the Conference of Foreign Ministers.

3. A Standing Financial Committee shall be formed by the Conference from the accredited representatives of the participating States, and shall meet at the Headquarters of the General Secretariat. This Committee shall in conjunction with the Secretary-General, prepare and supervise the budget of the General Secretariat according to the regulations approved by the Conference of Foreign Ministers.

### *Article VIII.* MEMBERSHIP

The Organization of the Islamic Conference is composed of the States which participated in the Conference of Kings and Heads of State and Government held in Rabat and the Foreign Ministers' Conference held in Jeddah, Karachi and signatory to this Charter. Every Muslim state is eligible to join the Islamic Conference on submitting an application expressing its desire and preparedness to adopt this Charter. The application shall be deposited with the General Secretariat, to be brought before the Foreign Ministers' Conference at its first meeting after the submission of the application. Membership shall take effect as of the time of approval of the Conference by a two-thirds majority of the Conference members.

### *Article IX.* ISLAMIC ORGANIZATIONS

The General Secretariat shall act within the framework of the present Charter and with the approval of the Conference to consolidate relations between the Islamic Conference and the Islamic organizations of International character and

# Annex 5



to realize cooperation in the service of the Islamic objectives approved by this Charter.

*Article X.* WITHDRAWAL

1. Any member State may withdraw from the Islamic Conference by sending a written notification to the Secretariat-General, to be communicated to all member States.

2. The State applying for withdrawal shall be bound by its obligations until the end of the fiscal year during which the application of withdrawal is submitted. It shall also settle any other financial obligation due to the Conference.

*Article XI.* AMENDMENT

Amendment to this Charter shall be made, if approved and ratified by a two-thirds majority of the member States.

*Article XII.* INTERPRETATION

Any dispute that may arise in the interpretation, application or implementation of any article in the present Charter shall be settled peacefully, and in all cases through consultations, negotiations, reconciliation or arbitration.

*Article XIII.* LANGUAGE

Languages of the Conference shall be Arabic, English and French.

*Article XIV.* RATIFICATION

This Charter shall be approved or ratified by member States in the organization of the Islamic Conference in accordance with the current procedure in their respective countries. This Charter goes into effect as of the date of deposition of the instruments of ratification with the General Secretariat by a simple majority of the States participating in the Third Islamic Conference of Foreign Ministers held in Jeddah from 14 to 18 Moharram 1392 (29 February to 4 March 1972).

13039

# Annex 5



DECLARATIONS and RESERVATIONS formulated on the occasion of the adoption of the Charter

DÉCLARATIONS et RÉSERVES formulées lors de l'adoption de la Charte

*CHAD*

*TCHAD*

[ARABIC TEXT — TEXTE ARABE]

"ان وفد تشاد لدى مؤتمر وزراء الخارجية الاسلامى الثالث يسجـــل
تحفظه بشأن اقرار ميثاق المؤتمر نظرا الى أن جمهورية تشاد دولة علمانية •

ومع ذلك فان اقرار الميثاق والتصديق عليه يرجع أولا وأخيرا الـــى
مجلس الأمة ، لأنه يمثل مسألة دستورية " •

"Considering the secular nature of the Republic of Chad, the Delegation of Chad to the Islamic Conference of Foreign Ministers registers reservation concerning the adoption of the Charter of the Conference.

"However, due to the fact that this is a problem which touches on the Constitution of the Republic of Chad, the adoption and ratification of the Charter will be up to the National Assembly."

« La délégation du Tchad à la 3e Conférence Islamique des Ministres des affaires étrangères formule ses réserves en ce qui concerne les résolutions de la Conférence, vu la laïcité de la République du Tchad.

« Toutefois, du fait que c'est un problème qui touche la Constitution qui régit la République du Tchad, il appartiendra à l'Assemblée nationale de décider son adoption et sa ratification. »

13039

# Annex 5



*INDONESIA* *INDONÉSIE*

[ARABIC TEXT — TEXTE ARABE]

" اقترح رئيس وفدى فى البيان الذى ألقاه يوم الاربعاء الماضى أن يؤسس المؤتمر على شكل مجمع تعاون وتشاور حيث جميع الدول الاسلامية تستطيع أن تشترك اشتراكا كاملا • وقد أبدى للمؤتمرين عدة أسباب تأييدا لاقتراحه • سوف لا أكررها هنا • لقد قرر المؤتمر بحكمته الآن أن يؤسس المؤتمر الاسلامى كمنظمة •

ان جمهورية أندونيسيا دستوريا ليست مؤسسة على دين معين • ولهذا فان من الصعب جدا على جمهورية أندونيسيا أن تربط نفسها رسميا — ودون تحفظات — بمنظمة أو تجمع يقوم على دين معين • وعلى ذلك وعلى الرغم أن جمهورية أندونيسيا ليست فى هذه المرحلة فى وضع يمكنها من الانضمام كعضو عامل فانها ستستمر باشتراكها فى أعمال المؤتمر بصفة دولة مشاركة ، الى الحد الأقصى الذى يتسق ودستورها وعلاوة على ذلك فان وفدى يعتقد بأن قرارات المؤتمر يجب أن تتخذ بالاجماع وان لها حكم التوصية • "

"In his statement last Wednesday, the Chairman of my Delegation proposed that the Conference be instituted as a forum of co-operation and consultation where all Moslem countries will be in a position to fully participate. He gave this Assembly several reasons in support of his proposal. I shall not repeat them here. The Conference in its wisdom has now decided that the Islamic Conference shall be constituted as an *Organisation*.

"The Republic of Indonesia is constitutionally not based on any specific religion. It is, therefore, very difficult for the Republic of Indonesia to associate itself formally—and withtout reservations—with an organisation or grouping which is based on a specific religion. Accordingly, while at this stage not being in a position to associate itself as a full member, the Republic of Indo-

« Dans l'allocution qu'il a prononcée le mercredi dernier le chef de ma délégation a suggéré que la Conférence soit constituée sous forme d'un organe d'entraide et de conseil de façon à ce que tous les pays musulmans puissent y participer entièrement en donnant aux membres de la Conférence plusieurs causes pour appuyer sa suggestion. Je ne reviendrai pas sur cela. La Conférence a décidé que la Conférence Islamique soit constituée comme une *organisation*,

« Statutairement la République de l'Indonésie n'est pas constituée sur une religion déterminée. Il est donc difficile à l'Indonésie de s'attacher officiellement, et sans réserve, à une organisation ou un organe basé sur une religion déterminée. Pour cela, et malgré que l'Indonésie, dans cette phase, n'est pas en position lui permettant l'intégration comme membre effectif, elle continuera

# Annex 5



nesia will continue its participation in the work of the Conference in the quality of a participating Country, to the full extent it is consistent with its Constitution. Furthermore, my Delegation believes that decisions of the Conference are to be taken by consensus and have a recommendative authority."

à participer aux activités de la Conférence en qualité de pays membre. En plus de cela, ma délégation pense que les résolutions de la Conférence doivent être prises à l'unanimité, et qu'elle a le droit de vote. »

*IRAN*

*IRAN*

[ARABIC TEXT — TEXTE ARABE]

"١ ـ ميثاق المؤتمر الاسلامي ٠

أ ـ نظرا الى الغاء المادة ١٢ المقصود بها أن تحدد بعبارات واضحة أنه لا يكون هنالك تناقض فيما بين الميثاق الحالي وبين ميثاق الأمم المتحدة ، وعلى أساس نص المادة ١٠٣ من ميثاق الأمم المتحدة فان حكومة ايران ترغب في أن تؤكد بأن أى التزام قد تتولى القيام به نتيجة للتصديق على ميثاق المؤتمر الاسلامي يجب أن يكون خاضعا لا مخالفا لحقوقها والتزاماتها بموجب ميثاق الأمم المتحدة ٠ وفي حالة وجود تعارض بين ميثاق المؤتمر الاسلامي وبين ميثاق الأمم المتحدة فان التزاماتها بموجب ميثاق الأمم المتحدة تكون لها الأولية ٠

ب ـ المقررات والتوصيات التي قد يتخذها المؤتمر على أساس مبادئ وأهداف المؤتمر كما أدرجت في الميثاق الحالي تكون مقبولة ما دام أنها تتسق وتنحصر ضمن نطاق توصيات ومقررات أجهزة الأمم المتحدة المختصة ٠

٢ ـ مقررات وتوصيات مؤتمر وزراء الخارجية الاسلامي الثالث ٠

ان التحفظ المذكور في الفقرة ( ب ) أعلاه ينطبق على كافة المقررات والتوصيات المتخذة من قبل مؤتمر وزراء الخارجية الاسلامي الثالث ٠"

13039

# Annex 5



"1. *Charter of the Islamic Conference*

*a*) In view of the deletion of article XII designed to establish in clear terms that there shall exist no conflict between the present Charter and the Charter of the United Nations, and basing itself on the provision of Article 103 of the Charter of the United Nations, the Government of Iran wishes to confirm that any obligation that it might assume as a result of the ratification of the Charter of the Islamic Conference shall be subject to, and not in variance with, its rights and obligations under the Charter of the United Nations. In the case of a conflict between the Charter of the Islamic Conference and the Charter of the United Nations, its obligations under the latter shall prevail.

*b*) Decisions and recommendations that may be adopted by the Conference on the basis of the principles and objectives of the Conference as inscribed in the present Charter, shall be acceptable in so far as they are consistent with, and fall within the scope of the recommendations and decisions of the appropriate organs of the United Nations.

"2. *Decisions and recommendations of the Third Session of the Islamic Conference of Foreign Ministers*

The reservation mentioned in (*b*) above also applies to all decisions and recommendations adopted by the Third Session of the Islamic Conference of Foreign Ministers."

« 1. *La Charte de la Conférence Islamique*

*a*) Vu l'abrogation de l'article 12 visant à éviter toute contradiction entre la Charte actuelle et celle des Nations Unies, et sur les bases du texte de l'Article 103 de la Charte des Nations Unies, le Gouvernement d'Iran désire préciser que toute obligation qui lui incombe résultant de l'approbation de la Charte de la Conférence Islamique, doit compatir et non aller contre ses droits et ses obligations conformément à la Charte des Nations Unies. En cas de différence entre la Charte de la Conférence Islamique et celle des Nations Unies, la priorité sera donnée à ses obligations conformément à la Charte des Nations Unies.

*b*) Les décisions et recommandations qui seraient prises par la Conférence sur la base des fondements et des buts de la Conférence tels qu'ils figurent dans la Charte actuelle seront admissibles tant qu'ils sont conformes et ne sortent pas du domaine des recommandations et décisions des organes des Nations Unies.

« 2. *Décisions et Recommandations de la 3e Conférence Islamique des Ministres des affaires étrangères*

La réserve formulée en *b* ci-dessus indiquée s'applique à toutes les décisions et recommandations prises par la 3e Conférence Islamique des Ministres des affaires étrangères. »

13039

# Annex 5



*LEBANON* *LIBAN*

[ARABIC TEXT — TEXTE ARABE]

" أخذ لبنان علما بميثاق المؤتمر الاسلامي .

يتحفظ لبنان حول جميع أحكام هذا الميثاق التي تتعارض مع دستوره وقوانينه وواقعه السياسي وأنظمته .

كما أنه يبدي نفس التحفظ بما يتعلق بوكالة الأنباء الاسلامية الدولية لجهة نشاطاتها المقبلة التي قد تتعارض مع دستوره وقوانينه وواقعه السياسي .

يعتبر لبنان جميع القرارات والتوصيات والبلاغات الصادرة عن المؤتمر نافذة بالنسبة اليه ، بقدر قبولها صراحة من قبل الحكومة اللبنانية وابلاغ هذا القبول رسميا الى الأمانة العامة . "

"Lebanon expresses its reservations to all provisions which are contradictory with its constitution, law, regulations and political realities.

"Moreover, Lebanon expresses the same reservations in relation to the International Islamic News Agency, concerning its future activities which may be contradictory with Lebanon's Constitution, laws and political realities.

"All resolutions, recommendations and communications emanating from the Conference will be valid as far as they are accepted explicitly by the Lebanese Government and upon official notification of this acceptance to the General Secretariat."

« Le Liban formule ses réserves quant à toutes les dispositions de la Charte qui sont en contradiction avec sa Constitution, ses lois, ses règlements et ses réalités politiques.

« De plus le Liban émet les mêmes réserves en ce qui concerne l'Agence Islamique internationale d'Information, en ce qui concerne ses activités futures qui seraient en contradiction avec sa Constitution, ses lois, et ses réalités politiques.

« Toutes les résolutions, recommandations et communiqués émanant de la Conférence seront applicables dans la mesure de leur acceptation expresse par le Gouvernement libanais et après signification officielle de cette acceptation au Secrétariat général. »

13039

# Annex 5



*TURKEY* *TURQUIE*

[ARABIC TEXT — TEXTE ARABE]

"" في الصياغة الحالية لمســـــــودة
الميثاق فاننا على يقين من أن الوضع الدستوري لعدد من المشتركين مثلنا نحن ســـــوف
يؤخذ بعين الاعتبار ٠٠ وحين يكتسب الميثاق صيغته النهائية فان وفدي سوف يهتـــــم
بملاحظة ذلك ويقدمه الى حكومتي لدراسة أدق بالنسبة الى أى مدى نستطيع دستوريـــــا
أن نستجيب للالتزامات المالية وغيرها من الالتزامات التي تتولد منها ٠٠٠ أما بالنســـــبة
للمقررات والتوصيات والبلاغات الصادرة عن المؤتمر فانني أحب أن أشير الى التحفظات التي أبداها
هذا الوفد أثناء المؤتمرات السابقة في الرباط وجدة وكراتشي "" ٠

"In the present work of drafting the Charter we trust that the constitutional position of a number of participants like ourselves will be taken into consideration . . . When the Charter takes its final shape, my Delegation will take note of it and will submit it to my Government for a closer examination as to what degree we may constitutionally comply with the obligations financial and otherwise, which will devolve from it . . . As for the Resolutions, recommendations and communications made by the Conference, I would like to refer to the reservations made by this Delegation during the previous Conferences of Rabat, Jeddah and Karachi."

« Dans la forme actuelle de la Charte nous sommes certains que la situation statutaire de plusieurs des participants comme nous sera prise en considération. Lorsque la Charte aura pris sa forme finale, ma délégation s'y intéressera et la présentera à mon Gouvernement pour étude plus détaillée pour savoir jusqu'où nous pouvons tenir les obligations financières et autres conformément à notre Statut. Quant aux décisions, recommandations et communiqués pris par la Conférence, je voudrais signaler la réserve formulée par cette délégation au cours des précédentes conférences à Rabat, Djeddah et Karachi. »

# Annex 6

International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, *UNTS*, vol. 1015, p. 243 [extract]

*Available at:*

https://treaties.un.org/doc/Publication/UNTS/Volume%201015/volume-1015-I-14861-English.pdf

*French version available at:*

https://treaties.un.org/doc/Publication/UNTS/Volume%201015/volume-1015-I-14861-French.pdf

## No. 14861

## MULTILATERAL

### International Convention on the Suppression and Punishment of the Crime of *Apartheid*. Adopted by the General Assembly of the United Nations on 30 November 1973

*Authentic texts: English, French, Chinese, Russian and Spanish.*

*Registered* ex officio *on 18 July 1976.*

## MULTILATÉRAL

### Convention internationale sur l'élimination et la répression du crime d'*apartheid*. Adoptée par l'Assemblée générale des Nations Unies le 30 novembre 1973

*Textes authentiques : anglais, français, chinois, russe et espagnol.*

*Enregistrée d'office le 18 juillet 1976.*

# Annex 6



*Article IX.* 1. The Chairman of the Commission on Human Rights shall appoint a group consisting of three members of the Commission on Human Rights, who are also representatives of States Parties to the present Convention, to consider reports submitted by States Parties in accordance with article VII.

2. If, among the members of the Commission on Human Rights, there are no representatives of States Parties to the present Convention or if there are fewer than three such representatives, the Secretary-General of the United Nations shall, after consulting all States Parties to the Convention, designate a representative of the State Party or representatives of the States Parties which are not members of the Commission on Human Rights to take part in the work of the group established in accordance with paragraph 1 of this article, until such time as representatives of the States Parties to the Convention are elected to the Commission on Human Rights.

3. The group may meet for a period of not more than five days, either before the opening or after the closing of the session of the Commission on Human Rights, to consider the reports submitted in accordance with article VII.

*Article X.* 1. The States Parties to the present Convention empower the Commission on Human Rights:

(*a*) to request United Nations organs, when transmitting copies of petitions under article 15 of the International Convention on the Elimination of All Forms of Racial Discrimination, to draw its attention to complaints concerning acts which are enumerated in article II of the present Convention;

(*b*) to prepare, on the basis of reports from competent organs of the United Nations and periodic reports from States Parties to the present Convention, a list of individuals, organizations, institutions and representatives of States which are alleged to be responsible for the crimes enumerated in article II of the Convention, as well as those against whom legal proceedings have been undertaken by States Parties to the Convention;

(*c*) to request information from the competent United Nations organs concerning measures taken by the authorities responsible for the administration of Trust and Non-Self-Governing Territories, and all other Territories to which General Assembly resolution 1514 (XV) of 14 December 1960 applies, with regard to such individuals alleged to be responsible for crimes under article II of the Convention who are believed to be under their territorial and administrative jurisdiction.

2. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV), the provisions of the present Convention shall in no way limit the right of petition granted to those peoples by other international instruments or by the United Nations and its specialized agencies.

*Article XI.* 1. Acts enumerated in article II of the present Convention shall not be considered political crimes for the purpose of extradition.

2. The States Parties to the present Convention undertake in such cases to grant extradition in accordance with their legislation and with the treaties in force.

*Article XII.* Disputes between States Parties arising out of the interpretation, application or implementation of the present Convention which have not been settled by negotiation shall, at the request of the States Parties to the dispute, be brought before the International Court of Justice, save where the parties to the dispute have agreed on some other form of settlement.

*Article XIII.* The present Convention is open for signature by all States. Any State which does not sign the Convention before its entry into force may accede to it.

# Annex 7

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, *UNTS*, vol. 1249, p. 13 [extract]

*Available at:*

https://treaties.un.org/doc/Treaties/1969/03/19690312%2008-49%20AM/Ch_IV_2p.pdf

# اتفاقية القضاء على جميع أشكال التمييز ضد المرأة

---

# 消除对妇女一切形式歧视公约

---

# CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

---

# CONVENTION SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION À L'ÉGARD DES FEMMES

---

# КОНВЕНЦИЯ О ЛИКВИДАЦИИ ВСЕХ ФОРМ ДИСКРИМИНАЦИИ В ОТНОШЕНИИ ЖЕНЩИН

---

# CONVENCION SOBRE LA ELIMINACION DE TODAS LAS FORMAS DE DISCRIMINACION CONTRA LA MUJER

Article 28

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 29

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 30

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.

Article 28

1. Le Secrétaire général de l'Organisation des Nations Unies recevra et communiquera à tous les Etats le texte des réserves qui auront été faites au moment de la ratification ou de l'adhésion.

2. Aucune réserve incompatible avec l'objet et le but de la présente Convention ne sera autorisée.

3. Les réserves peuvent être retirées à tout moment par voie de notification adressée au Secrétaire général de l'Organisation des Nations Unies, lequel informe tous les Etats parties à la Convention. La notification prendra effet à la date de réception.

Article 29

1. Tout différend entre deux ou plusieurs Etats parties concernant l'interprétation ou l'application de la présente Convention qui n'est pas réglé par voie de négociation est soumis à l'arbitrage, à la demande de l'un d'entre eux. Si, dans les six mois qui suivent la date de la demande d'arbitrage, les parties ne parviennent pas à se mettre d'accord sur l'organisation de l'arbitrage, l'une quelconque d'entre elles peut soumettre le différend à la Cour internationale de Justice, en déposant une requête conformément au Statut de la Cour.

2. Tout Etat partie pourra, au moment où il signera la présente Convention, la ratifiera ou y adhérera, déclarer qu'il ne se considère pas lié par les dispositions du paragraphe 1 du présent article. Les autres Etats parties ne seront pas liés par lesdites dispositions envers un Etat partie qui aura formulé une telle réserve.

3. Tout Etat partie qui aura formulé une réserve conformément aux dispositions du paragraphe 2 du présent article pourra à tout moment lever cette réserve par une notification adressée au Secrétaire général de l'Organisation des Nations Unies.

Article 30

La présente Convention, dont les textes en anglais, arabe, chinois, espagnol, français et russe font également foi, sera déposée auprès du Secrétaire général de l'Organisation des Nations Unies.

EN FOI DE QUOI les soussignés, à ce dûment habilités, ont signé la présente Convention.

Статья 29

1. Любой спор между двумя или несколькими государствами-участниками относительно толкования или применения настоящей Конвенции, не решенный путем переговоров, передается по просьбе одной из сторон на арбитражное разбирательство. Если в течение шести месяцев с момента подачи заявления об арбитражном разбирательстве сторонам не удалось прийти к согласию относительно организации арбитражного разбирательства, любая из этих сторон может передать данный спор в Международный Суд путем подачи заявления в соответствии со Статутом Суда.

2. Каждое государство-участник может во время подписания или ратификации настоящей Конвенции или присоединения к ней заявить о том, что оно не считает себя связанным обязательствами, содержащимися в пункте 1 этой статьи. Другие государства-участники не несут обязательств, вытекающих из указанного пункта данной статьи, в отношении какого-либо государства-участника, сделавшего подобную оговорку.

3. Любое государство-участник, сделавшее оговорку в соответствии с пунктом 2 настоящей статьи, может в любое время снять свою оговорку путем уведомления Генерального секретаря Организации Объединенных Наций.

Статья 30

Настоящая Конвенция, тексты которой на английском, арабском, испанском, китайском, русском и французском языках являются равно аутентичными, сдается на хранение Генеральному секретарю Организации Объединенных Наций.

В УДОСТОВЕРЕНИЕ ЧЕГО нижеподписавшиеся, должным образом на то уполномоченные, подписали настоящую Конвенцию.

Artículo 29

1. Toda controversia que surja entre dos o más Estados Partes con respecto a la interpretación o aplicación de la presente Convención que no se solucione mediante negociaciones se someterá al arbitraje a petición de uno de ellos. Si en el plazo de seis meses contados a partir de la fecha de presentación de solicitud de arbitraje las partes no consiguen ponerse de acuerdo sobre la forma del mismo, cualquiera de las partes podrá someter la controversia a la Corte Internacional de Justicia, mediante una solicitud presentada de conformidad con el Estatuto de la Corte.

2. Todo Estado Parte, en el momento de la firma o ratificación de la presente Convención o de su adhesión a la misma, podrá declarar que no se considera obligado por el párrafo 1 del presente artículo. Los demás Estados Partes no estarán obligados por ese párrafo ante ningún Estado Parte que haya formulado esa reserva.

3. Todo Estado Parte que haya formulado la reserva prevista en el párrafo 2 del presente artículo podrá retirarla en cualquier momento notificándolo al Secretario General de las Naciones Unidas.

Artículo 30

La presente Convención, cuyos textos en árabe, chino, español, francés, inglés y ruso son igualmente auténticos, se depositará en poder del Secretario General de las Naciones Unidas.

EN TESTIMONIO DE LO CUAL, los infrascritos, debidamente autorizados, firman la presente Convención.

# Annex 8

United Nations Convention on the Law of the Sea, 10 December 1982, *UNTS*, vol. 1833, p. 396 [extract]

*Available at:*

https://treaties.un.org/doc/publication/unts/volume%201833/volume-1833-a-31363-english.pdf

*French version available at:*

https://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1834-A-31363-French.pdf

# No. 31363

## MULTILATERAL

## United Nations Convention on the Law of the Sea (with annexes, final act and procès-verbaux of rectification of the final act dated 3 March 1986 and 26 July 1993). Concluded at Montego Bay on 10 December 1982

*Authentic texts: Arabic, Chinese, English, French, Russian and Spanish.*

*Registered* ex officio *on 16 November 1994.*

## MULTILATÉRAL

## Convention des Nations Unies sur le droit de la mer (avec annexes, acte final et procès-verbaux de rectification de l'acte final en date des 3 mars 1986 et 26 juillet 1993). Conclue à Montego Bay le 10 décembre 1982

*Textes authentiques : arabe, chinois, anglais, français, russe et espagnol.*

*Enregistrée d'office le 16 novembre 1994.*

PART XV

SETTLEMENT OF DISPUTES

SECTION 1. GENERAL PROVISIONS

Article 279
Obligation to settle disputes by peaceful means

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

Article 280
Settlement of disputes by any peaceful means chosen by the parties

Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

Article 281
Procedure where no settlement has been reached by the parties

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

Article 282
Obligations under general, regional or bilateral agreements

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

Article 283
Obligation to exchange views

1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Article 284
Conciliation

1. A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure.

2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.

3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.

4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.

Article 285
Application of this section to disputes submitted pursuant to Part XI

This section applies to any dispute which pursuant to Part XI, section 5, is to be settled in accordance with procedures provided for in this Part. If an entity other than a State Party is a party to such a dispute, this section applies mutatis mutandis.

SECTION 2. COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS

Article 286
Application of procedures under this section

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Article 287
Choice of procedure

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;

(b) the International Court of Justice;

# Annex 9

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, *UNTS*, vol. 1465, p. 85 [extract]

*Available at:*

https://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf

# اتفاقية لمناهضة التعذيب وغيره من ضروب المعاملة أو العقوبة القاسية أو اللاانسانية أو المهينة

# 禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚公约

# CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

# CONVENTION CONTRE LA TORTURE ET AUTRES PEINES OU TRAITEMENTS CRUELS, INHUMAINS OU DÉGRADANTS

# КОНВЕНЦИЯ ПРОТИВ ПЫТОК И ДРУГИХ ЖЕСТОКИХ, БЕСЧЕЛОВЕЧНЫХ ИЛИ УНИЖАЮЩИХ ДОСТОИНСТВО ВИДОВ ОБРАЩЕНИЯ И НАКАЗАНИЯ

# CONVENCION CONTRA LA TORTURA Y OTROS TRATOS O PENAS CRUELES, INHUMANOS O DEGRADANTES

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as

reservation by notification to the Secretary-General of the United Nations.

Article 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

(a) Signatures, ratifications and accessions under articles 25 and 26;

(b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;

(c) Denunciations under article 31.

Article 30

1. Tout différend entre deux ou plus des Etats parties concernant l'interprétation ou l'application de la présente Convention qui ne peut pas être réglé par voie de négociation est soumis à l'arbitrage à la demande de l'un d'entre eux. Si, dans les six mois qui suivent la date de la demande d'arbitrage, les parties ne parviennent pas à se mettre d'accord sur l'organisation de l'arbitrage, l'une quelconque d'entre elles peut soumettre le différend à la Cour internationale de Justice en déposant une requête conformément au Statut de la Cour.

2. Chaque Etat pourra, au moment où il signera ou ratifiera la présente Convention ou y adhérera, déclarer qu'il ne se considère pas lié par les dispositions du paragraphe 1 du présent article. Les autres Etats parties ne seront pas liés par lesdites dispositions envers tout Etat partie qui aura formulé une telle réserve.

3. Tout Etat partie qui aura formulé une réserve conformément aux dispositions du paragraphe 2 du présent article pourra à tout moment lever cette réserve par une notification adressée au Secrétaire général de l'Organisation des Nations Unies.

Article 31

1. Un Etat partie pourra dénoncer la présente Convention par notification écrite adressée au Secrétaire général de l'Organisation des Nations Unies. La dénonciation prend effet un an après la date à laquelle la notification aura été reçue par le Secrétaire général.

2. Une telle dénonciation ne libérera pas l'Etat partie des obligations qui lui incombent en vertu de la présente Convention en ce qui concerne tout acte ou toute omission commis avant la date à laquelle la dénonciation prendra effet; elle ne fera nullement obstacle à la poursuite de l'examen de toute question dont le Comité était déjà saisi à la date à laquelle la dénonciation a pris effet.

3. Après la date à laquelle la dénonciation par un Etat partie prend effet, le Comité n'entreprend l'examen d'aucune question nouvelle concernant cet Etat.

Статья 29

1. Любое Государство-участник настоящей Конвенции может предложить поправку и представить ее Генеральному секретарю Организации Объединенных Наций. Генеральный секретарь Организации Объединенных Наций препровождает затем предложенную поправку государствам-участникам с просьбой сообщить ему, высказываются ли они за созыв конференции государств-участников с целью рассмотрения этого предложения и проведения по нему голосования. Если в течение четырех месяцев с даты направления такого письма по крайней мере одна треть государств-участников выскажется за такую конференцию, Генеральный секретарь созывает конференцию под эгидой Организации Объединенных Наций. Любая поправка, принятая большинством государств-участников, присутствующих и участвующих в голосовании на этой конференции, представляется Генеральным секретарем всем государствам-участникам на утверждение.

2. Поправка, принятая в соответствии с пунктом 1 настоящей статьи, вступает в силу после того, как две трети государств-участников настоящей Конвенции уведомят Генерального секретаря Организации Объединенных Наций о принятии ими данной поправки в соответствии со своими конституционными процедурами.

3. Когда поправки вступают в силу, они становятся обязательными для тех государств-участников, которые их приняли, а для других государств-участников остаются обязательными те положения настоящей Конвенции и любые предшествующие поправки, которые были ими приняты.

Статья 30

1. Любой спор между двумя или более государствами-участниками в отношении толкования или применения настоящей Конвенции, который не может быть урегулирован путем переговоров, передается по просьбе одного из них на арбитраж. Если в течение шести месяцев с даты подачи просьбы об арбитраже стороны не в состоянии прийти к соглашению по вопросу об организации арбитража, по просьбе любой из сторон спор может быть передан в Международный Суд в соответствии со Статутом Суда.

2. Каждое Государство при подписании или ратификации настоящей Конвенции или при присоединении к ней может сделать заявление о том, что оно не считает себя обязанным положениями пункта 1 настоящей статьи. Другие государства-участники не будут связаны положениями пункта 1 настоящей статьи в отношении любого Государства-участника, сделавшего такую оговорку.

3. Любое Государство-участник, сделавшее оговорку в соответствии с пунктом 2 настоящей статьи, может в любое время снять свою оговорку, уведомив об этом Генерального секретаря Организации Объединенных Наций.

Статья 31

1. Любое Государство-участник может денонсировать настоящую Конвенцию путем письменного уведомления Генерального секретаря Организации Объединенных Наций. Денонсация вступает в силу по истечении года после получения уведомления Генеральным секретарем.

2. Такая денонсация не освобождает Государство-участника от его обязательств по настоящей Конвенции за любое действие или упущение, которое имело место до даты вступления денонсации в силу, и денонсация никоим образом не наносит ущерба продолжающемуся рассмотрению любого вопроса, который уже рассматривался Комитетом до даты вступления денонсации в силу.

3. После даты вступления в силу денонсации для какого-либо Государства-участника Комитет не начинает рассмотрения новых вопросов, касающихся данного Государства.

Статья 32

Генеральный секретарь Организации Объединенных Наций сообщает всем государствам - членам Организации Объединенных Наций и всем государствам, подписавшим настоящую Конвенцию или присоединившимся к ней, сведения о:

a) подписании, ратификации и присоединении в соответствии со статьями 25 и 26;

b) дате вступления в силу настоящей Конвенции в соответствии со статьей 27 и дате вступления в силу любых поправок в соответствии со статьей 29;

c) денонсациях в соответствии со статьей 31.

Статья 33

1. Настоящая Конвенция, английский, арабский, испанский, китайский, русский и французский тексты которой являются равно аутентичными, сдается на хранение Генеральному секретарю Организации Объединенных Наций.

2. Генеральный секретарь Организации Объединенных Наций направляет заверенные экземпляры настоящей Конвенции всем государствам.

Artículo 30

1. Las controversias que surjan entre dos o más Estados Partes con respecto a la interpretación o aplicación de la presente Convención, que no puedan solucionarse mediante negociaciones, se someterán a arbitraje, a petición de uno de ellos. Si en el plazo de seis meses contados a partir de la fecha de presentación de la solicitud de arbitraje las Partes no consiguen ponerse de acuerdo sobre la forma del mismo, cualquiera de las Partes podrá someter la controversia a la Corte Internacional de Justicia, mediante una solicitud presentada de conformidad con el Estatuto de la Corte.

2. Todo Estado, en el momento de la firma o ratificación de la presente Convención o de su adhesión a la misma, podrá declarar que no se considera obligado por el párrafo 1 del presente artículo. Los demás Estados Partes no estarán obligados por dicho párrafo ante ningún Estado Parte que haya formulado dicha reserva.

3. Todo Estado Parte que haya formulado la reserva prevista en el párrafo 2 del presente artículo podrá retirarla en cualquier momento notificándolo al Secretario General de las Naciones Unidas.

Artículo 31

1. Todo Estado Parte podrá denunciar la presente Convención mediante notificación hecha por escrito al Secretario General de las Naciones Unidas. La denuncia surtirá efecto un año después de la fecha en que la notificación haya sido recibida por el Secretario General.

2. Dicha denuncia no eximirá al Estado Parte de las obligaciones que le impone la presente Convención con respecto a toda acción u omisión ocurrida antes de la fecha en que haya surtido efecto la denuncia, ni la denuncia entrañará tampoco la suspensión del examen de cualquier asunto que el Comité haya empezado a examinar antes de la fecha en que surta efecto la denuncia.

3. A partir de la fecha en que surta efecto la denuncia de un Estado Parte, el Comité no iniciará el examen de ningún nuevo asunto referente a ese Estado.

Artículo 32

El Secretario General de las Naciones Unidas comunicará a todos los Estados Miembros de las Naciones Unidas y a todos los Estados que hayan firmado la presente Convención o se hayan adherido a ella:

a) Las firmas, ratificaciones y adhesiones con arreglo a los artículos 25 y 26;

b) La fecha de entrada en vigor de la presente Convención con arreglo al artículo 27, y la fecha de entrada en vigor de las enmiendas con arreglo al artículo 29;

c) Las denuncias con arreglo al artículo 31.

Artículo 33

1. La presente Convención, cuyos textos en árabe, chino, español, francés, inglés y ruso son igualmente auténticos, se depositará en poder del Secretario General de las Naciones Unidas.

2. El Secretario General de las Naciones Unidas remitirá copias certificadas de la presente Convención a todos los Estados.

---

-11-

# Annex 10

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, *UNTS*, vol. 2220, p. 3 [extract]

*Available at:*

https://treaties.un.org/doc/Treaties/1990/12/19901218%2008-12%20AM/Ch_IV_13p.pdf

# الاتفاقية الدولية لحماية حقوق جميع العمال المهاجرين وأفراد أسرهم

# 《保护所有移徙工人及其家庭成员权利国际公约》

# INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

# CONVENTION INTERNATIONALE SUR LA PROTECTION DES DROITS DE TOUS LES TRAVAILLEURS MIGRANTS ET DES MEMBRES DE LEUR FAMILLE

# МЕЖДУНАРОДНАЯ КОНВЕНЦИЯ О ЗАЩИТЕ ПРАВ ВСЕХ ТРУДЯЩИХСЯ-МИГРАНТОВ И ЧЛЕНОВ ИХ СЕМЕЙ

# CONVENCION INTERNACIONAL SOBRE LA PROTECCION DE LOS DERECHOS DE TODOS LOS TRABAJADORES MIGRATORIOS Y DE SUS FAMILIARES

Article 91

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of signature, ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 92

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration.

3. Any State Party that has made a declaration in accordance with paragraph 2 of the present article may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.

Article 93

1. The present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

Article 92

1. Tout différend entre deux ou plusieurs Etats parties concernant l'interprétation ou l'application de la présente Convention qui n'est pas réglé par voie de négociation sera soumis à l'arbitrage, à la demande de l'un d'entre eux. Si, dans les six mois qui suivent la date de la demande d'arbitrage, les parties ne parviennent pas à se mettre d'accord sur l'organisation de l'arbitrage, l'une quelconque d'entre elles pourra soumettre le différend à la Cour internationale de Justice, en déposant une requête conformément au Statut de la Cour.

2. Tout Etat partie pourra, au moment où il signera la présente Convention, la ratifiera ou y adhérera, déclarer qu'il ne se considère pas lié par les dispositions du paragraphe 1 du présent article. Les autres Etats parties ne seront pas liés par lesdites dispositions envers un Etat partie qui aura formulé une telle déclaration.

3. Tout Etat partie qui aura formulé une déclaration conformément aux dispositions du paragraphe 2 du présent article pourra à tout moment retirer cette déclaration par voie de notification adressée au Secrétaire général de l'Organisation des Nations Unies.

Article 93

1. La présente Convention, dont les textes anglais, arabe, chinois, espagnol, français et russe font également foi, sera déposée auprès du Secrétaire général de l'Organisation des Nations Unies.

2. Le Secrétaire général de l'Organisation des Nations Unies transmettra une copie certifiée conforme de la présente Convention à tous les Etats.

EN FOI DE QUOI les plénipotentiaires soussignés, dûment habilités par leurs gouvernements respectifs, ont signé la présente Convention.

3. Оговорки могут быть сняты в любое время путем соответствующего уведомления, направленного на имя Генерального секретаря Организации Объединенных Наций, который затем сообщает об этом всем Государствам-участникам. Такое уведомление вступает в силу со дня его получения.

Статья 92

1. Любой спор между двумя или несколькими Государствами-участниками относительно толкования или применения настоящей Конвенции, не решенный путем переговоров, передается по просьбе одного из них на арбитражное разбирательство. Если в течение шести месяцев с даты подачи заявления об арбитражном разбирательстве сторонам не удалось прийти к согласию относительно организации арбитражного разбирательства, любая из этих сторон может передать данный спор в Международный Суд путем подачи заявления в соответствии со Статутом Суда.

2. Каждое Государство-участник может во время подписания или ратификации настоящей Конвенции или присоединения к ней заявить о том, что оно не считает себя связанным обязательствами, содержащимися в пункте 1 настоящей статьи. Другие Государства-участники не считают себя связанными положениями пункта 1 настоящей статьи в отношении какого-либо Государства-участника, сделавшего подобное заявление.

3. Любое Государство-участник, сделавшее заявление в соответствии с пунктом 2 настоящей статьи, может в любое время аннулировать свое заявление путем уведомления Генерального секретаря Организации Объединенных Наций.

Статья 93

1. Настоящая Конвенция, тексты которой на английском, арабском, испанском, китайском, русском и фразцузском языках являются равно аутентичнымы, сдается на хранение Генеральному секретарю Организации Объединенных Наций.

2. Генеральный секретарь Организации Объединенных Наций препровождает заверенные копии настоящей Конвенции всем государствам.

В удостоверение чего нижеподписавшиеся полномочные представители, должным образом на то уполномоченные своими соответствующими правительствами, подписали настоящую Конвенцию.

Artículo 91

1. El Secretario General de las Naciones Unidas recibirá y comunicará a todos los Estados Partes el texto de las reservas formuladas por los Estados en el momento de la firma, la ratificación o la adhesión.

2. No se aceptará ninguna reserva incompatible con el objeto y el propósito de la presente Convención.

3. Toda reserva podrá ser retirada en cualquier momento por medio de una notificación a tal fin dirigida al Secretario General de las Naciones Unidas, quien informará de ello a todos los Estados. Esta notificación surtirá efecto en la fecha de su recepción.

Artículo 92

1. Toda controversia que surja entre dos o más Estados Partes con respecto a la interpretación o la aplicación de la presente Convención y no se solucione mediante negociaciones se someterá a arbitraje a petición de uno de ellos. Si en el plazo de seis meses contado a partir de la fecha de presentación de la solicitud de arbitraje las Partes no consiguen ponerse de acuerdo sobre la organización del arbitraje, cualquiera de las Partes podrá someter la controversia a la Corte Internacional de Justicia mediante una solicitud presentada de conformidad con el Estatuto de la Corte.

2. Todo Estado Parte, en el momento de la firma o la ratificación de la Convención o de su adhesión a ella, podrá declarar que no se considera obligado por el párrafo 1 del presente artículo. Los demás Estados Partes no estarán obligados por ese párrafo ante ningún Estado Parte que haya formulado esa declaración.

3. Todo Estado Parte que haya formulado la declaración prevista en el párrafo 2 del presente artículo podrá retirarla en cualquier momento mediante notificación dirigida al Secretario General de las Naciones Unidas.

Artículo 93

1. La presente Convención, cuyos textos en árabe, chino, español, francés, inglés y ruso son igualmente auténticos, se depositará en poder del Secretario General de las Naciones Unidas.

2. El Secretario General de las Naciones Unidas enviará copias certificadas de la presente Convención a todos los Estados.

EN TESTIMONIO DE LO CUAL, los infrascritos plenipotenciarios, debidamente autorizados para ello por sus respectivos gobiernos, han firmado la presente Convención.

---

# Annex 11

International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, *UNTS*, vol. 2716, p. 3 [extract]

*Available at:*

https://treaties.un.org/doc/Publication/CTC/Ch_IV_16.pdf

# الاتفاقية الدولية لحماية جميع الأشخاص من الاختفاء القسري

---

# 保护所有人免遭强迫失踪国际公约

---

# INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

---

# CONVENTION INTERNATIONALE POUR LA PROTECTION DE TOUTES LES PERSONNES CONTRE LES DISPARITIONS FORCÉES

---

# МЕЖДУНАРОДНАЯ КОНВЕНЦИЯ ДЛЯ ЗАЩИТЫ ВСЕХ ЛИЦ ОТ НАСИЛЬСТВЕННЫХ ИСЧЕЗНОВЕНИЙ

---

# CONVENCIÓN INTERNACIONAL PARA LA PROTECCIÓN DE TODAS LAS PERSONAS CONTRA LAS DESAPARICIONES FORZADAS

*Article 38*

1. This Convention is open for signature by all Member States of the United Nations.

2. This Convention is subject to ratification by all Member States of the United Nations. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention is open to accession by all Member States of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General.

*Article 39*

1. This Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the twentieth instrument of ratification or accession, this Convention shall enter into force on the thirtieth day after the date of the deposit of that State's instrument of ratification or accession.

*Article 40*

The Secretary-General of the United Nations shall notify all States Members of the United Nations and all States which have signed or acceded to this Convention of the following:

(*a*) Signatures, ratifications and accessions under article 38;

(*b*) The date of entry into force of this Convention under article 39.

*Article 41*

The provisions of this Convention shall apply to all parts of federal States without any limitations or exceptions.

*Article 42*

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation or by the procedures expressly provided for in this Convention shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are

unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. A State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a declaration.

3. Any State Party having made a declaration in accordance with the provisions of paragraph 2 of this article may at any time withdraw this declaration by notification to the Secretary-General of the United Nations.

*Article 43*

This Convention is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the two Additional Protocols thereto of 8 June 1977, or to the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

*Article 44*

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all the States Parties for acceptance.

3. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have accepted it in accordance with their respective constitutional processes.

2. La présente Convention est soumise à la ratification de tout État Membre de l'Organisation des Nations Unies. Les instruments de ratification seront déposés auprès du Secrétaire général de l'Organisation.

3. La présente Convention est ouverte à l'adhésion de tout État Membre de l'Organisation des Nations Unies. L'adhésion se fera par le dépôt d'un instrument d'adhésion auprès du Secrétaire général de l'Organisation.

*Article 39*

1. La présente Convention entrera en vigueur le trentième jour après la date du dépôt auprès du Secrétaire général de l'Organisation des Nations Unies du vingtième instrument de ratification ou d'adhésion.

2. Pour tout État qui ratifiera la présente Convention ou y adhérera après le dépôt du vingtième instrument de ratification ou d'adhésion, la présente Convention entrera en vigueur le trentième jour après la date du dépôt par cet État de son instrument de ratification ou d'adhésion.

*Article 40*

Le Secrétaire général de l'Organisation des Nations Unies notifiera à tous les États Membres de l'Organisation et à tous les États qui auront signé la présente Convention ou y auront adhéré :

*a*) Les signatures, les ratifications et les adhésions reçues en application de l'article 38 ;

*b*) La date d'entrée en vigueur de la présente Convention en application de l'article 39.

*Article 41*

Les dispositions de la présente Convention s'appliquent, sans limitation ni exception aucune, à toutes les unités constitutives des États fédéraux.

*Article 42*

1. Tout différend entre deux ou plusieurs États parties concernant l'interprétation ou l'application de la présente Convention qui n'est pas réglé par voie de négociation ou au moyen des procédures expressément prévues par la présente Convention est soumis à l'arbitrage, à la demande de l'un d'entre eux. Si, dans les six mois qui suivent la date de la demande d'arbitrage, les parties ne parviennent pas à se mettre d'accord sur l'organisation de l'arbitrage, l'une quelconque d'entre elles peut soumettre le différend à la Cour internationale de Justice, en déposant une requête conformément au Statut de la Cour.

2. Tout État partie pourra, au moment où il signera la présente Convention, la ratifiera ou y adhérera, déclarer qu'il ne se considère pas lié par les dispositions du paragraphe 1 du présent article. Les autres États parties ne seront pas liés par lesdites dispositions envers un État partie qui aura formulé une telle déclaration.

3. Tout État partie qui aura formulé une déclaration conformément aux dispositions du paragraphe 2 du présent article pourra à tout moment retirer cette déclaration par une notification adressée au Secrétaire général de l'Organisation des Nations Unies.

*Article 43*

La présente Convention est sans préjudice des dispositions du droit international humanitaire, y compris les obligations des Hautes Parties contractantes aux quatre Conventions de Genève du 12 août 1949 et aux deux Protocoles additionnels du 8 juin 1977 s'y rapportant, ou de la possibilité qu'a tout État d'autoriser le Comité international de la Croix-Rouge à visiter les lieux de détention dans les cas non prévus par le droit international humanitaire.

*Article 44*

1. Tout État partie à la présente Convention peut proposer un amendement et déposer sa proposition auprès du Secrétaire général de l'Organisation des Nations Unies. Le Secrétaire général communique la proposition d'amendement aux États parties à la présente Convention en leur demandant de lui faire savoir s'ils sont favorables à l'organisation d'une conférence d'États parties en vue de l'examen de la proposition et de sa mise aux voix. Si, dans les quatre mois qui suivent la date d'une telle communication, le tiers au moins des États parties se prononce en faveur de la tenue de ladite conférence, le Secrétaire général organise la conférence sous les auspices de l'Organisation des Nations Unies.

2. Tout amendement adopté à la majorité des deux tiers des États parties présents et votants à la conférence est soumis par le Secrétaire général de l'Organisation des Nations Unies à l'acceptation de tous les États parties.

3. Un amendement adopté selon les dispositions du paragraphe 1 du présent article entre en vigueur lorsque les deux tiers des États parties à la présente Convention l'ont accepté, conformément à la procédure prévue par leurs constitutions respectives.

4. Lorsque les amendements entrent en vigueur, ils ont force obligatoire pour les États parties qui les ont acceptés, les autres États parties demeurant liés par les dispositions de la présente Convention et par tout amendement antérieur qu'ils auraient accepté.

2. Настоящая Конвенция подлежит ратификации всеми государствами-членами Организации Объединенных Наций. Ратификационные грамоты сдаются на хранение Генеральному секретарю Организации Объединенных Наций.

3. Настоящая Конвенция открыта для присоединения всех государств-членов Организации Объединенных Наций. Присоединение осуществляется путем сдачи на хранение документа о присоединении Генеральному секретарю Организации Объединенных Наций.

**Статья 39**

1. Настоящая Конвенция вступает в силу на тридцатый день после сдачи на хранение Генеральному секретарю Организации Объединенных Наций двадцатой ратификационной грамоты или документа о присоединении.

2. Для любого государства, которое ратифицирует настоящую Конвенцию или присоединится к ней после сдачи на хранение двадцатой ратификационной грамоты или документа о присоединении, настоящая Конвенция вступает в силу на тридцатый день после сдачи на хранение этим государством его ратификационной грамоты или документа о присоединении.

**Статья 40**

Генеральный секретарь Организации Объединенных Наций информирует все государства — члены Организации Объединенных Наций и все государства, подписавшие настоящую Конвенцию или присоединившиеся к ней:

a) о подписании, ратификации и присоединении в соответствии со статьей 38;

b) о дате вступления настоящей Конвенции в силу в соответствии со статьей 39.

**Статья 41**

Положения настоящей Конвенции распространяются на все части федеративных государств без какого бы то ни было ограничения или исключения.

**Статья 42**

1. Любой спор между двумя или более государствами-участниками, касающийся толкования или применения настоящей Конвенции, который не удалось разрешить путем переговоров или с помощью процедур, непосредст-

венно предусмотренных настоящей Конвенцией, передается по просьбе одного из этих государств на арбитраж. Если в течение шести месяцев после даты подачи ходатайства об арбитраже сторонам не удается достичь согласия относительно организации арбитража, любая из них может передать данный спор на рассмотрение Международного Суда путем направления ходатайства в соответствии с его Статутом.

2. Любое государство-участник может при подписании, ратификации или присоединении к настоящей Конвенции сделать заявление о том, что оно не считает себя связанным положениями пункта 1 настоящей статьи. Другие государства-участники не будут связаны указанными положениями в отношении государства-участника, сделавшего такое заявление.

3. Любое государство-участник, которое сделало заявление в соответствии с положениями пункта 2 настоящей статьи, может в любой момент отозвать это заявление посредством уведомления, направленного Генеральному секретарю Организации Объединенных Наций.

**Статья 43**

Настоящая Конвенция применяется без ущерба для положений международного гуманитарного права, включая обязательства Высоких Договаривающихся Сторон четырех Женевских конвенций от 12 августа 1949 года и двух Дополнительных протоколов к ним 1977 года, а также возможности каждого государства разрешить Международному комитету Красного Креста посещать места содержания под стражей в ситуациях, не охватываемых международным гуманитарным правом.

**Статья 44**

1. Любое государство-участник настоящей Конвенции может предлагать поправки и представлять их Генеральному секретарю Организации Объединенных Наций. Генеральный секретарь препровождает предлагаемую поправку государствам-участникам настоящей Конвенции с просьбой сообщить ему, высказываются ли они за созыв конференции государств-участников с целью рассмотрения этого предложения и проведения по нему голосования. Если по истечении четырех месяцев после направления такого сообщения не менее одной трети государств-участников выскажется за созыв такой конференции, Генеральный секретарь организует эту конференцию под эгидой Организации Объединенных Наций.

3. La presente Convención estará abierta a la adhesión de todos los Estados Miembros de las Naciones Unidas. La adhesión se efectuará mediante el depósito de un instrumento de adhesión en poder del Secretario General de las Naciones Unidas.

*Artículo 39*

1. La presente Convención entrará en vigor el trigésimo día a partir de la fecha en que haya sido depositado el vigésimo instrumento de ratificación o de adhesión en poder del Secretario General de las Naciones Unidas.

2. Para cada Estado que ratifique la presente Convención o se adhiera a ella después de haber sido depositado el vigésimo instrumento de ratificación o de adhesión, la presente Convención entrará en vigor el trigésimo día a partir de la fecha en que ese Estado haya depositado su instrumento de ratificación o adhesión.

*Artículo 40*

El Secretario General de las Naciones Unidas comunicará a todos los Estados Miembros de las Naciones Unidas y a todos los Estados que hayan firmado la presente Convención o se hayan adherido a ella:

*a*) Las firmas, ratificaciones y adhesiones recibidas con arreglo al artículo 38;

*b*) La fecha de entrada en vigor de la presente Convención con arreglo al artículo 39.

*Artículo 41*

Las disposiciones de la presente Convención serán aplicables a todas las partes constitutivas de los Estados federales, sin limitación ni excepción alguna.

*Artículo 42*

1. Toda controversia que surja entre dos o más Estados Partes con respecto a la interpretación o aplicación de la presente Convención, que no se solucione mediante negociación o a través de los procedimientos previstos expresamente en la presente Convención, se someterá a arbitraje a petición de uno de los Estados implicados. Si en el plazo de seis meses contados a partir de la fecha de presentación de la solicitud de arbitraje, las partes no consiguen ponerse de acuerdo sobre la organización del mismo, cualquiera de las partes podrá someter la controversia a la Corte Internacional de Justicia, mediante una solicitud presentada de conformidad con el Estatuto de la Corte.

2. Cada Estado Parte, en el momento de la firma o ratificación de la presente Convención o de su adhesión a ella, podrá declarar que no se considera obligado por el párrafo 1 del presente artículo. Los demás Estados Partes no estarán

obligados por ese párrafo ante ningún Estado Parte que haya formulado esa declaración.

3. Cada Estado Parte que haya formulado la declaración prevista en el párrafo 2 del presente artículo podrá retirarla en cualquier momento notificándolo al Secretario General de las Naciones Unidas.

*Artículo 43*

La presente Convención se entiende sin perjuicio de las disposiciones del derecho internacional humanitario, incluidas las obligaciones que incumben a las Altas Partes contratantes de los cuatro Convenios de Ginebra de 12 de agosto de 1949 y de sus Protocolos Adicionales de 8 de junio de 1977, o de la posibilidad que tiene cada Estado Parte de autorizar al Comité Internacional de la Cruz Roja a visitar los lugares de detención en los casos no previstos por el derecho internacional humanitario.

*Artículo 44*

1. Cada Estado Parte en la presente Convención podrá proponer enmiendas o depositarlas en poder del Secretario General de las Naciones Unidas. El Secretario General comunicará las enmiendas propuestas a los Estados Partes en la presente Convención, pidiéndoles que le notifiquen si desean que se convoque una conferencia de Estados Partes con el fin de examinar las propuestas y someterlas a votación. Si, en el plazo de cuatro meses a partir de la fecha de la comunicación, un tercio al menos de los Estados Partes se declara en favor de tal convocatoria, el Secretario General organizará la conferencia bajo los auspicios de las Naciones Unidas.

2. Toda enmienda adoptada por una mayoría de dos tercios de los Estados Partes presentes y votantes en la conferencia será sometida por el Secretario General a todos los Estados Partes para su aceptación.

3. Una enmienda adoptada de conformidad con el párrafo 1 del presente artículo entrará en vigor cuando haya sido aceptada por una mayoría de dos tercios de los Estados Partes en la presente Convención, de conformidad con sus respectivos procedimientos constitucionales.

4. Cuando entren en vigor, las enmiendas serán obligatorias para los Estados Partes que las hayan aceptado, en tanto que los demás Estados Partes seguirán obligados por las disposiciones de la presente Convención y por las enmiendas anteriores que hayan aceptado.

*Artículo 45*

1. La presente Convención, cuyos textos en árabe, chino, español, francés, inglés y ruso son igualmente auténticos, será depositada en poder del Secretario General de las Naciones Unidas.

# Annex 12

Charter of the Organization of the Islamic Conference, 14 March 2008, *UNTS*, A-13039 [extract]

*Available at:*

https://treaties.un.org/doc/Publication/UNTS/No%20Volume/13039/A-13039-08000002801df9af.pdf

## No. 13039. Multilateral

CHARTER OF THE ISLAMIC CONFERENCE. JEDDAH, 4 MARCH 1972 [*United Nations, Treaty Series, vol. 914, I-13039.*]

CHARTER OF THE ORGANIZATION OF THE ISLAMIC CONFERENCE. DAKAR, 14 MARCH 2008*

**Entry into force:** 2 April 2017, in accordance with article 11 of the Charter of the Islamic Conference, dated 4 March 1972

**Authentic texts:** Arabic, English and French

**Registration with the Secretariat of the United Nations:** Organization of Islamic Cooperation, 22 June 2017

**No UNTS volume number has yet been determined for this record. The Text(s) reproduced below, if attached, are the authentic texts of the agreement /action attachment as submitted for registration and publication to the Secretariat. For ease of reference they were sequentially paginated. Translations, if attached, are not final and are provided for information only.*

## Nº 13039. Multilatéral

CHARTE DE LA CONFÉRENCE ISLAMIQUE. DJEDDAH, 4 MARS 1972 [*Nations Unies, Recueil des Traités, vol. 914, I-13039.*]

CHARTE DE L'ORGANISATION DE LA CONFÉRENCE ISLAMIQUE. DAKAR, 14 MARS 2008*

**Entrée en vigueur :** 2 avril 2017, conformément à l'article 11 de la Charte de la Conférence islamique du 4 mars 1972

**Textes authentiques :** arabe, anglais et français

**Enregistrement auprès du Secrétariat de l'Organisation des Nations Unies :** Organisation de la coopération islamique, 22 juin 2017

**Aucun numéro de volume n'a encore été attribué à ce dossier. Les textes disponibles qui sont reproduits ci-dessous sont les textes originaux de l'accord ou de l'action tels que soumis pour enregistrement. Par souci de clarté, leurs pages ont été numérotées. Les traductions qui accompagnent ces textes ne sont pas définitives et sont fournies uniquement à titre d'information.*

[ ENGLISH TEXT – TEXTE ANGLAIS ]

# Charter of the Organisation of the Islamic Conference

بسم الله الرحمن الرحيم

In the name of Allah, the most Compassionate, the most Merciful

We the Member States of the Organisation of the Islamic Conference, determined:

to acknowledge the Conference of Kings, Heads of State and Government of the Member States convened in Rabat from 9 to 12 Rajab, 1389 H, corresponding to 22 to 25 September 1969, as well as the Conference of Foreign Ministers held in Jeddah from 14 to 18 Muharram 1392 H corresponding to 29 February to 4 March 1972;

to be guided by the noble Islamic values of unity and fraternity, and affirming the essentiality of promoting and consolidating the unity and solidarity among the Member States in securing their common interests at the international arena;

to adhere our commitment to the principles of the United Nations Charter, the present Charter and International Law;

to preserve and promote the lofty Islamic values of peace, compassion, tolerance, equality, justice and human dignity;

to endeavour to work for revitalizing Islam's pioneering role in the world while ensuring sustainable development, progress and prosperity for the peoples of Member States;

to enhance and strengthen the bond of unity and solidarity among the Muslim peoples and Member States;

to respect, safeguard and defend the national sovereignty, independence and territorial integrity of all Member States;

to contribute to international peace and security, understanding and dialogue among civilizations, cultures and religions and promote and encourage friendly relations and good neighbourliness, mutual respect and cooperation;

to promote human rights and fundamental freedoms, good governance, rule of law, democracy and accountability in Member States in accordance with their constitutional and legal systems;

to promote confidence and encourage friendly relations, mutual respect and cooperation between Member States and other States;

to foster noble Islamic values concerning moderation, tolerance, respect for diversity, preservation of Islamic symbols and common heritage and to defend the universality of Islamic religion;

to advance the acquisition and popularization of knowledge in consonance with the lofty ideals of Islam to achieve intellectual excellence;

to promote cooperation among Member States to achieve sustained socio-economic development for effective integration in the global economy, in conformity with the principles of partnership and equality;

to preserve and promote all aspects related to environment for present and future generations;

to respect the right of self-determination and non-interference in the domestic affairs and to respect sovereignty, independence and territorial integrity of each Member State;

to support the struggle of the Palestinian people, who are presently under foreign occupation, and to empower them to attain their inalienable rights, including the right to self-determination, and to establish their sovereign state with Al-Quds Al-Sharif as its capital, while safeguarding its historic and Islamic character, and the holy places therein;

to safeguard and promote the rights of women and their participation in all spheres of life, in accordance with the laws and legislation of Member States;

to create conducive conditions for sound upbringing of Muslim children and youth, and to inculcate in them Islamic values through education for strengthening their cultural, social, moral and ethical ideals;

to assist Muslim minorities and communities outside the Member States to preserve their dignity, cultural and religious identity;

to uphold the objectives and principles of the present Charter, the Charter of the United Nations and international law as well as international humanitarian law while strictly adhering to the principle of non-interference in matters which are essentially within the domestic jurisdiction of any State;

to strive to achieve good governance at the international level and the democratization of the international relations based on the principles of equality and mutual respect among States and non-interference in matters which are within their domestic jurisdiction;

Have resolved to cooperate in achieving these goals and agreed to the present amended Charter.

## CHAPTER I

## Objectives and Principles

### Article 1

The objectives of the Organisation of the Islamic Conference shall be:

1. To enhance and consolidate the bonds of fraternity and solidarity among the Member States;

2. To safeguard and protect the common interests and support the legitimate causes of the Member States and coordinate and unify the efforts of the Member States in view of the challenges faced by the Islamic world in particular and the international community in general;

3. To respect the right of self-determination and non-interference in the domestic affairs and to respect sovereignty, independence and territorial integrity of each Member State;

4. To support the restoration of complete sovereignty and territorial integrity of any Member State under occupation, as a result of aggression, on the basis of international law and cooperation with the relevant international and regional organisations;

5. To ensure active participation of the Member States in the global political, economic and social decision-making processes to secure their common interests;

6. To promote inter-state relations based on justice, mutual respect and good neighbourliness to ensure global peace, security and harmony;

7. To reaffirm its support for the rights of peoples as stipulated in the UN Charter and international law;

8. To support and empower the Palestinian people to exercise their right to self-determination and establish their sovereign State with Al-Quds Al-Sharif as its capital, while safeguarding its historic and Islamic character as well as the Holy places therein;

9. To strengthen intra-Islamic economic and trade cooperation; in order to achieve economic integration leading to the establishment of an Islamic Common Market;

10. To exert efforts to achieve sustainable and comprehensive human development and economic well-being in Member States;

11. To disseminate, promote and preserve the Islamic teachings and values based on moderation and tolerance, promote Islamic culture and safeguard Islamic heritage;

12. To protect and defend the true image of Islam, to combat defamation of Islam and encourage dialogue among civilisations and religions;

13. To enhance and develop science and technology and encourage research and cooperation among Member States in these fields;

14. To promote and to protect human rights and fundamental freedoms including the rights of women, children, youth, elderly and people with special needs as well as the preservation of Islamic family values;

15. To emphasize, protect and promote the role of the family as the natural and fundamental unit of society;

16. To safeguard the rights, dignity and religious and cultural identity of Muslim communities and minorities in non-Member States;

17. To promote and defend unified position on issues of common interest in the international fora;

18. To cooperate in combating terrorism in all its forms and manifestations, organised crime, illicit drug trafficking, corruption, money laundering and human trafficking;

19. To cooperate and coordinate in humanitarian emergencies such as natural disasters;

20. To promote cooperation in social, cultural and information fields among the Member States.

**Article 2**

The Member States undertake that in order to realize the objectives in Article 1, they shall be guided and inspired by the noble Islamic teachings and values and act in accordance with the following principles:

1. All Member States commit themselves to the purposes and principles of the United Nations Charter;

2. Member States are sovereign, independent and equal in rights and obligations;

3. All Member States shall settle their disputes through peaceful means and refrain from use or threat of use of force in their relations;

4. All Member States undertake to respect national sovereignty, independence and territorial integrity of other Member States and shall refrain from interfering in the internal affairs of others;

5. All Member States undertake to contribute to the maintenance of international peace and security and to refrain from interfering in each other's internal affairs as enshrined in the present Charter, the Charter of the United Nations, international law and international humanitarian law;

6. As mentioned in the UN Charter, nothing contained in the present Charter shall authorize the Organisation and its Organs to intervene in matters which are essentially within the domestic jurisdiction of any State or related to it;

7. Member States shall uphold and promote, at the national and international levels, good governance, democracy, human rights and fundamental freedoms, and the rule of law;

8. Member States shall endeavour to protect and preserve the environment.

## CHAPTER II

## Membership

### Article 3

1. The Organisation is made up of 57 States member of the Organisation of the Islamic Conference and other States which may accede to this Charter in accordance with Article 3 paragraph 2.

2. Any State, member of the United Nations, having Muslim majority and abiding by the Charter, which submits an application for membership may join the Organisation if approved by consensus only by the Council of Foreign Ministers on the basis of the agreed criteria adopted by the Council of Foreign Ministers.

3. Nothing in the present Charter shall undermine the present Member States' rights or privileges relating to membership or any other issues.

### Article 4

1. Decision on granting Observer status to a State, member of the United Nations, will be taken by the Council of Foreign Ministers by consensus only and on the basis of the agreed criteria by the Council of Foreign Ministers.

2. Decision on granting Observer status to an international organisation will be taken by the Council of Foreign Ministers by consensus only and on the basis of the agreed criteria by the Council of Foreign Ministers.

## CHAPTER III

## Organs

### Article 5

The Organs of the Organisation of the Islamic Conference shall consist of:

1. Islamic Summit
2. Council of Foreign Ministers
3. Standing Committees

4. Executive Committee
5. International Islamic Court of Justice
6. Independent Permanent Commission of Human Rights
7. Committee of Permanent Representatives
8. General Secretariat
9. Subsidiary Organs
10. Specialized Institutions
11. Affiliated Institutions

## CHAPTER IV

## Islamic Summit

### Article 6

The Islamic Summit is composed of Kings and Heads of State and Government of Member States and is the supreme authority of the Organisation.

### Article 7

The Islamic Summit shall deliberate, take policy decisions and provide guidance on all issues pertaining to the realization of the objectives as provided for in the Charter and consider other issues of concern to the Member States and the Ummah.

### Article 8

1. The Islamic Summit shall convene every three years in one of the Member States.

2. The Preparation of the Agenda and all necessary arrangements for the convening of the Summit will be done by the Council of Foreign Ministers with the assistance of the General Secretariat.

### Article 9

Extraordinary Sessions will be held, whenever the interests of Ummah warrant it, to consider matters of vital importance to the Ummah and coordinate the policy of the Organisation accordingly. An Extraordinary Session may be held at the recommendation of the Council of Foreign Ministers or on the initiative of one of the Member States or the Secretary-General, provided that such initiative obtains the support of simple majority of the Member States.

## CHAPTER V

## Council of Foreign Ministers

### Article 10

1. The Council of Foreign Ministers shall be convened once a year in one of the Member States.

2. An Extraordinary Session of the Council of Foreign Ministers may be convened at the initiative of any Member State or of the Secretary-General if such initiative is approved by a simple majority of the Member States.

3. The Council of Foreign Ministers may recommend convening other sectorial Ministerial meetings to deal with the specific issues of concern to the Ummah. Such meetings shall submit their reports to the Islamic Summit and the Council of Foreign Ministers.

4. The Council of Foreign Ministers shall consider the means for the implementation of the general policy of the Organisation by:

   a. Adopting decisions and resolutions on matters of common interest in the implementation of the objectives and the general policy of the Organisation;

   b. Reviewing progress of the implementation of the decisions and resolutions adopted at the previous Summits and Councils of Foreign Ministers;

   c. Considering and approving the programme, budget and other financial and administrative reports of the General Secretariat and Subsidiary Organs;

   d. Considering any issue affecting one or more Member States whenever a request to that effect by the Member State concerned is made with a view to taking appropriate measures in that respect;

   e. Recommending to establish any new organ or committee;

   f. Electing the Secretary General and appointing the Assistant Secretaries General in accordance with Articles 16 and 18 of the Charter respectively;

   g. Considering any other issue it deems fit.

## CHAPTER VI

## Standing Committees

### Article 11

1. In order to advance issues of critical importance to the Organisation and its Member States, the Organisation has formed the following Standing Committees:

   i. Al Quds Committee

   ii. Standing Committee for Information and Cultural Affairs (COMIAC)

   iii. Standing Committee for Economic and Commercial Cooperation (COMCEC)

iv. Standing Committee for Scientific and Technological Cooperation (COMSTECH).

2. The Standing Committees are chaired by Kings and Heads of State and Government and are established in accordance with decisions of the Summit or upon the recommendation of the Council of Foreign Ministers and the membership of such Committees.

## CHAPTER VII

## Executive Committee

### Article 12

The Executive Committee is comprised of the Chairmen of the current, preceding and succeeding Islamic Summits and Councils of Foreign Ministers, the host country of the Headquarters of the General Secretariat as well as the Secretary-General as an ex-officio member. The Meetings of the Executive Committee shall be conducted according to its Rules of Procedure.

## CHAPTER VIII

## Committee of Permanent Representatives

### Article 13

The prerogatives and modes of operation of the Committee of Permanent Representatives shall be defined by the Council of Foreign Ministers.

## CHAPTER IX

## International Islamic Court of Justice

### Article 14

The International Islamic Court of Justice established in Kuwait in 1987 shall, upon the entry into force of its Statute, be the principal judicial organ of the Organisation.

## CHAPTER X

## Independent Permanent Commission on Human Rights

### Article 15

The Independent Permanent Commission on Human Rights shall promote the civil, political, social and economic rights enshrined in the organisation's covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values.

## CHAPTER XI

## General Secretariat

### Article 16

The General Secretariat shall comprise a Secretary-General, who shall be the Chief Administrative Officer of the Organisation and such staff as the Organisation requires. The Secretary-General shall be elected by the Council of Foreign Ministers for a period of five years, renewable once only. The Secretary-General shall be elected from among nationals of the Member States in accordance with the principles of equitable geographical distribution, rotation and equal opportunity for all Member States with due consideration to competence, integrity and experience.

### Article 17

The Secretary General shall assume the following responsibilities:

a. bring to the attention of the competent organs of the Organisation matters which, in his opinion, may serve or impair the objectives of the Organisation;

b. follow-up the implementation of decisions, resolutions and recommendations of the Islamic Summits, and Councils of Foreign Ministers and other Ministerial meetings;

c. provide the Member States with working papers and memoranda, in implementation of the decisions, resolutions and recommendations of the Islamic Summits and the Councils of Foreign Ministers;

d. coordinate and harmonize, the work of the relevant Organs of the Organisation;

e. prepare the programme and the budget of the General Secretariat;

f. promote communication among Member States and facilitate consultations and exchange of views as well as the dissemination of information that could be of importance to Member States;

g. perform such other functions as are entrusted to him by the Islamic Summit or the Council of Foreign Ministers;

h. submit annual reports to the Council of Foreign Ministers on the work of the Organisation.

### Article 18

1. The Secretary-General shall submit nominations of Assistant Secretaries General to the Council of Foreign Ministers, for appointment, for a period of 5 years in accordance with the principle of equitable geographical distribution

and with due regard to the competence, integrity and dedication to the objectives of the Charter. One post of Assistant Secretary General shall be devoted to the cause of Al-Quds Al-Sharif and Palestine with the understanding that the State of Palestine shall designate its candidate.

2. The Secretary-General may, for the implementation of the resolutions and decisions of the Islamic Summits and the Councils of Foreign Ministers, appoint Special Representatives. Such appointments along with mandates of the Special Representatives shall be made with the approval of the Council of Foreign Ministers.

3. The Secretary-General shall appoint the staff of the General Secretariat from among nationals of Member States, paying due regard to their competence, eligibility, integrity and gender in accordance with the principle of equitable geographical distribution. The Secretary-General may appoint experts and consultants on temporary basis.

**Article 19**

In the performance of their duties, the Secretary-General, Assistant Secretaries General and the staff of the General Secretariat shall not seek or accept instructions from any government or authority other than the Organisation. They shall refrain from taking any action that may be detrimental to their position as international officials responsible only to the Organisation. Member States shall respect this exclusively international character, and shall not seek to influence them in any way in the discharge of their duties.

**Article 20**

The General Secretariat shall prepare the meetings of the Islamic Summits and the Councils of Foreign Ministers in close cooperation with the host country insofar as administrative and organizational matters are concerned.

**Article 21**

The Headquarters of the General Secretariat shall be in the city of Jeddah until the liberation of the city of Al-Quds so that it will become the permanent Headquarters of the Organisation.

**CHAPTER XII**

**Article 22**

The Organisation may establish Subsidiary Organs, Specialized Institutions and grant affiliated status, after approval of the Council of Foreign Ministers, in accordance with the Charter.

## Subsidiary Organs

### Article 23

Subsidiary organs are established within the framework of the Organisation in accordance with the decisions taken by the Islamic Summit or Council of Foreign Ministers and their budgets shall be approved by the Council of Foreign Ministers.

### CHAPTER XIII

## Specialized Institutions

### Article 24

Specialized institutions of the Organisation are established within the framework of the Organisation in accordance with the decisions of the Islamic Summit or Council of Foreign Ministers. Membership of the specialized institutions shall be optional and open to members of the Organisation. Their budgets are independent and are approved by their respective legislative bodies stipulated in their Statute.

## Affiliated Institutions

### Article 25

Affiliated institutions are entities or bodies whose objectives are in line with the objectives of this Charter, and are recognized as affiliated institutions by the Council of Foreign Ministers. Membership of the institutions is optional and open to organs and institutions of the Member States. Their budgets are independent of the budget of the General Secretariat and those of subsidiary organs and specialized institutions. Affiliated institutions may be granted observer status by virtue of a resolution of the Council of Foreign Ministers. They may obtain voluntary assistance from the subsidiary organs or specialized institutions as well as from Member States.

### CHAPTER XIV

## Cooperation with Islamic and other Organizations

### Article 26

The Organisation will enhance its cooperation with the Islamic and other Organizations in the service of the objectives embodied in the present Charter.

## CHAPTER XV

## Peaceful Settlement of Disputes

### Article 27

The Member States, parties to any dispute, the continuance of which may be detrimental to the interests of the Islamic Ummah or may endanger the maintenance of international peace and security, shall, seek a solution by good offices, negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice. In this context good offices may include consultation with the Executive Committee and the Secretary-General.

### Article 28

The Organisation may cooperate with other international and regional organisations with the objective of preserving international peace and security, and settling disputes through peaceful means.

## CHAPTER XVI

## Budget & Finance

### Article 29

1. The budget of the General Secretariat and Subsidiary Organs shall be borne by Member States proportionate to their national incomes.

2. The Organisation may, with the approval of the Islamic Summit or the Council of Foreign Ministers, establish special funds and endowments (waqfs) on voluntary basis as contributed by Member States, individuals and Organisations.These funds and endowments shall be subjected to the Organisation's financial system and shall be audited by the Finance Control Organ annually.

### Article 30

The General Secretariat and subsidiary organs shall administer their financial affairs according to the Financial Rules of Procedure approved by the Council of Foreign Ministers.

### Article 31

1. A Permanent Finance Committee shall be set up by the Council of Foreign Ministers from the accredited representatives of the participating Member States which shall meet at the Headquarters of the Organisation to finalize the programme and budget of the General Secretariat and its subsidiary organs in accordance with the rules approved by the Council of Foreign Ministers.

2. The Permanent Finance Committee shall present an annual report to the Council of Foreign Ministers which shall consider and approve the programme and budget.

3. The Finance Control Organ comprising financial/auditing experts from the Member States shall undertake the audit of the General Secretariat and its subsidiary organs in accordance with its internal rules and regulations.

## CHAPTER XVII

## Rules of Procedure and Voting

### Article 32

1. The Council of Foreign Ministers shall adopt its own rules of procedure.

2. The Council of Foreign Ministers shall recommend the rules of procedures of the Islamic Summit.

3. The Standing Committees shall establish their own respective rules of procedure.

### Article 33

1. Two-third of the Member States shall constitute the quorum for the meetings of the Organisation of the Islamic Conference.

2. Decisions shall be taken by consensus. If consensus cannot be obtained, decision shall be taken by a two-third majority of members present and voting unless otherwise stipulated in this Charter.

## CHAPTER XVIII

## Final Provisions

## Privileges and Immunities

### Article 34

1. The Organisation shall enjoy in the Member States, immunities and privileges as necessary for the exercise of its functions and the fulfilment of its objectives.

2. Representatives of the Member States and officials of the Organisation shall enjoy such privileges and immunities as stipulated in the Agreement on Privileges and Immunities of 1976.

3. The staff of the General Secretariat, subsidiary organs and specialised institutions shall enjoy privileges and immunities necessary for the

performance of their duties as may be agreed between the Organisation and host countries.

4. A Member State which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the Council of Foreign Ministers if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Council may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

## Withdrawal

### Article 35

1. Any Member State may withdraw from the Organisation by notifying the Secretary-General one year prior to its withdrawal. Such a notification shall be communicated to all Member States.

2. The State applying for withdrawal shall be bound by its obligations until the end of the fiscal year during which the application for withdrawal is submitted. It shall also settle any other financial dues it owes to the Organisation.

## Amendments

### Article 36

Amendments to the present Charter shall take place according to the following procedure:

a. Any Member State may propose amendments to the present Charter to the Council of Foreign Ministers;

b. When approved by two-third majority of the Council of Foreign Ministers and ratified by a two-third majority of the Member States, it shall come into force.

## Interpretation

### Article 37

1. Any dispute that may arise in the interpretation, application or implementation of any Article in the present Charter shall be settled cordially, and in all cases through consultation, negotiation, reconciliation or arbitration;

2. The provisions of this Charter shall be implemented by the Member States in conformity with their constitutional requirements.

**Article 38**

Languages of the Organisation shall be Arabic, English and French.

## Transitional Arrangement

## RATIFICATION AND ENTRY INTO FORCE

**Article 39**

1. This Charter shall be adopted by the Council of Foreign Ministers by two-third majority and shall be open for signature and ratification by Member States in accordance with the constitutional procedures of each Member State.

2. The instruments of ratification shall be deposited with the Secretary General of the Organisation.

3- This Charter replaces the Charter of the Organisation of the Islamic Conference which was registered in conformity with Article 102 of the Charter of the United Nations on February 1, 1974.

*Done at the city of Dakar (Republic of Senegal), the Seventh day of Rabi Al-Awal, One Thousand Four Hundred and Twenty-nine Hijra, corresponding to Fourteenth day of March Two Thousand and Eight.*

# Annex 13

Charter of the Organisation of Islamic Cooperation*

*Available at:*

https://www.oic-oci.org/upload/documents/charter/en/oic_charter_2018_en.pdf

*French version available at:*

https://www.oic-oci.org/upload/documents/charter/fr/oic_charter_2018_fr.pdf

* As in force at times material to this case.

**Annex 13**

**!**

!

# Charter of the Organisation of Islamic Cooperation (OIC)

# Charter of the
# Organisation of Islamic Cooperation

In the name of Allah, the most Compassionate, the most Merciful

**Preamble**

**We the Member States of the Organisation of Islamic Cooperation, determined:**

to acknowledge the Conference of Kings, Heads of State and Government of the Member States convened in Rabat from 9 to 12 Rajab, 1389 H, corresponding to 22 to 25 September 1969, as well as the Conference of Foreign Ministers held in Jeddah from 14 to 18 Muharram 1392 H corresponding to 29 February to 4 March 1972;

to be guided by the noble Islamic values of unity and fraternity, and affirming the essentiality of promoting and consolidating the unity and solidarity among the Member States in securing their common interests at the international arena;

to adhere our commitment to the principles of the United Nations Charter, the present Charter and International Law;

to preserve and promote the lofty Islamic values of peace, compassion, tolerance, equality, justice and human dignity;

to endeavour to work for revitalizing Islam's pioneering role in the world while ensuring sustainable development, progress and prosperity for the peoples of Member States;

to enhance and strengthen the bond of unity and solidarity among the Muslim peoples and Member States;

to respect, safeguard and defend the national sovereignty, independence and territorial integrity of all Member States;

to contribute to international peace and security, understanding and dialogue among civilizations, cultures and religions and promote and encourage friendly relations and good neighbourliness, mutual respect and cooperation;

to promote human rights and fundamental freedoms, good governance, rule of law, democracy and accountability in Member States in accordance with their constitutional and legal systems;

to promote confidence and encourage friendly relations, mutual respect and cooperation between Member States and other States;

to foster noble Islamic values concerning moderation, tolerance, respect for diversity, preservation of Islamic symbols and common heritage and to defend the universality of Islamic religion;

to advance the acquisition and popularization of knowledge in consonance with the lofty ideals of Islam to achieve intellectual excellence;

to promote cooperation among Member States to achieve sustained socioeconomic development for effective integration in the global economy, in conformity with the principles of partnership and equality;

to preserve and promote all aspects related to environment for present and future generations;

to respect the right of self-determination, non-interference in the domestic affairs, sovereignty, independence and territorial integrity of each Member State;

to support the struggle of the Palestinian people, who are presently under foreign occupation, and to empower them to attain their inalienable rights, including the right to self-determination, and to establish their sovereign state with Al-Quds Al-Sharif as its capital, while safeguarding its historic and Islamic character, and the holy places therein;

to safeguard and promote the rights of women and their participation in all spheres of life, in accordance with the laws and legislation of Member States;

to create conducive conditions for sound upbringing of Muslim children and youth, and to inculcate in them Islamic values through education for strengthening their cultural, social, moral and ethical ideals;

to assist Muslim minorities and communities outside the Member States to preserve their dignity**,** cultural and religious identity;

to uphold the objectives and principles of the present Charter, the Charter of the United Nations and international law as well as international humanitarian law while strictly adhering to the principle of non-interference in matters which are essentially within the domestic jurisdiction of any State;

to strive to achieve good governance at the international level and the democratization of the international relations based on the principles of equality and mutual respect among States and non-interference in matters which are within their domestic jurisdiction;

**Have resolved to cooperate in achieving these goals and agreed to the present amended Charter.**

## CHAPTER I

## Objectives and Principles

### Article 1

The objectives of the Organisation of Islamic Cooperation shall be:

1. To enhance and consolidate the bonds of fraternity and solidarity among the Member States**;**

2. To safeguard and protect the common interests and support the legitimate causes of the Member States and coordinate and unify the efforts of the Member States in view of the challenges faced by the Islamic world in particular and the international community in general;

3. To respect the right of self-determination and non-interference in the domestic affairs, the sovereignty, independence and territorial integrity of each Member State;

4. To support the restoration of complete sovereignty and territorial integrity of any Member State under occupation, as a result of aggression, on the basis of international law and cooperation with the relevant international and regional organisations;

5. To ensure active participation of the Member States in the global political, economic and social decision-making processes to secure their common interests;

6. To promote inter-state relations based on justice, mutual respect and good neighbourliness to ensure global peace, security and harmony;

7. To reaffirm its support for the rights of peoples as stipulated in the UN Charter and international law;

8. To support and empower the Palestinian people to exercise their right to self-determination and establish their sovereign State with Al-Quds Al-Sharif as its capital, while safeguarding its historic and Islamic character as well as the Holy places therein;

9. To strengthen intra-Islamic economic and trade cooperation; in order to achieve economic integration leading to the establishment of an Islamic Common Market;

10. To exert efforts to achieve sustainable and comprehensive human development and economic well-being in the Member States;

11. To disseminate, promote and preserve the Islamic teachings and values based on moderation and tolerance, promote Islamic culture and safeguard Islamic heritage;

12. To protect and defend the true image of Islam, to combat defamation of Islam and encourage dialogue among civilisations and religions;

13. To enhance and develop science and technology and encourage research and cooperation among Member States in these fields;

14. To promote and to protect human rights and fundamental freedoms including the rights of women, children, youth, elderly and people with special needs as well as the preservation of Islamic family values;

15. To emphasize, protect and promote the role of the family as the natural and fundamental unit of society;

16. To safeguard the rights, dignity and religious and cultural identity of Muslim communities and minorities in non-Member States;

17. To promote and defend unified position on issues of common interest in the international fora;

18. To cooperate in combating terrorism in all its forms and manifestations, organised crime, illicit drug trafficking, corruption, money laundering and human trafficking;

19. To cooperate and coordinate in humanitarian emergencies such as natural disasters;

20. To promote cooperation in social, cultural and information fields among the Member States.

**Article 2**

The Member States undertake that in order to realize the objectives in Article 1, they shall be guided and inspired by the noble Islamic teachings and values and act in accordance with the following principles:

1. All Member States commit themselves to the purposes and principles of the United Nations Charter;

2. Member States are sovereign, independent and equal in rights and obligations;

3. All Member States shall settle their disputes through peaceful means and refrain from use or threat of use of force in their relations;

4. All Member States undertake to respect national sovereignty, independence and territorial integrity of other Member States and shall refrain from interfering in the internal affairs of others;

5. All Member States undertake to contribute to the maintenance of international peace and security and to refrain from interfering in each other's internal affairs as enshrined in the present Charter, the Charter of the United Nations, international law and international humanitarian law;

6. As mentioned in the UN Charter, nothing contained in the present Charter shall authorize the Organisation and its Organs to intervene in matters which are essentially within the domestic jurisdiction of any State or related to it;

7. Member States shall uphold and promote, at the national and international levels, good governance, democracy, human rights and fundamental freedoms, and the rule of law;

8. Member States shall endeavour to protect and preserve the environment.

## CHAPTER II

## Membership

### Article 3

1. The Organisation is made up of 57 States member of the Organisation of Islamic Cooperation and other States which may accede to this Charter in accordance with Article 3 paragraph 2.

2. Any State, member of the United Nations, having Muslim majority and abiding by the Charter, which submits an application for membership may join the Organisation if approved by consensus only by the Council of Foreign Ministers on the basis of the agreed criteria adopted by the Council of Foreign Ministers.

3. Nothing in the present Charter shall undermine the present Member States' rights or privileges relating to membership or any other issues.

**Article 4**

1. Decision on granting Observer status to a State, member of the United Nations, will be taken by the Council of Foreign Ministers by consensus only and on the basis of the agreed criteria by the Council of Foreign Ministers.

2. Decision on granting Observer status to an international organisation will be taken by the Council of Foreign Ministers by consensus only and on the basis of the agreed criteria by the Council of Foreign Ministers.

## CHAPTER III

## Organs

**Article 5**

The Organs of the Organisation of Islamic Cooperation shall consist of:

1. Islamic Summit
2. Council of Foreign Ministers
3. Standing Committees
4. Executive Committee
5. International Islamic Court of Justice
6. Independent Permanent Commission of Human Rights
7. Committee of Permanent Representatives
8. General Secretariat
9. Subsidiary Organs
10. Specialized Institutions
11. Affiliated Institutions

## CHAPTER IV

## Islamic Summit

**Article 6**

The Islamic Summit is composed of Kings and Heads of State and Government of Member States and is the supreme authority of the Organisation.

**Article 7**

The Islamic Summit shall deliberate, take policy decisions and provide guidance on all issues pertaining to the realization of the objectives as provided for in the Charter and consider other issues of concern to the Member States and the Ummah.

**Article 8**

1. The Islamic Summit shall convene every two years in one of the Member States.

2. The Preparation of the Agenda and all necessary arrangements for the convening of the Summit will be done by the Council of Foreign Ministers with the assistance of the General Secretariat.

### Article 9

Extraordinary Sessions will be held, whenever the interests of Ummah warrant it, to consider matters of vital importance to the Ummah and coordinate the policy of the Organisation accordingly. An Extraordinary Session may be held at the recommendation of the Council of Foreign Ministers or on the initiative of one of the Member States or the Secretary-General, provided that such initiative obtains the support of simple majority of the Member States.

## CHAPTER V

## Council of Foreign Ministers

### Article 10

1. The Council of Foreign Ministers shall be convened once a year in one of the Member States.

2. An Extraordinary Session of the Council of Foreign Ministers may be convened at the initiative of any Member State or of the Secretary-General if such initiative is approved by a simple majority of the Member States.

3. The Council of Foreign Ministers may recommend convening other sectorial Ministerial meetings to deal with the specific issues of concern to the Ummah. Such meetings shall submit their reports to the Islamic Summit and the Council of Foreign Ministers.

4. The Council of Foreign Ministers shall consider the means for the implementation of the general policy of the Organisation by:

    a. Adopting decisions and resolutions on matters of common interest in the implementation of the objectives and the general policy of the Organisation;

    b. Reviewing progress of the implementation of the decisions and resolutions adopted at the previous Summits and Councils of Foreign Ministers;

    c. Considering and approving the programme, budget and other financial and administrative reports of the General Secretariat and Subsidiary Organs;

d. Considering any issue affecting one or more Member States whenever a request to that effect by the Member State concerned is made with a view to taking appropriate measures in that respect;

e. Recommending to establish any new organ or committee;

f. Electing the Secretary General and appointing the Assistant Secretaries General in accordance with Articles 16 and 18 of the Charter respectively;

g. Considering any other issue it deems fit.

## CHAPTER VI

## Standing Committees

### Article 11

1. In order to advance issues of critical importance to the Organisation and its Member States, the Organisation has formed the following Standing Committees:

   i. Al Quds Committee;

   ii. Standing Committee for Information and Cultural Affairs (COMIAC);

   iii. Standing Committee for Economic and Commercial Cooperation (COMCEC); and

   iv. Standing Committee for Scientific and Technological Cooperation (COMSTECH).

2. The Standing Committees are chaired by Kings and Heads of State and Government and are established in accordance with decisions of the Summit or upon the recommendation of the Council of Foreign Ministers and the membership of such Committees.

## CHAPTER VII

## Executive Committee

### Article 12

The Executive Committee is comprised of the Chairmen of the current, preceding and succeeding Islamic Summits and Councils of Foreign Ministers, the host country of the Headquarters of the General Secretariat as well as the Secretary-General as an

exofficio member. The Meetings of the Executive Committee shall be conducted according to its Rules of Procedure.

## CHAPTER VIII

## Committee of Permanent Representatives

### Article 13

The prerogatives and modes of operation of the Committee of Permanent Representatives shall be defined by the Council of Foreign Ministers.

## CHAPTER IX

## International Islamic Court of Justice

### Article 14

The International Islamic Court of Justice established in Kuwait in 1987 shall, upon the entry into force of its Statute, be the principal judicial organ of the Organisation.

## CHAPTER X

## Independent Permanent Commission on Human Rights

### Article 15

The Independent Permanent Commission on Human Rights shall promote the civil, political, social and economic rights enshrined in the organisation's covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values.

## CHAPTER XI

## General Secretariat

### Article 16

The General Secretariat shall comprise a Secretary-General, who shall be the Chief Administrative Officer of the Organisation and such staff as the Organisation requires. The Secretary-General shall be elected by the Council of Foreign Ministers for a period of five years, renewable once only. The Secretary-General shall be elected from among nationals of the Member States in accordance with the principles of

equitable geographical distribution, rotation and equal opportunity for all Member States with due consideration to competence, integrity and experience.

**Article 17**

The Secretary General shall assume the following responsibilities:

a. Bring to the attention of the competent organs of the Organisation matters which, in his opinion, may serve or impair the objectives of the Organisation;

b. Follow-up the implementation of decisions, resolutions and recommendations of the Islamic Summits, and Councils of Foreign Ministers and other Ministerial meetings;

c. Provide the Member States with working papers and memoranda, in implementation of the decisions, resolutions and recommendations of the Islamic Summits and the Councils of Foreign Ministers;

d. Coordinate and harmonize, the work of the relevant Organs of the Organisation;

e. Prepare the programme and the budget of the General Secretariat;

f. Promote communication among Member States and facilitate consultations and exchange of views as well as the dissemination of information that could be of importance to Member States;

g. Perform such other functions as are entrusted to him by the Islamic Summit or the Council of Foreign Ministers;

h. Submit annual reports to the Council of Foreign Ministers on the work of the Organisation.

**Article 18**

1. The Secretary-General shall submit nominations of Assistant Secretaries General to the Council of Foreign Ministers, for appointment, for a period of five years in accordance with the principle of equitable geographical distribution and with due regard to the competence, integrity and dedication to the objectives of the Charter. One post of Assistant Secretary General shall be devoted to the cause of Al-Quds Al-Sharif and Palestine with the understanding that the State of Palestine shall designate its candidate.

2. The Secretary-General may, for the implementation of the resolutions and decisions of the Islamic Summit and the Council of Foreign Ministers, appoint Special Representatives. Such appointments along with mandates of the

Special Representatives shall be made with the approval of the Council of Foreign Ministers.

3. The Secretary-General shall appoint the staff of the General Secretariat from among nationals of Member States, paying due regard to their competence, eligibility, integrity and gender in accordance with the principle of equitable geographical distribution. The Secretary-General may appoint experts and consultants on temporary basis.

**Article 19**

In the performance of their duties, the Secretary-General, Assistant Secretaries General and the staff of the General Secretariat shall not seek or accept instructions from any government or authority other than the Organisation. They shall refrain from taking any action that may be detrimental to their position as international officials responsible only to the Organisation. Member States shall respect this exclusively international character, and shall not seek to influence them in any way in the discharge of their duties.

**Article 20**

The General Secretariat shall prepare the meetings of the Islamic Summits and the Councils of Foreign Ministers in close cooperation with the host country insofar as administrative and organizational matters are concerned.

**Article 21**

The Headquarters of the General Secretariat shall be in the city of Jeddah until the liberation of the city of Al-Quds so that it will become the permanent Headquarters of the Organisation.

**CHAPTER XII**

**Article 22**

The Organisation may establish Subsidiary Organs, Specialized Institutions and grant affiliated status, after approval of the Council of Foreign Ministers, in accordance with the Charter.

## Subsidiary Organs

**Article 23**

Subsidiary organs are established within the framework of the Organisation in accordance with the decisions taken by the Islamic Summit or Council of Foreign Ministers and their budgets shall be approved by the Council of Foreign Ministers.

## CHAPTER XIII

## Specialized Institutions

### Article 24

Specialized institutions of the Organisation are established within the framework of the Organisation in accordance with the decisions of the Islamic Summit or Council of Foreign Ministers. Membership of the specialized institutions shall be optional and open to members of the Organisation. Their budgets are independent and are approved by their respective legislative bodies stipulated in their Statute.

## Affiliated Institutions

### Article 25

Affiliated institutions are entities or bodies whose objectives are in line with the objectives of this Charter, and are recognized as affiliated institutions by the Council of Foreign Ministers. Membership of the institutions is optional and open to organs and institutions of the Member States. Their budgets are independent of the budget of the General Secretariat and those of subsidiary organs and specialized institutions. Affiliated institutions may be granted observer status by virtue of a resolution of the Council of Foreign Ministers. They may obtain voluntary assistance from the subsidiary organs or specialized institutions as well as from Member States.

## CHAPTER XIV

## Cooperation with Islamic and other Organizations

### Article 26

The Organisation will enhance its cooperation with the Islamic and other Organizations in the service of the objectives embodied in the present Charter.

## CHAPTER XV

## Peaceful Settlement of Disputes

### Article 27

The Member States, parties to any dispute, the continuance of which may be detrimental to the interests of the Islamic Ummah or may endanger the maintenance of international peace and security, shall seek a solution by good offices, negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice. In this context good offices may include consultation with the Executive Committee and the Secretary-General.

### Article 28

The Organisation may cooperate with other international and regional organisations with the objective of preserving international peace and security, and settling disputes through peaceful means.

## CHAPTER XVI

## Budget & Finance

### Article 29

1. The budget of the General Secretariat and Subsidiary Organs shall be borne by Member States proportionate to their national incomes.

2. The Organisation may, with the approval of the Islamic Summit or the Council of Foreign Ministers, establish special funds and endowments (waqfs) on voluntary basis as contributed by Member States, individuals and Organisations.These funds and endowments shall be subjected to the Organisation's financial system and shall be audited by the Finance Control Organ annually.

### Article 30

The General Secretariat and subsidiary organs shall administer their financial affairs according to the Financial Rules of Procedure approved by the Council of Foreign Ministers.

### Article 31

1. A Permanent Finance Committee shall be set up by the Council of Foreign Ministers from the accredited representatives of the participating Member States which shall meet at the Headquarters of the Organisation to finalize the

programme and budget of the General Secretariat and its subsidiary organs in accordance with the rules approved by the Council of Foreign Ministers.

2. The Permanent Finance Committee shall present an annual report to the Council of Foreign Ministers which shall consider and approve the programme and budget.

3. The Finance Control Organ comprising financial/auditing experts from the Member States shall undertake the audit of the General Secretariat and its subsidiary organs in accordance with its internal rules and regulations.

## CHAPTER XVII

## Rules of Procedure and Voting

### Article 32

1. The Council of Foreign Ministers shall adopt its own rules of procedure.

2. The Council of Foreign Ministers shall recommend the rules of procedures of the Islamic Summit.

3. The Standing Committees shall establish their own respective rules of procedure.

### Article 33

1. Two-third of the Member States shall constitute the quorum for the meetings of the Organisation of Islamic Cooperation.

2. Decisions shall be taken by consensus. If consensus cannot be obtained, decision shall be taken by a two-third majority of members present and voting unless otherwise stipulated in this Charter.

## CHAPTER XVIII

## Final Provisions

## Privileges and Immunities

### Article 34

1. The Organisation shall enjoy in the Member States, immunities and privileges as necessary for the exercise of its functions and the fulfilment of its objectives.

2. Representatives of the Member States and officials of the Organisation shall enjoy such privileges and immunities as stipulated in the Agreement on Privileges and Immunities of 1976.

3. The staff of the General Secretariat, subsidiary organs and specialised institutions shall enjoy privileges and immunities necessary for the performance of their duties as may be agreed between the Organisation and host countries.

4. A Member State which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the Council of Foreign Ministers if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Council may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

## Withdrawal

### Article 35

1. Any Member State may withdraw from the Organisation by notifying the Secretary-General one year prior to its withdrawal. Such a notification shall be communicated to all Member States.

2. The State applying for withdrawal shall be bound by its financial obligations until the end of the fiscal year during which the application for withdrawal is submitted. It shall also settle any other financial dues it owes to the Organisation.

## Amendments

### Article 36

Amendments to the present Charter shall take place according to the following procedure:

a. Any Member State may propose amendments to the present Charter to the Council of Foreign Ministers;

b. When approved by two-third majority of the Council of Foreign Ministers and ratified by a two-third majority of the Member States, it shall come into force.

## Interpretation

### Article 37

1. Any dispute that may arise in the interpretation, application or implementation of any Article in the present Charter shall be settled cordially, and in all cases through consultation, negotiation, reconciliation or arbitration;

2. The provisions of this Charter shall be implemented by the Member States in conformity with their constitutional requirements.

### Article 38

Languages of the Organisation shall be Arabic, English and French.

## Transitional Arrangement

## Ratification and Entry into Force

### Article 39

1. This Charter shall be adopted by the Council of Foreign Ministers by two-third majority and shall be open for signature and ratification by Member States in accordance with the constitutional procedures of each Member State.

2. The instruments of ratification shall be deposited with the Secretary General of the Organisation of Islamic Cooperation.

3- This Charter replaces the Charter of the Organisation of the Islamic Conference which was registered in conformity with Article 102 of the Charter of the United Nations on February 1, 1974.

*Done at the city of Dakar (Republic of Senegal), the Seventh day of Rabi Al-Awal, One Thousand Four Hundred and Twenty-nine Hijra, corresponding to Fourteenth day of March Two Thousand and Eight.*

This charter has been registered with the United Nations in conformity with Article 102 of the Charter of United Nations on 22 June 2017.

**Endnotes**

1. The emblem of the Organization was changed in accordance with resolution 5/38-ORG.
2. The name of the OIC was changed pursuant to resolution 4/38-ORG.
3. The first para of Article 8 was amended as follows, “The Islamic Summit shall convene every two years in one of the Member States”, instead of 3 years, by virtue of resolution 3/44-ORG. The amendment shall enter into force after the ratification of two thirds of the Member States.

# CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS

# Annex 14

*Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Ireland, and the French Republic*, Decision of 30 June 1977, *UN Reports of International Arbitral Awards*, vol. XVIII, p. 40 [extract]

*Available at:*

https://legal.un.org/riaa/cases/vol_XVIII/3-413.pdf

Annex 14

# REPORTS OF INTERNATIONAL ARBITRAL AWARDS

# RECUEIL DES SENTENCES ARBITRALES

**Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)**

30 June 1977 - 14 March 1978

VOLUME XVIII pp. 3-413

NATIONS UNIES - UNITED NATIONS

definition to the meaning of the expression "special circumstances". The French Republic, it says, by its own unilateral act simply excluded the application of the equidistance principle in the series of areas which it specified, and the effect was not to interpret Article 6 but to modify the scope of its application. The reservation, it argues, took the form of a restriction on the application of the equidistance method in cases not specifically provided for by Article 6, which only contains a general principle and does not enumerate a series of individual and particular cases. The French Government adds that the reservation also had the effect of extending and rendering absolute in the named areas the rule in Article 6 calling for agreement in the determination of the boundary of the continental shelf.

55. The Court thinks it sufficient to say that, although the third reservation doubtless has within it elements of interpretation, it also appears to constitute a specific condition imposed by the French Republic on its acceptance of the delimitation régime provided for in Article 6. This condition, according to its terms, appears to go beyond mere interpretation; for it makes the application of that régime dependent on acceptance by the other State of the French Republic's designation of the named areas as involving "special circumstances" regardless of the validity or otherwise of that designation under Article 6. Article 2(1)(*d*) of the Vienna Convention on the Law of Treaties, which both Parties accept as correctly defining a "reservation", provides that it means "a unilateral statement, however phrased or named, made by a State . . . whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in its application to that State". This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State. This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this "reservation" is to be considered a "reservation" rather than an "interpretative declaration".

56. The Court will now proceed to examine the effect of the French Republic's reservations on the terms of the Convention applicable as between it and the United Kingdom, and will do so on the basis that the three reservations to Article 6 are true reservations and admissible. Both the Parties have addressed themselves to the question of the effect of the French reservations, should the Court decide, as it has done, that the 1958 Convention is a treaty in force as between them and part of the law to be applied under Article 2(1) of the Arbitration Agreement. They are, however, in complete disagreement as to the effect of the reservations upon the conditions under which the terms of the Convention, particularly those of Article 6, would be applicable as between the Parties to the present proceedings.

57. The French Republic maintains that it is the combined effect of its reservations and their rejection by the United Kingdom which determines the question. In its view, the governing principle is that of the mutuality of consent in the conclusion of treaties. The French Republic's reservations to Article 6, it says, being valid reservations permitted by Article 12, imposed

# Annex 15

*Channel Tunnel Group Limited and France-Manche S.A.* v. *United Kingdom and France*, Permanent Court of Arbitration Case No. 2003-06, Partial Award, 30 January 2007 [extract]

*Available at:*

https://pcacases.com/web/sendAttach/487

*French version available at:*

https://pcacases.com/web/sendAttach/488

**Annex 15**

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH ARTICLE 19 OF THE TREATY BETWEEN THE FRENCH REPUBLIC AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND CONCERNING THE CONSTRUCTION AND OPERATION BY PRIVATE CONCESSIONAIRES OF A CHANNEL FIXED LINK SIGNED AT CANTERBURY ON 12 FEBRUARY 1986**

**- BETWEEN -**

**1. THE CHANNEL TUNNEL GROUP LIMITED**

**2. FRANCE-MANCHE S.A.**

**- AND -**

**1. THE SECRETARY OF STATE FOR TRANSPORT OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND**

**2. LE MINISTRE DE L'ÉQUIPEMENT, DES TRANSPORTS, DE L'AMÉNAGEMENT DU TERRITOIRE, DU TOURISME ET DE LA MER DU GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE**

---

# PARTIAL AWARD

---

**The Arbitral Tribunal:**

Professor James Crawford SC, Chairman

Maître L. Yves Fortier CC QC

H.E. Judge Gilbert Guillaume

The Rt. Hon. Lord Millett

Mr Jan Paulsson

**Registry:**

Permanent Court of Arbitration

30 January 2007

**Annex 15**

**AGENTS, COUNSEL AND OTHER REPRESENTATIVES OF THE PARTIES**

**Eurotunnel**

Mr Matthew Weiniger, Herbert Smith LLP, Agent, Counsel and Advocate;

Professor Christopher Greenwood, CMG, QC, Counsel and Advocate;

Maître François-Henri Briard, Delaporte Briard Trichet, Counsel and Advocate;

Maître Emmanuelle Cabrol, Herbert Smith LLP, Counsel and Advocate;

Maître Jean-Pierre Boivin, Cabinet Boivin, Counsel;

Maître Malik Memlouk, Cabinet Boivin, Counsel;

Maître Corentin Chevallier, Cabinet Boivin, Counsel;

Mr Matthew Page, Herbert Smith LLP, Counsel;

Ms Joanne Greenaway, Herbert Smith LLP, Counsel;

Mr Oliver Jones, Herbert Smith LLP, Counsel;

Mr Milo Molfa, Herbert Smith LLP, Assistant-Counsel;

Mr Jean-Alexis Souvras, General Counsel, Eurotunnel;

Mr David Marteau, Legal Affairs Department, Eurotunnel.

**France**

Mr Jean-Luc Florent, Deputy Legal Director at the Ministry of Foreign Affairs, Agent;

Mr Alain Pellet, Professor at the University of Paris X-Nanterre, member and former Chairman of the International Law Commission of the United Nations, Counsel and Advocate;

Mr Mathias Forteau, Professor of Law at the University of Lille 2, Counsel and Advocate;

Mr Pierre Bodeau-Livinec, Legal Affairs Department, Ministry of Foreign Affairs, Deputy-Agent;

Mr Jean-Pierre Ghuysen, *Inspecteur général des transports et des travaux publics*, President of the French Delegation to the Intergovernmental Commission on the Channel Tunnel, Expert-Counsel;

Mr Arnaud Tournier, *Chargé de mission*, General Secretariat for the Channel Tunnel, Expert-Counsel;

Mr Franck Latty, Doctor of Law, *Chargé de mission,* General Secretariat for the Channel Tunnel, Expert-Counsel.

**United Kingdom**

Mr Christopher A. Whomersley, Deputy Legal Adviser, Foreign and Commonwealth Office, Agent;

Mr K. Akbar Khan, First Secretary, British Embassy, The Hague, Deputy Agent;

Mr David Anderson QC, Counsel;

Mr Samuel Wordsworth, Counsel;

Ms Jessica Wells, Counsel;

Mr John Henes, former Chairman, UK Delegation to the Intergovernmental Commission on the Channel Tunnel;

Ms Deborah Phelan, Department of Transport;

Mr Michael Harakis, Department of Transport.

they are – can however lead to difficulties in particular contexts. A great deal depends on the specific language of the instruments from which the tribunal derives its authority, and the source of the rights and obligations in issue. In the present case, the principal issue is not the law to be applied by the Tribunal, but the source of the Parties' rights and obligations. As the Tribunal has already observed, this question is expressly dealt with by Clause 41.1.

135. In the present case, three questions need to be distinguished:

(1) Was there a "dispute" between the Claimants and either or both Respondents which existed at the time of the Request?

(2) As to any such dispute, have the Claimants presented claims falling within the scope of Clause 40.1 of the Concession Agreement?

(3) Does the fact that certain proceedings were or could have been brought before another forum pursuant to Clause 41.4 of the Concession Agreement affect the present Tribunal's capacity to deal with the claims?

In answering these questions the Tribunal will apply the standard articulated in the Oil Platforms case, and since adopted by other international tribunals.[88] In other words it is necessary to ask whether the breaches pleaded by the Claimants do or do not fall within the provisions of the Concession Agreement from which alone the Tribunal's jurisdiction derives.

### 1. Was there a "dispute" between the Claimants and the Respondents as to each of the claims?

136. It must first be observed that, although the Claimants put forward the Sangatte claim and the SeaFrance claim as part of a single dispute, in truth the two are entirely distinct. They involve different acts or omissions of the Respondents, as well as different provisions of the Concession Agreement and (to the extent they may be applicable) also different rules of international law. Questions of jurisdiction and admissibility have to be separately considered with regard to each of them.

---

88 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, ICJ Reports 1996, 803, 810 (para. 16). See also *Case concerning Legality of Use of Force (Yugoslavia v. Belgium)*, ICJ Reports 1999, 124, 137 (para. 38); and in other tribunals, e.g. *United Parcel Service of America Inc. v. Government of Canada* (2002) 7 ICSID Reports 285, 296-7; *SGS Société Générale de Surveillance SA v. Republic of the Philippines* (2004) 8 ICSID Reports 515, 523-4.

137. Clause 40.1 of the Concession Agreement refers to "[a]ny dispute between the Concessionaires or either of them and the Principals or either of them relating to this Agreement" (« *tout différend relatif à l'application de la Concession survenant entre les Concessionnaires... et les Concédants* »). Thus it covers disputes which had arisen at the time of the Request, which is dated 17 December 2003.

138. There is no doubt that there was a subsisting dispute between the Claimants and the Respondents concerning the various aspects of the Sangatte claim. The Concessionaires wrote to the Governments and to the IGC on 17 March 2003 and on 26 March 2003 respectively seeking to commence negotiations with a view to finding a possible resolution to their claims in relation to the clandestine migrant phenomenon. The IGC replied on 11 June 2003 indicating that it was unable to respond favourably to this request.

139. No such formal step was taken with respect to the SeaFrance claim. It might be said that the actions of France or of French public sector entities were not the specific responsibility of the IGC and that a different approach to this issue might reasonably have been taken. But the IGC's terms of reference under Article 10 of the Treaty are broad and it could certainly have considered a complaint of this kind; more particularly the IGC was the obvious forum to inform the United Kingdom of the issues and to seek its support. It is true that the Concessionaires did write twice to the relevant French Minister complaining about subsidies. The first letter, dated 17 February 1999, expressed "disquiet" at existing and proposed subsidies to P & O/Stena and SeaFrance and called for equal treatment or better still the abolition of all subsidies.[89] There appears to have been no follow-up. The second letter, dated 4 February 2003, referred to the State aid complaint brought by P & O to the European Commission. It explained that "Eurotunnel had not wished at the time to associate itself with such an action against the State", but nonetheless noted that the impact of the subsidy to SeaFrance on prices in the cross-Channel market had been appreciable.[90] The letter referred to the Concession Agreement, without expressly alleging a breach thereof. But it expressed

[89] Letter from Patrick Ponsolle to Jean-Claude Gayssot dated 17 February 1999, Bundle H, p. 4313 (translation by the Registry).

[90] Letter from Richard Shirrefs to Francis Mer dated 4 February 2003, Bundle H, p. 4701 (translation by the Registry).

"strong disquiet" in relation to the State aid being extended, whether directly or indirectly, to SeaFrance.

140. By contrast the record discloses no letter or communication of any kind to the United Kingdom in respect of the failures on its part to act of which the Claimants now complain.[91]

141. It is thus understandable that France and, *a fortiori*, the United Kingdom should argue that there was no actual dispute over the SeaFrance claim prior to the commencement of the present arbitration. Though perhaps formal the concern is not a minor one: the SeaFrance claim accounts for more than 90% of the total amount of approximately £458m claimed as damages in these proceedings. In response, the Claimants refer to the letter of 4 February 2003, but their main argument is that, even if there were some formal deficiency in this regard, international tribunals have not allowed these to prevent a decision on a claim where the deficiency could readily be cured by filing a new application. They note that the International Court has applied that principle on a number of occasions, most recently in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, where it said:

> Finally, the Court will address Rwanda's argument that the statement by its Minister of Justice could not in any event have any implications for the question of the Court's jurisdiction in this case, since it was made nearly three years after the institution of the proceedings. In this connection, the Court recalls that it has consistently held that, while its jurisdiction must surely be assessed on the date of the filing of the act instituting proceedings ... the Court should not, however, penalize a defect in procedure which the Applicant could easily remedy (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26). In the present case, if the Rwandan Minister's statement had somehow entailed the withdrawal of Rwanda's reservation to Article IX of the Genocide Convention in the course of the proceedings, the DRC could on its own initiative have remedied the procedural defect in its original Application by filing a new Application.[92]

On the other hand the Court held that it had no jurisdiction over the Congo's claims under a number of treaties in circumstances where the Congo had made no attempt to invoke the treaties before the commencement of the arbitration, nor any attempt to

---

91 Letter from Patrick Ponsolle to Jean-Claude Gayssot dated 17 February 1999, Bundle H, p. 4313, refers to another letter written by Eurotunnel to the British Minister of Transport John Prescott, protesting against exemptions from social security payments apparently granted to P & O/Stena. That letter has not been produced.

92 Judgment of 3 February 2006, para. 54, online: ICJ <http://www.icj-cij.org>.

comply with other procedural requirements of those treaties.[93] Thus prerequisites to jurisdiction – which under Clause 40.1 of the Concession Agreement include the existence of a dispute – cannot simply be ignored.

142. It is established that a party to international proceedings cannot create a dispute by its request for arbitration, even if such a dispute would have been within jurisdiction had it existed and could therefore, potentially, be the subject of a new request following further exchanges between the parties.[94] On the other hand international tribunals have been willing to discern a dispute from general exchanges of correspondence manifesting a difference of view without requiring the claim to have been made out with any particularity. In the case of interstate disputes under the Treaty, Article 19(1)(a) requires that the dispute must not have been settled by consultations within three months. There is no equivalent provision for disputes between the Concessionaires and the Governments relating to the Concession Agreement (Article 19(1)(b)) and therefore no other procedural condition to arbitration. The present case is very close to the line but on balance the Tribunal holds that as a result of the letter of 4 February 2003 and the other steps taken by the Concessionaires, there was a dispute between them and the French Government concerning at least the issue of subsidies and that the dispute relates to the Concession Agreement for the purposes of Clause 40.1.

143. The same conclusion cannot be reached so far as the United Kingdom is concerned. There appears to have been no communication on this subject between the Concessionaires and the United Kingdom prior to the Request, no attempt to bring the matter formally before the IGC and no prior indication by any means or in any forum of what the United Kingdom might have neglected to do in relation to the SeaFrance subsidies. There was in the Tribunal's view no dispute between the Concessionaires and the United Kingdom as concerns the SeaFrance claim at the time the Request was served, and that aspect of the claim is accordingly outside its jurisdiction.

---

93 See *ibid.*, paras. 91-92 (Convention on the Elimination of All Forms of Discrimination Against Women), 99-100 (WHO Constitution), 108 (UNESCO Constitution), 118-119 (Montreal Convention).

94 See *Electricity Company of Sofia and Bulgaria*, PCIJ Ser. A/B No. 77 (1939), 83.

# Annex 16

*Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Permanent Court of Arbitration Case No. 2011-03, Award, 18 March 2015 [extract]

*Available at:*

https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf

**Annex 16**

**IN THE MATTER OF THE CHAGOS MARINE PROTECTED AREA ARBITRATION**

**- before -**

**AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**

**- between -**

**THE REPUBLIC OF MAURITIUS**

**- and -**

**THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND**

---

# AWARD

---

**The Arbitral Tribunal:**
Professor Ivan Shearer AM, President
Judge Sir Christopher Greenwood CMG, QC
Judge Albert Hoffmann
Judge James Kateka
Judge Rüdiger Wolfrum

**Registry:**
Permanent Court of Arbitration

**18 March 2015**

Kingdom's consultation process[449] and the failure of the United Kingdom to honour the assurance by former Prime Minister Gordon Brown.[450]

376. In Mauritius' view, the "violation of the commitment given at the highest level" made it plain that "no diplomatic solution was possible" and accordingly, continuing exchanges on the issue would have been futile.[451] Moreover, Mauritius submits that it was entirely reasonable to consider that further exchanges after initiation of these proceedings would have been futile in view of the circumstances.[452]

### 2. The Tribunal's Decision

377. As set out above, the Parties disagree both as to the interpretation of Article 283 and as to its application to Mauritius' Fourth Submission. Mauritius' account of its compliance with Article 283 ranges widely through the history of the Parties' diplomatic exchanges regarding the proposed MPA. The United Kingdom, in contrast, points to the absence of a specific communication setting out a particular dispute by reference to the Convention and either proposing an approach for its resolution, or inviting an exchange of views.

378. In the Tribunal's view, much of the argument on this issue has tended to confuse two related, but distinct concepts. Article 283 requires the Parties to "proceed expeditiously to an exchange of views regarding [the] settlement [of the dispute] by negotiation or other peaceful means." Article 283 thus requires the Parties to exchange views regarding the means for resolving their dispute; it does not require the Parties to in fact engage in negotiations or other forms of peaceful dispute resolution. As a matter of textual construction, the Tribunal considers that Article 283 cannot be understood as an obligation to negotiate the substance of the dispute. Read in that manner, Article 283(1) would, redundantly, require that parties "negotiate regarding the settlement of the dispute by negotiation". The Tribunal also notes that Article 283(2) requires a further exchange of views upon the failure of a dispute settlement procedure. If an exchange of views were taken to involve substantive negotiations, this would literally require that, upon the failure of negotiations, the parties must engage in negotiations: such a construction cannot be correct. Finally, the drafters of this provision saw fit to include an exhortation that the parties proceed "expeditiously" to an exchange of views. Given the clear

449 Mauritius' Reply, para. 4.59.

450 Mauritius' Reply, para. 4.61.

451 Mauritius' Reply, para. 4.63.

452 Final Transcript, 951:21 to 952:3.

and understandable preference among the participants at the Third UN Conference on the Law of the Sea that disputes be resolved by negotiation whenever possible, the Tribunal cannot accept that the final text could have included a provision that would have the effect of rushing, or potentially imposing a time limit on, substantive negotiations. Article 283 is thus a provision particular to the Convention and distinct from a requirement that parties engage in negotiations prior to resorting to arbitration.

379. The Convention includes no express requirement that parties engage in negotiations on the substance of a dispute before resorting to compulsory settlement. To the extent that such a requirement could be considered to be implied from the structure of sections 1 and 2 of Part XV, the Tribunal has no hesitation in concluding that Mauritius has met such a requirement. The Parties discussed the proposed MPA during the bilateral talks in July 2009, in diplomatic correspondence, at CHOGM, and in a number of conversations between Prime Minister Ramgoolam and Foreign Minister Boolell and the British High Commissioner in Mauritius, Mr John Murton. With respect to any obligation to carry out substantive negotiations, the Tribunal considers it to be settled international law that "it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument," but that "the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation) Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at p. 85, para. 30; *see also Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392 at pp. 428-429, para. 83). Moreover, States themselves are in the best position to determine where substantive negotiations can productively be continued, and "if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*" (*Mavrommatis Palestine Concessions, Jurisdiction, Judgment of 30 August 1924, PCIJ Series A, No. 2*, p. 6 at p. 13, 15). As set out in the factual record, Mauritius engaged in negotiations with the United Kingdom regarding the steps that would be taken before an MPA might be declared (see paragraphs 128–147 above). Mauritius' decision that substantive negotiations could not continue in parallel with the United Kingdom's Public Consultation, or that negotiations did not warrant pursuing after the MPA was declared on 1 April 2010, did not violate any duty to negotiate in respect of the Parties' dispute.

380. Article 283, however, concerns an exchange of views on the means to settle the dispute, whether by negotiation or other peaceful means. In the Tribunal's view, the most unequivocal example of compliance with this provision is that offered by Australia and New Zealand in the *Southern Bluefin Tuna* arbitration. In identical Notes Verbales dated 15 September 1999, Australia and New Zealand each set out a history of diplomatic communications recording the termination of negotiations, the possible submission of the dispute to mediation, Japan's preference for arbitration under the 1993 Convention for the Conservation of Southern Bluefin Tuna, and Australia and New Zealand's rejection of this option and intent to submit that dispute to arbitration under the Convention (*Southern Bluefin Tuna (New Zealand v. Japan)*, Request for the Prescription of Provisional Measures Submitted by New Zealand at Annex 1, New Zealand's Diplomatic Note 701/14/7/10/3 to Japan dated 15 July 1999, *reproduced in* International Tribunal for the Law of the Sea, *Pleadings, Minutes of Public Sittings and Documents, Vol. 4 (1999)* at p. 14; *Southern Bluefin Tuna (Australia v. Japan)*, Request for the Prescription of Provisional Measures Submitted by Australia at Annex 1, Australia's Diplomatic Note No. LGB 99/258 to Japan dated 15 July 1999, *reproduced in* International Tribunal for the Law of the Sea, *Pleadings, Minutes of Public Sittings and Documents, Vol. 4 (1999)* at p. 82). The United Kingdom points to the absence of a similar record of views exchanged in these proceedings and would have the Tribunal deny jurisdiction on those grounds.

381. The Tribunal, however, is sensitive to the concern expressed by the tribunal in *Barbados/Trinidad and Tobago* that an overly formalistic application of Article 283 does not accord with how diplomatic negotiations are actually carried out (*Award of 11 April 2006, PCA Award Series*, pp. 94-96, RIAA, Vol. XXVII, p. 147 at pp. 206-207, paras. 201-205). In practice, substantive negotiations concerning the parties' dispute are not neatly separated from exchanges of views on the preferred means of settling a dispute, and the idealized form exhibited in *Southern Bluefin Tuna* will rarely occur. Accordingly, it is unsurprising that in the jurisprudence on Article 283 it is frequently not clear as to whether the communications that were considered sufficient for the purposes of Article 283 were substantive or procedural in nature.

382. Nevertheless, Article 283 forms part of the Convention and was intended to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings. It should be applied as such, but without an undue formalism as to the manner and precision with which views were exchanged and understood. In the Tribunal's view, Article 283 requires that a dispute have arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed. In the present case, the Tribunal considers that a dispute regarding the

manner in which the United Kingdom was proceeding with the proposed MPA had arisen at least as of Mauritius' Note Verbale of 23 November 2009. In that communication, Mauritius set out its concern regarding the impact of the MPA on issues of sovereignty, resettlement, and fisheries. Mauritius also stated its view that these issues should be addressed in the bilateral framework between the two governments and that this should be done before the United Kingdom undertook to consult with the public:

> [. . .]
>
> Furthermore, the Ministry of Foreign Affairs, Regional Integration and International Trade would like to state that since there is an on-going bilateral Mauritius-UK mechanism for talks and consultations on issues relating to the Chagos Archipelago and a third round of talks is envisaged early next year, the Government of the Republic of Mauritius believes that it is inappropriate for the consultation on the proposed marine protected area, as far as Mauritius is concerned, to take place outside this bilateral framework.
>
> The Government of Mauritius considers that an MPA project in the Chagos Archipelago should not be incompatible with the sovereignty of the Republic of Mauritius over the Chagos Archipelago and should address the issues of resettlement, access to the fisheries resources, and the economic development of the islands in a manner which would not prejudice an eventual enjoyment of sovereignty. A total ban on fisheries exploitation and omission of those issues from any MPA project would not be compatible with the long-term resolution of, or progress in the talks, on the sovereignty issue.
>
> The stand of the Government of Mauritius is that the existing framework for talks on the Chagos Archipelago and the related environmental issues should not be overtaken or bypassed by the consultation launched by the British Government on the proposed MPA.[453]

383. Once a dispute has arisen, Article 283 then requires that the Parties engage in some exchange of views regarding the means to settle the dispute. As is apparent from Foreign Secretary David Miliband's letter of 15 December 2009, the United Kingdom considered it appropriate to continue with a third round of bilateral talks in parallel with the Public Consultation:

> [. . .]
>
> At our meeting, you mentioned your concerns that the UK should have consulted Mauritius further before launching the consultation exercise. I regret any difficulty this has caused you or your Prime Minister in Port Louis. I hope you will recognize that we have been open about the plans and that the offer of further talks has been on the table since July.
>
> I would like to reassure you again that the public consultation does not in any way prejudice or cut across our bilateral intergovernmental dialogue with Mauritius on the proposed Marine Protected Area. The purpose of the public consultation is to seek the views of the wider interested community, including scientists, NGOs, those with commercial interests and other stakeholders such as the Chagossians. The consultations and our plans for an MPA do not in any way impact on our commitment to cede the territory when it is no longer needed for defence purposes.

---

[453] Note Verbale dated 23 November 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 1197/28/10 (**Annex MM-155**).

> Our ongoing bilateral talks are an excellent forum for your Government to express its views on the MPA. We welcome the prospect of further discussion in the context of these talks, the next round of which now look likely to happen in January.
>
> As well as the MPA there are, of course, many other issues for bilateral discussion. My officials remain ready to continue the talks and I hope that Mauritius will take up the opportunity to pursue this bilateral dialogue.
>
> [. . .][454]

384. Mauritius, in contrast, considered that the dispute should be resolved through bilateral talks, but that pending such talks the United Kingdom's Public Consultation should be put on hold. This is apparent from Mauritius' account of the conversation at CHOGM (see paragraphs 135–138 above) and, in any event, from Foreign Minister Arvin Boolell's letter of 30 December 2009:

> During our recent meeting in the margins of the Commonwealth Heads of Government Meeting, I had expressed the concerns of the Government of Mauritius about the Marine Protected Area project. I had stated that it was inappropriate for the British authorities to embark on consultations on the matter outside the bilateral Mauritius-United Kingdom mechanism for talks on issues relating to the Chagos Archipelago.
>
> [. . .]
>
> In these circumstances, as I have mentioned, Mauritius is not in a position to hold separate consultations with the team of experts of the UK on the proposal to establish a Marine Protected Area.
>
> You will no doubt be aware that, in the margins of the last CHOGM, our respective Prime Ministers agreed that the Marine Protected Area project be put on hold and that this issue be addressed during the next round of Mauritius-United Kingdom bilateral talks.[455]

385. Although this correspondence also dealt with substantive matters (as would be expected), the Parties' views on the settlement of the dispute by negotiation were clearly exchanged in December 2009. This is all that Article 283 requires. It is not necessary for the Parties to comprehensively canvas the means for the peaceful settlement of disputes set out in either the UN Charter or the Convention, nor was Mauritius "obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted" (*Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10 at para. 47). Nor, importantly, does Article 283 require that the exchange of views include the possibility of compulsory settlement or that—before resorting to compulsory settlement—one party caution the other regarding the possibility of litigation or set out the specific claims that it might choose to

---

454 Letter dated 15 December 2009 from the UK Secretary of State for Foreign and Commonwealth Affairs to the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius (**Annex MM-156**).

455 Letter dated 30 December 2009 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs (**Annex MM-157**).

advance. In the present case, both Parties preferred to address their dispute through negotiations, albeit subject to incompatible conditions that ultimately prevented further talks from taking place. The exchange of views took place on this basis. Thereafter, Mauritius determined that the possibility of reaching agreement on the conditions for further negotiations had been exhausted and elected to proceed with compulsory settlement through arbitration. Nothing further was called for.

386. Accordingly, the Tribunal concludes that Mauritius has met the requirement of Article 283 to exchange views regarding the settlement, by negotiation or other peaceful means, of the dispute underpinning Mauritius' Fourth Submission.

* * *

# Annex 17

*The South China Sea Arbitration* (*Philippines* v. *China)*, Permanent Court of Arbitration Case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015 [extract]

*Available at:*

https://pcacases.com/web/sendAttach/2579

**Annex 17**

**PCA Case Nº 2013-19**

**IN THE MATTER OF AN ARBITRATION**

**- before -**

**AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**

**- between -**

**THE REPUBLIC OF THE PHILIPPINES**

**- and -**

**THE PEOPLE'S REPUBLIC OF CHINA**

---

# AWARD ON JURISDICTION AND ADMISSIBILITY

---

**Arbitral Tribunal:**

Judge Thomas A. Mensah (Presiding Arbitrator)
Judge Jean-Pierre Cot
Judge Stanislaw Pawlak
Professor Alfred H.A. Soons
Judge Rüdiger Wolfrum

**Registry:**

Permanent Court of Arbitration

**29 October 2015**

**Submission No. 13** relates to the Philippines' protest against China's "purported law enforcement activities as violating the Convention on the International Regulations for the Prevention of Collisions at Sea and also violating UNCLOS"[100] and China's rejection of those protests.[101]

**Submission No. 14** relates to a dispute concerning China's "activities at Second Thomas Shoal . . . after these proceedings were commenced," including the prevention of the rotation and resupply of Philippine personnel at the Shoal and interference with navigation.[102] The Philippines refers to China's diplomatic communications and communications with the Philippine forces stationed on Second Thomas Shoal.[103]

## B. THE TRIBUNAL'S DECISION

148. The concept of a dispute is well-established in international law and the inclusion of the term within Article 288 constitutes a threshold requirement for the exercise of the Tribunal's jurisdiction. Simply put, the Tribunal is not empowered to act except in respect of one or more actual disputes between the Parties. Moreover, such disputes must concern the interpretation and application of the Convention.

149. In determining whether these criteria are met, the Tribunal recalls that, under international law, a "dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[104] Whether such a disagreement exists "is a matter for objective determination."[105] A mere assertion by one party that a dispute exists is "not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence."[106] It is not adequate to show that "the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the

---

100 Jurisdictional Hearing Tr. (Day 2), p. 144; Note Verbale from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1222, p. 1 (30 April 2012) (**Annex 209**).

101 Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239, p. 1 (25 May 2012) (**Annex 211**).

102 Jurisdictional Hearing Tr. (Day 2), p. 144.

103 Memorandum from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (23 April 2013) (**Annex 93**); Letter from the Virgilio A. Hernandez, Major General, Armed Forces of the Philippines, to the Secretary of Foreign Affairs, Department of Foreign Affairs of Republic of the Philippines (10 March 2014) (**Annex 99**).

104 *Mavrommatis Palestine Concessions*, Jurisdiction, Judgment of 30 August 1924, PCIJ Series A, No. 2, p. 6 at p. 11 (**Annex LA-57**).

105 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, p. 65 at p. 74 (**Annex LA-1**).

106 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, p. 65 at p. 74 (**Annex LA-1**).

other."[107] Moreover, the dispute must have existed at the time the proceedings were commenced.[108] In the present case, that would be 22 January 2013, the date of the Philippines' Notification and Statement of Claim.

150. Where a dispute exists between parties to the proceedings, it is further necessary that it be identified and characterised. The nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or whether subject-matter based exclusions from jurisdiction are applicable. Here again, an objective approach is called for, and the Tribunal is required to "isolate the real issue in the case and to identify the object of the claim."[109] In so doing it is not only entitled to interpret the submissions of the parties, but bound to do so. As set out in *Fisheries Jurisdiction (Spain v. Canada)*, it is for the Court itself "to determine on an objective basis the dispute dividing the parties, by examining the position of both parties."[110] Such a determination will be based not only on the "Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence."[111] In the process, a distinction should be made "between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute."[112]

151. In the present case, the Philippines argues that it has submitted to the Tribunal a series of concrete disputes concerning the interpretation or application of specific articles of the Convention to Chinese activities in the South China Sea and to certain maritime features occupied by China. The Philippines also considers that it has submitted a dispute concerning the interaction of "historic rights" claimed by China with the provisions of the Convention. China's Position Paper sets out two overarching characterisations of the Parties' dispute that, in China's view, exclude it from the Tribunal's jurisdiction. In its Position Paper, China argues,

---

107 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, p. 319 at p. 328 (**Annex LA-6**).

108 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70 at pp. 84-85, para. 30 (**Annex LA-34**).

109 *Nuclear Tests (New Zealand v. France),* Judgment, ICJ Reports 1974, p. 457 at p. 466, para. 30; *see also Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order of 22 September 1995, ICJ Reports 1995, p. 288 at p. 304, para. 55.

110 *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432 at p. 448, para. 30 (**Annex LA-23**).

111 *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432 at p. 449, para. 31 (**Annex LA-23**).

112 *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432 at p. 449, para. 32 (**Annex LA-23**); *see also Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 208 (**Annex LA-225**).

first, that the Parties' dispute concerns "territorial sovereignty over several maritime features in the South China Sea" and, second (in what the Tribunal understands to be an alternative argument), that the Parties' dispute concerns matters that are "an integral part of maritime delimitation." The former characterisation would, in China's view, mean that the dispute is not one concerning the interpretation or application of the Convention; the latter would bring it within the ambit of the jurisdictional exceptions created by China's declaration under Article 298 of the Convention. As China's objections concern the Philippines' Submissions as a whole, the Tribunal considers it appropriate to address them generally, before turning to the Philippines' arguments concerning the proper characterisation of its Submissions.

152. There is no question that there exists a dispute between the Parties concerning land sovereignty over certain maritime features in the South China Sea. The Philippines concedes as much,[113] and the objection set out in China's Position Paper is premised on the existence of such a dispute. A dispute over sovereignty is also readily apparent on the face of the diplomatic communications between the Parties provided by the Philippines. The Tribunal does not accept, however, that it follows from the existence of a dispute over sovereignty that sovereignty is also the appropriate characterisation of the claims the Philippines has submitted in these proceedings. In the Tribunal's view, it is entirely ordinary and expected that two States with a relationship as extensive and multifaceted as that existing between the Philippines and China would have disputes in respect of several distinct matters. Indeed, even within a geographic area such as the South China Sea, the Parties can readily be in dispute regarding multiple aspects of the prevailing factual circumstances or the legal consequences that follow from them. The Tribunal agrees with the International Court of Justice in *United States Diplomatic and Consular Staff in Tehran* that there are no grounds to "decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important."[114]

153. The Tribunal might consider that the Philippines' Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty. Neither of these situations, however, is the case. The Philippines has not asked the Tribunal to rule on sovereignty and, indeed, has expressly and repeatedly requested that the Tribunal refrain from so doing.[115] The Tribunal likewise does not see that

---

113 Memorial, para. 1.16; Supplemental Written Submission, para. 26.8.

114 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, ICJ Reports 1980, p. 3 at pp. 19-20, para. 36 (**Annex LA-175**).

115 Memorial, para. 1.16; Jurisdictional Hearing Tr. (Day 1), pp. 76-77, 99.

any of the Philippines' Submissions require an implicit determination of sovereignty. The Tribunal is of the view that it is entirely possible to approach the Philippines' Submissions from the premise—as the Philippines suggests[116]—that China is correct in its assertion of sovereignty over Scarborough Shoal and the Spratlys. The Tribunal is fully conscious of the limits on the claims submitted to it and, to the extent that it reaches the merits of any of the Philippines' Submissions, intends to ensure that its decision neither advances nor detracts from either Party's claims to land sovereignty in the South China Sea. Nor does the Tribunal understand the Philippines to seek anything further. The Tribunal does not see that success on these Submissions would have an effect on the Philippines' sovereignty claims and accepts that the Philippines has initiated these proceedings with the entirely proper objective of narrowing the issues in dispute between the two States.[117] In this respect, the present case is distinct from the recent decision in *Chagos Marine Protected Area*. The Tribunal understands the majority's decision in that case to have been based on the view both that a decision on Mauritius' first and second submissions would have required an implicit decision on sovereignty and that sovereignty was the true object of Mauritius' claims. For the reasons set out in this paragraph, the Tribunal does not accept the objection set out in China's Position Paper that the disputes presented by the Philippines concern sovereignty over maritime features.

154. One aspect of this objection, however, warrants further comment. In its Position Paper, China objects that "the Philippines selects only a few features" and argues that "[t]his is in essence an attempt at denying China's sovereignty over the Nansha Islands as a whole."[118] The Tribunal does not agree that the Philippines' focus only on the maritime features occupied by China carries implications for the question of sovereignty. The Tribunal does, however, consider that this narrow selection may have implications for the merits of the Philippines' claims. To the extent that a claim by the Philippines is premised on the absence of any overlapping entitlements of China to an exclusive economic zone or to a continental shelf, the Tribunal considers it necessary to consider the maritime zones generated by any feature in the South China Sea claimed by China, whether or not such feature is presently occupied by China.

155. Turning now to the question of maritime boundaries, the Tribunal is likewise not convinced by the objection in China's Position Paper that the Parties' dispute is properly characterised as relating to maritime boundary delimitation. The Tribunal agrees with China that maritime boundary delimitation is an integral and systemic process. In particular, the Tribunal notes that the concepts of an "equitable solution", of "special circumstances" in respect of the territorial sea, and of

116 Jurisdictional Hearing Tr. (Day 1), p. 98.

117 Memorial, para. 1.34.

118 China's Position Paper, para. 19.

"relevant circumstances" in respect of the exclusive economic zone and continental shelf may entail consideration of a wide variety of potential issues arising between the parties to a delimitation. It does not follow, however, that a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself.

156. In particular, the Tribunal considers that a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap. While fixing the extent of parties' entitlements and the area in which they overlap will commonly be one of the first matters to be addressed in the delimitation of a maritime boundary, it is nevertheless a distinct issue. A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements. In contrast, a dispute over claimed entitlements may exist even without overlap, where—for instance—a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention.

157. In these proceedings, the Philippines has challenged the existence and extent of the maritime entitlements claimed by China in the South China Sea. This is not a dispute over maritime boundaries. The Philippines has not requested the Tribunal to delimit any overlapping entitlements between the two States, and the Tribunal will not effect the delimitation of any boundary. Certain consequences, however, do follow from the limits on the Tribunal's competence in this respect and the limited nature of the dispute presented by the Philippines. China correctly notes in its Position Paper that certain of the Philippines' Submissions (Submissions No. 5, 8 and 9) request the Tribunal to declare that specific maritime features "are part of the exclusive economic zone and continental shelf of the Philippines" or that certain Chinese activities interfered with the Philippines' sovereign rights in its exclusive economic zone. Because the Tribunal has not been requested to—and will not—delimit a maritime boundary between the Parties, the Tribunal will be able address those of the Philippines' Submissions based on the premise that certain areas of the South China Sea form part of the Philippines' exclusive economic zone or continental shelf only if the Tribunal determines that China could not possess any potentially overlapping entitlement in that area. This fact also bears on the decisions that the Tribunal is presently prepared to make regarding the scope of its jurisdiction (see Paragraphs 390 to 396 below).

158. Having addressed the two objections raised generally by China concerning the nature of the Parties' dispute, the Tribunal turns to the disputes that it considers do appear from the

Philippines' Submissions, as reflected in the Parties' diplomatic correspondence in the record and the public statements of the Parties.

159. The Tribunal is called upon to address an issue arising from the manner in which China has chosen to publicly present its claimed rights in the South China Sea and also from China's non-participation in these proceedings. The existence of a dispute in international law generally requires that there be "positive opposition" between the parties, in that the claims of one party are affirmatively opposed and rejected by the other.[119] In the ordinary course of events, such positive opposition will normally be apparent from the diplomatic correspondence of the Parties, as views are exchanged and claims are made and rejected.

160. In the present case, however, China has not elaborated on certain significant aspects of its claimed rights and entitlements in the South China Sea. China has, for instance, repeatedly claimed "historic rights" or rights "formed in history" in the South China Sea.[120] But China has not, as far as the Tribunal is aware, clarified the nature or scope of its claimed historic rights. Nor has China clarified its understanding of the meaning of the "nine-dash line" set out on the map accompanying its Notes Verbales of 7 May 2009.[121] Within the Spratlys, China has also generally refrained from expressing a view on the status of particular maritime features and has

---

119 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, p. 319 at p. 328.

120 *See, e.g.*, Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-064-2011-S, p. 6, para. 8 (21 June 2011) (**Annex 72**); Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011*, p. 2 (16 September 2011) (**Annex 113**).

121 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009) (**Annex 191**); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009) (**Annex 192**). The Tribunal's use of the term "nine-dash line" is not to be understood as recognizing any particular nomenclature or map as correct or authoritative. The Tribunal observes that different terms have been used at different times and by different entities to refer to this line. For example, China refers to "China's dotted line in the South China Sea" (China's Position Paper, para. 8); Viet Nam refers to the "nine-dash line" (Viet Nam's Statement, para. 4(i)); Indonesia has referred to the "so called 'nine-dotted-lines map' (Note Verbale from the Permanent Mission of the Republic of Indonesia to the United Nations to the Secretary-General of the United Nations, No. 480/POL-703/VII/10, pp. 1-2 (8 July 2010) (**Annex 197**); and some commentators have referred to it as the "Cow's Tongue" and "U-Shaped Line." Further, the Tribunal observes that the number of dashes varies, depending on the date and version of the map consulted. For example, there were eleven dashes in the 1947 Atlas Map "Showing the Location of the Various Islands in the South China Sea (Nanhai Zhu Dao Wei Zhi Tu) (Memorial, Figure 4.5, **Annex M20**) and those in the 1950s (**Annexes M1-M3**) . Nine dashes appeared in subsequent maps, including that appended to the 2009 Notes Verbales to the UN Secretary-General (Memorial Figure 1.1, Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009) (**Annex 191**); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009) (**Annex 192**)). Ten dashes appear in the more recent 2013 "Map of the People's Republic of China" produced by China Cartographic Publishing House (**Annex M19**).

rather chosen to argue generally that "China's Nansha Islands [are] fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."[122] The Tribunal sees nothing improper about this and considers that China is free to set out its public position as it considers most appropriate. Nevertheless, certain consequences follow for the Tribunal's determination of whether a dispute can reasonably be said to exist where the Philippines' claims raise matters on which China has so far refrained from expressing a detailed position.

161. The Tribunal notes that:

> a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party.[123]

The existence of a dispute may also "be inferred from the failure of a State to respond to a claim in circumstances where a response is called for."[124]

162. The Tribunal recalls that this issue arose in the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, in which the United States declined to expressly affirm or contradict the United Nations' view that its legislation constituted a violation of the United Nations Headquarters Agreement. The Court, on that occasion, noted that:

> where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty.[125]

Similarly, in *Land and Maritime Boundary (Cameroon v. Nigeria)*, Nigeria adopted a reserved approach to setting out its position and argued only generally that there was "no dispute concerning the delimitation of that boundary as such throughout its whole length."[126] The Court observed that:

---

122 *See*, *e.g.*, Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011, p. 2 (14 April 2011) (**Annex 201**).

123 *Land and Maritime Boundary (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275 at p. 315, para. 89 (**Annex LA-25**).

124 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70 at pp. 84-85, para. 30 (**Annex LA-34**).

125 *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, ICJ Reports 1988, p. 12 at p. 28, para. 38.

126 *Land and Maritime Boundary (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275 at pp. 316-17, para. 93 (**Annex LA-25**).

> Nigeria is entitled not to advance arguments that it considers are for the merits at the present stage of the proceedings; in the circumstances however, the Court finds itself in a situation in which it cannot decline to examine the submission of Cameroon on the ground that there is no dispute between the two States. Because of Nigeria's position, the exact scope of this dispute cannot be determined at present; a dispute nevertheless exists between the two Parties, at least as regards the legal bases of the boundary. It is for the Court to pass upon this dispute.[127]

163. In the Tribunal's view, two principles follow from this jurisprudence. First, where a party has declined to contradict a claim expressly or to take a position on a matter submitted for compulsory settlement, the Tribunal is entitled to examine the conduct of the Parties—or, indeed, the fact of silence in a situation in which a response would be expected—and draw appropriate inferences. Second, the existence of a dispute must be evaluated objectively. The Tribunal is obliged not to permit an overly technical evaluation of the Parties' communications or deliberate ambiguity in a Party's expression of its position to frustrate the resolution of a genuine dispute through arbitration.

164. In the Tribunal's view, the Philippines' Submissions No. 1 and 2 reflect a dispute concerning the source of maritime entitlements in the South China Sea and the interaction of China's claimed "historic rights" with the provisions of the Convention. This dispute is evident from the diplomatic exchange between the Parties that followed China's Notes Verbales of 7 May 2009, which stated, in relevant part that:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government and is widely known by the international community.[128]

The Notes enclosed a map depicting what is known as the nine-dash line in the South China Sea.

165. The Philippines' contrasting view that entitlements in the South China Sea stem only from land features is well set out in its Note Verbale of 5 April 2011, issued in explicit response to China's Notes Verbales of 7 May 2009. In addition to claiming sovereignty over the "Kalayaan Island Group (KIG)", the Note provides in relevant part:

> On the "Waters Adjacent" to the Islands and other Geological Features
>
> **SECOND,** the Philippines, under the Roman notion of *dominium maris* and the international law principle of "*la terre domine la mer*" which states that the land dominates the sea, necessarily exercises sovereignty and jurisdiction over the waters around or adjacent to each relevant geological feature in the KIG as provided for under the United Nations Convention on the Law of the Sea (UNCLOS).

---

127 *Land and Maritime Boundary (Cameroon v. Nigeria),* Preliminary Objections, Judgment, ICJ Reports 1998, p. 275 at pp. 316-17, para. 93 (**Annex LA-25**).

128 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009) (**Annex 191**); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009) (**Annex 192**).

> At any rate, the extent of the waters that are "adjacent" to the relevant geological features are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention.
>
> On the Other "Relevant Waters Seabed and Subsoil" in the SCS
>
> **THIRD**, since the adjacent waters of the relevant geological features are definite and subject to legal and technical measurement, the claim as well by the People's Republic of China on the *"relevant waters as well as the seabed and subsoil thereof*" (as reflected in the so-called 9-dash line map attached to Notes Verbales CML/17/2009 dated 7 May 2009 and CML/18/2009 dated 7 May 2009) outside of the aforementioned relevant geological features in the KIG and their "adjacent waters" would have no basis under international law, specifically UNCLOS. With respect to these areas, sovereignty and jurisdiction or sovereign rights, as the case may be, necessarily appertain or belong to the appropriate coastal or archipelagic state – the Philippines – to which these bodies of waters as well as seabed and subsoil are appurtenant, either in the nature of Territorial Sea, or 200 M Exclusive Economic Zone (EEZ), or Continental Shelf (CS) in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.[129]

166. This Note prompted an immediate and comprehensive objection from China, which both rejected the Philippines' claim of sovereignty and set out certain comments on China's claimed maritime rights. China's Note of 14 April 2011 stated in relevant part that:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over relevant waters as well as the seabed and subsoil thereof. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence. The contents of the Note Verbale No 000228 of the Republic of Philippines are totally unacceptable to the Chinese Government.
>
> . . . Furthermore, under the legal principle of "*la terre domine la mer*", coastal states' Exclusive Economic Zone (EEZ) and Continental Shelf claims shall not infringe upon the territorial sovereignty of other states.
>
> Since 1930s, the Chinese Government has given publicity several times the geographical scope of China's Nansha Islands and the names of its components. China's Nansha Islands is therefore clearly defined. In addition, under the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992)* and the *Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998)*, China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.[130]

167. In the Tribunal's view, a dispute is readily apparent in the text and context of this exchange: from the map depicting a seemingly expansive claim to maritime entitlements, to the Philippines' argument that maritime entitlements are to be derived from "geological features" and based solely on the Convention, to China's invocation of "abundant historical and legal evidence" and rejection of the contents of the Philippines' Note as "totally unacceptable". The existence of a dispute over these issues is not diminished by the fact that China has not clarified the meaning of the nine-dash line or elaborated on its claim to historic rights.

---

129 Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 April 2011) (**Annex 200**).

130 Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 April 2011) (**Annex 201**).

168. Nor is the existence of a dispute concerning the interpretation and application of the Convention vitiated by the fact that China's claimed entitlements appear to be based on an understanding of historic rights existing independently of, and allegedly preserved by, the Convention. The Philippines' position, apparent both in its diplomatic correspondence and in its submissions in these proceedings, is that "UNCLOS supersedes and nullifies any 'historic rights' that may have existed prior to the Convention."[131] This is accordingly not a dispute about the existence of specific historic rights, but rather a dispute about historic rights in the framework of the Convention. A dispute concerning the interaction of the Convention with another instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention.

169. In the Tribunal's view, the Philippines' Submissions No. 3, 4, 6, and 7 reflect a dispute concerning the status of the maritime features and the source of maritime entitlements in the South China Sea. The Philippines has requested that the Tribunal determine the status—as an island, rock, low-tide elevation, or submerged feature—of nine maritime features, namely: Scarborough Shoal, Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef and McKennan Reef (including Hughes Reef), Johnson Reef, Cuarteron Reef and Fiery Cross Reef. In this instance, the Parties appear to have only rarely exchanged views concerning the status of specific individual features.[132] China has set out its view on the status of features in the Spratly Islands as a group, stating that "China's Nansha Islands [are] fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."[133] The Philippines has likewise made general claims, setting out its view that "the extent of the waters that are 'adjacent' to the relevant geological features are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention."[134] The Philippines has, however, also underlined its view that the features in the Spratly Islands are entitled to at most a 12 nautical mile territorial sea and that any claim to an exclusive economic zone or to a continental shelf in the South China Sea must emanate from one of the surrounding coastal or archipelagic States. For example, following an incident concerning survey operations in the area of Reed Bank, the Philippines stated:

---

131 Memorial, para. 4.96(2).

132 *See*, *e.g.*, Memorandum from Rodolfo C. Severino, Undersecretary, Department of Foreign Affairs of the Republic of the Philippines, to the President of the Republic of the Philippines (27 May 1997) (**Annex 25**).

133 Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011, p. 2 (14 April 2011) (**Annex 201**).

134 Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 April 2011) (**Annex 200**).

> SECOND, even while the Republic of the Philippines has sovereignty and jurisdiction over the [Kalayaan Island Group], the Reed Bank where [service contract] CSEC 101 is situated does not form part of the "adjacent waters," specifically the 12 M territorial waters of any relevant geological features in the [Kalayaan Island Group] either under customary international law or the United Nations Convention on the Law of the Sea (UNCLOS);
>
> THIRD, Reed Bank is not an island, a rock, or a low tide elevation. Rather, Reed Bank is a completely submerged bank that is part of the continental margin of Palawan. Accordingly, Reed Bank, which is about 85 M from the nearest coast of Palawan and about 595 M from the coast of Hainan, forms part of the 200 M continental shelf of the Philippine archipelago under UNCLOS;
>
> FOURTH, Article 56 and 77 of UNCLOS provides that the coastal or archipelagic State exercises sovereign rights over its 200 M Exclusive Economic Zone and 200 M Continental Shelf. As such, the Philippines exercises exclusive sovereign rights over the Reed Bank.[135]

170. The Tribunal considers that, viewed objectively, a dispute exists between the Parties concerning the maritime entitlements generated in the South China Sea. Such a dispute is not negated by the absence of granular exchanges with respect to each and every individual feature. Rather, the Tribunal must "distinguish between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute."[136] International law does not require a State to expound its legal arguments before a dispute can arise.

171. The Tribunal is conscious that it may emerge, in the course of the Tribunal's examination or in light of further communications from China, that the Parties are not, in fact, in dispute on the status of, or entitlements generated by, a particular maritime feature. In this respect, the Tribunal considers the situation akin to that faced by the International Court of Justice in *Land and Maritime Boundary (Cameroon v. Nigeria)*: even if "the exact scope of this dispute cannot be determined at present; a dispute nevertheless exists between the two Parties."[137] The Tribunal is entitled to deal with this dispute.

172. In the Tribunal's view, the Philippines' Submission No. 5 merely presents another aspect of the same general dispute between the Parties concerning the sources of maritime entitlements in the South China Sea. In Submission No. 5, however, the Philippines has asked not for a determination of the status of a particular feature, but for a declaration that Mischief Reef and Second Thomas Shoal as low-tide elevations "are part of the exclusive economic zone and continental shelf of the Philippines." In so doing, the Philippines has in fact presented a dispute concerning the status of every maritime feature claimed by China within 200 nautical miles of Mischief Reef and Second Thomas Shoal, at least to the extent of whether such features are

---

135 Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885 (4 April 2011) (**Annex 199**).

136 *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432 at p. 449, para. 32 (**Annex LA-23**).

137 *Land and Maritime Boundary (Cameroon v. Nigeria),* Preliminary Objections, Judgment, ICJ Reports 1998, p. 275 at pp. 316-17, para. 93 (**Annex LA-25**).

islands capable of generating an entitlement to an exclusive economic zone and to a continental shelf. Only if no such overlapping entitlement exists—and only if China is not entitled to claim rights in the South China Sea beyond those permitted by the Convention (the subject of the Philippines' Submissions No. 1 and 2)—would the Tribunal be able to grant the relief requested in Submission No. 5.

173. If the Philippines' Submissions No. 1 through 7 concern various aspects of the Parties' dispute over the sources and extent of maritime entitlements in the South China Sea, the Philippines' Submissions No. 8 through 14 concern a series of disputes regarding Chinese activities in the South China Sea. The incidents giving rise to these Submissions are well documented in the record of the Parties' diplomatic correspondence and the Tribunal concludes that disputes implicating provisions of the Convention exist concerning the Parties' respective petroleum and survey activities,[138] fishing (including both Chinese fishing activities and China's alleged interference with Philippine fisheries),[139] Chinese installations on Mischief Reef,[140] the actions of Chinese law enforcement vessels,[141] and the Philippines' military presence on Second Thomas Shoal.[142]

---

138 *See, e.g.*, Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (10)PG-047 (22 February 2010) (**Annex 195**); Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110526 (2 March 2011) (**Annex 198**); Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885 (4 April 2011) (**Annex 199**); Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (11)PG-202 (7 July 2011) (**Annex 202**).

139 See, for instance, the extensive correspondence collected at the Memorial, para. 3.40 n. 211.

140 See, *e.g.,* Government of the Republic of the Philippines and Government of the People's Republic of China, Philippine-China Bilateral Consultations: Summary of Proceedings (20-21 March 1995) (**Annex 175**); Government of the Republic of the Philippines and Government of the People's Republic of China, Joint Statement: Philippine-China Experts Group Meeting on Confidence Building Measures, (23 March 1995) (**Annex 178**); Department of Foreign Affairs of the Republic of the Philippines, Transcript of Proceedings: RP-PRC Bilateral Talks (9 August 1995) (**Annex 179**); Government of the Republic of the Philippines and Government of the People's Republic of China, Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue (10 August 1995) (**Annex 180**); Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 983577 (5 November 1998) (**Annex 185**).

141 *See, e.g.*, Note Verbale from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1222, p. 1 (30 April 2012) (**Annex 209**); Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239, p. 1, (25 May 2012) (**Annex 211**).

142 *See, e.g.*, Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1585 (9 May 2013) (**Annex 217**); Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1882, 10 June 2013 (**Annex 219**); Note Verbale from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 140711 (11 March 2014) (**Annex 221**); Memorandum from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (23 April 2013) (**Annex 93**).

174. Submissions No. 11 and 12(b), which concern allegations that China's activities in the South China Sea have caused environmental harm,[143] require particular consideration in light of their reference to the provisions of the Convention on Biological Diversity (the "**CBD**"). In its Memorial, the Philippines stated that "China's toleration of its fishermen's environmentally harmful activities at Scarborough Shoal and Second Thomas Shoal . . . constitute violations of its obligations under the CBD."[144] The Tribunal has given consideration to whether, for the purposes of its jurisdiction under Article 288, Submissions No. 11 and 12(b) constitute "disputes concerning the interpretation and application of this Convention," or disputes that concern the interpretation or application of the Convention on Biological Diversity.

175. The Tribunal is satisfied that the incidents alleged by the Philippines, in particular as to the use of dangerous substances such as dynamite or cyanide to extract fish, clams, or corals at and around Scarborough Shoal and Second Thomas Shoal,[145] could involve violations of obligations under Article 194 of the Convention, read in conjunction with Article 192 of the Convention, to take measures to prevent, reduce and control pollution of the marine environment.

176. The Tribunal also accepts the Philippines' assertion that, while it considers China's actions and failures to be inconsistent with the provisions of the CBD, the Philippines has not presented a claim arising under the CBD as such.[146] The Tribunal is satisfied that Article 293(1) of the Convention, together with Article 31(3) of the Vienna Convention on the Law of Treaties, enables it in principle to consider the relevant provisions of the CBD for the purposes of interpreting the content and standard of Articles 192 and 194 of the Convention.[147]

177. While the Tribunal acknowledges that the factual allegations made by the Philippines could potentially give rise to a dispute under both the Convention and the CBD, the Tribunal is not convinced that this necessarily excludes its jurisdiction to consider Submissions No. 11 and 12(b). It is not uncommon in international law that more than one treaty may bear upon a

---

143 *See, e.g.*, Memorandum from Assistant Secretary of the Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (23 March 1998) (**Annex 29**); Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 2000100 (14 January 2000) (**Annex 186**); Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-09-2001-S (17 March 2001) (**Annex 47**); Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-0894 (11 April 2012) (**Annex 205**).

144 Memorial, paras. 6.85-6.89.

145 Memorial, paras. 6.80, 6.89.

146 Supplemental Written Submission, para. 11.

147 Supplemental Written Submission, paras. 11.3-11.5; Jurisdictional Hearing Tr. (Day 2), p. 97; *see also* Memorial, para. 6.82, on the relevance of the CBD under Article 293(1) of the Convention.

particular dispute, and treaties often mirror each other in substantive content.[148] Moreover, as stated by ITLOS in *MOX Plant*, although different treaties "contain rights or obligations similar to or identical with the rights and obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention."[149]

178. The Tribunal is accordingly satisfied that disputes between the Parties concerning the interpretation and application of the Convention exist with respect to the matters raised by the Philippines in all of its Submissions in these proceedings.

* * *

[148] *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, Separate Opinion of Judge Wolfrum, ITLOS Reports 2001, p. 131.

[149] *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at p. 106, paras. 48-52 (**Annex LA-39**); *see also Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280 at p. 294, para. 55 (**Annex LA-37**).

# BOOKS, ARTICLES AND COMMENTARIES

# Annex 18

R. Ago, "Obligations *Erga Omnes* and the International Community", in J.H.H. Weiler *et al.* (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989) [extract]

# International Crimes of State

A Critical Analysis of the ILC's Draft Article 19 on State Responsibility

Edited by

Joseph H. H. Weiler  Antonio Cassese
Marina Spinedi


1989

Walter de Gruyter · Berlin · New York

**Annex 18**

*Library of Congress Cataloging-in-Publication Data*

International crimes of state : a critical analysis of the ILC's Draft Article 19 on State Responsibility / edited by Joseph H. H. Weiler, Antonio Cassese, Marina Spinedi.
XII, 368 p. 15,5 × 23 cm. — (Series A — Law = Droit : v. 10)
Based on the proceedings of the Conference on Crimes of State, organized by the European University Institute and the University of Florence, and held at the European University Institute.
Bibliography: p.
Includes index.
ISBN 0-89925-456-X (U.S.) : $90.00 (est.)
1. International offenses — Congresses. 2. Government liability (International law) — Congresses. I. Weiler, Joseph, 1951— . II. Cassese, Antonio. III. Spinedi, Marina. IV. Conference on Crimes of State (1984 : European University Institute) V. European University Institute. VI. Università di Firenze. VII. Series: Series A — Law : v. 10.
JX5415.I57 1988 88—3681
341.7'7 — dc19 CIP

*Deutsche Bibliothek Cataloguing in Publication Data*

**International crimes of state** : a crit. analysis of the ILC's draft art. 19 on state responsibility / ed. by Joseph H. H. Weiler ... — Berlin ; New York : de Gruyter, 1988
(European University Institute) : Ser. A, Law ; 10)
ISBN 3-11-011619-7
NE: Weiler, Joseph H. H. [Hrsg.]; Istituto Universitario Europeo <Fiesole>: European University Institute / A


Dust Cover Design: Rudolf Hübler, Berlin.
Setting and Printing: Arthur Collignon GmbH, Berlin.
Binding: Verlagsbuchbinderei Dieter Mikolai, Berlin.
Printed in Germany

national State crimes, all the more so since they — as must again be stressed — form part of *lex lata*.

At the bottom of this set of provisions, as has been pointed out, is the principle that establishes the obligation to "respect and secure respect" for humanitarian law. One may in fact ask, as Nino Cassese has just done, whether practice confirms the existence of such an obligation. Cassese denies it, basing himself on the rarity of interventions by third States in this area. Nevertheless, I am convinced that this undeniable rarity well shows that the States do not feel themselves bound by an actual obligation to act, but that practice is nevertheless enough to show the existence of a right to act, if not that of an obligation. In other words, a number of situations exists in which "third" States have "stuck their nose in", discreetly or publicly, in this type of matter to put pressure on the guilty State to cease its wrongful conduct, or to condemn its acts, whereby proving that they had a feeling of being entitled so to act. I do not have time to analyze this practice — which is extremely significant even if not very much elaborated — and I shall therefore confine myself to mentioning by way of an example that the breaches of humanitarian law in the Iran-Iraq conflict brought many reactions from States and UN agencies or other international organizations, stimulated by the appeals of the I. C. R. C., which had called on States to observe their obligations to "secure respect" for humanitarian law.

In conclusion, I think that the concept of international State crime is part of continuous process of development of international law, and does not represent — as some claim — a total overturning of its principles. Among the stages of this development are to be counted not only the system for aggression and for relational or institutional reactions to it mentioned by Abi-Saab and Graefrath, but also the highly significant precedent of international humanitarian law that establishes at least the right of all States to adopt, both jointly and severally, measures to react against serious breaches of the Geneva law by other States.

R. Ago:

**Obligations *Erga Omnes* and the International Community**

I should like to make an observation on the expression "obligations *erga omnes*". It comes from an *obiter dictum* which the International Court of Justice put into the *Barcelona Traction* decision. In my opinion, the expression is misleading. In reality, almost all obligations of customary international law are obligations *erga omnes* in the sense that they are towards each and all States. Clearly, for instance, the obligation to respect the immunity of a diplomat is one that each State owes to all other States. However, breach of such an international obligation sets up a purely bilateral

relationship between the State that committed the violation and the State that suffered it.

When *erga omnes* was used in the *obiter dictum* of the *Barcelona Traction* decision, the Court had something else in mind: obligations toward the international community. We then began to see the emergence of something which already exists to some extent today and we hope will go on growing; namely that the entity called the international community, distinct from its members who have rights and obligations, is able to enter into legal relationships with its members. That is a very great advance, and very probably notions like that of *jus cogens* or of international crimes will be able truly to take form only once that phenomenon has become a reality. I do not believe that one can say "if there is an internationally wrongful act a little more serious than another one, or than other ones, we shall call it a 'crime', and all States will legitimately be able to intervene". Not at all. It is not all States, but rather the international community that is envisaged as the possible bearer of a right of reaction to this particularly serious form of internationally wrongful act. Accordingly, the whole idea of obligations *erga omnes* is bound up not only with the fact of recognition of the existence of that community as such, but also with the fact of more advanced institutionalization of that community. The United Nations has made an attempt, although I shall not say they have fully succeeded, especially in this aspect, and I hope that this stage will be only provisional. But obviously, one must reach the point of conceiving the existence of certain institutions which, at a given moment, will be able to intervene, to decide the action to be taken, to judge and to do what is necessary, in order for the idea of more serious internationally wrongful acts to be able to become definitive.

I would add that there is a cautious tendency to say, "very well, as long as we have no well-established, institutionalized, international community as such, let us do nothing; let us stay with what there has been in the past". But what does that mean, "to stay in the past", "to stay within tradition"? It means that hitherto international law provided no other reaction to its breach than the possibility of asking for reparations. But that is not true. For as long as international law has existed, States have reacted in the most varied manner to internationally wrongful acts. What existed was the most utter anarchy. For in reality, if a State was strong, it reacted one way, and if weak in another, but the individualist reaction to breaches of international law was very often drastically punitive. In Spain, when it was the scene of a terrible civil war, a submarine of one of those well-known powers that ought not to have intervened but did so was sunk by one of the sides. How did the country of the nationality of that submarine react? With a thorough bombing of the town of Barcelona. Can one do other than see that as a punitive, repressive reaction? It was a typical example of a sanction applied by the individual State that considered

itself injured by the internationally wrongful act that had been committed. So the real progress in trying to work out this idea of international crimes (in the dual aspect of the content of certain norms by comparison with others, and the consequences to which it may lead in both the form of reaction and the institutions that may intervene) has been that of bringing a little order into the great disorder that previously existed. There was no desire to introduce anything new, but simply to say: "what can one do in the event of such a serious breach? Should we leave it up to the free play of interstate relationships to establish who is to react, what the reaction is to be, and by what means?" That was the intention, and that is why I believe it is extremely important for institutions to be established through which progress can be achieved in this area.

H. Bokor-Szego:

**Short Comments on the Concept of Crimes of States and Some Related Notions**

I wish to speak very briefly on the relationship between the notion of State crime and *jus cogens*. Professor Bennouna has rightly emphasized that the existence of imperative norms reflects the worldly conscience. I would add that the existence of these norms also reflects contemporary international reality. The whole edifice of international law is founded on the existence of these norms, which represent a higher interest of the community of States. Although not all breaches of imperative norms constitute international crimes of States, in the case of international crimes of States there is breach of an imperative norm.

As regards the relationship between the concept of obligations *erga omnes* and that of State crime, in the sense of Article 19 (2) of the draft, in the case of an international crime of a State there is breach of an international obligation essential for the safeguarding of fundamental interests of the international community. From the nature of such an obligation, it clearly follows that the culprit of such a crime is in breach of an obligation of *erga omnes* character.

Finally, as regards the relationship between the notions of international crimes of a State and crimes under international law, it is very clear from the wording of Article 19 (3) (c) that a State which does not meet its obligations in respect of the prevention and repression of such crimes itself becomes guilty of an international crime. I would add that I fully share Judge Ago's point of view that the conventions on *apartheid* and genocide have lacunae and that one cannot really imagine how persons acting privately could commit genocide. Or how could a policy of *apartheid* be carried out on a private basis?

# Annex 19

J. Crawford, *State Responsibility: The General Part* (2013) [extract]

# State Responsibility

## The General Part

James Crawford

CAMBRIDGE UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Published in the United States of America by Cambridge University Press, New York

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9780521822664



First published 2013

Printed in the United Kingdom by CPI Group Ltd, Croydon CR0 4YY

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloguing-in-Publication data*
Crawford, James, 1948–
State responsibility : the general part / James Crawford SC, FBA, BA, LLB (Adel), DPhil (Oxon), LLD (Cantab), Whewell Professor of International Law, University of Cambridge, Former Member of the International Law Commission.
pages cm. – (Cambridge studies in international and comparative law: 100)
ISBN 978-0-521-82266-4 (Hardback)
1. International obligations. 2. Government liability (International law) I. Title.
KZ4080.C73 2013
341.26–dc23

2012049381

ISBN 978-0-521-82266-4 Hardback

Additional resources for this publication at www.cambridge.org/crawford

rights and obligations outside the system as a whole; and, within the system equally, such rights and obligations exist only so far as there is actual provision for them ... Hence, although ... the members of the League had an interest in seeing that the obligations entailed by the mandates system were respected, this was an interest which, according to the very nature of the system itself, they could exercise only through the appropriate League organs, and not individually.[14]

According to the Court's conclusion in 1966, reached by the casting vote of the president, Sir Percy Spender, the default rule under general international law was not to recognize individual standing of states for the protection of a 'sacred trust' or common interest; enforcement could only take place through a collective form of invocation within the framework of an international organization.[15]

## 11.2 The International Law Commission's compromise

Although there is no complete agreement on the enumeration of communitarian norms and although the law in this area is still developing, the principle that in certain cases any state had standing to protest against breaches of certain fundamental norms, and if necessary to institute proceedings to vindicate its interest as a member of the international community, has long been accepted.[16]

The idea was reflected, in the Draft Articles on State Responsibility adopted by the ILC on first reading in 1996, in two unwieldy provisions, Draft Article 19 (dealing with 'international crimes of States') and Draft Article 40 (defining the 'injured State' to include, in the case of state crimes and in certain other cases, all states). On second reading these were radically changed. Draft Article 19 disappeared, being replaced by Articles 40 and 41 (dealing with consequences of serious breaches of peremptory norms). Draft Article 40 was transfigured, emerging as Articles 42 and 48 (distinguishing between the 'injured State' and other states entitled to invoke responsibility even though not individually injured by the breach). Much more attention has been paid in the literature to the debate over 'international crimes of State'.[17] This

[14] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa)*, Second Phase, ICJ Rep. 1966 p. 6, 35.
[15] Judges Tanaka (ibid., 250) and Jessup (ibid., 325) appended strong dissents on this point.
[16] E.g. Jennings and Watts (eds.), 1 (1992), 5.
[17] See Crawford, in Crawford, Pellet and Olleson (2010) 405; Ollivier, in Crawford, Pellet and Olleson (2010) 703. On 'crimes of state' see also the Excursus to this chapter.

chapter focuses on the other half of the equation, ARSIWA Article 48 and the accompanying notion of invocation of responsibility in the public interest.[18] Article 48 reads as follows:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
   (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
   (b) The obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
   (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
   (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under Articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

The significance of this provision is that – read with Article 42 – it breaks the link between substantive rights and process which previously restricted the development of the law, giving rise to such implausibilities as Draft Article 40. In the *Reparation for Injuries* case, the Court said that 'only the party to whom an international obligation is due can bring a claim in respect of its breach'.[19] The problem with this proposition – unimpeachable in the context of bilateral norms, and indeed of the factual situation underlying that opinion – is at least twofold. First, there is no collective entity with capacity to act, yet it seems extravagant to treat obligations, for example in the environmental or human rights sphere, as owed individually to every state. The collective action problem in international law is not solved by prematurely turning collective obligations into bundles of bilateral obligations, in the manner of the early-modern attempts at multilateral treaty-making.[20] Second, even though every state may have legitimate concerns at some breach of an international

[18] See Simma, (1994) 250 Hague *Receuil* 217. See also Crawford, in Andenas (ed.), 2 *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (2000) 23.
[19] *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949 p. 149, 181–2.
[20] See Marek, in Diez et al. (1980) 17.

obligation, particular states may be particularly injured or affected by it, and their priority when it comes to reactions should be recognized.

In short, rather than reducing everything to the level of individually held substantive rights, Article 48 recognizes that certain communitarian norms are owed either to the other states parties (sometimes referred to as obligations *erga omnes partes*) or to 'the international community as a whole' (obligations *erga omnes*).[21] As a consequence, in the case of obligations *erga omnes partes* every state party to the treaty in question has a procedural right, that is, *locus standi* to invoke its application on behalf and for the benefit of all the parties; and in the case of obligations *erga omnes*, every state has standing to invoke it on behalf of 'the international community as a whole'. This provision 'in general achieves a certain balance, *de lege ferenda*, between the collective interest in compliance with basic community values and the countervailing interest in not encouraging the proliferation of disputes'.[22]

The movement from bilateralism to a community-oriented approach in the work of the ILC can be traced back to Special Rapporteur Fitzmaurice's Third Report on the Law of Treaties.[23] He proposed a distinction between 'interdependent' and 'integral' treaty obligations, affecting the capacity of states to derogate from them by a subsequent treaty and entailing their responsibility for doing so.[24] Fitzmaurice gave as examples of interdependent obligations those whose violation by one party prejudices the treaty regime between all, for example in the context of disarmament or of fishing moratoria.[25] Integral obligations on the other hand were defined as 'self-existent, absolute and inherent for each party and not dependent on a corresponding performance by the others';[26] examples included obligations under the Genocide Convention, human rights conventions, the 1949 Geneva Conventions, ILO conventions and treaties providing for a certain regime in a given area such as that at the entrance of the Baltic Sea.[27]

[21] See, in the context of international criminal responsibility, Rome Statute for the International Criminal Court, 17 July 1998, 2187 UNTS 2, Art. 5(1); cf. ILC Draft Statute for the International Criminal Court, ILC Ybk 1994/II(2), 26–7, Preamble.

[22] Crawford, Fourth Report, 11.

[23] Fitzmaurice, Third Report, ILC Ybk 1958/II, 27–8, 44ff (Art. 19 and commentary).

[24] Ibid.

[25] Fitzmaurice, Second Report, ILC Ybk 1957/II, 54 n. 73; Fitzmaurice, Third Report, ILC Ybk 1958/II, 44.

[26] Fitzmaurice, Second Report, ILC Ybk 1958/II, 28.

[27] Treaty of Copenhagen, 14 March 1857, 116 CTS 357; Convention of Washington, 11 April 1857, 116 CTS 465. See further Fitzmaurice, Second Report, ILC Ybk 1957/II, 54; Fitzmaurice, Third Report, ILC Ybk 1958/II, 44.

After re-examining in the light of government comments whether these types of obligation should constitute a special case of treaty conflict, the ILC, noting the varying importance of these types of obligation from ones concerning technical matters to those relating to the maintenance of peace, nuclear tests and human rights, decided to 'leave the question as one of international responsibility'.[28] Indeed, these considerations did in due course influence the ILC's definitions of obligations *erga omnes partes* and *erga omnes* in Article 48(1)(a) and (b) respectively, as is made clear in the commentaries.

Article 48 was not adopted without criticism. Some governments expressed concern as to its breadth and potential for abuse, for 'opening the flood gates' of litigation;[29] while some scholars[30] complained that it is too weak compared with its predecessor, reflecting the notion of 'State crime'. Subsequent practice gives no indication that these fears were substantiated. States do not seem inclined to bring international legal proceedings without good reason. If they choose to do so nevertheless, acting (or purporting to act) in the common interest of the international community, they should not be hindered by procedural technicalities. Better to give states standing in court to protect what they perceive as global values than to leave them only with non-judicial means of dispute settlement, whether in the guise of countermeasures or under the rubric of 'responsibility to protect'.

For its part the ILC endorsed in ARSIWA Article 48 the principle of standing to invoke *erga omnes* obligations, relying on the *Barcelona Traction* dictum, and in 2011 adopted an analogous provision in Article 49 of the Draft Articles on Responsibility of International Organizations (DARIO).[31] In line with the *Wall* opinion,[32] this provides for standing of both states and international organizations to invoke the responsibility of an international organization for breaches of communitarian norms. However, it qualifies the standing of international organizations by imposing the requirement that 'the obligation breached is owed to the international community as a whole and safeguarding the interest of the

[28] ILC Ybk 1966/II, 217.

[29] Crawford, Fourth Report, 11 for the comments of Japan and France. See also Crawford, Third Report, 27–8, nn. 142–5 referring to the comments of Italy (ILC Ybk 1998/II(1), 104); Venezuela (UN Doc. A/C.6/54/SR.23, §54); Austria (ILC Ybk 1998/II(1), 138); and the United States (ILC Ybk 1998/II(1), 142).

[30] Cassese (2005), 269–71.

[31] ILC Report 2011, UN Doc. A/66/10, 52.

[32] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004 p. 136.

international community underlying the obligation breached is included among the functions of the international organization invoking responsibility'.[33] This functional restriction flows logically from the more limited 'measure of international personality [of international organizations] and the capacity to operate upon the international plane'.[34] A further, practical impediment to the application of DARIO Article 49 is the lack of any judicial forum before which international organizations could bring claims or have their responsibility invoked.[35]

Some light is shed on the status of these provisions by the Court's treatment of Belgium's standing in *Belgium* v. *Senegal*. The case concerned allegations of crimes against humanity and torture made against Hissène Habré, a former president of Chad, who had been granted asylum in Senegal. In 2005 Belgium sought his extradition relying in particular on the 1984 Torture Convention. After four years, Habré not having been tried or extradited during that time, in 2009 Belgium commenced proceedings seeking his extradition. Senegal argued that the claim was inadmissible in that none of the torture victims had Belgian nationality at the time of the alleged offences. Belgium relied, inter alia, on ARSIWA Article 42(b)(i), claiming a 'special interest' by reason of the Belgian proceedings and extradition request. The Court declined to decide the case on that ground, holding instead that the relevant provisions of the Torture Convention were obligations *erga omnes partes* 'in the sense that each State party has an interest in compliance with them in any given case'.[36] It concluded:

> The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.[37]

[33] ILC Report 2011, 64, Art. 49(3). [34] *Reparation for Injuries*, ICJ Rep. 1949 p. 174, 179.
[35] Given an appropriate arbitration agreement, such proceedings could be governed by the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States of 1 July 1996, available at www.pca-cpa.org/showpage.asp?pag_id=1188.
[36] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, 20 July 2012, §68.
[37] Ibid., §69. See also ibid., §23 (Judge Owada), §§21–3 (Judge Skotnikov); and cf. ibid., §§11–18 (Judge Xue, diss.).

Although the Court did not refer to Article 48, the decision is in fact firmly in line with ARSIWA Article 48(1)(a). But the Court's use of the term *erga omnes partes* is significant, suggesting that it may be more parsimonious with *erga omnes* obligations in future.[38]

## 11.3 Invocation of communitarian norms

In its 2004 *Wall* Advisory Opinion, the International Court drew broad legal consequences from the internationally wrongful acts flowing from Israel's breaches of communitarian norms as regards other states. In particular, it noted:

> The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law ...
>
> Given the character and importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall ... They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention ... are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.
>
> Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion.[39]

It may be observed that the consequences referred to transcend traditional state responsibility and demonstrate certain communitarian characteristics. While respect for the right of self-determination is defined as an *erga omnes* obligation, the humanitarian norms under the Geneva Conventions are characterized as *erga omnes partes*. The scope of the consequences is correspondingly different – those flowing from the breach of self-determination relate not only to all states but also to the

[38] The Court held that the dispute was exclusively one under the Torture Convention and not under general international law: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, 20 July 2012, §55.

[39] *Wall*, ICJ Rep. 2004 p. 136, 199–200.

# Annex 20

P. van Dijk, *Judicial Review of Governmental Action and the Requirement of an Interest to Sue* (1980) [extract]

# JUDICIAL REVIEW OF GOVERMENTAL ACTION AND THE REQUIREMENT OF AN INTEREST TO SUE

*A Comparative Study on the Requirement of an Interest to Sue in National and International Law*

P. van Dijk

Professor of the Law of International Organizations
Europa Instituut, Utrecht University

With a foreword by

J.H.W. Verzijl

emeritus professor of international law

Status Juris: 1978

SIJTHOFF & NOORDHOFF 1980
Alphen aan den Rijn, The Netherlands
Rockville, Maryland USA
T.M.C. Asser Institute, The Hague

Interuniversitair Instituut voor Internationaal Recht T.M.C. Asser Instituut
20-22 Alexanderstraat, The Hague.

The T.M.C. Asser Institute is an interuniversity institute founded in 1965 by the eight Dutch universities offering courses in international law. The Institute is responsible for the promotion of education and research in international law, particularly by carrying out documentation and research programmes, in the fields covered by the three departments. It participates in both the editing and publishing of the Netherlands International Law Review and the Netherlands Yearbook of International law.

ISBN 90 286 0120 1

Library of Congress Catalog Card Number: 80-51740



Printed in The Netherlands.

f) *Other examples of actions in the public interest*

Of the examples of an action in the public interest dealt with above, the system of minorities protection and the mandate and trusteeship systems have been discussed because of their great historical importance as a source of inspiration for procedures for international legal protection instituted since then or to be instituted in the future. The ILO procedure also fulfils this function, but is in addition of great actual value because it is applicable to all the ILO conventions, of which there are about 150[446]; all of these conventions may form the subject-matter of an action in the public interest under the conditions discussed above.[447]

Furthermore a number of (other) human rights conventions contain a jurisdictional clause formulated in similar or at least equally broad terms as the clauses in the legal instruments discussed above. Mention may be made of Article 8 of the Slavery Convention of 1926[448], Article 4 of the Convention of 1933 for the Suppression of Traffic in Women of Full Age[449], Article IX of the Convention of 1948 on the Prevention and Punishment of the Crime of Genocide[450], Article 22 of the Convention of 1950 for the Suppression of Traffic in Persons and Exploitation of Prostitution of Others[451], Article 38 of the Convention of 1951 relating to the Status of Refugees[452], Article V of the Convention of 1953 on the International Right of Correction[453], Article IX of the Convention of 1953 on the Political Rights of Women[454], Article 34 of the Convention of 1954 relating to the Status of Stateless Persons[455], Article 10 of the Supplementary Convention of 1956 on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery[456], Article 10 of the Convention of

446. See International Labour Organisation, *Conventions and Recommendations 1919-1966* (International Labour Office 1966), with supplements. See also the publication in the ILO Official Bulletin.

447. See supra pp. 451-454.

448. 60 L.N.T.S. p. 253 at pp. 265-267. See also the Annex to the 1953 Protocol to amend the Convention, 182 U.N.T.S. p. 51 at p. 62.

449. 150 L.N.T.S. p. 431 at p. 439. See also the Annex to the 1947 Protocol to amend the Convention, 53 U.N.T.S. p. 13 at p. 30.

450. 78 U.N.T.S. p. 277 at p. 282.

451. 96 U.N.T.S. p. 271 at p. 284.

452. 189 U.N.T.S. p. 137 at p. 178. See N. Robinson, *Convention Relating to the Status of Refugees; Its History, Significance and Contents* (1952), p. 36.

453. 435 U.N.T.S. p. 191 at p. 198.

454. 193 U.N.T.S. p. 135 at p. 140.

455. 360 U.N.T.S. p. 117 at p. 154.

456. 266 U.N.T.S. p. 3 at p. 44.

1957 on the Nationality of Married Women[457], Article 14 of the Convention of 1961 on the Reduction of Statelessness[458], and Article 22 of the Convention of 1965 for the Elimination of all Forms of Racial Discrimination.[459]

Some conventions with a humanitarian character contain the provision that disputes about the interpretation and application of the convention shall be submitted to the Court "at the request of the parties to the dispute".[460] In such cases therefore a request cannot be addressed to the Court by each of the contracting parties on its own initiative, but only with the consent of the opposite party on the basis of a special agreement ad hoc. Such a clause is of little importance, since even without that clause the parties might jointly apply to the Court.[461] In fact, if supervision by the Court is to function as an effective method of international legal protection, it is imperative that this supervision can be brought into effect "at the request of any one of the parties to the dispute", as provided for in the clauses mentioned in the preceding paragraph. Such a provision, however, could not be agreed upon for all humanitarian conventions, and has moreover been excluded by a number of States by making a reservation when ratifying those conventions in which it has been provided for.[462]

Can the provisions in the conventions mentioned in the two preceding paragraphs also be said to grant to the contracting parties the right to bring an action before the Court without their having to advance an individual interest? Such an individual interest would not seem to follow here from the mere capacity of the State as a contracting party, since these are conventions which have not been concluded primarily in the interest of the individual

457. 309 U.N.T.S. p. 65 at p. 72.

458. Official Records of the General Assembly, Ninth Session, Supplement No. 21 (A/2890), p. 49; UN Yearbook on Human Rights 1961, pp. 427-430. A/Conf. 9/15, 1961.

459. 660 U.N.T.S. p. 195 at pp. 236-238. See N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (1970), p. 104.

460. Such a clause is contained, for instance, in Art 8 of the Convention of 1960 against discrimination in education, 429 U.N.T.S. p. 93 at p. 102, and in Art 8 of the Convention of 1962 on consent to marriage, minimum age for marriage, and the registration of marriages, 521 U.N.T.S. p. 231 at p. 236.

461. Gross therefore rightly speaks of "A total emasculation of jurisdictional clauses"; L. Gross, "The International Court of Justice: Considerations on Requirements for Enhancing its Rôle in the International Legal Order", 65 A.J.I.L. 1971, pp. 253-326 at p. 265.

462. Thus e.g., with respect to Art 22 of the Convention for the Elimination of All Forms of Racial Discrimination. For this, see Lerner, *The U.N. Convention*, pp. 104 and 109-112.

States, but in the public interest for the protection of certain rights of individuals and groups of individuals. These conventions do not therefore really create legal relations among the contracting parties themselves, but establish common obligations with a collective guarantee for their observance, such as is also the case in the minorities treaties, mandates, trusteeship agreements, and ILO conventions discussed above. In this case the collective guarantee is expressed not only in the non-judicial procedures sometimes likewise provided for[463], but also in the formulation of the jurisdictional clause by virtue of which a State may represent the public interest through an individual action.

None of these conventions has so far formed the subject-matter of contentious proceedings before the Court, so that the Court has not yet had an opportunity to decide on the character of the right of action to which the contracting States are entitled. There is, however, a clear indication in the advisory opinion of the Court on the Genocide Convention. This contains the following passage: "The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. ... In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of these high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the convention provide, by virtue of the common will of the parties, *the foundation and measure of all its provisions*."[464] It would seem that this characterization cannot lead to any other conclusion but that in the Court's view a jurisdictional clause included in such a convention confers on the contracting States a right of action in the public interest for the maintenance of the legal principles laid down in the convention.[465]

463. Art VIII of the Genocide Convention; Arts 8-14 of the Convention for the Elimination of All Forms of Racial Discrimination.

464. *Reservations to the Convention on Genocide*, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 15 at p. 23 (emphasis added).

465. See also De Visscher, *Aspects récents*, p. 71: "Au défaut d'un organe commun ayant titre et qualité pour les défendre en justice, de tels intérêts [généraux] peuvent ne trouver de protection efficace que dans le recours individuel. L'intérêt reste la mesure de l'action, mais à la notion d'un intérêt strictement individualisé se superpose celle d'un intérêt fonctionnel, à la revendication d'un droit subjectif celle d'un contrôle objectif qui ouvre aux Etats membres d'une collectivité la défense des fins supérieures d'un ordre juridique auquel ils participent."

Apart from the conventions for the protection of human rights in the narrow sense, many other conventions have been concluded in which the emphasis is on the protection of a public interest of the international community, or at least of a common interest of the contracting States, rather than on the rights and interests of each individual State.[466] These conventions may concern problems such as the maintenance of world peace, the economic world order, world health care, protection of the environment, protection of cultural values, and similar general interests. Some of these conventions too contain a jurisdictional clause under which any dispute concerning the interpretation or application of the treaty provisions may be submitted to the Court by any of the contracting States. This is so, for instance, in four conventions and a protocol on narcotic drugs[467], Article 15 of the Convention of 1923 for the Suppression of the Circulation of and Traffic in Obscene Publications[468], Article IX of the Agreement of 1949 for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific, and Cultural Character[469], Article 18 of the Convention of 1950 on Declarations of Death of Missing Persons[470], Article 13 of the International Convention of 1954 for the Prevention of Pollution of the Sea by Oil[471], Article 33 of the Berne Convention for the Protection of Literary and Artistic Works of 1886, as revised in 1967[472], Article 12 of the Convention of 1970 for the Suppression of Unlawful Seizure of Aircraft[473], and Article 14 of the Convention of 1971 to Discourage Acts of Violence against Civil Aviation.[474]

In some of these cases the actions provided for overlap to some

466. See the Note of H.L. in 16 B.Y.I.L. 1935, pp. 164-166 at p. 165: "States conclude multilateral treaties not only in order to secure for themselves concrete mutual advantages in the form of a tangible give and take, but also in order to protect general interests of an economic, political or humanitarian nature, by means of obligations the uniformity and general observance of which are of the essence of the agreement. The interdependence of international relations frequently results in states having a vital interest in the maintenance of certain rules and principles, although a modification or breach of these principles in any particular case is not likely to affect adversely some of them at all or at least not in the same degree."

467. See: 12 U.N.T.S. p. 179 at pp. 200, 204-206, and 208; 456 U.N.T.S. p. 56 at p. 88; 520 U.N.T.S. p. 151 at p. 262.

468. 46 U.N.T.S. p. 201 at pp. 210-212.

469. 197 U.N.T.S. p. 3 at p. 10.

470. 119 U.N.T.S. p. 99 at p. 136.

471. 327 U.N.T.S. p. 3 at pp. 12-14.

472. 828 U.N.T.S. p. 221 at pp. 275-277.

473. 10 I.L.M. 1971, p. 133 at p. 135.

474. 10 I.L.M. 1971, p. 1151 at p. 1155.

extent those discussed supra in sub-sections 4.1 and 4.2. Whilst in the category of the conventions on human rights discussed above the contracting States are primarily concerned to protect non-nationals, the protection of the State's own interests and those of its nationals does occupy an important place in the conventions in discussion here. The essential difference from the actions discussed in the above-mentioned sub-sections, however, remains that the applicant State may advance such an individual interest, but need not do so. The mere interest in the protection of the general values regulated in the convention forms a sufficient basis for the interest to sue on the part of the contracting States.

Not all conventions for the protection of human rights or of other public interests of the international community, however, contain a jurisdictional clause as described above. Some of them do not even assign any function at all to the Court.[475] In the case of a dispute concerning such a convention or concerning a general humanitarian rule not contained in a convention, can a State institute proceedings against another State on the ground of a general title of jurisdiction without having to claim the violation or imminent violation of a right of its own or a right of one or more of its nationals? Usually the various conventions on the settlement of disputes and the declarations accepting the compulsory jurisdiction of the Court relate quite generally to all international legal disputes, while particular categories may be expressly excluded. That in general there is no restriction that the dispute must concern an alleged infringement of the legal position of the applicant State or its nationals[476], however, does not necessarily imply that no such restriction is applicable. The relative provisions and declarations only bear on the jurisdiction of the Court. General condi-

475. The most important examples are the UN Covenants of 1966 on Civil and Political Rights, 6 I.L.M. 1967, pp. 368-385, and on Economic, Social, and Cultural Rights, ibid. pp. 360-368; Official Records of the General Assembly, Twenty-first Session, Supplement No. 16 (A/6316), p. 49. For a comprehensive report of the discussions about whether a jurisdictional clause was or was not to be included, see L.B. Sohn, "A Short History of United Nations Documents on Human Rights", in: *The United Nations and Human Rights*, (Eighteenth Report of the Commission to Study the Organization of Peace 1968), pp. 39-186 at pp. 120-168. As to the second category of conventions in the public interest, a jurisdictional clause relating to the Court is lacking, for instance, in the Conventions on the Deep Sea and Cosmic Space, while Art XI of the Antarctic Convention requires the consent of both parties for a reference to the Court.

476. See, however, e.g., Art 17 of the Revised General Act for the Pacific Settlement of International Disputes, which contains a reference to "All disputes with regard to which the parties are in conflict as to their respective rights", 71 U.N.T.S. p. 101 at p. 110.

tions for admissibility are usually assumed as a matter of course. One of these conditions in international procedural law is that in principle a State may stand for only its own rights or those of its nationals, unless otherwise provided for. It is true that every State has an interest in the observance of the conv· ntion to which it is a party[477], and generally, in the maintenance of the international legal order of which it forms part.[478] Moreov :r, where international rules for the protection of fundamental interests of the international community, including basic human rights, are concerned, these create international obligations *erga omnes*.[479] However, all this does not confer upon the States a general right to institute an action in the public interest. For the latter they are dependent upon the consent beforehand or ad hoc of the State against which the action is directed or upon a regulation within the framework of an international organization.[480] The very resistance of many States to the broad formulation of jurisdictional clauses in multilateral conventions and the reservations made in that respect do not permit for the *lex lata* any other conclusion but that the right to bring an action in the public interest does not ensue from general international law; such a right must have been agreed upon—expressly or impliedly—between the States concerned in a treaty or on an ad hoc basis.

---

477. See Golsong, 110 R.C.A.D.I. 1963-III, p. 23: "Generally speaking, the observance of international treaty obligations is subject to joint control by the Contracting Parties, for it is in the interest of each of these States that the others should also respect their obligations."

478. See Ph.C. Jessup, *Modern Law of Nations* (1948), p. 2: "Breaches of the law must no longer be considered the concern of only the state directly and primarily affected."

479. Thus also the Court in the *Barcelona Traction* case, I.C.J. Reports 1970, p. 3 at p. 32. See also the individual opinion of Judge Petrén in the *Nuclear Tests* cases, I.C.J. Reports 1974, p. 303.

480. The Court therefore held in this same *Barcelona Traction* case, ibid. p. 47—disregarding, however, all those above-mentioned humanitarian conventions in which an action in the public interest has indeed been granted to the State in the jurisdictional clause included in the said conventions—that "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality." In the *Nuclear Tests* cases the Court unfortunately did not consider the question of an action in the public interest. See in particular the dissenting opinion of Judge De Castro, I.C.J. Reports 1974, pp. 386-387, and the joint dissenting opinion, ibid. p. 521.

## 5. Summary

Since according to the law as it stands only States may appear as parties before the International Court of Justice in contentious proceedings and the Court can exercise jurisdiction over a State only with its consent given in general or ad hoc, the possibilities of review of governmental action by the Court are very limited. The interest to sue required on the part of the applicant State does not really lead to an examination of the subjective interests of the State in the requested review, but relates mainly to a number of specific, more or less objective requirements for the admissibility of the claim.

The issue of the required interest to sue raises hardly any problems when the State complains that its own rights have been directly affected. If the existence of the rights invoked appears plausible to the Court, the interest of the State in a judgment of the Court on the merits is presumed, unless the requested decision can no longer have any legal effect, or unless the application has been prematurely brought or constitutes an abuse of the right of action on the part of the applicant State.

In the case of diplomatic protection where the proceedings instituted by the State concern the treatment of one or more of its nationals by the defendant State, the former's interest to sue is presumed on the ground of the link of nationality between the allegedly injured private persons and the applicant State. Here, too, it is required that the purpose of the contentious proceedings can (still/already) be realized and the claim does not constitute an abuse of the right of action. Further there is the special requirement that the allegedly injured private person has previously exhausted the remedies available within the legal system of the defendant State. The rule introduced by the Court, to the effect that a nationality can be invoked against a State only if it forms the legal expression of a genuine link which connects the private person concerned more closely with the applicant State than with any other State, does not find sufficient support in international law and practice beyond the case of multiple nationality; the only general test is that of the legality according to national and international law of the acquisition of nationality. Finally, a State may also bring an action in order to protect its nationals as shareholders in a foreign company, on the condition that the company itself does not enjoy international legal protection, or at any rate that such legal protection is blocked, if not *de jure*, at least *de facto*.

# Annex 21

P.N. Drost, *The Crime of State*, vol. II, *Genocide: United Nations legislation on international criminal law* (1959) [extract]

# THE CRIME OF STATE

## PENAL PROTECTION FOR FUNDAMENTAL FREEDOMS OF PERSONS AND PEOPLES

*by*

PIETER N. DROST
Dr Jur. (Utrecht), LL.B. (London)
Diplômé de l'Académie de Droit International de La Haye

## BOOK II

A. W. SYTHOFF – LEYDEN
1959

international legal order is threatened by persons acting in a political capacity or with political motives within a national legal order, such acts must be considered as common crimes under international law. The inadmissibility of the plea of act of state under international law means the negation of the political character of international crime.

International criminal law purports to extend protection against "official" crime committed by agents of state. State crime takes place in the course of politics. Public crime perpetrated under governmental authority by persons obeying domestic law and orders is political crime. International criminal law is directed against national political crime. The legal protection against international crime and criminals should not be hindered or countervailed by a national policy of covering political acts and shielding politicians.

International crimes must be considered political crimes in most respects and precisely because of this political character they are to be regarded as common crimes in connection with extradition. Crimes under national law may in certain circumstances be considered as as political offences for which the perpetrators may expect political shelter abroad. When international crimes are committed whether or not the authors occupy a political position and independently of the fact that the acts have been performed with political motives or for a political purpose, then such acts should not be considered abroad as political offences but must be dealt with as common crimes for the purpose of extradition by other states. Criminals under international law should not be granted political asylum in other countries but should be surrendered and treated as common criminals. Neither act nor author punishable under international law is to be considered as political under municipal law. Apart from the national character of the perpetrators which may militate against his surrender to a foreign state by the state of his nationality, international criminals should fall under the principle of *aut dedere aut punire*. Generally speaking, international crimes must be extraditable offences.

### *127. Senseless Article VIII*

When substituting any Member State for "any Contracting Party" in the text the redundancy of the present Article immediately becomes clear. Of course, any Member "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III". The possibility under the Charter is important; the provision in the Convention of no consequence.

Political action of United Nations organs for the repression of genocide in the territory of any Member State is independent of the territorial scope of the present Convention in so far as such criminal matters are not considered to belong to the reserved domain of any state not bound by the Convention. Even without the sterile stipula-

tion of Article VIII the argument of domestic jurisdiction is of no avail to any Contracting Party who by adhering to the Convention as such agreed on the international character of the crime and the international concern of its repression.

*128. Preponderant Provision of Article IX*

In view of the text of Article 36 sub 2 of the Statute of the International Court of Justice the words of the present Article IX "including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III" are superfluous. The jurisdiction of the Court comprises the determination of the civil liability of states for breach of international obligations. The Court is competent to establish a breach of treaty and to decide on the nature and extent of the reparation to be made for such breach.

The recognition of the compulsory jurisdiction of the Court in all disputes between Contracting Parties arising under the Convention constitutes an important means of international judicial implementation of a treaty on substantive criminal law by way of the international civil responsibility of states. Undoubtedly the Article contains a provision of cardinal significance but it does not contribute to international and individual criminal justice.

*129. Worthless Articles XIV and XV*

It shocks the juristic conscience to realize that under the positive law of the Convention genocide is conceived an international crime for an indefinite and uncertain period yet delimited in definite and certain terms of time. The legislators established genocide as a crime under the law of nations on a temporary basis. Under the Convention genocide is considered a crime for the time being. Admittedly, this notion does not refer to the moral nature of the act but, legally speaking, this "old crime under a new name" may possibly disappear from the international statute book.

International treaty law is dependent for its development on the voluntary acceptance by independent states. A convention on criminal law needs the adherence and support of a certain number of states in order to constitute a positive contribution to general international law. Before its reception within the positive law of nations the Convention on Genocide had to be ratified by 20 states. From the moment of this initial introduction into positive international law by the original Ratifying Powers which thereby acknowledge the criminal character of genocide for the purpose of its international legal repression at least among the Participating Powers, it is difficult legally to consider genocide anything else but as having been recognized and established as a crime for always in the future.

If the idea is correct that criminal law constitutes an indispensable element of international integration by imposing individual penal obligations on the person whatever his public or private position, then any speculation on the possibility of abrogation of an once accepted

# Annex 22

P. Dupuy and C. Hoss, "Article 34", in A. Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice: A Commentary* (third edn., 2019) [extract]

# The Statute of the International Court of Justice

*A Commentary*

Third Edition

Edited by

ANDREAS ZIMMERMANN CHRISTIAN J. TAMS

in collaboration with

KARIN OELLERS-FRAHM
CHRISTIAN TOMUSCHAT

Assistant Editors

FELIX BOOS ELENI METHYMAKI

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries



First Edition published in 2006
Second Edition published in 2012
Third Edition published in 2019

Impression: 1



Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2018956536

ISBN 978–0–19–881489–4

Printed in Italy by
L.E.G.O. S.p.A.

In so doing, the Committee has not wished to go so far as to admit, as certain delegations appear disposed to do so, that public international organizations may become parties to a case before the Court. Admitting only that such organizations might, to the extent indicated, furnish information, it has laid down a rule which certain persons have considered as being one of procedure rather than of competence. The Committee, by placing it nevertheless in Article 34, has intended to emphasise its importance.[37]

**8** The third paragraph of Article 34 as it is worded now was added later, at the San Francisco Conference by Committee IV/1. The initiative for this addition came from the British delegation. It was referred to by the Committee as follows:

The first Committee approved the draft prepared by the Committee of Jurists which added to this article as it appeared in the old Statute a provision for the Court's requesting and receiving information from public international organizations. A further paragraph was added by the first Committee to provide a procedure for implementing the previous provisions by which, when the Court is called upon to construe the constituent instrument of an organization or a convention adopted under it, the organization will be notified and will receive copies of the documents of the written proceedings. Article 26 of the old Statute had included a somewhat similar provision limited to labour cases.[38]

**9** Judge Hudson, who took part in both the Washington Committee of Jurists and in Committee IV/1 of the San Francisco Conference made an interesting comment on these initiatives. He indicated that:

there was some disposition at Washington to permit international organisations to appear as parties before the Court; a suggestion to this end had been advanced by the International Labour Office in 1944.

The new second paragraph is an enlargement of a provision in the final paragraph of Article 26 of the original Statute which applied only to the International Labour Office. The new third paragraph, proposed by the British delegation at San Francisco, is in line with insistence of the International Labour Office that its *locus standi* under the original Article 26 be in some degree maintained.[39]

## II. Practice of the Court

**10** Article 34, para. 1 is a provision which the Court will implicitly or explicitly[40] examine in each of the cases before it, since it is an issue of institutional *ordre public*.[41]

Whenever the PCIJ was faced with an application from entities other than a State, it adopted the practice, still followed today by the ICJ, to reply by a letter signed by the Registrar referring the applicant entity to Article 34 of the Statute.[42]

The number of communications emanating from non-state entities or private individuals has considerably increased over the seventy years of existence of the ICJ. Nowadays

[37] UNCIO XIV, pp. 139, 839.

[38] *Cf.* Shaw, *Rosenne's Law and Practice*, vol. II, p. 646.

[39] Hudson, *AJIL* (1946), p. 30.

[40] *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008) pp. 412, 430, where the Court felt the need to state that it was not 'disputed nor disputable … that both Parties [Croatia and Serbia] satisfied the condition laid down in Article 34 of the Statute' since both were States for purposes of Article 34, paragraph 1.

[41] Kolb, *ICJ*, pp. 273–6, going so far as to state that it is a rule of peremptory nature.

[42] In the years of the PCIJ, the Court would publish a summary of some of the communications received in the PCIJ's Yearbook PCIJ Series E under the heading 'Applications from private persons', see *e.g.*, PCIJ, Series E No. 15, pp. 58–60; for some references *cf.* Kolb, *ICJ*, p. 267, fn. 381.

thousands of such communications are received every year.[43] In most cases, the communications will receive a standard reply along the lines of the formula chosen by the PCIJ. In few, but nonetheless important cases, the Court will have to proceed to examine the identification of the applicant entity. For instance, the Court can be faced with individuals representing a new government after a *coup d'état*; this was the case after the constitutional crisis in Honduras in 2009, when the legitimacy of the new government was contested by the overthrown government. From the perspective of the old government of Mr José Manuel Zelaya Rosales, the application filed by the new Honduran government against Brazil was a private initiative because the new government allegedly had no representative powers. In accepting the Application initiating proceedings against Brazil, the Court made an implicit finding as to the recognition of the new government and its power to file an Application on behalf of the Republic of Honduras.[44]

Conversely, the 'application' for revision of the Judgment of 26 February 2007 in the *Bosnian Genocide* case filed by the former Agent of Bosnia and Herzegovina, Mr Softić, was not accepted to constitute a valid application instituting proceedings in light of an apparent uncertainly surrounding the intentions of Bosnia and Herzegovina regarding a request for revision. The Minister for Foreign Affairs and a Member of the Presidency had previously informed the Registrar of the Court that the Presidency had not adopted any decision regarding the institution of new proceedings before the Court, or regarding the appointment of Mr Softić or anybody else to act as Agent of Bosnia and Herzegovina.[45]

Article 34, paras. 2 and 3 received no application during the early years of the United Nations, although some cases, like the *Corfu Channel* case[46] or the *U.S. Nationals in Morocco* case[47] could have permitted it.[48] It was only with regard to the *Aerial Incident of 27 July 1955* case[49] that the Council of the ICAO was, in its 33rd session in March 1958, seised by the organization's Secretary-General. He drew attention to the pending case which he thought might be of relevance for the legal aspects of the safety of civil aircraft flying nearby international frontiers and being able inadvertently to cross them.[50] The Council agreed that the Secretariat could supply information to the Court on request.[51] In the *South West Africa* case, the Director-General of the International Labour Office

[43] Kolb, *ICJ*, p. 267, fn. 381. The latest version of the *ICJ Yearbook* with revised structure and content does not contain any numbers for private applications but it is to be assumed that these communications are still received in high numbers by the Registry. It only contains a general paragraph stating that it is 'not possible for the Registry to give legal advice or to enter into correspondence with private persons concerning any matter at issue between them and the authorities of their own or another country', *cf. ICJ Yearbook* (2014–2015), p. 47. Under the heading of 'jurisdiction *ratione personae*', it is simply noted that 'International Organizations, other collectivities and private persons are … not entitled to institute proceedings before the International Court of Justice.' *Ibid*., p. 52.

[44] ICJ Press Release No. 2009/30 of 29 October 2009. The case was removed from the Court's List by Order of 12 May 2010 (*Certain Questions concerning Diplomatic Relations*, Order of 12 May 2010, ICJ Reports (2010), p. 303) at the request of Honduras before any further procedural steps were taken. See ICJ Press Release No. 2010/15 of 19 May 2010.

[45] Statement by H.E. Judge Ronny Abraham, President of the International Court of Justice, ICJ Press Release No. 2017/12 of 9 March 2017.

[46] *Corfu Channel*, Preliminary Objections, ICJ Reports (1948), pp. 15 *et seq*.

[47] *U.S. Nationals in Morocco*, Judgment, ICJ Reports (1952), pp. 176 *et seq*.

[48] *Cf.* Shaw, *Rosenne's Law and Practice*, vol. II, p. 648.

[49] *Aerial Incident of 27 July 1955* (Israel v. Bulgaria), Preliminary Objections, ICJ Reports (1959), pp. 127 *et seq*.

[50] *Cf.* Shaw, *Rosenne's Law and Practice*, vol. II, pp. 648–9.

[51] ICAO Doc. C-WP/2609 (1958), para. 5. For PCIJ practice, *cf.* Fischer, *Les rapports entre l'Organisation Internationale du Travail et la Cour permanente de Justice internationale* (1946).

# Annex 23

G. Gaja, "The Role of the United Nations in preventing and Suppressing Genocide", in P. Gaeta (ed.), *The UN Genocide Convention – A Commentary* (2009) [extract]

# The UN Genocide Convention— A Commentary

*Edited by*

PAOLA GAETA

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford ox2 6dp
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto
With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam
Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York



First published 2009



British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data

Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India
Printed in Great Britain
on acid-free paper by
CPI Antony Rowe

ISBN 978–0–19–957021–8

1 3 5 7 9 10 8 6 4 2

the Security Council responded to certain acts of genocide, but also what has been done so far could not be described as an adequate way of preventing and repressing those acts.

## 2. The Legal Significance of Article VIII of the Genocide Convention

During the preparatory work of the Convention in the Sixth Committee of the General Assembly, the preliminary question was raised whether the Convention could add to the powers given to UN organs by the Charter. This is a more general issue that has arisen in several other contexts: for instance, with regard to the attribution to the Security Council by the Statute of the International Criminal Court (ICC) of the power to refer to the ICC prosecutor a situation in which crimes 'appear to have been committed' (Article 13(b)) or the power to defer investigation or prosecution (Article 16). Those powers cannot be easily related to the UN Charter, although both provisions consider that the Security Council would then act 'under Chapter VII of the Charter'.[1]

In the Sixth Committee the delegate of Poland, Mr. Lachs, maintained that a treaty like the forthcoming Genocide Convention could grant additional powers to the Security Council:

> Since the Security Council had been set up, a number of international agreements had added considerably to the powers of the Council. Under the Peace Treaty with Italy, for example, the Security Council had been given extensive powers in the Free Territory of Trieste.[2]

This view was criticized by the delegate of the US, Mr. Maktos, according to whom:

> the convention could not include provisions involving amendments to the Charter. If the joint USSR and French amendment were to have the effect of enlarging the powers of the Security Council, that would involve amending the Charter and if it were not to have such an effect, it was unnecessary to mention the already existing powers of the Security Council.[3]

The delegate of Greece, Mr. Spiropoulos:

> admitted that there was some precedent for conferring new powers on the Security Council through international conventions, but stated that, in such cases, the Security Council would have to be asked whether it wished to accept the new functions.[4]

[1] The view that neither provision adds to the powers of the Security Council was expressed by L. Condorelli and S. Villalpando, 'Referral and Deferral by the Security Council', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Vol. I, 627, at 629 and 646.

[2] UN Doc. A/C.6/SR.101. [3] *Ibid.* [4] *Ibid.*

It would be difficult to consider that the procedure for amending the UN Charter set forth in Article 108 of the Charter could be circumvented by a treaty to which only some member States were parties. Even the acceptance of new powers on the part of the Security Council would not be sufficient. However, a treaty could do something short of increasing or restricting the powers of the Security Council: it could affect the exercise of those powers in relation to the states parties to the treaty, especially when that exercise depends on the consent of the states concerned. A treaty, like the Genocide Convention, could provide such consent.

Article VIII as finally adopted does not lend itself to the interpretation that it intends to extend or restrict the powers of the Security Council or other UN organs. It simply provides:

> Any Contracting party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

In its first order on provisional measures in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice (ICJ) noted that the applicant state had invoked Article VIII of the Genocide Convention and had called upon the Court 'to act immediately and effectively to do whatever it can to prevent and suppress' the acts of genocide complained of or threatened. The Court considered that:

> Article VIII, even assuming it to be applicable to the Court as one of the 'competent organs of the United Nations', appears not to confer on it any functions or competence additional to those provided for in its Statute.[5]

Similar conclusions could be reached with regard to the 'functions or competence' of any of the other UN organs. Moreover, the fact that, according to Article VIII, 'action' is to be taken by UN organs 'under the Charter' confirms that no addition is intended to the existing powers of those organs.

Article VIII refers to 'any Contracting Party' without making a distinction between states that are members of the UN and those that are not. However, this cannot imply that, when a UN organ is called upon according to Article VIII, the status of member of the UN becomes irrelevant for the UN organ.[6]

[5] Provisional Measures Order, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, 8 April 1993 ('1993 First Provisional Measures Order'), at 23, § 47.

[6] According to J.L. Kunz, 'The United Nations Convention on Genocide', 43 *American Journal of Int'l Law* (1949) 738, at 746, when a non-member state invokes Article VIII the 'United Nations are

In so far as the conditions for the exercise of the powers are concerned, Article VIII could be construed as implying that all the contracting states accept that a matter referred to under Article VIII of the Convention does not pertain to domestic jurisdiction, and therefore as removing the barrier raised by Article 2(7) of the UN Charter.[7] This possible effect of Article VIII is no longer significant, since the commission of acts of genocide has clearly become a matter of international concern and cannot be viewed as included in the domestic jurisdiction of a state, whether or not it is a party to the Convention.[8]

Given the fact that Article VIII of the Genocide Convention does not add to the powers of UN organs nor affects their exercise, the provision retains only an expository character.[9] When discussing Article VIII in the text that had been submitted by the *ad hoc* Committee,[10] the Sixth Committee had first come to the conclusion that the provision was superfluous.[11] On the basis of a joint amendment by Belgium and the UK,[12] the Sixth Committee had decided to delete it, albeit by a small majority.[13] However, the discussion on the provision continued, in view of the presence of some other amendments, although these did not lead to the adoption of any alternative text. The provision was reinstated only at a later meeting, on the basis of an Australian amendment to

called to intervene'. For a similar view, see N. Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs, 1960) 90. However, the condition set out in Article 35 (2) of the UN Charter would seem to apply.

[7] Thus H.H. Jescheck, 'Genocide', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam etc.: North Holland/Elsevier, 1995), Vol. II, 541, at 542.

[8] B. Conforti, *The Law and Practice of the United Nations* (2nd edn., The Hague/London/Boston: Kluwer Law International, 2000), at 143–4 and 174. The reference to Article 2 (7) of the Charter that appears in the second preambular paragraph of Security Council Resolution 688 (1991) may relate to the part of the resolution which concerns the opening of a dialogue between the Iraqi Government and the Kurdish minority. See G. Gaja, 'Genocidio dei curdi e dominio riservato', 74 *Rivista di Diritto Internazionale* (1991) 95.

[9] It could not thus be correctly described as 'senseless', as was done by P.N. Drost, *Genocide. United Nations Legislation on International Criminal Law* (Leyden: Sijthoff, 1959), at 133.

[10] 'Report of the *ad hoc* Committee on Genocide. 5 April to 10 May 1948', UN Doc. E/794. The text of draft Article VIII ran as follows: '1. A party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide. 2. A party to this Convention may bring to the attention of any competent organ of the United Nations any case of violation of this Convention.'

[11] This view was expressed by the delegates of the UK, Mr. Fitzmaurice (UN Doc. A/C.6/SR.94 and SR.101), of Belgium, Mr. Kaeckenbeck (A/C.6/SR.94), of the Netherlands, Mr. de Beus (*ibid.*), of France, Mr. Chaumont (A/C.6/SR.101), of the US, Mr. Matkos (*ibid.*), of Ecuador, Mr. Correa (A/C.6/SR.102), of Luxembourg, Mr. Pescatore (*ibid.*), of India, Mr. Sundaram (*ibid.*), and of Canada, Mr. Feaver (A/C.6/SR.105).

[12] UN Doc. A/C.6/258. The joint amendment was based on two amendments that had been respectively presented by the delegations of Belgium (A/C.6/217) and the UK (A/C.6/236).

[13] By 21 votes to 18, with 1 abstention (UN Doc. A/C.6/SR.101).

a subsequent article.[14] The amended text was quite similar to the one that had been previously deleted, but was adopted by a large majority.[15]

The delegate of the UK, Mr. Fitzmaurice, explained that:

> although his delegation considered it unnecessary to include in the convention provisions conferring on the organs of the United Nations powers which they already possessed under the terms of the Charter, he had voted in favour of the Australian amendment in order that it might be clear, beyond any doubt, that the joint amendment of Belgium and the United Kingdom [...] did not imply that recourse might be had only to the International Court of Justice, to the exclusion of the other competent organs of the United Nations.[16]

The Drafting Committee then reinstated as Article VIII the text that had been adopted on the basis of the Australian amendment.[17]

Although certain proposals had been made for considering in Article VIII only the role of the Security Council and the General Assembly, the final text refers to all the 'competent organs'. This is meant to include also the Trusteeship Council, the Economic and Social Council and the Secretariat.

## 3. Genocide as a Threat to Peace within the Meaning of Article 39 of the UN Charter

It is clear that action by the Security Council under Chapter VII was going to be in most cases the only effective way for the UN to contribute to the prevention and repression of acts of genocide. Also in this respect, the Genocide Convention does not per se affect the exercise of powers under the Charter.

During the preparatory work the delegate of the Soviet Union, Mr. Morozov, had stated: 'Any act of genocide was always a threat to international peace and security and as such should be dealt with under Chapters VI and VII of the Charter.'[18] A French amendment envisaged calling 'the attention of the Security Council to the cases of genocide and of other violations of the present Convention likely to constitute a threat to international peace and security'.[19]

[14] UN Doc. A/C.6/265. The text of the amendment ran as follows: 'With regard to the prevention and suppression of acts of genocide, a Party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter of the United Nations.'

[15] By 29 votes to 4, with 5 abstentions (UN Doc. A/C.6/SR.105).

[16] UN Doc. A/C.6/SR.105.

[17] UN Doc. A/C.6/289 & Corr.1.

[18] UN Doc. A/C.6/SR.101.

[19] UN Doc. A/C.6/259. The amendment was illustrated by the delegate of France, Mr. Chaumont (A/C.6/SR.101).

# Annex 24

V. Gowlland-Debbas and M. Forteau, "Article 7, UN Charter", in A. Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice: A Commentary* (third edn., 2019) [extract]

# The Statute of the International Court of Justice

*A Commentary*

Third Edition

Edited by

ANDREAS ZIMMERMANN CHRISTIAN J. TAMS

in collaboration with

KARIN OELLERS-FRAHM
CHRISTIAN TOMUSCHAT

Assistant Editors

FELIX BOOS ELENI METHYMAKI

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries



First Edition published in 2006
Second Edition published in 2012
Third Edition published in 2019

Impression: 1



Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2018956536

ISBN 978–0–19–881489–4

Printed in Italy by
L.E.G.O. S.p.A.

# Article 7 UN Charter

**1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.**

**2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.**

**1. Il est créé comme organes principaux de l'Organisation des Nations Unies: une Assemblée générale, un Conseil de sécurité, un Conseil économique et social, un Conseil de tutelle, une Cour internationale de Justice et un Secrétariat.**

**2. Les organes subsidiaires qui se révéleraient nécessaires pourront être créés conformément à la présente Charte.**

### 1. *The Absence of a Hierarchy between the ICJ and other Principal organs: The Principle of Equality*

There is no hierarchy between principal organs, at least not between the ICJ and the Security Council and the General Assembly; the relationship between them is based on the principle of equality.[41] But equality between the principal organs does not preclude their interdependence, nor scrutiny of their activities by other principal organs. While the Court has not considered itself bound by the provisions of Article 15, para. 2 UN Charter which states that 'The General Assembly shall receive and consider reports from the other organs of the United Nations', it began to submit such reports as of 1968. But there is no supervision by the political organs as such of the Court's activities as a judicial organ. The Assembly has merely taken note of these reports without any substantive debate and Member States have only made very broad statements following the annual presentation to the UN General Assembly by the ICJ President of the activities of the Court; this has been considered as 'an appropriately restrained procedure in view of the independent judicial character of the Court'.[42] 22

Moreover, the Court is dependent on the principal organs of the United Nations for many aspects of its functioning. Thus, the Security Council and the General Assembly both participate in the election of members of the Court (Articles 4–14 of the Statute), in amending the Statute (Article 69 of the Statute) and, as seen earlier, in determining the conditions by which non-UN Member States can become parties to the Statute (Article 93, para. 2 UN Charter) or have access to the Court (Article 35 of the Statute in regard to the Security Council).

The General Assembly authorizes UN organs, other than the Security Council, and Specialized Agencies to request advisory opinions (Article 96, para. 2 UN Charter). As seen previously, it has to approve the budget of the Court which is part of the expenses of the Organization. The Security Council has been assigned the competence to enforce the judgments of the ICJ (Article 94, para. 2 UN Charter). In addition, the Secretary-General has been assigned formal functions under the Statute in connection to the election of the judges (Articles 5, paras. 1, 7, and 14) and the notification and transmission of documents relating to: resignation and dismissal of judges (Articles 13, para. 4, and 18, para. 2), declarations under Article 36, para. 2 (Article 36, para. 4), cases brought before the Court (Articles 40, para. 3, and 41, para. 2), advisory opinions (Article 67), and amendments to the Statute (Article 70).[43] 23

[41] *Cf. Competence of the General Assembly*, Advisory Opinion, ICJ Reports (1950), pp. 4, 8, and Diss. Op. Azevedo, *ibid.*, pp. 22, 26, pointing out that the Security Council, as a principal organ, was placed at the same level as the other deliberative organs.

[42] Schwebel, in *Le droit international au service de la paix, de la justice et du développement*, pp. 431, 442. *Cf.* also Schwarzenberger, *International Law as applied by International Courts and Tribunals*, vol. III, *International Constitutional Law* (1976), pp. 347–53 and vol. IV, *International Judicial Law* (1986), pp. 420–1. In recent years, the President of the ICJ has also addressed the General Assembly on regular occasions (in particular the Sixth Committee), although, as Rosenne points out, this is not a formality but an exercise in public relations (Shaw, *Rosenne's Law and Practice*, vol. I, pp. 113–4) (the speeches of the Presidents of the ICJ since 1994 can be found on the Court's website at <http://www.icj-cij.org>).

[43] Whereas the Secretary-General of the League refrained from submitting written or oral statements, the Secretary-General of the United Nations now acts as a *de facto* party to advisory proceedings, at least when a claim is directed against the United Nations. *Cf.* Schwarzenberger, *supra*, fn. 42, *International Constitutional Law*, pp. 347 *et seq*. and *International Judicial Law*, p. 416. The Secretary-General is also required in advisory proceedings to transmit to the Court 'all documents likely to throw light upon the question' submitted to the ICJ (Art. 65, para. 2 of the ICJ Statute). This assistance provided for by the Secretariat can prove problematic when the UN Secretariat or Secretary-General has also been entrusted with political functions as regards the

# Annex 25

R. Kolb, "General Principles of Procedural Law", in A. Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice: A Commentary* (third edn., 2019) [extract]

# The Statute of the International Court of Justice

*A Commentary*

Third Edition

Edited by

ANDREAS ZIMMERMANN CHRISTIAN J. TAMS

in collaboration with

KARIN OELLERS-FRAHM
CHRISTIAN TOMUSCHAT

Assistant Editors

FELIX BOOS ELENI METHYMAKI

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries



First Edition published in 2006
Second Edition published in 2012
Third Edition published in 2019

Impression: 1



Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2018956536

ISBN 978–0–19–881489–4

Printed in Italy by
L.E.G.O. S.p.A.

abuse of procedure, estoppel, and the maxim *nemo commodum capere potest de sua propria injuria*. All of these principles rest upon the general principle of good faith.

## II. The General Duty of Loyalty between the Parties (Principle of Good Faith)

**48** The most fundamental principle of substantive law applicable to judicial proceedings in general is the proposition that, by engaging in proceedings before an international tribunal, the parties enter into a legal relationship characterized by mutual trust and confidence. Thus, the parties are bound by a general commitment of loyalty among themselves and towards the Court.[155] This duty flows from the principle of good faith recognized in general international law and stipulated also in Article 2, para. 2 UN Charter as a general duty of the Member States.[156] The principle of good faith has a series of 'concretizations' in the field of procedural law.[157]

First, it requires the parties not to undertake any action which could frustrate or substantially adversely affect the proper functioning of the procedure chosen, the point being to protect the object and purpose of the proceedings. As has already been said, the proceedings are also characterized by their adversarial nature and the opposing claims of the parties. Thus, it is perfectly open to a party to further its own interests even at the expense of the other party. But this selfishness has some limits. It cannot disregard requirements of a proper functioning of the procedure as such.[158] Thus, a party may not deliberately present false or forged pieces of evidence.[159] It may not impede the production of evidence by the other party by having recourse to pressure or any other equivalent device either. Second, the principle forms the basis of the more specific rule on the prohibition of abuse of procedure.[160] Third, it is the basis for the application of procedural estoppel or of the maxim *nemo commodum capere potest de sua propria turpitudine*. The last two propositions can be applied to evidentiary issues. To that extent, they can be said to govern the proceedings of international tribunals. It is proposed to focus here on the three aspects of abuse of procedure, estoppel, and *nemo commodum*.

### *1. The Prohibition of Abuse of Procedure*

**49** Abuse of procedure is a special application of the prohibition of abuse of rights, which is a general principle applicable in international law as well as in municipal law.[161] It consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established, especially for a fraudulent, procrastinatory, or frivolous purpose, for the purpose of causing harm or obtaining an illegitimate advantage, for the purpose of reducing or removing the effectiveness of some other available process, or for purposes of pure propaganda. To these situations, action with a malevolent intent or with bad faith can be added. In a synthetic definition, it can be said that abuse of procedure consists in the use of procedural instruments and

[155] *Cf.* Sereni (1955), p. 1714.
[156] On this provision, see Kolb, in Simma, *UN Charter*, Art. 2, para. 2, *passim.*
[157] *Cf.* the detailed analysis in Kolb (2000), pp. 579 *et seq*.
[158] *Cf. ibid.*, pp. 587 *et seq.* (in the context of negotiation).
[159] See Reisman/Skinner, *Fraudulent Evidence before Public International Tribunals* (2014).
[160] *Cf. infra*, MN 49 *et seq*.
[161] Kolb (2000), pp. 429 *et seq*. There is no room here to venture into a description of the various contents of the principle.

entitlements with a fraudulent, malevolent, dilatory, vexatious, or frivolous intent, with the aim to harm another or to secure an undue advantage to oneself, with the intent to deprive the proceedings (or some other related proceedings) of their proper object and purpose or outcome, or with the intent to use the proceedings for aims alien to the ones for which the procedural rights at stake have been granted (*e.g.*, pure propaganda).[162] The existence of such an abuse is not easily to be assumed; it must be rigorously proven. The concept of abuse of procedure cannot be caught completely in the abstract, since it can relate to a variety of different situations.

The case law of the ICJ is replete with instances where the principle of abuse of pro- 50
cedure has been invoked. The Court, however, has never found the conditions for an application of the principle to be fulfilled. But it did not reject the concept as such; it merely affirmed that its application was not warranted in the cases under consideration. In each case, its analysis seems to have been correct.

The contentious cases in which the principle has so far been invoked are the following:[163]

- *Ambatielos* (claim of abuse of procedure by excessive delay in presentation of a claim);[164]
- *Right of Passage over Indian Territory* (claim of abuse of procedure by application in too short a time span after deposit of an optional declaration, 'surprise attack');[165]
- *Barcelona Traction* (claim of abuse of procedure by a new application with the same arguments after having discontinued a case);[166]
- *Nicaragua* (claim of futility and political propaganda intent by request of provisional measures);[167]
- *Border and Transborder Armed Actions* (claim of abuse of procedure by institution of judicial proceedings in parallel with the Contadora Process; claim of abuse by the political inspiration of the request and by its artificiality);[168]
- *Arbitral Award of 31 July 1989* (claim of abuse of procedure by invoking a declaration of the president of the arbitral tribunal in order to cast doubt on the validity of the award);[169]
- *Certain Phosphate Lands in Nauru* (claim of abuse of procedure to the extent that Nauru demanded from the respondent an attitude which it did not itself display);[170]
- *Application of the Genocide Convention* (claim of abuse of procedure by the request for provisional measures due to political motives and repetition of the request);[171]

[162] Gestri, 'Considerazioni sulla teoria dell'abuso del diritto alla luce della prassi internazionale', *RDI* 77 (1994), pp. 27 *et seq.*, 43 *et seq.* As has been said by the Australian High Court in the *Csr Ltd. v. Cigna Insurance Australia Ltd.* case, *ILR* 118 (1997), pp. 409–10: 'The counterpart of a court's power to prevent its process being abused is its power to protect the integrity of those processes once set in motion.'

[163] *Cf. ibid.*, pp. 640 *et seq.*

[164] *Ambatielos*, Merits, ICJ Reports (1953), pp. 10, 23.

[165] *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 146–7.

[166] *Barcelona Traction,* Preliminary Objection, ICJ Reports (1964), pp. 6, 24–5.

[167] *Nicaragua*, Provisional Measures, ICJ Reports (1984), pp. 169, 178–9, paras. 21–5.

[168] *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 91–2, paras. 51 *et seq.*, pp. 105–6, para. 94.

[169] *Arbitral Award of 31 July 1989*, Judgment, ICJ Reports (1991), pp. 53, 63, paras. 26–7.

[170] *Nauru*, Judgment, ICJ Reports (1992), pp. 240, 255, paras. 37–8.

[171] *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 325, 336, para. 19; *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 622, para. 46.

- *Aerial Incident of 10 August 1999* (claim of abuse of procedure by invocation of a reservation to an optional declaration whose content was purportedly directed only against Pakistan, thus being discriminatory);[172]
- *Avena* (claim of abuse of procedure by delay in the presentation of the request).[173]

The conclusion to be drawn from these precedents is not that abuse of procedure is an unrecognized principle, for, as it will be shown in the following paragraphs, it has been applied by other international tribunals. It is rather that the threshold for admitting an abuse is quite high, and possibly exacting. Moreover, in most ICJ cases, the claims that there had been an abuse of procedure were made in a rather unconvincing way, as an appendix to other, more compelling arguments.

To the contrary, rules on abuse of procedure have developed with particular strength in certain branches of international law. Thus, in human rights law, petitions and communications are declared inadmissible when there is an abuse of procedure. This has been the case, for example, under the mandate system of the League of Nations and under the UN trusteeship system,[174] and later under ancient Article 27, para. 2, of the ECHR, now Article 35, para. 3, ECHR (1950),[175] Rule 96, cl. c, of the Rules of Procedure of the Human Rights Committee under the CCPR (2012),[176] Article 56, para. 3 of the African Charter on Human Rights (requests written in disparaging or insulting language),[177] or Article 22, para. 2, of the Convention against Torture

[172] *Aerial Incident of 10 August 1999*, Judgment, ICJ Reports (2000), pp. 12, 30, para. 40.

[173] *Avena*, Judgment, ICJ Reports (2004), pp. 12, 37–8, para. 44.

[174] Schwelb, 'The Abuse of the Right of Petition', *Revue des droits de l'homme* 3 (1970), pp. 313 *et seq.*, 324-6.

[175] Convention on the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5, Art. 35, para. 3: 'The Court shall declare inadmissible any individual application … with it considers … an abuse of the right of application.' See *e.g.*, Appanah, 'À la recherche posthume de l'intention du requérant: l'identification délicate de la requête abusive au sens de la Convention', *Revue trimestrielle des droits de l'homme* 26 (2015), pp. 1053 *et seq.*; Jungwiert, 'Sur la requête abusive devant la Cour européenne des droits de l'homme', in *Essays in Honor of J. P. Costa* (2011), pp. 329 *et seq.*; Flauss, 'L'abus de droit dans le cadre de la Convention européenne des droits de l'homme', *Revue universelle des droits de l'homme* 4 (1992), pp. 461 *et seq.*; Hottelier, 'La requête abusive au sens de l'article 27, 2 de la Convention européenne des droits de l'homme', *Revue trimestrielle des droits de l'homme* 2 (1991), pp. 301 *et seq.*; Spielmann/Spielmann, 'La notion d'abus des droits de l'homme à la lumière de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales', in *L'abus de droit et les concepts équivalents: Principe et applications actuelles* (Council of Europe, ed., 1990), pp. 60 *et seq.*; Palmieri, 'L'abuso del diritto di ricorso individuale dinanzi alla Commissione europea dei diritti dell'uomo', in *Essays in Honor of G. Sperduti* (1984), pp. 623 *et seq.*; Monconduit, 'L'abus du droit de recours individuel devant la Commission européenne des droits de l'homme', *AFDI* 17 (1971), pp. 347 *et seq.* The interpretation is restrictive: *Aydin v. Turkey*, Appl. No 23178/94, ECHR 1997-VI, paras. 59–61; *Andronicou and Constantinou v. Cypru*, Appl. No 25052/94, ECHR 1997-VI, paras. 163–5; *Assenov and Others v. Bulgaria*, Appl. No. 24760/94, ECHR 1998-VIII, paras. 87–9; *Buscarini and Others v. San Marino*, Appl. No. 24645/94, ECHR 1999-I, pp. 605, 613, paras. 20–1. In the more recent case law, see *Saba v. Italy*, Appl. No. 36629/10, 1 July 2014, paras. 49 *et seq.; Flores Quiros v. Spain*, Appl. No. 75183/10, 19 July 2016, para. 21; *Bagdonavicius e.a. v. Russia*, Appl. No. 19841/06, 11 October 2016, para. 64; *Kanaginis v. Greece*, Appl. No 27662/09, 27 October 2016, paras. 23–4.

[176] Rules of Procedure of the Human Rights Committee, UN Doc CCPR/C/3/Rev.10 (2012), Art. 96, cl. c; Gestri, *supra*, fn. 162, p. 31; Cassese, 'The Admissibility of Communications to the United Nations on Human Rights Violations', *Revue des droits de l'homme* 5 (1972), pp. 375 *et seq.* See *K. L. v. Denmark* (1980), in: *Human Rights Committee, Selected Decisions under Optional Protocol* (1985) (CCPR/C/OP/I, p. 26).

[177] African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217, Art. 56, para. 3; Palmieri, 'Aperçu du règlement intérieur de la Commission africaine des droits de l'homme et des peuples', in *La Charte africaine des droits de l'homme et des peuples* (Palmieri, ed., 1990), p. 128.

(1984).[178] There is manifestly a non-negligible danger that private individuals will abuse human rights remedies for frivolous or quixotic causes; and hence the screening under this heading has been established. International administrative law and the case law of the administrative tribunals is replete with references to misuse of authority, including on the procedural plane.[179]

The same is true for investment arbitration.[180] Thus, a claim may be declared inadmissible if certain facts have been forged and falsified, since this is a breach of good faith (*i.e.*, a sort of clean hands doctrine).[181] By the same token, if an investment was acquired in violation of municipal law or in bad faith, it is not to be considered a 'protected investment' and the arbitration clause may not be applied. This leads to a lack of jurisdiction of the arbitral tribunal.[182] The same occurs when no real investment was made at all; or if the investment was purchased with the sole aim of commencing arbitral procedures.[183] Further, the principle of abuse of procedure applies to the cases where the investor restructures his assets—*e.g.*, by the creation of new corporations, by acquiring a new corporate nationality which allows the application of a BIT[184]—with the sole aim to get access to arbitration. If a purportedly new claim is substantially the same as a previous one and is resubmitted under some circumventing legal construction (*e.g.*, transfer of the claim to another entity), it will be dismissed under the rule on abuse of procedure.[185] The rule on abuse of procedure plays further a residual role for a series of other situations, *e.g.*, the plea that proceedings are misused solely for the purpose to put political pressure on the State so as to have it abandon some criminal proceedings.[186]

Finally, within the law of the sea, Article 294 UNCLOS[187] gives the tribunal chosen by the parties to decide their dispute the power to scrutinize whether the claimant's request related to the coastal State's exercise of its sovereign rights under Article 297 constitutes an abuse of procedure and to declare it inadmissible *in limine litis*.[188]

[178] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 112, Art. 22, para. 2; Gestri, *supra*, fn. 162, p. 32–3.

[179] See Kolb, *Good Faith in International Law* (2017), pp. 169 et seq. See already Amerasinghe, 'Détournement de pouvoir in International Administrative Law', *ZaöRV* 44 (1984), pp. 439 *et seq*.

[180] De Brabandère, '"Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims', *JIDS* 3 (2012), pp. 609 *et seq*.

[181] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras. 226 *et seq*.

[182] *Ibid*., para. 208.

[183] *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, para. 174 and *Cementownia 'Nowa Huta' S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 13 September 2009, para. 159. False statements were also the issue here.

[184] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 106 *et seq.; TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008, paras. 134 *et seq.*, with the piercing of the corporate veil; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, paras. 2.99 *et seq*.

[185] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, paras. 49-50.

[186] The plea was finally withdrawn during the pleadings: *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, paras. 111 *et seq*.

[187] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397, Art. 294.

[188] Ferrara, 'Article 298: Preliminary Proceedings', in *United Nations Convention on the Law of the Sea: A Commentary* (Proelss, ed., 2017), pp. 1896–9; Nordquist (ed.), *United Nations Convention on the Law of the*

51 An interesting situation possibly giving rise to an abuse of procedure would present itself if a State that had lost a case before the ICJ were to move to the political organs of the United Nations in order to evade or to delay the execution of the judgment. Since the competences of political and judicial organs are different, there is no reason to conclude automatically that there has been an abuse of procedure if a political organ is seised after a judicial procedure.[189] For there may be many valid reasons to seek a more complete solution of the dispute than the one offered by a judicial institution when important political aspects are at stake. But if there was evidence suggesting that the State in question merely sought to delay the execution of the judgment, or to escape the obligations flowing from it, the political organ could find *in limine* that an abuse of procedure had been established and that the case thus could not be heard.[190] This aspect does not relate directly to the procedure of the Court, but it indirectly touches upon it, since it concerns the efficacy of the Court's rulings.

Many other instances of abuse of procedure could be envisaged, *e.g.*, the 'flooding' of the Court with procedural objections of any type, in order to frustrate the efficacy of the proceedings; the late invocation of bases of competence if there is a disadvantage to the other party;[191] the raising of a new request in the course of proceedings if it is prejudicial to the procedural position (equality) of the other party (*alternativa petitio non est audienda*).[192] Often, such questions are addressed by the constitutive texts of the tribunals. Thus the Statute and the Rules of Court provide for the timing in the presentation of arguments.[193] The content of these provisions can also be read as a sanction of the principle on prohibition of abuse of procedure, because it is essentially for that reason that they have been drafted.

### 2. *The Principle of Estoppel*

52 The principle of estoppel (or of the prohibition of *venire contra factum proprium*)[194] 'operates on the assumption that one party has been induced to act in reliance on the assurances or other conduct of another party, in such a way that it would be prejudiced were the other party later to change its position'.[195] Thus, under certain restrictive conditions,[196] the law does not permit the first party to change its position to the detriment of the second; or, if it changes its position, it will become liable for the damage caused

*Sea 1982, A Commentary*, vol. V (1989), pp. 75 *et seq.* See also Cannone, *Il tribunale internazionale del diritto del mare* (1991), pp. 134 *et seq.*; Rosenne, 'Settlement of Fisheries Disputes in the Exclusive Economic Zone', *AJIL* 73 (1979), pp. 100 *et seq.*; Caflisch, 'Le règlement judiciaire et arbitral des différends dans le nouveau droit international de la mer', in *Essays in Honor of Bindschedler* (1980), pp. 355–6.

[189] For a more general treatment of the interrelation between the Court and the political organs of the United Nations, *cf.* Gowland-Debbas/Forteau on Art. 7 UN Charter MN 20–52.

[190] *Cf.* already Salvioli, 'Les règles générales de la paix', *Rec. des Cours* 46 (1933-IV), pp. 9–163, 138–9. *Cf.* also the more reserved position of Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* (1975), p. 139.

[191] *Cf.* paras. 42–4 of the interim orders in the *Legality of Use of Force* (Yugoslavia v. Belgium; Yugoslavia v. Netherlands), Order of 2 June 1999, ICJ Reports (1999), pp. 124 *et seq.*, 542 *et seq.*

[192] *Cf.* Kolb (2000), pp. 646–9.

[193] *Cf. e.g.*, Arts. 48 *et seq.* of the Rules.

[194] On this principle *cf.* Kolb (2000), pp. 357 *et seq.* (with many references), and also McGibbon, 'Estoppel in International Law', *ICLQ* 7 (1958), pp. 468 *et seq.*; Martin, *L'estoppel en droit international public* (1979).

[195] Mosler, 'General Course on Public International Law', *Rec. des Cours* 140 (1974-IV), pp. 1–320, 147.

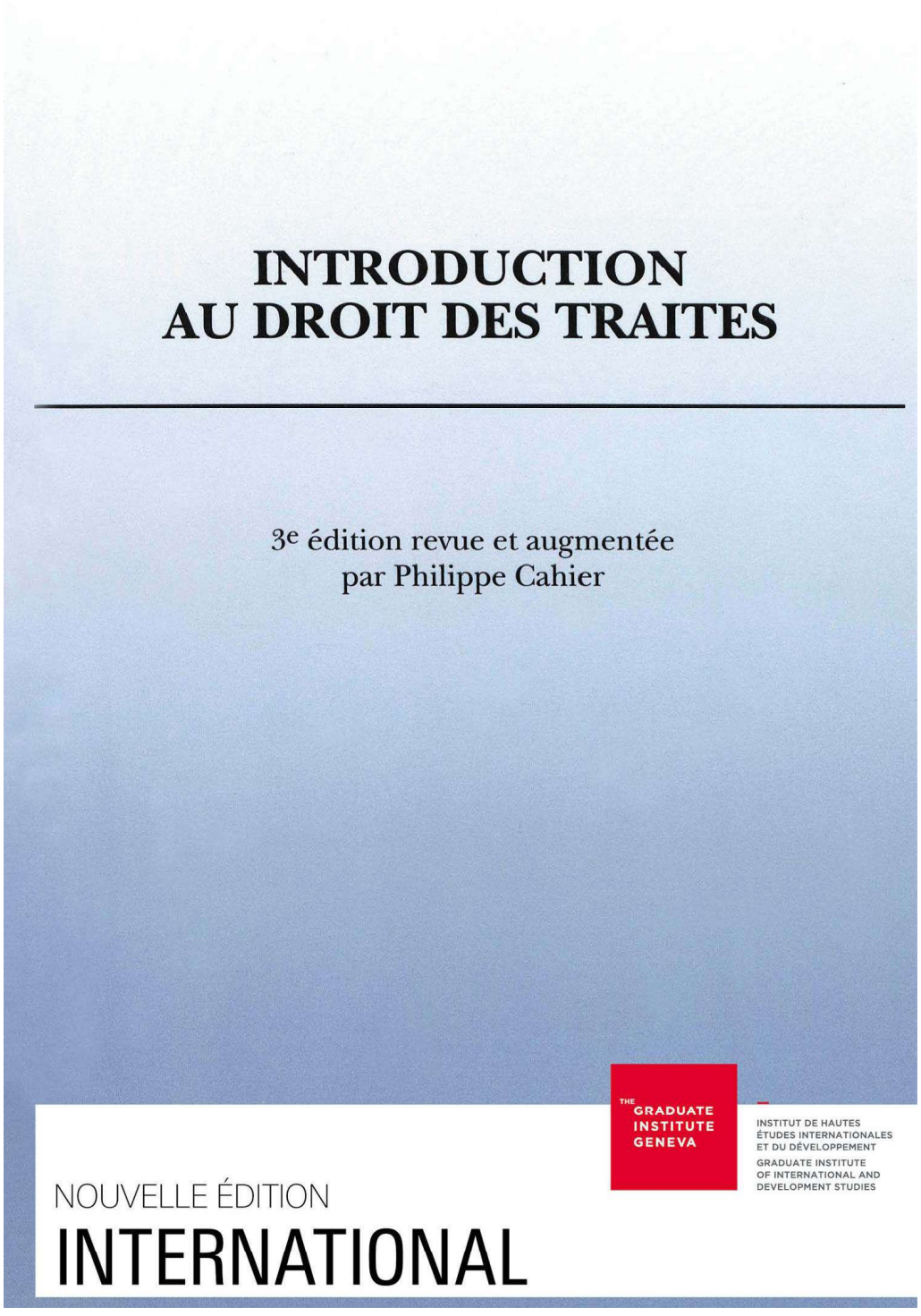
[196] These conditions would seem to be the following: (1) a free, clear, and unequivocal initial conduct by one party, legally imputable to it; (2) an effective and *bona fide* reliance by another party on that conduct, inciting it to adopt a certain conduct on its part; (3) damage suffered by that second party resulting from its reliance on

# Annex 26

P. Reuter, *Introduction au Droit du Traités* (third revised edn. by P. Cahiers, 1995) [extract]

**Annex 26**

PAUL REUTER




[redacted]

# Introduction au droit des traités

**Paul Reuter**

Éditeur : Graduate Institute Publications
Année d'édition : 1985
Date de mise en ligne : 11 décembre 2014
Collection : International
ISBN électronique : 9782940549535

**Édition imprimée**
ISBN : 9782130472636
Nombre de pages : xii-256

http://books.openedition.org

**Référence électronique**
REUTER, Paul. *Introduction au droit des traités.* Nouvelle édition [en ligne]. Genève : Graduate Institute Publications, 1985 (généré le 20 janvier 2015). Disponible sur Internet : <http://books.openedition.org/iheid/1748>. ISBN : 9782940549535.

Ce document a été généré automatiquement le 20 janvier 2015. Il est issu d'une numérisation par reconnaissance optique de caractères.

## § 2 — Régime des réserves aux traités

### A. Historique et généralités

59 **127** Selon l'article 2 (1) (d) des Conventions de 1969 et de 1986 « l'expression "réserve" s'entend d'une déclaration unilatérale, quel que soit son libellé ou sa désignation faite par un Etat quand il signe, ratifie, accepte ou approuve un traité ou y adhère, par laquelle il vise à exclure ou à modifier l'effet juridique de certaines dispositions du traité dans leur application à cet Etat ».

60 D'un point de vue formel la « réserve » se présente très généralement comme un incident dans la procédure de conclusion d'un traité, bien que certains traités prévoient également la possibilité de certaines réserves « à tout moment » en présence de certains événements qui modifient la portée des engagements souscrits. L'essence de la « réserve » est de poser une *condition* : l'Etat ne s'engage qu'à la condition que certains effets juridiques du traité ne lui soient pas appliqués, que ce soit par l'exclusion ou la modification d'une règle ou par l'interprétation ou l'application de celle-ci. Bien souvent l'intention des Etats est exprimée d'une manière ambiguë, le plus souvent pour des raisons de politique intérieure, notamment en qualifiant de « Déclarations interprétatives » des prises de position dépourvues d'effet si elles ne constituaient pas des réserves. Le régime des réserves soulève encore des difficultés qui ont fait l'objet d'une jurisprudence internationale importante. Mais dans un exposé sommaire c'est à la signification profonde, révélée par l'évolution contemporaine de leur régime qu'il faut s'attacher : celui-ci est commandé par les problèmes de participation aux traités, et notamment aux traités à vocation universelle.

61 **128** En effet, bien que techniquement possible pour un traité bilatéral, la « réserve » ne constitue pas dans le cadre de ce dernier une figure juridique pratique, ni originale, car elle se ramène à rouvrir après leur clôture les négociations. C'est dans le traité multilatéral qu'elle prend tout son intérêt ; elle est alors en étroite correspondance avec la règle qui a présidé à l'adoption du texte du traité. Si, comme il était d'usage avant 1914, le texte a été adopté à l'unanimité, tout Etat était certain de ne pas se voir opposer sans son consentement une disposition pour lui inacceptable, les Etats qui négociaient devaient ou bien élaborer des dispositions acceptables pour tous, ou bien en cas d'impossibilité décider à l'unanimité quelles seraient les dispositions qui pourraient être retranchées du texte ou modifiées pour les Etats qui ne pourraient s'accommoder que d'engagements réduits : seules étaient recevables les réserves acceptées à l'unanimité et généralement prévues à l'avance dans le texte du traité. Les négociateurs avaient ainsi à mesurer l'intensité du besoin d'une participation universelle et le prix qu'il était nécessaire de payer pour assurer cette participation, puis à prendre leur décision en conséquence.

62 **129** Avec la pratique qui admet que les textes des traités multilatéraux assez ouverts sont arrêtés à la majorité des deux tiers, le problème change au moins en la forme : il existe en effet une minorité qui n'est plus assurée de voir prendre son point de vue en considération ; elle ne pourra empêcher qu'une matière soit réglée en un certain sens qui ne sera pas le sien, n'ayant que la ressource de s'abstenir de participer au traité, ce qui n'est parfois pas suffisant pour défendre ses intérêts. On peut, il est vrai, prévoir à l'avance la possibilité de réserves destinées à rallier les minoritaires ; mais maintenant

une telle solution ne dépend que de la position prise par une majorité : on peut donc ressentir le besoin d'un régime de réserves plus souple que par le passé.

63 **130** Chaque traité pouvant, avec une entière liberté, déterminer son régime de réserves, il ne s'agit la plupart du temps que d'un problème de politique conventionnelle. La difficulté apparaît dans la mesure où le traité en cause a omis de régler ce point. Mais ce cas est assez fréquent, surtout dans des situations difficiles où l'on préfère ne pas soulever la question au cours des négociations à raison de son issue incertaine ou trop laborieuse : la CV en fournit elle-même un exemple retentissant puisqu'elle a omis dans ses dispositions finales de traiter de la question des réserves à ses propres dispositions ! La convention pour la prévention et la répression du crime de génocide, qui était également muette sur les réserves qu'un Etat pouvait apporter à ses dispositions, donna lieu à un avis consultatif célèbre de la CIJ (*Recueil,* 1951, p. 15) à propos duquel s'affrontèrent deux thèses. L'une, traditionnelle, donnait préférence à l'intégrité de la Convention, c'est-à-dire soumettait au consentement de tous les Etats contractants l'admissibilité d'une réserve ; l'autre, qui l'emporta devant la Cour, donnait la priorité à l'universalité lorsqu'il s'agissait de traités largement ouverts et admettait la possibilité de réserves à la seule condition qu'elles ne mettent pas en péril l'objet et le but du traité. Mais, selon la Cour, chaque Etat contractant prenait position du sujet de la réserve pour son propre compte et l'Etat auteur de la réserve devenait ainsi partie au traité au regard des Etats qui avaient accepté sa réserve, mais non au regard des autres ; chaque traité se trouvait ainsi, par un relativisme radical, morcelé en des cercles de relations conventionnelles non seulement ayant un contenu différent, mais encore groupant des Etats dont certains ne reconnaissaient pas tous les autres comme parties au traité[21].

64 **131** Cet avis qui avantageait les Etats alors minoritaires au sein des Nations Unies, l'URSS et ses alliés, s'insérait dans des tendances qui s'étaient manifestées notamment au sein du panaméricanisme où un système analogue, mais précédé d'une procédure de notification permettant aux Etats de connaître leurs réactions réciproques avant de prendre une position définitive, était en usage. Il provoqua divers remous ; la CDI s'insurgea à l'époque contre l'avis de la Cour et maintint le principe de l'intégrité des traités. Les organisations internationales, notamment l'ONU et l'OMCI, durent à plusieurs reprises débattre de cette question ; les secrétariats internationaux, assumant les fonctions de dépositaires, demandèrent à être déchargés de toute responsabilité dans ce domaine ; ce fut la solution à laquelle se rallia l'Assemblée générale (Résolution 598 (VI), 12 janvier 1952). Finalement, si l'on écarte de la règle de l'unanimité dans l'acceptation des réserves, le problème se pose de savoir quelles sont les atténuations que l'on peut apporter au principe inverse qui fait régner le relativisme le plus complet dans les relations conventionnelles. La CDI, dans son projet d'articles, s'était largement inspirée de l'avis de la Cour de 1951 ; à la Conférence de Vienne on rediscuta des principes et on proposa incidemment une formule de liberté contrôlée suivant laquelle, pour qu'une réserve soit considérée comme compatible avec le traité, il fallait qu'elle soit reconnue telle par une majorité qualifiée des Etats parties au traité – les deux tiers en principe. Mais finalement ce fut un courant très libéral qui l'emporta : on a voulu au maximum généraliser la participation aux traités et défendre les minorités de l'oppression des majorités ; sur au moins deux points, le texte final qui fut retenu est plus libéral encore que les propositions de la Commission[22].

[redacted]

# Annex 27

S. Rosenne, "War Crimes and State Responsibility", *Israel Yearbook on Human Rights*, vol. 24 (1994) [extract]

# WAR CRIMES AND STATE RESPONSIBILITY

*By Shabtai Rosenne**

In his Fifth Report on State Responsibility, Professor Gaetano Arrangio-Ruiz, Special Rapporteur of the International Law Commission for the topic of State Responsibility, raised the issue of the consequences of the so-called international "crimes" of States in relation to the international responsibility of the State of the accused person, especially in terms of the discharge of the responsibility. The notion of "crimes" of State is taken from Part One, Article 19, of the draft articles on State Responsibility which the International Law Commission had already adopted.[1] The Special Rapporteur passed under review the question of the relationship between the international responsibility of a State for criminal actions committed by individuals and attributed to the State, and the international responsibility of that State toward the injured State arising out of that same action. This is always on the assumption that the necessary factor of the attribution of the act to that State is satisfied. He faced head-on the question of what he termed the "International Criminal Liability of States, of Individuals or of Both".[2]

In Chapter II, paragraph 126, of his Fifth Report, Arrangio-Ruiz explained that when individual responsibility is involved, one should simply ascertain whether the prosecution of individual perpetrators by States injured by an international crime can also be properly considered a lawful form of sanction against the wrongdoing State. In a long footnote, he suggested that this might be the case of exercise of jurisdiction that would otherwise be "inadmissible" with respect to an official who was the material perpetrator of conduct that constituted or contributed toward constituting an international crime of State.

* Member of the Institute of International Law: Honorary Member of the American Society of International Law. Based on a paper delivered in the International Legal Colloquium on War Crimes at Tel Aviv University, December 1993.

[1] For the Fifth Report, *see* Doc. A/CN.4/453, Add.1 + Corr.1-3, Add.2 and Add.3. To be reproduced in [1993] II *Y.B. Int'l L. Comm'n.* For Part One, Art. 19, *see* [1976] II *Y.B. Int'l L. Comm'n*, Part Two, *Report of the Commission to the General Assembly on the Work of its 28th Session* (A/31/10*), Ch. III 95. Reproduced in *The International Law Commission's Draft Articles on State Responsibility*, Part I, Arts. 1-35, at 179 (S. Rosenne ed., 1991).

[2] Fifth Report, Ch. II, Sec. 3, paras. 142 ff., in Add. 3 (cited).



*Y. Dinstein (ed.), Israel Yearbook on Human Rights 24*, 63–102.

In that connection, he referred to *Filartiga v. Pena-Irala*.[3] This was a civil case that nevertheless dealt with the question of an act of State and justiciability in a civil action. Arrangio-Ruiz also referred, inter alia, to Article 4 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[4] By that provision, persons committing genocide or any other of the enumerated acts shall be punished, "whether they are constitutionally responsible rulers, public officials or private individuals".

Arrangio-Ruiz called attention to the decision of the Security Council to establish an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. In the preamble of that Resolution, the Security Council simultaneously called upon all parties and others concerned to cease and desist from all breaches of international humanitarian law.[5] At the Commission's 1993 Session, the Special

[3] 77 *International Law Reports* (hereinafter: *I.L.R.)* 169 (1980, 1984).

[4] Adopted by UN G.A. in Res. 260 (III), 9 December 1948, 78 *U.N.T.S.* 277. *See further* notes 23 and 39 below. The major commentaries on this instrument are: N. Robinson, *The Genocide Convention, its Origins and Interpretation* (1949); N. Robinson, *The Genocide Convention, A Commentary* (1960); P.N. Drost, *The Crime of State*, Book II, *Genocide: United Nations Legislation on International Criminal Law* (1959); Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, N. Ruhashyankiko, *Study of the Question of the Prevention and Punishment of the Crime of Genocide* (Doc. E/CN.4/Sub.2/416, mimeo. 1978); *id.*, B. Whitaker, Revised and updated *Report on the Question of the Prevention and Punishment of the Crime of Genocide* (Doc. E/CN.4/Sub.2/1985/6, mimeo. 1985). *See also* M. Shaw, "Genocide and International Law", *International Law at a Time of Perplexity* 797 (Y. Dinstein and M. Tabory, eds., 1989).

[5] UN S.C. Res. 808, 22 February 1993. For the Secretary-General's Report on the Statute of the proposed tribunal, *see* Doc. S/25704 and Add.1, leading to the establishment of the Tribunal by the Security Council in UN S.C. Res. 827, 25 May 1993. Statements made in the 3217th meeting of the Security Council when that Resolution was adopted suggest there was no intention that the activities of the Tribunal would directly affect the international responsibility of any State concerned. The discussion related exclusively to issues of individual responsibility. For the list established by the Security Council of candidates for Judges, *see* UN S.C. Res. 857, 20 August 1993. For the appointment of the prosecutor, *see* UN S.C. Res. 877, 21 October 1993. For the election of the Judges, *see* General Assembly, 47th Session, *Official Records*, Annexes, agenda item 156 and decision 47/328, 17 September 1993 (term commencing on 17 November 1993). On the initial financing of the Tribunal, *see* the Report of the Fifth Committee, *ibid.*, agenda item 155 (A/47/1014) and Res. 47/235, 14 September 1993, adopted without a vote. The question of the "legality" or the propriety of this action of the Security Council is controversial. However, that does not affect the issues discussed in this article. On this Tribunal, *see also* J.C. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", 87 Am. *J. Int'l L* 639 (1993); American Bar Association, Special

Rapporteur introduced this part of his Fifth Report. The Commission, however, due to lack of time, was unable to discuss it.[6]

The meaning of the terms *State Responsibility* and *International Crimes* needs clarification before approaching the issue of the relationship between the two.

For present purposes, Part One, Article 1, of the draft articles on State Responsibility gives an adequate explanation of what the International Law Commission has in mind in using the term *State Responsibility:*

> Every internationally wrongful act of a State entails the international responsibility of that State.[7]

*International Crime* is more difficult. It seems to have at least two connotations.

The first is an act of an individual, that act being, by international treaty (to which the individual is not a party) or by customary international law, placed in the category of "crime". In these circumstances, a contracting Party to that treaty should bring its internal legislation in line with its international obligations under that treaty. (It is an open question whether a State must ensure that its legislation keep pace with developments in customary international law.) Failure to do this is a breach of the treaty, regardless of whether or not any of that State's nationals are charged with a crime of that sort before any competent tribunal. Often the act in question is already a crime under internal law, and the liability of the State to prosecute or extradite an accused person depends on the internal law of that State and its international obligations. The "internationalization" of the criminal act and of the obligation to prosecute or extradite, has followed from inadequacies in the application of the internal criminal law. On the other hand, the substantive definition of an international crime in this sense is distinct from all questions of jurisdiction to

---

Task Force of the Section of International Law and Practice, *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia* (M. Leigh, Chairman, 1993). The International Law Commission, at the specific request of the General Assembly, is also preparing a draft statute for an International Criminal Tribunal. It submitted its first completed draft adopted on first reading later in 1993. *See* General Assembly, 48th Session, Official Records, Supplement No. 10 (A/48/10), *Report of the International Law Commission on the Work of its 45th Session,* Annex (1993).

6 *Ibid.*, para. 283.

7 [1973] II, *Y.B. Int'l L. Comm'n, Report of the Commission on the Work of its 25th Session* (A/9010/Rev.1), Ch. II 173; Rosenne ed., *supra* note 1, at 43. Other provisions in the draft articles make it clear that the wrongful act is a breach of any international obligation of the State, whether originating in a treaty or in any other rule of international law.

prosecute or extradite an individual accused of committing an international crime. Here the substantive law is far ahead of the procedural law.

Most of the recent treaties that internationalize crimes in this sense have their origin in the international reaction to "terrorism", including terrorism in war or other hostile actions. This includes the Geneva Conventions of 1949 and Additional Protocol I of 1977 on the protection of victims of international armed conflicts,[8] and above all, the Convention on the Prevention and Punishment of the Crime of Genocide.[9] Notable exceptions are the modern Conventions for the suppression of traffic in narcotic drugs and psychotropic substances, and those dealing with the protection of civil aircraft and merchant shipping. All these have their roots in international experience showing the need for international action against such deviations from international standards of conduct by States or by individuals, whether acting as agents of States or for their own profit. Typically, recent treaties of this class contain provisions regarding extradition based on the ambiguously worded principle *aut dedere aut judicare*.[10] This does not appear, however, in the Genocide Convention or the Geneva Conventions and Protocol.

[8] For the Conventions of 1949, *see* 75 *U.N.T.S.* 31. For Additional Protocol I of 1977 *see* 1125 *U.N.T.S.* 3. The major commentaries on these instruments are those of the International Committee of the Red Cross, *Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field* (hereinafter: *Commentary I), for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, relative to the Treatment of Prisoners of War*, and *relative to the Protection of Civilians in Time of War*, published under the general editorship of J.S. Pictet, 4 volumes (1952-1960); Y. Centos, *et. al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987). *See also* M. Bothe, *et. al., New Rules for Victims of Armed Conflicts* (1982).

[9] *Supra* note 4. This Convention has come before the International Court on three occasions, but so far the Court has not made any direct pronouncements relative to the issues discussed in this paper. The cases are: Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide advisory opinion, [1951] *I.C.J. Rep.* 15; Trial of Pakistani Prisoners of War (Pakistan v. India), [1973] *I.C.J. Rep.* 328 (Provisional measures), 347 (Discontinuance); and the pending case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), [1993] *I.C.J. Rep.* 3 (Provisional measures), 325 (Further provisional measures). The Counter-memorial is not due to be filed until the summer of 1995, and a long time will elapse before this case reaches the merits stage.

[10] Issues relating to the *aut dedere aut judicare* provision are now before the International Court of Justice in the two cases concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom; Libya v. United States of America), [1992] *I.C.J. Rep.* 3, 114 (Provisional Measures) and 231, 234 (Time-limits). The Counter-

A second approach to the concept of international crime has been introduced by the International Law Commission in Part One, Article 19, of its draft articles on the law of State Responsibility.[11] This imputes the crime directly to a State. Article 19, which is not exhaustive, reads:

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

   (*a*) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
   (*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
   (*c*) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;
   (*d*) a serious breach of an international obligation of essential importance for the safeguarding and preserving of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict.[12]

---

memorials are not due to be filed until the summer of 1995, and here, too, a long time will elapse before these cases reach the merits stage. For a recent survey, *see* E.W. Wise, "The Obligation to Extradite or Prosecute", 27 *Is. L. Rev.* 268 (1993).

[11] *Supra* note 1. *And see International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (J.H. Weiler, *et al.* eds., 1989).

[12] Arrangio-Ruiz, who is critical of Art. 19 in his Fifth Report, asks whether it is appropriate to elaborate what he terms a "single dichotomy between 'crimes', on the one hand, and 'delicts', on the other." Fifth Report, Ch. II, sec. 3, para. 161 (*supra* note 1). A negative answer to the question seems appropriate. While for present purposes a detailed critique of Art. 19 is not necessary, it would seem that paras. 1 and

Clearly, paragraph 3, subparagraphs (*a*) and (*b*), are not on the same footing as subparagraphs (*c*) and (*d*). The first two relate to acts *by or directly attributable to* the State – if a State may be personified in that way without doing violence to the maxim *Societas delinquere non potest* (assuming it to be applicable). Sub-paragraph (*c*) relates in equal measure to an act of State and to an individual's acts, including war crimes. Sub-paragraph (*d*) usually relates to acts of an individual, whether he is acting in the name of a State or not. For that reason, State Responsibility, and more accurately the discharge or remedy for the breach of international law evidenced by the internationally wrongful act, may call for carefully nuanced differential treatment.

We must first examine the role of the law of treaties with respect to the law of State Responsibility.

In the nature of things, an internationally wrongful act of the type under consideration here is a breach of the applicable treaty. Often, it will be what the 1969 Vienna Convention on the Law of Treaties[13] terms a "material breach". On this, Article 60, paragraph 2, provides:

> A material breach of a multilateral treaty by one of the parties entitles:
>
> (*a*) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part, or to terminate it either:
>
> (i) in the relations between themselves and the defaulting State, or
> (ii) as between all the parties;
>
> (*b*) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
> (*c*) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.[14]

---

4 are superfluous. Para. 1 repeats Art. 1, cited above. Para. 4 is not normative and belongs to a commentary.

13 1155 *U.N.T.S.* 331.

14 *See* S. Rosenne, *Breach of Treaty* (1985). In Part Two, Art. 5, of the draft articles on State Responsibility, the term "injured State" replaces the term used in the Vienna

For the purposes of Article 60, *material breach* consists in (a) a repudiation of the treaty not sanctioned by the Convention on the Law of Treaties, or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty (paragraph 3). By paragraph 5 of Article 60:

> Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

At the same time, two other provisions of the Convention are directly relevant. The eighth paragraph of the Preamble reads:

> *Affirming* that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention[.][15]

In addition, Article 73 provides:

> The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from . . . the international responsibility of a State . . .[16]

Most often, the remedies outlined in Article 60 will be of little use to an injured State faced with the type of situation envisaged in Part One, Article 19, of the draft articles on State Responsibility. Nevertheless, when Article 60 is read in the context of the other two provisions cited, clearly the Vienna Convention leaves the rights of the injured State unimpaired, under general international law, to undertake proportionate counter-measures of one kind or other compatible with international law.

In this context there are other relevant aspects of the law of treaties.

One derives from Article 63 of the Statute of the International Court of Justice, which reads:

---

Convention, "a party specially affected". *See* Rosenne's work cited in the next note, at 57.

15 *See* S. Rosenne, *Developments in the Law of Treaties 1945-1986*, 7 (1989).

16 *Ibid.*, 34, 341.

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.[17]

This Court regularly applies this provision. To some extent, it could open the way to a degree of multilateralization of an originally bilateral dispute arising out of the type of treaty under consideration here. In the current case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* the Court went a stage further. It sent a similar notification, under Article 34 of the Statute, to the Secretary-General of the United Nations.[18]

On the other hand, in the second provisional measures phase of that case, the Court adopted an attitude of caution toward a request that it should "clarify" the rights of the applicant State under the Genocide Convention for use "in the Security Council and the General Assembly and elsewhere". The Court held that it could not, in the exercise of its power to indicate provisional measures, indicate by way of "clarification" that other States or entities, not parties to the litigation, should take or refrain from specific action in relation to the alleged acts of genocide.[19]

More should not be read into that passage than what it says: "clarifications" of a State's legal position under a multilateral treaty for use in the Security Council or the General Assembly or elsewhere cannot be made in proceedings for the indication of provisional measures. They are proceedings in anticipation of a judgment on the merits between the parties, that judgment, by virtue of Article 59 of the Statute, having no binding force except between the

[17] *See* S. Rosenne, *Intervention in the International Court of Justice* (1993). And *see* on this the dissenting opinions of Judge Petrén in the Pakistani Prisoners of War case, and of Judge Schwebel in the Military and Paramilitary Activities in and against Nicaragua (Intervention of El Salvador) case. [1973] *I.C.J. Rep.* 335; [1984] *I.C.J. Rep.* 236.

[18] [1993] *I.C.J. Rep.* 3, 9 (para. 6). The reason for this action is not clear, nor was there any need for it except perhaps as a courtesy toward the Secretary-General and the Security Council, both working together to maintain or restore the peace and to undertake humanitarian aid missions in the war-torn area. Through the combination of Art. 40 of the Statute and Art. 42 of the Rules of Court, the Secretary-General of the United Nations receives notification of every contentious case brought before the Court. Art. 34 was inserted to deal with the position of other intergovernmental international organizations.

[19] *Ibid.*, 325, 344 (para. 40).

parties and in respect of that particular case.[20] This does not exclude "clarifications" in the judgment on the merits, after full pleading: indeed, this could well be the natural consequence of a judgment on the merits, despite Article 59 of the Statute. Nor does it prevent an organ such as the General Assembly or the Security Council from requesting "clarifications" through the advisory procedure.

On the whole, then, the law of treaties is not helpful in answering questions concerning the relationship between international crimes and State Responsibility. The law of treaties is the primary component for determining whether there has been a breach of a given treaty. The law of treaties, together with the treaty concerned, supply the primary rule to activate the law of State Responsibility. The law of State Responsibility deals with the consequences of the breach, when those consequences are beyond the range of the law of treaties.[21] At most, this combination points to the need for a careful articulation of the two components of the law. This is a matter which, it appears, is now engaging the attention of the International Law Commission.

There are two major international instruments, from which the combined problem of breach by a State party and criminal violation by an individual can easily arise. They are the Genocide Convention of 1948, and the Geneva Conventions of 1949 on the Protection of War Victims supplemented by Additional Protocol I of 1977 on the Protection of Victims of International Armed Conflicts. They have several features in common. Criminal acts of individuals, as defined in these instruments, are simultaneously "internationally wrongful acts", and "crimes" under international and often under internal law. It is natural, therefore, that each be brought within the scope of the two international criminal tribunals current today – that established by the Security Council in relation to the territory of the former Yugoslavia, and that being proposed by the International Law Commission. Being violations of international treaties, the impugned actions engage the international responsibility of the State, at all events assuming they are, or can be, attributed to a State. They all come within the category of "war crimes". In the substantive rules of the two sets of provisions, there is extensive overlap. These sets of rules differ in two major respects: the nature of criminal intent (*mens rea*) required, and the procedures by which the accused person can be tried.

[20] Art. 59 provides that the decision of the Court has no binding force except between the parties and in respect of that particular case. Further in this author's "Article 59 of the Statute of the International Court of Justice Revisited", *Liber Amicorum: Estudios en homenaje a los 75 años del Profesor Eduardo Jiménez de Aréchaga* (M. Rama - Montaldo ed., 1994).

[21] *Cf.* the Rainbow Warrior arbitration (New Zealand/France), 82 *I.L.R.* 499, 550 (para. 75) (1990).

Both these sets of instruments, therefore, contain all the elements necessary for an examination of the relationship between inter-State responsibility in the accepted sense, and derived State responsibility following from the acts of individual persons, that are declared to be internationally criminal acts. Each carefully defines the acts that are criminal, and often war crimes at that. They require criminal intent (*mens rea*). The States parties must enact appropriate legislation. The Genocide Convention confers jurisdiction on the International Court of Justice over disputes concerning the interpretation, application or fulfilment of the Convention, including disputes relating to the responsibility of a State for genocide or any of the other acts enumerated in the appropriate provision of the Convention. This element is not found in the Geneva Conventions. Both envisage a multifaceted system for the trial of alleged offenders, to be examined later.

The legislative history of the compromissory clause in the Genocide Convention furnishes an early illustration of diplomatic practice on the relationship between international criminal law with the possibility of the trial of an individual offender by an international criminal tribunal, and the law of State Responsibility. It is important for an understanding of the issues involved.

Article 9 of the Genocide Convention provides:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

At the second part of its First Session in 1946, the General Assembly adopted the basic Resolution 96 (I) of 11 December 1946. In that Resolution, the General Assembly affirmed that genocide is a crime under international law, for the commission of which principals and accomplices, whether private individuals, public officials or statesmen, are punishable. It invited member States to enact the necessary legislation for the prevention and punishment of this crime. Finally, it requested the Economic and Social Council (ECOSOC) to undertake the necessary studies to draw up a draft convention on the crime of genocide, for submission to the General Assembly.

The International Court of Justice, in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, drew two consequences from that Resolution. The first was that the principles underlying the Convention are principles that are recognized by civilized nations as binding upon States, even without any conventional

obligation. The second is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Court continued:

> The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope.[22]

ECOSOC, at its Fourth Session, requested the Secretariat to undertake, with the assistance of experts, the necessary preparatory action and submit a draft (hereinafter: the "Secretariat's Draft") to the Council's next Session.[23]

The Secretariat's Draft envisaged (Article 9) that all persons guilty of genocide under the Convention would be tried by an international court in two sets of circumstances: (1) when a State itself was unwilling to try or extradite the offender; and (2) when the acts of genocide had been committed by individuals acting as organs of the State or with the support or toleration of the State. It also contained (Article 14) a simple compromissory clause providing that disputes relating to the interpretation or application of the Convention should be submitted to the International Court of Justice.[24]

[22] [1951] *I.C.J. Rep.* 15, 23. Reiterated in the Court's first order indicating provisional measures in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, [1993] *I.C.J. Rep.* 3, 23 (para. 49). Nevertheless, the U.S. Court of Appeals, District of Columbia Circuit, refused to regard a nonstate, *in specie* the Palestine Liberation Organization, as subject to duties imposed by customary international law governing the conduct of belligerent nations, including the Genocide Convention. Tel-Oren v. Libyan Arab Republic, concurring opinion of Bork, J., 726 *F. 2d* 774, 806 (1984); 77 *I.L.R.* 192, 235. *Sed quaere*? In 1989 the Palestine Liberation Organization submitted to the depositary of the Geneva Conventions a communication concerning its participation in the Geneva Conventions and the Additional Protocols. The depositary informed the States parties that it was not in a position to settle the question of whether the communication should be considered an instrument of accession to the Conventions and Protocols. There the matter rests. UN Doc. A/INF/48 (mimeo. 30 August 1993), Note *a*.

[23] ECOSOC Res. 47 (IV), 28 March 1947. The experts consulted by the Secretariat were Professors M. Lemkin, author of the standard work *Axis Rule in Occupied Europe* (1944) and reputedly of the word *genocide*; V.V. Pella, author of the standard work *La Guerre-Crime et les Criminels de Guerre: Réflexions sur la justice pénale internationale, ce qu'elle est et ce qu'elle devrait être* (1946); and H. Donnedieu de Vabres, who had been the French member of the International Military Tribunal for the Trial of German Major War Criminals (the Nuremberg Tribunal).

[24] ECOSOC Doc. E/447 (mimeo. 1947); General Assembly, 2nd Session (1947), Sixth Committee, *Official Records* (A/362) 213. For detailed history of this early phase, *see Prevention and Punishment of Genocide: Historical Summary* (2 November 1946 to 20 January 1948, and 21 January to 24 March 1948), ECOSOC Docs. E/621 and Add.1 (mimeo. 1948).

This led to two important comments by the United States of America. One was to add "between any of the High Contracting Parties" after the initial word "Disputes", since "only States may be parties to cases before the Court". The second read:

> Because of the jurisdiction which may be conferred upon an international tribunal [a reference to the trial by an international tribunal], as indicated above, it seems desirable in order to prevent concurrent or conflicting jurisdiction, to add the following proviso to this Article: "provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a tribunal referred to in Article VII."[25]

At this point, ECOSOC set up an *ad hoc* Committee on Genocide. This was to prepare the draft convention, taking into consideration the Secretariat's draft and the comments of Governments.[26]

Article 14 of the Secretariat's Draft was discussed at the 20th meeting of the *ad hoc* Committee. There was no debate of substance, and the two amendments proposed by the United States were accepted after a vote.[27] The Committee reported the article out as follows (Article 10):

> Disputes between the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice, provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to and is pending before or has been passed upon by a competent international criminal tribunal.

At the same time, Article 9 was considerably revised, and read (as Article 7):

[25] ECOSOC Doc. E/623 (mimeo. 1948) 27.

[26] ECOSOC Res. 117 (VI), 3 March 1948. The *ad hoc* Committee was composed of representatives of China, France, Lebanon, Poland, USSR, United States of America and Venezuela, governments which had each submitted observations on the Secretariat's Draft. J. Maktos (USA) was elected Chairman. The Committee was in session from 5 April to 10 May 1948. Its document symbol is E/AC.25/-.

[27] E/AC.25/SR.20, p. 5. A brief second reading is reported in E/AC.25/SR.24, 12 (article renumbered 9, later 10).

> Persons charged with genocide or any of the other acts enumerated in Article IV shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal.[28]

In that form, the matter came before the Sixth Committee at the first part of the Third Session of the General Assembly in 1948. Several amendments were submitted. They and the debate that followed threw into sharp relief the fundamental problem of the interrelationship between State Responsibility and individual criminal responsibility under international law.

An amendment by Belgium proposed to delete from Article 10 the provision that had been inserted in the *ad hoc* Committee by adoption of the amendment proposed by the United States.[29] An amendment of the United Kingdom referred both to Article 7, and to Article 10. It suggested replacing the text of Article 7 by the following:

> Where the act of genocide . . . is, or is alleged to be the act of the State or government itself or of any organ or authority of the State or government, the matter shall, at the request of any other party to the present Convention, be referred to the International Court of Justice, whose decision shall be final and binding. Any acts or measures found by the Court to constitute acts of genocide shall be immediately discontinued or rescinded and if already suspended shall not be resumed or reimposed.

For the *ad hoc* Committee's text for Article 10 the United Kingdom proposed:

> In addition to the cases contemplated by article VII of the present Convention, all disputes between the High Contracting Parties relating to the interpretation or application of the Convention shall, at the request of any party to the dispute, be referred to the International Court of Justice.

The United Kingdom explained that its amendment to Article 7 was due to the fact that there was no international criminal court. It gave the same explanation for the proposal to drop the last part of Article 10.[30]

Belgium then submitted a sub-amendment to the British amendment to Article 7, reading:

[28] ECOSOC Doc. E/AC.25/12. For the *ad hoc* Committee's report, *see* ECOSOC, *Official Records*, 3rd year, 7th Session, Supplement No. 6, *Report of the Ad Hoc Committee on Genocide*, 5 April to 10 May 1948 (E/794).

[29] General Assembly, 3rd Session, Part I (1948), Sixth Committee, *Official Records*, Annexes (A/C.6/217) 18.

[30] *Ibid.*, (A/C.6/236 & Corr.1) 24, 25.

> Any dispute relating to the fulfilment of the present undertaking or to the direct responsibility of a State for the acts enumerated in article IV may be referred to the International Court of Justice by any of the Parties to the present Convention.
>
> The Court shall be competent to order appropriate measures to bring about the cessation of the imputed acts *[actes incriminés]* or to repair the damage caused to the injured persons or communities.[31]

A few days later, Belgium and the United Kingdom replaced their amendments by a joint amendment to Article 10:

> Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV, shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties.[32]

The Sixth Committee discussed Article 10 of the *ad hoc* Committee's draft and these and other amendments at its 103rd to 105th meetings, on 12 and 13 November 1948. The discussion was confused on procedural issues. The most important speech was that of the representative of the United Kingdom, Mr. (as he then was) Gerald Fitzmaurice. He touched upon what is the central issue now under discussion. Explaining the joint Belgian/British amendment to Article 10, he indicated that the two countries had always maintained that the Convention would be incomplete if no mention were made of the responsibility of States for the acts enumerated in Articles 2 and 4. The United Kingdom had been impressed by the fact that in previous meetings, all speakers had recognized that the responsibility of States "was almost always involved" in all acts of genocide. The joint amendment made recourse to the International Court of Justice "obligatory". It was intended to impose upon all States parties to the Convention the obligation to refer all disputes relating to cases of genocide to the International Court.[33] In a later intervention,

[31] *Ibid.*, (A/C.6/252) 28.

[32] *Ibid.*, (A/C.6/258) 28.

[33] General Assembly, 3rd Session, Part I, Sixth Committee, *Official Records* 430. However, it is unusual to interpret a compromissory clause in this form as imposing an obligation on a State to refer such disputes to the Court. It is more frequently understood as permitting the unilateral institution of proceedings and as conferring

Fitzmaurice clarified that the responsibility envisaged in the joint amendment "was civil responsibility, not criminal responsibility".[34] He did not elaborate on that.

The representative of France (Ch. Chaumont) made the following pertinent comment:

> [He] was in no way opposed to the principle of the international responsibility of States so long as it was a matter of civil, and not criminal, responsibility.[35]

The representative of Greece (J. Spiropoulos) asked whether there was a difference between application and fulfilment of a convention and whether it was necessary to retain both words in the text. On the question of responsibility he said:

> [T]he notion of responsibility of a State did not seem to him very clear. What was meant was obviously not international responsibility for violation of the convention, which was already implicit in article I of the draft convention. The French delegation thought that the amendment related to the civil responsibility of the State, and that idea seemed to be confirmed by the original Belgian text [A/C.6/252] which referred to reparation for damage caused. If, however, that interpretation were accepted, the result would be that in a number of cases the State responsible would have to indemnify its own nationals. But in international law the real holder of a right was the State and not private persons. The State would thus be indemnifying itself.[36]

An important observation on this aspect was made by the representative of Poland (M. Lachs):

> [H]e objected to the joint amendment on the one hand because it provided for the application of measures which in no way constituted direct means of international punishment of a crime such as genocide, and on the other hand because it conferred on the International Court of Justice competence in a field in which other United Nations organs could play a more effective role. The result of that amendment, as drafted, would be in effect that the

---

jurisdiction on the Court in relation to the respondent State, under Art. 36, para. 1, of the Statute of the Court.

[34] *Ibid.*, 440.

[35] *Ibid.*, 431.

[36] *Ibid.*, 432.

> Court had virtually exclusive jurisdiction in that field. It would be easy for a State guilty of genocide to invoke article X, thus amended, to contest the competence of the Security Council or of the General Assembly by alleging that the question raised constituted a dispute, within the meaning of that article, and that it could be examined only by the Court.
>
> It would be more logical to . . . let the provisions of the Charter itself operate freely, especially Article 96, according to which it was for the General Assembly and the Security Council to refer to the International Court of Justice if they deemed it necessary.[37]

During the debate, which continued along those lines, India introduced an amendment to the joint Belgian/British amendment. It was to replace "at the request of any of the High Contracting Parties" by "at the request of any of the parties to the dispute".[38] This was adopted. The Sixth Committee rejected a motion to delete "fulfilment", and another motion to delete the reference to responsibility. The vote on that was close, 19 votes to 17 with 9 abstentions. The amended joint amendment was then adopted by 23 votes to 13, with 8 abstentions.[39]

Article 9 (renumbered) was reported out in its present form.[40] No further discussion on it took place.

This legislative history has been presented at length because two aspects call for notice.

The first is the refusal of the negotiating States in the General Assembly to accept a compromissory clause which would have allowed, and possibly obliged, any State party to the Convention to institute proceedings, and the decision to limit the right to seise the Court to a State party to a dispute concerning the interpretation, application or fulfilment of the Convention. Without prejudice to Article 63 of the Statute of the International Court of Justice, this shuts out the slight opening that the unamended texts might have

[37] *Ibid.*, 435. In his judicial capacity, Lachs was later to express the view that the Convention was "an instrument codifying existing law". Dissenting opinion in the North Sea Continental Shelf cases, [1969] *I.C.J. Rep.* 226.

[38] *Supra* note 33 (Doc. A/C.6/260, mimeo., incorporated in the record of the 103rd meeting of the Sixth Committee) 437.

[39] For the voting, *see ibid.*, 447. For the second reading of this article in the Sixth Committee, when a motion for reconsideration of the article was not adopted, *see ibid.*, 687. For the adoption of the Convention in the Committee, *see ibid.*, 701.

[40] For the adoption of the Convention at the 178th and 179th meetings of the General Assembly, *see* General Assembly, 3rd session, Part I, Plenary Meetings, *Official Records* 810; for the report of the Sixth Committee, *see ibid.*, Annexes (A/760 and Corr.2) 494 (1948).

given to the idea of an *actio popularis* in relation to the *erga omnes* obligations of the Genocide Convention, initiated by a third State as an original party. It may go further, and weaken any idea that those obligations are obligations *erga omnes*, as that expression is gaining currency in international law. Experience to date shows that this has protected the Court and other organs of the United Nations, especially the Security Council, from the risk of intrusion into each other's affairs. In this respect, the attitude adopted by the Court in the second provisional measures phase of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case[41] is consistent with the general trend of opinion as expressed during the negotiation of the Convention.[42]

The second significant aspect of the legislative history of Article 9 of the Genocide Convention shows that the negotiating States contemplated "civil responsibility", although none of those who used that term made any attempt to explain on the record what was meant by it. It is not surprising, therefore, that scholarly opinion on this aspect is uncertain. In 1949, Nehemiah Robinson[43] thought that it was not clear whether the responsibility was criminal or civil. While it was obvious that States could not be charged with criminal, but only civil, responsibility, the definition of civil responsibility was unclear, and Robinson believed that under Article 9 the question of compensation could arise only if the respondent State were responsible for such action in the territory of another State or against citizens of the claimant State. Indeed, in his 1960 book, Robinson is careful:

> As the Court deals with disputes between States, it cannot pronounce formal judgments on persons, even members of government or constitutionally responsible rulers, but only on whether a State carried out its obligations under the Convention and, if it did not, what measures it must take and what its (civil) responsibility for the violation of the

41 *See* text to *supra* note 19.

42 Bosnia's threatened action against the United Kingdom claiming that its votes in the Security Council violate its obligations under the Genocide Convention, had it been pursued, could have required revision of this analysis. *See* Statement of the Agent for Bosnia at the meeting of the Court on 26 August 1993, CR 93/35 at 16 and Statement of Intent of 15 November 1993, circulated to the Security Council and the General Assembly in Doc. A/48/659-S/26806. The United Kingdom (whose armed forces are participating in UNPROFOR) indicated that such proceedings, if initiated, would be "vigorously defended", and Bosnia then decided not to proceed with respect to the United Kingdom on an action in the International Court, but left open the possibility of similar actions against all the other parties to the Genocide Convention. UN Docs. A/48/736-S/26847 and S/26908.

43 Robinson, *supra* note 4, at 42.

> Convention should be. In the judgment, the action by officials or private persons could only be considered as involving or not involving the responsibility of the State.[44]

Similarly Drost sees Article 9 as referring only to civil responsibility. The Court can establish the breach of a treaty and decide on the nature and extent of the reparation to be made for such breach.

> The recognition of the compulsory jurisdiction of the Court in all disputes between the Contracting Parties arising under the Convention constitutes an important means of international judicial implementation of a treaty on substantive criminal law by way of the international civil responsibility of States. Undoubtedly the Article contains a provision of cardinal significance but it does not contribute to international and individual criminal justice.[45]

A change is noted in later writings. Ruhashyankiko, for example, wrote in 1978 that he found it difficult to share an opinion that Article 9 established an international civil responsibility of the State to its own nationals.[46] In the absence of any case where the article had been applied and interpreted by the International Court of Justice, both the preparatory work and the text of the article itself led him to doubt that the purpose of the provision was to include in the concept of international responsibility of the State, "which of its very nature implies solely legal relations between States, a liability towards its own nationals". If such were not the case, the provision would seem superfluous. He suggested that if it were decided to review the Convention, it would be desirable to clear up the problem of the scope of State Responsibility. Ruhashyankiko concluded this part of his study with the following paragraph which still retains validity:

> [T]he compulsory jurisdiction of the Court on genocide might, theoretically, be of some importance for the application of the Convention,

[44] Robinson, *supra* note 4, at 106.

[45] Drost, *supra* note 4, at 134.

[46] Yet this is precisely what the International Military Tribunal for the Trial of German Major War Criminals did in that part of its judgment which dealt with crimes against humanity. For the text of this Judgment, *see The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (hereinafter: Nuremberg Judgment) 411, 468 (British ed. 1950). *See further* on this, J. Robinson, "The International Military Tribunal and the Holocaust: Some Legal Reflections", 7 *Is. L. Rev.* 1 (1972).

> bearing in mind the non-existence of an international criminal court and the ineffectiveness of the provisions of article VI on the competence of national courts in the territory where the crime was committed. Nevertheless, the fact that article IX has not been applied, although acts of genocide have been alleged since the 1948 Convention came into force, casts doubt on the practical usefulness of this article.[47]

In 1985 Whitaker wrote:

> Individuals' responsibility . . . need not necessarily exclude in appropriate cases a State's collective responsibility also towards the victims, including sometimes liability for damages and restitution.

He also recommended that when the Convention is revised, consideration should be given to including provision for a State's responsibility for genocide together with reparations.[48]

Shaw is cautious:

> The question as to whether States may indeed be criminally responsible is highly controversial, and it is unclear, for example, what penal sanctions may be imposed upon States beyond the accepted existence of liability to compensate in defined situations. On the other hand, there is no doubt that [? as to] the core proposition, that the international community views such phenomena as aggression, slavery, forceful colonial domination and genocide as reprehensible activities for which States are to be held accountable. Whether the best means available to deal with this is through a deemed criminal responsibility of States is open to question and disputation, but it is important to emphasize the centrality of responsibility borne by States in such cases as genocide, for the crime is such that it may hardly be committed by individuals acting alone.[49]

There is little State practice on this question.

In the *Pakistani Prisoners of War* case, the central issue, as expressed in the application instituting the proceedings, was whether under the Genocide Convention Pakistan had an exclusive claim to jurisdiction in relation to charges of genocide against some 195 Pakistani prisoners of war and civilian

[47] Ruhashyankiko, *supra* note 4, at paras. 329-31, footnotes omitted.
[48] Whitaker, *supra* note 4, at para. 54.
[49] Shaw, *supra* note 4, at 814, footnotes omitted.

internees being held by India. The various *petita* of the application instituting the proceedings related exclusively to questions of the interpretation of the Convention.[50] In the pending case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the application instituting the proceedings, in so far as it relates to the Genocide Convention, asks for judgment declaring the respondent State to be in breach of various articles of the Convention, that the respondent is under an obligation to pay to the applicant, "in its own right and as *parens patriae* for its citizens", reparations for damages to persons and property as well as to the applicant's economy and environment caused by the alleged violations of international law, in a sum to be determined by the Court.[51] There is no mention of "punitive" or "exemplary" damages. In neither of these cases did the document instituting the proceedings suggest anything other than the unqualified responsibility of the respondent States for breaches of the Genocide Convention. No doubt a compensation phase would clarify the question of exemplary or punitive damages. But that is another matter altogether, and it is doubtful if it comes within the scope of what are called "punitive sanctions against a State".

The international humanitarian law based on the Geneva Conventions of 1949 and Protocol I presents another example. These instruments differ from the Genocide Convention in three major respects. One: they do not contain a compromissory clause conferring jurisdiction on the International Court of Justice. Two: they carefully define a series of acts which, if they are done "wilfully" and are not justified by military necessity, are "grave breaches" of the 1949 Conventions, and are specifically defined as "war crimes" in Protocol I. Three: in their original form they do not envisage trial of offenders by an international criminal tribunal.

At the Diplomatic Conference of 1949, several delegations proposed to include a clause conferring jurisdiction on the International Court of Justice. The matter was referred to a Working Party of the Joint Commission established by the Conference. The Joint Commission proposed inserting in each Convention a new common provision by which parties to a given Convention which had not recognized as compulsory *ipso facto* and without special agreement, in relation to any State accepting the same obligation, the

[50] Pakistani Prisoners of War case, Pleadings 3. The case was discontinued and no documents relating to the merits were filed.

[51] Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Application instituting Proceedings 134, para. 135. *See also* [1993] *I.C.J. Rep.* 3, 4 (para. 2). In its second request for provisional measures, Bosnia asked for a specific measure addressed to the President of Serbia by name. *Ibid.*, 325, 332 (para. 6). The Court declined to do this.

jurisdiction of the Court in the circumstances mentioned in Article 36 of the Statute, would undertake to recognize the competency of the Court in all matters concerning the interpretation or application of that Convention. This proposal gave rise to a bitter debate at the 22nd and 28th plenary meetings of the Conference. The debate concerned the compatibility of the proposed text with the Charter and Statute. Although some of the representatives who took part in that debate had taken part in the negotiation of the Genocide Convention a few months earlier, the debate did not raise questions of the relationship between the proposed jurisdiction of the Court and State Responsibility or the criminal responsibility of individuals. Another working group then proposed to settle the issue through a resolution. This was adopted by the Conference in the following terms:

> The Conference recommends that, in the case of a dispute relating to the interpretation or application of the present Conventions which cannot be settled by other means, the High Contracting Parties concerned endeavour to agree between themselves to refer such dispute to the International Court of Justice.[52]

The fact that there is no formal compromissory clause conferring jurisdiction on the Court in the Conventions or in Additional Protocol I does not exclude that jurisdiction entirely. As between States parties to the Statute of the Court, declarations made under Article 36, paragraph 2, of the Statute (the so-called "compulsory jurisdiction") can confer such jurisdiction on the Court, unless a valid reservation expressly excludes it. There may also be other instruments between the States concerned conferring jurisdiction on the Court, such as a regional or a bilateral agreement for the settlement of disputes; and if the construction of any of the Geneva Conventions or of Protocol I is in issue, Article 63 of the Statute of the International Court could provide an opportunity for third-State intervention.

The Geneva Conventions have been relevant in three international cases. The International Military Tribunal for the Trial of German Major War Criminals expressly identified breaches of the Geneva Convention of 1929 on Prisoners of War[53] as "War Crimes" within the meaning of Article 6(*b*) of the Charter of the International Military Tribunal established under the London

[52] *Supra* note 8, Commentary I, 130, 379 and 2-A *Final Record of the 1949 Conference* 230. The best explanation of the reasons for not including in the Geneva Conventions a formal compromissory clause conferring jurisdiction on the International Court is found in P. des Gouttes, *La Convention de Genève du 27 juillet 1929: Commentaire* 215 (1930). The author was a distinguished member of the International Committee of the Red Cross and Secretary-General of the 1929 Diplomatic Conference.

[53] 118 *L.N.T.S.* 343.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers.[54] This was part of the Tribunal's answer to the defence plea that the trial was itself in violation of the fundamental legal principle of *nullum crimen sine lege*.

The International Court of Justice discussed the application of the Geneva Conventions in the merits phase of the *Military and Paramilitary Activities in and against Nicaragua* case, between Nicaragua and the United States of America.

The jurisdiction of the Court was based primarily on the declarations of the two States accepting the compulsory jurisdiction under Article 36, paragraph 2, of the Statute. The United States declaration of 1946 contained a reservation excluding disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction. Because this reservation was applicable, the Court could not rely directly on the Geneva Conventions. The Court nevertheless looked for a way around this. It said:

> [I]n its view the conduct of the United States may be judged according to the fundamental general principles of humanitarian law; in its view the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles.

The Court found significant the terms of the denunciation clauses of the 1949 Conventions. They provided that the denunciation should in no way impair the obligations which the parties to a conflict should remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience. The Court continued:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" . . . The Court may therefore find them applicable to the present dispute[.]
>
> . . .

[54] 82 *U.N.T.S.* 279. *See also* Nuremberg Judgment, *supra* note 46, at 467.

> 220. The Court considers that there is an obligation on the United States Government, in the terms of [common] Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Conventions[.][55]

In the second provisional measures phase of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, Bosnia sought to ground the jurisdiction, which was based on the compromissory clause of the Genocide Convention, as well as in the customary and conventional international laws of war and international humanitarian law, including but not limited to the four Geneva Conventions of 1949, Protocol I, the Hague Regulations on Land Warfare of 1907, and the Nuremberg Charter, Judgment and Principles. The Court dismissed this curtly:

> [T]he applicant has not brought to the attention of the Court any provision in the texts enumerated conferring upon the Court jurisdiction to deal with a dispute between the Parties concerning matters to which hose exts relate; . . . such jurisdiction is not prima facie established.[56]

The difference between these cases is explained by the different bases of jurisdiction. In the *Nicaragua* case, the primary jurisdiction rested on the two declarations accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute. Given its terms, with its reference to "any question of international law", that provision leaves the Court with some freedom to manoeuvre. The third case was based on Article 36, paragraph 1,

[55] [1986] *I.C.J. Rep.* 14, 113 (paras. 218 ff.). *See also* at 129 (para. 254). The Geneva Conventions had not been invoked by Nicaragua, and Nicaragua had not attributed to the United States any breach of humanitarian law; the relevance of these passages to the Court's judgment is not readily apparent. Important dissents to this part of the judgment were appended by Judges Ago at 184, Schwebel at 388 and 523, and Sir Robert Jennings at 537. The denunciation clauses to which this judgment refers are Arts. 63, 62, 142, 158 common to each of the four Conventions of 1949. *See also* Art. 43 of the 1969 Vienna Convention on the Law of Treaties, on obligations imposed by international law independently of a treaty.

[56] [1993] *I.C.J. Rep.* 325, 341 (para. 33). The judge *ad hoc* appointed by Bosnia, E. Lauterpacht, pointed out in his separate opinion that the recourse to those treaties "appears to be founded on some misconception", at 414 (para. 19).

of the Statute combined with Article 9 of the Genocide Convention, a strictly defined jurisdiction limited to the Genocide Convention.[57]

Regarding breaches of the Geneva Conventions, it is convenient to take Geneva Convention I, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 1949, as a model.

Chapter VIII (Articles 45 to 48) deals with the execution of the Convention. Article 45 requires each party to a conflict, acting through its commanders-in-chief, to "ensure the detailed execution" of the Convention and "to provide for unforeseen cases, in conformity with the general principles" of the Convention. Chapter IX (Articles 49 to 54) deals with the repression of abuses and infractions. Article 49 requires each Party to the Convention to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches as defined in the following article (and the equivalent in the other Conventions). Each Party must search for persons alleged to have committed or ordered to be committed such grave breaches and shall bring such persons, regardless of their nationality, before its courts. It may also, if it prefers, hand such persons over to another Party, provided that the other Party has made out a *prima facie* case – a form of *aut dedere aut judicare,* although in permissive and not obligatory terms. Article 50 defines as "grave breaches" a series of acts "if committed against persons or property protected" by the Convention. The acts in question must have been "wilful" or the like, not justified by military necessity and not carried out "unlawfully and wantonly". The acts in question are such as only individuals can perform them. Article 51, on the responsibility of the contracting parties, provides that no party

> shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.[58]

[57] In that connection, it may be noted that both in the negotiating history of the Genocide Convention and in some of the earlier commentaries mentioned in *supra* note 4 there is confusion between the two formal bases of jurisdiction under Art. 36, para. 1 or 2 of the Statute. Thus Robinson, in his 1960 work, *see* Robinson, *supra* note 4, at 101 *(contra* his 1949 work at 43); Drost *supra* note 4, at 110. In the Border and Transborder Armed Actions (Jurisdiction and Admissibility) case the International Court clarified that jurisdiction based on a treaty in force is distinct from jurisdiction based on declarations made under Art. 36, para. 2, of the Statute. [1988] *I.C.J. Rep.* 69.

[58] Parallel articles in the other three Conventions are Arts. 46-52; 129-31; 146-48. There are different provisions, however, regarding the enactment of legislation.

Protocol I amplifies this. Different provisions of the Protocol add to the list of "grave breaches". Part V, Section II (Articles 85 to 91) deals with repression of breaches of the Conventions and the Protocol. Article 85 addresses separately the repression of both "breaches" and "grave breaches" of the Protocol and of the Conventions. Article 85, paragraph 5, goes on to provide that without prejudice to the application of the Conventions and of the Protocol, "grave breaches of these instruments shall be regarded as war crimes". This is the first and, it is believed, the only instrument of current positive international law to contain a statement of what acts constitute "war crimes".

Protocol I also addresses State Responsibility, beyond Article 51 (and the corresponding Articles in the other Conventions) cited above. Article 91 of Protocol I provides:

> A party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

This is not a new provision. Something similar appeared in Article 3 of Hague Convention (No. IV) Respecting the Laws and Customs of War on Land of 1907, which provided:

> [Translation]
> A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.
>
> *La Partie belligérante qui violerait les dispositions dudit Règlement [Règlement annexé à la convention] sera tenue à indemnité, s'il y a lieu. Elle sera responsable de tous actes commis par les personnes faisant partie de sa force armée.*

Article 3 of the Hague Convention (No. IV) of 1907 has been interpreted as intended to establish the responsibility of the belligerent States for violations of the Rules concerning the Laws and Customs of War, and therefore did not apply in respect of the responsibility of the subjects of belligerents.[59] It is not

[59] Deuxième Conférence Internationale de la Paix, La Haye 15 juin-18 octobre 1907, *Actes et Documents* vol. I 626; 205 *Consolidated Treaty Series* 277. English translation from *Reports to the Hague Conference of 1899 and 1907*, at 509 (J.B. Scott ed., 1917). The application of this provision was considered by the Belgian Court of

clear what purpose is served by Article 91 of Additional Protocol I, which in its terms is more restrictive than current international law regarding the consequences of a breach of a treaty. Neither of the Commentaries mentioned in note 8 above gives a satisfactory explanation for this provision, which the Diplomatic Conference of 1974-77 did not examine in depth.[60]

These instruments avoid the underlying issue of whether State Responsibility here is "civil" or "criminal". That issue was not mentioned in the Diplomatic Conferences of 1949 or 1974-77. The Conventions and Protocol adopt a pragmatic approach eschewing theoretical formulations. They set out rules of law regarding individual breaches and grave breaches of specific provisions of the Conventions and of Protocol I. Those breaches and grave breaches are by their nature acts of individuals and, as stated, are now formally identified as "war crimes". These breaches and grave breaches are not, in the terms of the Conventions themselves, the equivalent of "material breach" as used in the Vienna Convention on the Law of Treaties. Indeed, they may not always be attributable to a State within the framework either of the general law of treaties or of the general law of State Responsibility. In this respect, Article 91 of Protocol I, as *lex specialis*, overrides the rules of attribution in the law of State Responsibility. Nonetheless, at the same time the acts *can be* breaches of the treaties concerned. They *can be* material breaches coming within the terms of Article 60 of the Vienna Convention. Then, however, paragraph 5 will become operative in most instances that can be conceived.

The fundamental rule of the Genocide Convention regarding trial of an individual offender is found in Article 6, as follows:

> Persons charged with genocide or any of the acts enumerated in article III shall be tried by the competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

By Article 7, genocide and those other acts enumerated in Article 3 shall not be considered as political crimes for the purposes of extradition. The parties agree in such cases to grant extradition in accordance with their laws and treaties in

---

Cassation in *re Strauch and Others* (1949), 16 *Annual Digest and Reports of Public International Law Cases* 404.

[60] ICRC *Commentary* 1053 (1987); Bothe, *et al.*, *supra* note 8, at 546. *But see* F. Kalshoven, "State Responsibility for Warlike Acts of the Armed Forces", 40 *Int'l & Comp. L.Q.* 827 (1991).

force. That is as far as the Convention goes in incorporating the principle *aut dedere aut judicare.*

The only judicial interpretation of Article 6 is by the Israel Courts in the *Eichmann* case. The relevant passage in the judgment of the Jerusalem District Court reads:

> It is clear that Article 6, like all other articles which determine the conventional obligations of the contracting parties, is intended for cases of genocide which will occur in the future after the ratification of the treaty or the adherence thereto by the State or States concerned. It cannot be assumed, in the absence of an express provision in the Convention itself, that any of the conventional obligations, including Article 6, will apply to crimes which had been perpetrated in the past. It is of the nature of conventional obligations, as distinct from confirmation of existing principles, that unless another intention is implicit, their application is *ex nunc* and not *ex tunc*. Article 6 . . . is a purely purposive provision, and does not presume to affirm a subsisting principle. We must therefore draw a clear distinction between the first part of Article 1 . . . and Article 6, which comprises a special provision undertaken by the contracting parties with regard to the trial of crimes that may be committed in the future. Whatever may be the purport of this latter obligation within the meaning of the Convention (and in the event of differences of opinion as to the interpretation thereof, each contracting party may, under Article 9, appeal to the International Court of Justice), it is certain that it constitutes no part of the principles of customary international law which are also binding outside the conventional application of the Convention.

This was clarified by the Supreme Court on appeal. The Supreme Court accepted the analysis of the District Court on the purport of Article 6. At the same time it added:

> This obligation, however, has nothing to do with the universal *power* vested in every State to prosecute for crimes of this type committed in the past – a power which is based on *customary* international law.[61]

[61] 36 *I.L.R.* 5, 36 (District Court, 1961); 304 (Supreme Court, 1962), emphasis in the original. The international law regarding the retroactive effect of a treaty has since been clarified in Art. 28 of the Vienna Convention on the Law of Treaties, *supra* note 13.

The provisions of the Geneva Conventions regarding trial are relatively simple and, perhaps surprisingly, do not envisage the possibility of trial by an international criminal court.

Again, taking 1949 Geneva Convention as the model, Article 49 has been cited above.

This is supplemented in Protocol I. As stated, Article 85, paragraph 5, is specific in providing that without prejudice to the application of the Conventions and the Protocol, grave breaches of those instruments "shall be regarded as war crimes". Article 88 deals in standard terms with mutual assistance in criminal matters. It imposes a general duty of co-operation in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of the Protocol. The Article concludes with the following:

> The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.[62]

This leaves untouched existing or future treaties for the surrender of an accused person, whether by means of extradition to another State or surrender for trial before an international tribunal. In addition, Article 91, cited above, deals with the responsibility of a party to a conflict which violates the provisions of the Conventions or of the Protocol.

At the same time, however, Protocol I has made one apparent innovation as far as the Geneva Conventions are concerned. In Article 90, it provides for the establishment of an International Fact-finding Commission. The parties to Protocol I may at any time declare that they recognize *ipso facto* and without special agreement, in relation to any other party accepting the same obligation, the competence of the Commission "to enquire into allegations by such other Party, as authorized by this Article".[63] The Commission is to be established

[62] *Supra* note 8, at 43.

[63] This provision is modelled on Art. 36, para. 2, of the Statute of the International Court of Justice. At the 48th Session of the General Assembly, the Observer for the International Committee of the Red Cross regretted that the system of universal criminal jurisdiction established by the 1949 Geneva Conventions had not always been effectively implemented. The decision to establish an international tribunal for the prosecution of persons responsible for the crimes committed in the territory of the former Yugoslavia helped to strengthen the existing system and was a reflection of the political will of States to punish war crimes. The ICRC welcomed that development, since in its view the tribunal represented a first step towards the establishment of a

when no less than twenty parties have agreed to accept the competence of the Commission. On such occurrence, the depositary (Switzerland) is to convene a meeting of those parties to elect the members of the Commission, such meetings to be convened at intervals of five years. The Commission is to consist of fifteen members "of high moral standing and acknowledged impartiality". It shall be competent to enquire into any facts alleged to be a grave breach or other serious violation of the Conventions and Protocol, and to facilitate through its good offices the restoration of an attitude of respect for the Conventions and the Protocol. In other situations the Commission shall institute an enquiry at the request of one party to the conflict "only with the consent of the other Party or Parties concerned". Unless otherwise agreed, all enquiries are to be undertaken by a Chamber consisting of seven members. Five shall be members of the Commission not nationals of any party to the conflict, and two shall be *ad hoc* members appointed by each side. The Commission is to report on its findings of fact to the parties, with such recommendations as it may deem appropriate, but shall not report its findings publicly unless all the parties to the conflict have requested it to do so.

So far the necessary quorum to set this procedure in motion has not been attained.

Although an innovation for the Geneva Conventions, this provision adds little to existing international procedures. Moreover, developments in Bosnia show that the underlying concept, that only two "sides" are likely to be involved, does not accord with modern reality. This is another example of the problem of "multilateral disputes" which is coming to the fore.[64]

In the second *Italian South Tyrol Terrorism* case, the Supreme Court of Austria regarded both the Genocide Convention and the 1949 Geneva Conventions as "landmarks" on the way to achieving the aim that no State should proceed to protect a crime even if the crime's results prove to be to its advantage.[65]

The decision of the Security Council to establish an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law in former Yugoslavia has a direct bearing on this topic.[66]

---

permanent international criminal jurisdiction. United Nations, General Assembly, 48th session, Sixth Committee, *Official Records*, A//C.6/48/SR.22, para. 94.

[64] *Cf.* L.F. Damrosch, "Multilateral Disputes", in *The International Court at a Crossroads* 376 (L.F. Damrosch ed., 1987).

[65] 71 *I.L.R.* 242, 246 (1967).

[66] This may be inferred from the observation of Arrangio-Ruiz drawing particular attention to this without any direct conclusions. *See* text to *supra* note 5. UN S.C. Res. 808 was adopted nearly a month before the proceedings were instituted in the Court (20 March 1993).

Article 4 of the Statute of that Tribunal is specific in giving the Tribunal the power to prosecute persons committing genocide as defined in that Article – a definition that coincides with the provisions of the Genocide Convention. Article 5 empowers it to prosecute persons responsible for a series of crimes committed in armed conflict directed against any civilian population, whether international or internal in character. These crimes include murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts. They are denominated *crimes against humanity*. Confusion can arise from the fact that the establishment resolution of the Tribunal (Resolution 808 (1993)) itself recites earlier resolutions affirming that persons who commit or order the commission of grave breaches of the humanitarian law conventions "are individually responsible in respect of such breaches". Likewise, the second establishment Resolution 827 (1993) expresses the grave alarm of the Security Council at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and it enumerates a series of acts corresponding to those set out in Article 5 of the Statute. This poses the question of whether it is possible to guarantee a fair trial in light of such expression of views by the Security Council on what would be a central issue for the defence. It also could pose questions as to the manner in which both the International Court of Justice and the Tribunal can exercise their functions in a case relating to acts of that character.

The significance of defining the grave breaches as "war crimes" was not immediately apparent, either in 1949 or in 1977. It became apparent in 1993. The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia confers jurisdiction over grave breaches of the Geneva Conventions of 1949 (Article 2) and over violations of the laws and customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5). Similarly, the Draft Statute for an International Criminal Tribunal prepared by the International Law Commission[67] would give that Tribunal jurisdiction, inter alia, over genocide, grave breaches of the Geneva Conventions including Protocol I (Article 22), a case which may be submitted to it on the authority of the Security Council (Article 25), and a crime related to an act of aggression after the Security Council has determined that the State concerned has committed the act of aggression that is the subject of the charge (Article 27).

There are two things to be noted from this brief survey of this aspect of the jurisdiction of the two current international criminal tribunals, apart from the

[67] *Supra* note 5.

differences in the criminal intent required. One is that, in one form or another, the international responsibility of the State is specifically reserved. The second is the requirement of some authorization from the Security Council, save where the act charged is already classified as a crime under international law. The extensive overlapping between the various crimes defined as genocide, grave breaches of the Geneva Conventions, war crimes, and crimes against humanity has a consequence that a single act may simultaneously be a crime under more than one, and in fact, even under all of these headings.

In a complicated manner, the International Law Commission adopted on first reading a series of articles of Part Two of the law on State Responsibility. These deal with the consequences of an internationally wrongful act. After some generalities not relevant to present purposes, these consequences are headed *Cessation of Wrongful Conduct* (Article 6), *Reparation* (Article 6 bis), *Restitution in Kind* (Article 7), *Compensation* (Article 8), *Satisfaction* (Article 10), and *Assurances and Guarantees of Non-repetition* (Article 10 bis).[68] As seen, some of these, particularly compensation, are also specifically mentioned in the Geneva Conventions.

From this list *Satisfaction* (without displacing the others) would appear to offer the most promise for reconciling the problem of "civil" and "criminal" responsibility of a State, and that of the criminal prosecution of an individual before an international tribunal, and the responsibility of the State of which that person was a national or on whose behalf he was acting. In its present form, Article 10 reads:

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:
   (a) an apology;
   (b) nominal damages;
   (c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;
   (d) in cases where the international wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

[68] For current texts, *see* Report cited in *supra* note 5, at para. 234.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

The commentary cites many arbitrations in which some form of satisfaction like those suggested in Article 10 was awarded. The most important of these is the judgment of the International Court of Justice on the merits in the *Corfu Channel* case. Here the Court was asked whether the United Kingdom had violated the sovereignty of Albania by reason of certain defined acts, and "is there any duty to give satisfaction". The Court replied by stating that the acts in question "violated the sovereignty" of Albania, and that "this declaration by the Court constitutes in itself appropriate satisfaction".[69] Inherent in this decision is the fact of its being made public.

The commentary of the International Law Commission does not mention a public declaration by the Security Council as satisfaction of this kind. Possibly the first instance of this was Resolution 138 (1960) of 23 June 1960 on Argentina's complaint against Israel over "the transfer of Adolf Eichmann to the territory of Israel". In the operative paragraphs of that Resolution, the Security Council

1. *Declares* that acts such as that under consideration which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security;
2. *Requests* the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law;
3. *Expresses* the hope that the traditionally friendly relations between Argentina and Israel will be advanced.

That was accepted by Argentina as adequate satisfaction and the two Governments, "animated by a desire to give effect to the resolution of the Security Council", resolved to regard the incident as closed.[70]

There is another case involving Israel. In December 1968, following terrorist attacks on Israeli civil aircraft at Athens airport, Israel attacked Beirut International Airport and destroyed several civil airliners belonging to Middle

[69] [1949] *I.C.J. Rep.* 4, 16. *Notice also* the second petition of Israel in the Aerial Incident of 27 July 1955 case, [1959] *ibid.*, 127, 130. The Court declined jurisdiction and did not discuss this issue. In the Rainbow Warrior arbitration there is a long discussion on *Declarations of Unlawfulness as Satisfaction*, *supra* note 21, at 575 (para. 121).

[70] *Supra* note 61, at 59 (Joint Communiqué of 3 August 1960).

East Airlines which were parked there. Lebanon brought a complaint before the Security Council. In Resolution 262 (1968) of 31 December, the Security Council condemned Israel for its premeditated military operation in violation of its obligations under the Charter and cease-fire resolutions. In paragraph 4 of that Resolution, the Security Council considered that Lebanon was entitled "to appropriate redress for the destruction it has suffered, responsibility for which has been acknowledged by Israel", but left open the question of what would be the "appropriate redress". Lebanon then applied to the Council of the International Civil Aviation Organization for "appropriate redress". After a bitter debate in an Extraordinary Session, the Council decided "to adjourn *sine die* the discussion on this subject".[71] The Security Council's Resolution was sufficient.

Decisions of the Security Council in the matter, named in its *Official Records* as *The Situation between Iraq and Kuwait*, supply a series of more significant illustrations. In its initial Resolution 660 (1990), 2 August 1990, the Security Council determined that there existed a "breach of international peace and security as regards the Iraqi invasion of Kuwait". It condemned that invasion and demanded immediate and unconditional Iraqi withdrawal. In Resolution 667 (1990), 16 September, it strongly condemned a series of what it termed "aggressive acts perpetrated by Iraq" against diplomatic premises and personnel in Kuwait, in violation of international obligations under the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations respectively.[72] In Resolution 674 (1990), 29 October, it extended this to violations of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949. In Resolution 678 (1990), 29 November, it authorized the Member States "to use all necessary means to uphold and implement" all earlier resolutions and restore international peace and security in the area, a prelude to the Gulf War. In Resolution 686 (1991), 2 March, it demanded that Iraq accept in principle its liability under international law for any loss, damage or injury arising in regard to Kuwait and third States and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait. In Resolution 687 (1991), 3 April, the Security Council took concrete steps to apply some of its decisions.

In section A, paragraphs 2 to 4, of Resolution 687, it set in motion a procedure to "demarcate [not *delimit*] the boundary" between Iraq and Kuwait. The object was to enable the Security Council to guarantee the inviolability of

[71] *See* ICAO Docs. 8793-1, 8793-3 and 8793-4, minutes of the first, third and fourth meetings of the Extraordinary Session of the Council, between 20 and 31 January 1969. In fact, the Security Council's resolution did not meet Lebanon's expectations in submitting its complaint.

[72] 500 *U.N.T.S.* 95; 596 *U.N.T.S.* 261.

that boundary, an example of assurances and guarantees of non-repetition envisaged in Part Two, Article 10, of the draft articles on State Responsibility of the International Law Commission. This was conducted through a procedure reminiscent of an international arbitral process for territorial demarcation. It terminated with a *Final Report on the Demarcation of the International Boundary between the Republic of Iraq and the State of Kuwait by the United Nations Iraq-Kuwait Boundary Demarcation Commission.*[73] This was accepted by the Security Council in Resolution 833 (1993), 27 May.

Section E (paragraphs 16 to 19) of Resolution 687 deals with the discharge of Iraq's liability under international law for any direct loss or damage – including environmental damage and the depletion of natural resources – or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait. For this purpose, in Resolution 692 (1991), 20 May, the Security Council established the United Nations Compensation Commission and the United Nations Compensation Fund. This Commission operates much in the same way as any other modern claims commission, and is proceeding to deal with the various claims against Iraq arising out of Iraq's illegal actions.[74] There is no mention of punitive or exemplary damages in this context, but there is nothing to prevent their award in appropriate circumstances.

The fact that the Security Council acted in that way in the situation between Iraq and Kuwait lends point to the manner in which both the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991 and the draft Statute for an international criminal tribunal of the International Law Commission are each linked to the Security

[73] Doc. S/25811 and Add.1, 21 and 24 May 1993. For a documented account of the work of this Commission, *see* 3 *Iraq and Kuwait: The Hostilities and their Aftermath* 433 (M. Weller ed., 1993). The document symbol of the Boundary Commission is IKBDC/.

[74] Further in Weller, *supra* note 73, at 537. The document symbol of the Commission is S/AC.216/-. Interest attaches to the Commission's decision of 26 June 1992 on the eligibility for compensation of members of the Allied Coalition Armed Forces. In principle, members of those Forces are not eligible for compensation for loss or injury arising as a consequence of their involvement in military operations against Iraq except where:

(a) The compensation is awarded in accordance with the general criteria already adopted;

(b) They were prisoners of war as a consequence of their involvement in Coalition military operations against Iraq in response to its unlawful invasion and occupation of Kuwait;

(c) The loss or injury resulted from mistreatment in violation of international humanitarian law (including the Geneva Conventions of 1949).

Provisional Rules for Claims Procedure (Doc. S/24363-S/AC.216/1992/11), Annex II.

Council. The first of these was established by the Security Council. The second, in its present form, envisages decisions of the Security Council as an element of its jurisdiction over certain types of criminal acts, especially when there is no international treaty already defining them as international crimes. In turn, this would require the Security Council to exercise great care in framing its decisions so as not to prejudge any issue to be brought before a tribunal. This is to ensure a fair trial in accordance with the requirements of the 1966 International Covenant on Civil and Political Rights,[75] specifically mentioned in the Report of the Secretary-General (paragraph 106) leading to the establishment of the Yugoslav Tribunal.

These actions of the Security Council on the one hand, and the technique adopted for these criminal tribunals on the other, suggest a new approach to the fundamental question of the responsibility of a State in a case of war crimes, and the relation between the responsibility of a State and the criminal responsibility of an individual, whoever that individual may be. In this respect, the political debate in 1948 on the nature of State responsibility for acts of genocide, together with the scholastic controversy which it has engendered, is instructive, although its relevance to today's problems is limited. A leading authority and a former member of the International Law Commission has commented on that controversy in the following terms:

> The discussion on international crimes is burdened with misunderstandings and prejudices based on penal law. This goes so far that often States and scholars who vigorously oppose the very idea of a special responsibility regime of international crimes and denounce it as criminalizing State responsibility do not hesitate to understand counter-measures as punitive sanctions or to speak of or demand provisions on punitive or exemplary damages.

The writer goes on to say that he is not convinced that in contemporary international law there exist different regimes of State Responsibility which are connected with the specific contents and function of the obligation breached. He expressed the view that "the codification of international responsibility cannot pass over that situation in silence".[76] In this connection, it is to be noticed that in 1963, the Sub-Commission on State Responsibility of the International Law Commission included in its programme of work – which is still the guide for the Commission's work on the topic – the question of the penalty in international law, the relationship between consequences giving rise

[75] 999 *U.N.T.S.* 171; 1057 *U.N.T.S.* 407 (correction of the Spanish text).

[76] B. Graefrath, "International Crimes – A Specific Regime of International Responsibility of States and its Legal Consequences", *supra* note 11, at 161.

to reparation and those giving rise to punitive action and the possible distinction between internationally wrongful acts involving "merely" the duty to make reparation and those involving the application of sanctions. That careful formulation is not predicated upon any distinction between the civil and the criminal responsibility of States. It places all its emphasis on what it calls the forms of international responsibility and the duty to make reparation.[77] That would seem to be the most appropriate approach. Furthermore, in that context it is to be stressed that what are called "punitive damages" or "exemplary damages" are not necessarily recognition of the "criminal" responsibility of the State as that term is now understood. They are to be regarded more as a form of calculating, in light of all the circumstances, the quantum of reparation due in monetary terms, and not as punitive sanctions designed to deter continuation or repetition of illegal activities by States. Punitive sanctions of that nature are not imposed through legal, quasi-legal or diplomatic procedures. They are imposed only through an international body empowered to impose "sanctions", whether on a universal scale or on a regional scale. As the experience with Iraq shows, the imposition of punitive sanctions leaves unaffected the non-punitive remedies which the injured States can seek.

This approach means abandoning ideas having their origin in internal legal systems or in abstract jurisprudence between *torts* and *crimes*, or, as in Part One, Article 19, on State Responsibility, between *crimes* and *delicts*, as a basis for responsibility. As the International Law Commission has worded it, any internationally wrongful act leads to an instance of State Responsibility. However, it seems that this term itself may be misleading and the cause of much misunderstanding, and a return to "International Responsibility" would more closely indicate what is involved.[78] It is not a mere change of

[77] International Law Commission, [1963] II *Y.B. Int'l L. Comm'n, Report of the Commission on the Work of its 15th Session* (A/5509), Annex I, Report by Mr. Ago (A/CN.4/152), 228, para. 6.

[78] That change in nomenclature would also overcome the difficult question of the international responsibility of international organizations, and of what Judge Bork termed "nonstates" (*supra* note 22). At the beginning of its examination of the topic, the International Law Commission reported:

> It [the Commission] does not underrate the importance of studying questions relating to the responsibility of subjects of international law other than States. The overriding need for clarity in the examination of the topic and the organic nature of the draft, however, clearly make it necessary to defer consideration of these other questions.

[1973] II *Y.B. Int'l L. Comm'n , Report of the Commission on the Work of its 25th Session,* Ch. 2, para. 37; reproduced in Rosenne, *supra* note 1, at 39. The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations contains, in the preamble and Articles 60 and 74,

nomenclature or terminology. It would mean a return to the language of classical writers on State Responsibility, including D. Anzilotti, R. Ago, and E. Jiménez de Aréchaga.[79]

If that should become the point of departure, namely that *any* internationally wrongful act attributable to *any* subject of international law involves international responsibility, the necessary conclusion would be that attention has to be moved from the qualification of the act in abstract jurisprudential terms to determination of its consequences in terms of appropriate reparative action by or on the account of the offending subject of international law, be it a State or any other subject of the law, in favour of another State or entity, or even of the international community at large (*erga omnes*). That reparative action may be spontaneous. It may be the outcome of negotiation (in many cases it is). It may be the consequence of a decision by a competent body such as the Security Council, or the International Court of Justice, or some other agreed third party organ accepted by the States concerned. It may even be agreed that the injured State or other entity accept or agree on satisfaction proffered *ex gratia*, when the quantum of that satisfaction is determined by some other binding third-party decision.[80] There is no end to the requirements and the possibilities which modern diplomacy can employ, always with the supreme objective of removing a cause of international tension even in its mildest form, and to avoid and repair the consequences of a major breach of the peace in its most severe form.

Put that way, the question is not so much whether or not prosecution of an individual accused of violating a rule of international law can be considered a lawful form of sanction against the wrongdoing State. Some might even see that formulation as putting the cart before the horse, since the injured entity always has the option as to the redress acceptable to it. The question to be considered is whether only the prosecution of the individual concerned, whatever the outcome of the prosecution, can be adequate reparative action for

---

provisions corresponding to the preamble and Articles 60 and 73 of the 1969 Vienna Convention on the Law of Treaties. Art. 74 para. 2 states that the provisions of the Convention shall not prejudge any question that may arise in regard to a treaty from the international responsibility of an international organization. This is probably the first major international treaty to recognize the existence of general international responsibility of an international organization. Doc. A/CONF.129/15 (mimeo.). Reproduced in 25 *I.L.M.* 543 (1986). For an illustration of the responsibility of the United Nations for illegal actions not arising from military necessity by soldiers serving in a peace-keeping operation, *see* the exchange of notes between Belgium and the United Nations of 20 February 1965, [1965] *United Nations Juridical Yearbook* 39.

[79] *See* [1972] II *Y.B. Int'l L. Comm'n*, R. Ago, *Fourth Report on State Responsibility* (A/CN.4/264 and Add.1), Annex II (bibliography).

[80] As an illustration of this, *see* the award of 11 January 1992 by the Chile/U.S.A. Commission in the Letelier and Moffitt case, 88 *I.L.R.* 727.

that entity.[81] Leaving aside the options of the injured entity, the answer will depend on the personality and role of the accused, the diligence with which the prosecution is pursued and its outcome, and the defences that were raised and their disposal. If the accused is found guilty, his punishment will be a factor. It may be assumed that prosecution of a soldier or an official of junior rank, or a verdict of not-guilty or not-proven would, or could, leave the question open. The International Court of Justice, in its second Order on provisional measures in the *Application of the Convention on the Prevention and Punishment of Genocide* case, noted the decision of the Security Council to establish the international tribunal for the prosecution of persons responsible for serious violations of international law committed in the territory of former Yugoslavia. The Court did not draw any *direct* conclusions from that action of the Security Council.[82]

There is an implication in this that if the Court should be called upon to assess responsibility in this case, the existence and the activities of that Tribunal will be a relevant factor. If care is not taken, this is likely to become accentuated should the Tribunal have to deal with serious, as opposed to petty, cases. In this regard, two aspects at least of the Tribunal's Statute[83] may become relevant. By Article 21, paragraph 4(d), every accused person must be tried in his presence, thus preventing any trial *in absentia.* Secondly, Article 29 deals with co-operation and judicial assistance to the Tribunal by States, and entailed in this is a requirement that States shall comply without delay with any request for assistance or with an order issued by a Trial Chamber, including, but not limited, to the arrest or detention of persons and the surrender or the transfer of the accused to the Tribunal. This is not a formal obligation to extradite, and the principle *aut dedere aut judicare* is not incorporated in the instruments by which the Tribunal was established and operates. The

[81] In the Aerial Incident of 27 July 1955 case, part of the reparation requested by Israel was for the Court to place on record the failure of the respondent Government to implement an undertaking given during the diplomatic negotiations, to identify and punish the culpable persons. *See supra* note 60. Art. 5 of the Draft Code of Crimes against the Peace and Security of Mankind specifically provides that prosecution of an individual for a crime against the peace and security of mankind (which includes such acts as genocide [Art. 19], systematic violations of human rights [Art. 21], exceptionally serious war crimes [Art. 22], international terrorism [Art. 24], illicit traffic in narcotic drugs [Art. 25] and wilful and severe damage to the environment [Art. 26]) "does not relieve a State of any responsibility under international law for an act or omission attributable to it". International Law Commission, [1991] II *Y.B. Int'l L. Comm'n Report of the Commission on the Work of its 41st Session,* (A/46/10), Ch. IV, Sec. D1, and Commentary, Sec. D2.

[82] [1993] *I.C.J. Rep.* 348 (para. 56). Similar reference is found in the separate opinions of Judge Ajibola at 404 (para. 7) and Judge *ad hoc* E. Lauterpacht at 425 (para. 48).

[83] *See supra* note 5.

Secretary-General's report, which constitutes the justification for the Statute, states in paragraph 126 that an order by a Trial Chamber for the surrender or transfer of persons to the custody of the Tribunal "shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations". It is open to question whether the legal obligations of States, obligations which in themselves partly rest on a legal fiction, and which would derive from the combination of Articles 25 and 103 of the Charter in relation to the Tribunal, the Statute of which was adopted by the Security Council acting under Chapter VII of the Charter, could easily override provisions of the internal law (and possibly its constitutional law) of any State as regards the extradition or surrender of an alleged fugitive criminal from its territory, especially since in the jurisprudence of the European Court of Human Rights, as the *Soering* case demonstrates, the surrender of an accused person is now inextricably linked with the protection of human rights.[84]

In this context, it has been stated that the legal consequences of state conduct being categorized as criminal in international law are not clear. One presumes that such criminality would give rise to a special regime of international responsibility different from that applying to other situations involving State responsibility, with the possibility of a special regime for sanctions. The same authors point out that while there is no tribunal with what is termed "appropriate criminal jurisdiction over States" they at the same time indicate that there is nothing in Article 36 or Article 38 of the Statute of the International Court of Justice to limit the Court's jurisdiction to deciding only "civil" disputes submitted to it.

[84] 161 *European Court of H.R.* 1990, Ser. A. As stated, the report of the Secretary-General specifically referred to the relevant provisions regarding a fair trial contained in Art. 14 of the 1966 International Covenant on Civil and Political Rights. Notwithstanding the apparently categoric formulation of the Statute, draft rules of procedure for the Tribunal submitted by the United States envisaged the possibility that the surrender of an accused person may not be automatic, but may require an extradition or other proceeding in accordance with the laws of the requested country. On that basis the United States suggested that if the Tribunal concluded that a State was not making "substantial and good faith efforts" to comply with its request or order, the Tribunal might notify the Secretary-General for transmission to the Security Council, which should take "appropriate action". Rules 14.5 and 14.6 and Commentary. Suggestions for the Rules of the Tribunal submitted to the Secretary-General of the United Nations on 18 November 1993. Text on file with the author. Nevertheless, Rule 58 of the Rules of Procedure and Evidence adopted by the Tribunal on 11 February 1994 provides that the obligations laid down in Art. 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused to the Tribunal which may exist under the national law or extradition treaties of the State concerned. Art. 59 envisages a report to the Security Council in the event that a requested State does not report on its inability to execute a warrant of arrest. Doc. IT/32, 14 March 1994.

> To the extent that a treaty binding on the parties to the dispute, *or a rule of customary law* [italics added], treats as criminal the respondent states' [sic: state's] conduct there would appear to be nothing to prevent the Court deciding that that conduct gave rise to criminal responsibility on the part of the state concerned.[85]

Should that come to pass, an unlikely event given the consensual basis of the jurisdiction of the International Court, no doubt the matter would then come before the Security Council, either under its general powers as set out in Chapters VI and VII of the Charter, or under Article 94. The Security Council would assume the responsibility – a political responsibility – for drawing consequences from such a decision by the Court. At that point, the matter goes beyond the reach of received international legal principle and enters that of the difficult political issue of the relations between the Security Council and the Court.[86]

In conclusion, it is submitted that in practical terms there is no need to pursue the question of whether the responsibility of a State is "civil" or "criminal" or whether the maxim *Societas delinquere non potest* has any place in today's international law. The responsibility of a State, as of any other subject of international law, flows from the internationally wrongful act of that State or other subject of international law. That internationally wrongful act gives rise to a claim for appropriate redress in favour of the injured party. The most that international law can require, in relation to that redress, is the established condition of proportionality in counter-measures, whatever their technical qualification (retortion, reprisals, retaliation, etc.). The development of international organization, and the increased activity of the Security Council, make it possible and feasible to reformulate the law of international responsibility in terms more responsive to contemporary conditions.[87]

[85] 1 *Oppenheim's International Law*, Peace, *Introduction and Part 1* 535 n. 13 (R. Jennings & A. Watts, eds., 9th ed., 1992).

[86] For the point of view of a Member of the Court on this question, *see* M. Bedjaoui, "Du contrôle de légalité des actes du Conseil de Sécurité", *Nouveaux itinéraires en droit: Hommage à François Rigaux* 69 (1993), written in his personal capacity.

[87] In turn, this requires the Security Council to exercise the utmost care in using its broad powers, and not to state that it is acting under Ch. VII of the Charter unless it really is faced with threats to the peace, breaches of the peace or acts of aggression. The two cases of Security Council resolutions against Israel mentioned in this article were each taken within the scope of Ch. VI of the Charter on the pacific settlement of disputes.

# Annex 28

B. Schiffbauer, "Article VIII", in C. Tams *et al*. (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014) [extract]

# Convention on the Prevention and Punishment of the Crime of Genocide:

# A Commentary

by

Christian J. Tams,
Lars Berster and
Björn Schiffbauer

C.H. BECK · Hart · Nomos
2014

**Annex 28**

*Published by*
Verlag C. H. Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
eMail: bestellung@beck.de
*Co-published by*
Hart Publishing, 16C Worcester Place, Oxford, OXI 2JW, United Kingdom,
online at: www.hartpub.co.uk

and

Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5
76530 Baden-Baden, Germany
eMail: www.nomos.de
Published in North America (US and Canada) by Hart Publishing,
c/o International Specialized Book Services, 930 NE 58th Avenue, Suite 300,
Portland, OR 97213-3786, USA, eMail: orders@isbs.com



ISBN 978-3-406-60317-4 (Beck)
ISBN 978-1-84946-198-6 (Hart Publishing)
ISBN 978-3-8329-7269-1 (Nomos)



Printed in Germany by
fgb · freiburger graphische betriebe GmbH & Co. KG
Bebelstraße 11, 79108 Freiburg

Typeset by
Reemers Publishing Services GmbH, Krefeld

## Article VIII

**Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.**

Table of Contents:



### A. Introduction

Article VIII, together with Article IX, is one of two provisions of the Genocide Convention dealing with state referrals to organs of the United Nations. In contrast to Article IX, which applies exclusively to inter-state disputes regarding the interpretation or application of the Convention coming before the ICJ, Article VIII refers more broadly to the relationship between the Convention and all 'competent organs' of the UN. Whilst the formulation of the provision was the subject of criticism both during the drafting of the Convention and indeed subsequently, there are a number of ways in which Article VIII has contributed to the enhancing international cooperation with regards to the establishment of a system of genocide prevention. As such, referrals under Article VIII might be one way for a state to comply with its broader duty to prevent genocide imposed by Article I.[1] 1

One of the core problems of the Genocide Convention is that it does not address or impose obligations on the UN itself. The conventional obligation to prevent and suppress genocide is imposed on states. However, Article VIII specifically involves the UN in supporting state parties to meet their obligations under the Convention. It provides an additional means of referring a situation to the UN other than 2

[1] Conversely, the duty to prevent is not 'absorbed' by Article VIII referrals, see Article I, mn. 32.

Article 35 of the UN Charter. As such, it is suggested that in some small way this provision is capable of remedying the congenital defect that the Convention does not impose any obligations on the UN to prevent or punish genocide. But for the most part, the UN's role in relation to genocide has developed outside the realm of the Convention.

3 The interaction between Article VIII and the modern institutional framework on genocide in international law is a product of both the legal configuration of the Convention as well as the related subsequent political development; as such it is necessary to give attention to both the legal and political frameworks. In doing so, this commentary will examine the legal features of Article VIII and assess the additional protection it provides in relation to the UN Charter and the rights conferred upon state parties. The commentary then seeks to highlight that Article VIII forms part of a nexus with the UN Charter and the obligations imposed on state parties.

4 Article VIII requires that the UN provide institutional assistance to state parties from the moment the request is made. In addition to institutional assistance being provided by the UN in relation to requests from states, the UN has also subsequently developed means of assistance *proprio motu*. At least indirectly, Article VIII has served as an important component in the contemporary international law and particularly the UN framework in relation to the prevention and punishment of genocide.

## B. Drafting history

5 Whilst Article XIII in its current formulation is not set out in explicit terms in GA Resolution 96(I), there is the recommendation that:

> '…international co-operation be organised between States with a view to facilitating the speedy prevention and punishment of the crime of genocide …'[2]

The policy of cooperation recommended in this provision of the GA Resolution was subsequently to find expression in the Genocide Convention. As this was not a completely new terrain in the early years of the UN Charter, chances of establishing a system of inter-state cooperation appeared to be more convenient from the beginning of the drafting process.

6 This concept found more concrete expression in the Draft Convention prepared by the UN Secretariat in May 1947 and adopted by the Secretary General of 26 June 1947[3] which stated in Article XII that:

> 'Irrespective of any provision in the foregoing articles, should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nation to take measures for the suppression or prevention of such crimes.
> In such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations.'

The significance of this draft article is the mention of the 'competent organs' of the UN – crucially extending the Convention beyond the state parties. The rationale

[2] UN Doc. A/RES/96(I); see also Robinson, Genocide Convention, 17–8 and 121.
[3] UN Doc. E/447; see also Robinson, Genocide Convention, 122–30.

for this draft article in fact envisaged that the UN play some oversight role in relation to compliance with the obligations imposed on state parties.[4] Due to the state of development of international criminal law at this time, it was felt that strong international cooperation with the support of the UN was required to ensure compliance with the obligations set out in the Convention.[5] However, details at this stage as to how exactly the UN would ensure the compliance with the Convention were not clear and doubts were already raised as to whether the UN was competent to play any role in relation to non-member states.[6] Such contentious issues were the subject of consideration in the *Ad Hoc* Committee.

Despite several amendment proposals, disagreement remained in relation to two 7
main legal issues, namely whether specific UN organs should be mentioned in Article VIII and whether there should be a compulsory duty to notify those organs or not.[7] However both proposals to give the Security Council exclusive competence under Article VIII and to provide for a specific obligation to report relevant cases to the UN did not attract sufficient support at this stage of the drafting process.[8] Instead, a compromise based on a provision earlier proposed by China was adopted by the *Ad Hoc* Committee,[9] which referred to the UN as a whole in the first paragraph and recognised a general right of notification in the second paragraph. The result of the compromise provision was Article VIII of the Draft Convention prepared by the *Ad Hoc* Committee entitled 'Action of the United Nations':

> 'Article VIII: [Action of the United Nations] 1. A party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide.
> 2. A party to this Convention may bring to the attention of any competent organ of the United Nations any case of violation of this Convention.'[10]

However this compromise provision did not bring an end to disagreement 8
regarding the formulation of Article VIII. Before the Sixth Committee the assumption that the role of the SC could be extended without amendment of the Convention appeared to be widely held. Ultimately, a joint a proposal by the United Kingdom[11] and Belgium[12] suggested eschewing any reference to the SC since the necessary competence for SC action could be found in the UN Charter; this was accepted and draft Article VIII was adopted by the Sixth Committee.[13] A later attempt to reintroduce a provision which specifically envisaged SC action (supposedly to ensure that mention of a UN organ other than the ICJ was included in the Convention[14]), including the submission of an amendment by Australia to

---

[4] UN Doc. E/447, 45.
[5] UN Doc. E/447, 45–6.
[6] UN Doc. E/447, 46, see also Schabas, Genocide in Int'l Law (2nd ed.), 534–5.
[7] *Inter alia* by the USA (UN Doc. E/632) and the Soviet Union (UN Doc. E/AC.25/7), for more details Schabas, Genocide in Int'l Law (2nd ed.), 535; UN Doc. E/794, 33–5.
[8] UN Doc. E/794, 33; further Schabas, Genocide in Int'l Law (2nd ed.), 536–7.
[9] UN Doc. E/794, 34–5; Schabas, Genocide in Int'l Law (2nd ed.), 536.
[10] UN Doc. E/794, see also Robinson, Genocide Convention, 131–7.
[11] UN Doc. A/C.6/236.
[12] UN Doc. A/C.6/217.
[13] Schabas, Genocide in Int'l Law (2nd ed.), 536; UN Doc. A/C.6/SR.101 (28 votes to 18, 1 abstention).
[14] Gaja, in: Gaeta, Genocide Convention, 401; Robinson, Genocide Convention, 91; Schabas, Genocide in Int'l Law (2nd ed.), 538.

this end, was rejected by a Committee vote and Article VIII was adopted without further deliberation.[15]

9 Despite the tumultuous drafting process it is clear that at all times the state parties were seeking to achieve strong international cooperation to achieve the goals of the Convention and that the UN was to play some role in support of the state parties in this respect. Although the Convention does not place any obligations on the UN itself, the drafting process clearly shows that the drafters wanted to ensure strong institutional cooperation rather than placing narrow obligations on one UN organ or another.[16]

### C. Interpretation

10 Notwithstanding concerns expressed during the drafting, Article VIII is by no means a useless provision; once interpreted in light of the Convention's object and purpose and the subsequent practice of state parties, Article VIII can be filled with meaning. This section will firstly examine the meaning and scope of the right of any state party to 'call upon any competent organ of the United Nations to take such action under the Charter of the United Nations…' before assessing the practical issues regarding the procedure of state referrals. However, the provision is not a 'catch all' clause covering the totality of UN action against genocide. In order to give a full account, a separate section addresses subsequent developments that – while not coming within the scope of Article VIII – are nevertheless relevant to an understanding of the UN's role in the prevention and suppression of genocide.[17]

11 Unlike Article IX, addressing inter-state proceedings about the interpretation, application or fulfilment of the Convention, the scope of application of Article VIII is far from clear. In contrast with the initiation of strictly judicial proceedings before the ICJ which is governed by the ICJ's Statute, referral to UN organs is a much more amorphous concept. Referral under Article VIII can be seen as a more political procedure, which serves as an alternative weapon in achieving the prevention and punishment of the crime of genocide. The following section attempts to highlight how Article VIII, in establishing a right to call upon UN organs for support, can be potentially useful in achieving compliance with the Convention.

#### I. The utility of Article VIII: 'call upon … to'

12 In light on criticisms of Article VIII as being without utility[18] or even senseless[19] this section seeks to highlight that this provision in fact provides a means of referral to UN organs that is independent from the means of referral available under the UN Charter.

13 The expression 'call upon … to' signifies by its ordinary meaning 'demand that someone do something'.[20] This first and foremost is formulated as a right of states to address themselves to, and to be heard by, United Nations organs, e. g. by raising

---

[15] UN Doc. A/C.6/SR.105.
[16] Robinson, Genocide Convention, 89–90.
[17] *Infra,* mns 46 et seq.
[18] Whitaker Report, 35–5 (paras 65–6); but see also Schabas, Genocide in Int'l Law (2nd ed.), 538.
[19] Drost, Genocide, 133–4.
[20] Oxford Dictionary, 248 ('call', phrasal verbs, 'call on', para. 2, 'call upon' with infinitive).

awareness for a particular situation, by demanding action, or by proposing a certain course of conduct. While that much is undisputed, the question remains whether Article VIII, by recognising a right to 'call upon' others, requires a little more. In particular, it could imply not only a right to be heard by the respective organ, but also a right to some form of reaction. Of course, as regards the specific reaction, the eventual decisions will have to be made by the 'competent organs' as they are 'to take actions … they consider appropriate'.[21] In other words, Article VIII does not imply a right to see one's calls for action heeded, let alone grant a right to force upon UN organs a particular course of action. However, while UN organs retain discretion as to the specific course of action chosen, there are good arguments to suggest that Article VIII requires at least some form of reaction (and be it only a rejection). As regards the wording of the provision, this is brought out in particular by the French and Spanish language versions, which use 'saisir' and 'recurrir a', both of which imply a reaction following a request. Moreover, it is relevant that terms like 'call upon', 'saisir' and 'recurrir a' typically are used in relation to court proceedings, and presuppose that the court that has been 'saisi' responds in some way. This result can draw support from the object and purpose of the Convention, which recognises the crucial role of the United Nations in the prevention and punishment of genocide. A mere right to be heard, not accompanied by a right to some form of response, would hinder effective responses to genocide at least when states need UN support to comply with their conventional duties.

### 1. Rights to state referral under the UN Charter compared with Article VIII

The UN Charter provides for a power of state referral in Article 35, paragraphs 1 and 2: 14

> '1. Any Member of the United Nations may *bring* any dispute, or any situation of the nature referred to in Article 34, *to the attention* of the Security Council or of the General Assembly.
> 2. A state which is not a Member of the United Nations may *bring to the attention* of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter'[22].

Without prejudice to their status of being a UN member state or not,[23] both paragraphs enable states to 'bring to the attention' of the GA or SC international disputes. Unlike Article VIII as construed above, the UN Charter, however, is silent on the consequences that flow from such a referral. Whilst the right to bring a dispute to the attention of the GA or SC implies nothing more than a right of notification, the right 'to call upon' as set out in the Genocide Convention implies that some action is required of the UN organ upon notification.[24] For instance, Rule 3 of the Provisional Rules of Procedure[25] of the SC appears to require nothing more than that the President call a meeting of the SC when a situation is referred to it under Article 35

[21] *Infra*, mns 24 et seq.
[22] Emphasis added.
[23] More *infra*, mns 20-2.
[24] Oxford Dictionary, 102 ('attention', para. 1).
[25] Such procedure rules of an organ match the broad meaning of 'subsequent practice', see Villiger, Commentary on the VCLT, Article 31, mns 22–3, 19.

to decide whether a situation ought to be placed on the agenda of the SC.[26] While this indeed might be sufficient to comply with a right of notification, it would be an insufficient response to a 'call' for action. The distinction between the two was brought out by the *Ad Hoc* Committee draft which distinguished between the right of states to 'bring [matters] to the attention' of the United Nations and the right to 'call upon' them.[27] The French and Spanish versions of Article VIII confirm this result. The formulations 'attirer l'attention' (French) as well as 'llevar a la atención' (Spanish) both do not require a subsequent action but are instead limited to a right to be heard. In the French and Spanish (just as in the English) versions, the UN Charter therefore deviates from the terminology employed in Article VIII of the Genocide Convention and uses 'softer' terms to describe the different rights to initiative granted to states. The comparison suggests that, precisely because the right to bring a matter to the attention of the Security Council under Article 35 of the Charter was more limited in scope, it made sense for Article VIII of the Genocide Convention to provide for a stronger right to 'call upon' UN organs.

15 Furthermore, before bringing a situation to the attention of the SC under Article 35 an additional hurdle in the form of Article 33 para. 1 UN Charter must be overcome. According to this provision parties to a dispute must first of all try to settle the dispute through any of the means of pacific settlement set out therein.[28] It is only after such settlement has been attempted and failed that a dispute can be brought to the attention of the GA or SC under Article 35 UN Charter.[29] No such requirement is imposed on state parties to the Genocide Convention before they can resort to Article VIII.

16 In relation to the GA, no further provision is made for state referrals in the UN Charter. Under Rules 13 lit. (e) and (h) of the GA's Rules of Procedure (the latter making specific reference to Article 35 of the Charter) all items proposed by member states and non-member states must be included on the agenda of a subsequent session of the GA.[30] Consequently, in contrast to the SC, bringing an issue to the attention of the GA entails not only notification but also the right to have the item placed on the agenda of the GA. This creates a situation more akin to that found in Article VIII of the Genocide Convention, however it should be noted that the GA may alter its Rules of Procedure whilst modification of Article VIII can only be achieved through the formal amendment process set out in the Convention. No provision is made under the Charter for state initiatives in relation to any other UN organ.[31]

---

[26] UN Doc. S 796/Rev.7; see further Wasum-Rainer/Jahn-Koch, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 30, mns 14–56; Schweisfurth, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 35, mns 26–8. As adopted by the SC pursuant to Article 30 of the UN Charter, this rule is part of the subsequent practice of the UN members (at least those that have been members of the SC so far) und thus a primary means of interpretation according to Article 31 para. 3 lit. (b) VCLT.

[27] *Supra*, mn. 7.

[28] Whilst still legally binding, Article 33 para. 1 has somewhat lost its significance since states most often now refer 'situations' rather than 'disputes' and as such avoid the application of this provision; see for references Schweisfurth, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 35, mn. 14.

[29] Schweisfurth, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 35, mn. 14.

[30] In fact, the same applies to non-members pursuant to Rule 13(h), with an explicit reference to Article 35 para. 2 UN Charter; UN Doc. A/520/Rev.17; see further Fitschen, in: in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 21, mn. 46.

[31] Although reference to state initiatives made be contained within their Rules of Procedure, see Rule 9 para. 2 lit. (e) of the Rules of Procedure of the ECOSOC, UN Doc. E/5715/Rev.2.

On the whole, the comparison suggests that Article VIII provides an independent means of referring a relevant situation to an organ of the United Nations that cannot be found elsewhere in the UN Charter. 17

**2. The relationship between Article VIII and the UN Charter**

One prominent criticism of Article VIII is that in imposing an obligation on UN organs to take action as a result of a referral made by a state party, this provision could somehow interfere with the UN Charter system or induce an organ to act *ultra vires*. Particularly during the adoption process and in the Convention's early years such concerns were articulated.[32] From a contemporary perspective, the problem may seem less acute: While member states in 1948 were concerned about intrusive UN interference into the their domestic affairs, developments since 1948 have clarified that genocidal threats are proper matters for UN concern – in fact, if anything, UN action to combat them is desired and called for.[33] 18

Still, the fact remains that by virtue of a special treaty, separate from the UN Charter, UN organs are vested with obligations and possibly competences. In principle, this could indeed give rise to concerns about *ultra vires* activities and the delimitation of UN competences. However, in the specific case of Article VIII; three arguments suggest that the problems, even in 1948, were perceived rather than real. First, while the preceding considerations have emphasised the relevance of Article VIII, which implies a need for some form of response on behalf of the UN, it is clear that UN organs retain a considerable measure of discretion in deciding about the specific course of conduct to be adopted. In shaping their 'appropriate' response, UN organs can ensure they act *intra vires*. Second, as a product of the UN codification movement, the Genocide Convention is presumed to be compatible with the UN's founding document, viz. the Charter.[34] The aims of the Convention stand in a close context to the object and purpose of the UN, namely to provide for worldwide peace and security.[35] Preventing genocide is a highly relevant contribution to this purpose. While formally, separate, the two treaties complement each other and can be construed accordingly. Third, even if the Genocide Convention went beyond the Charter as interpreted in 1948, in elaborating and adopting (and thereby approving) the Genocide Convention, the UN General Assembly could be said to have developed the UN system.[36] Its involvement in the drafting process can be seen as 'subsequent practice'[37] and is relevant for the purposes of Charter interpretation. In sum, Article VIII stands in a close interrelation to the UN 19

[32] See the historic discussion and references to it in Robinson, Genocide Convention, 91–2.

[33] For documents calling for comprehensive UN involvement see *infra,* mns 33 et seq.; and further Introduction, mns 3 and 28.

[34] For more on the interrelation between the UN Charter and other treaties, and on the role of Article 103 Charter, see Paulus/Leiß, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 103, mns 17–8. Pursuant to Article 31 para. 3 lit. (c) VCLT, treaty interpretation has to take account of the normative context of treaty provisions; this, too, facilitates the systematic integration of separate treaty rules. For brief comment see Introduction, mns 30–8.

[35] See in general Wolfrum, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 1, mns 1–38.

[36] For brief comment on the General Assembly's role as a 'Charter interpreter' see Kadelbach, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Interpretation, mns 52–5.

[37] See Introduction, mns 11–2.

Charter. It complements Charter-based rights of initiative, but goes beyond them and thus retains its autonomous relevance.

### II. Personal scope: 'any contracting party'

20 Article VIII provides a right of referral to 'any contracting party', in other words any state party to the Convention. First, it should be noted that in relation to Article VIII no specific link to an instance of genocide need be established before a referral can be made under this provision. In addition, the right of a contracting party to call upon the UN organs for assistance under Article VIII is not restricted to instances of genocide involving other contracting parties, but is competent to do so at any time. The broad application of this provision corresponds to the object and purpose of the Convention to prevent and punish any acts of genocide. Article VIII thus opens the door for a procedure similar to a (non-judicial) '*actio popularis*'.

21 That having been said, the right to invoke Article VIII to call upon UN organs for assistance is restricted to contracting parties to the Genocide Convention.[38] Consequently, non-parties seeking to raise genocide-related issues before the UN are restricted to rights of referral recognised in the UN Charter.

22 Conversely, in the years after the adoption of the Convention it was discussed whether contracting parties to the Convention could invoke Article VIII despite not being UN member states.[39] Providing such access to the UN for non-member states could be said to contravene the principle of *pacta tertiis nec nocent nec prosunt*. Whilst today this debate is only of esoteric interest due to near universal UN membership,[40] in theory at least a situation could arise where a new state, for example, would become party to the Genocide Convention and not to the UN Charter (at least not at first).[41] In this setting, it seems beyond doubt that parties to the Genocide Convention can 'call upon' UN organs pursuant to Article VIII even before they join the Organization. This would seem to follow from the ordinary meaning of Article VIII itself, which does not distinguish between UN members and UN non-members. Systematically, support can be derived from a comparison between Articles VIII and XI: while the former treats members and non-members alike, the latter stipulates that UN non-members must be invited to join the Genocide Convention regime.[42] From the perspective of the UN, to preclude non-members from raising genocide-related matters before Charter organs does not seem to be required either. Not only are the Charter-specific procedures aimed to facilitate international peace and security, or dispute resolution, open to non-members.[43] What is more, the UN, as per its Charter's Article 1, aspires to be a

---

[38] Kunz, AJIL 43 (1949), 746.

[39] Robinson, Genocide Convention, 94–5.

[40] See Fastenrath, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 4, mns 9–10.

[41] As it happened e. g. regarding UNESCO with Palestine on 31 October 2011, see http://www.unesco.org/new/en/media-services/single-view/news/general_conference_admits_palestine_as_unesco_member_state.

[42] For details see Article XI, mns 8–9.

[43] See notably Article 35 para. 2 UN Charter (recognising the right of '[a] state which is not a member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter'). For comment see Schweisfurth, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 35, mns 18–24.

'centre for harmonizing the actions of nations in the attainment of [the UN's aims]' and to that effect (as per Article 2, para. 6) is to 'ensure that states which are not Members of the United Nations act in accordance with [its] Principles'. Finally, Article 102 para. 2 of the Charter is indicative: it provides that once a treaty has been registered with the UN Secretariat, it can be invoked before UN organs, without distinguishing between UN members and non-members.[44] All this clarifies that the United Nations does not regard itself as a 'closed shop' but envisages the participation of non-member states in broad measure. In line with this, there is no reason at all to read Article VIII of the Genocide Convention restrictively. The right to 'call upon' UN organs is open to all parties to the Convention.

### III. Substantive scope

A number of significant legal issues arise in relation to the substantive scope of Article VIII. Such legal issues relate to which are the 'competent organs of the UN', what 'actions under the UN Charter' are covered and what action is to be considered 'appropriate'. 23

#### 1. 'competent organs of the UN'

In referring to the 'competent organs of the UN' Article VIII applies to all UN organs, making no difference between them.[45] The competence of an organ must be assessed on a case-by-case basis according to the functions of the organ under the UN Charter and in light of the object and purpose of the Convention. The notion of 'organs' refers to Article 7 UN Charter, which lists six principal organs (the GA, SC, ECOSOC, the Trusteeship Council, the ICJ[46] and the Secretariat[47]) and, in paragraph 2, envisages the creation of subsidiary organs.[48] 24

As Article VIII of the Convention contains no restriction, the reference to 'organs' could be read to cover principal as well as subsidiary organs. It could, read dynamically, even be construed to comprise subsidiary organs established after 1948. However, Article VIII only refers to organs that can take 'action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III'. Put differently, the 'competence' of an organ must be based on the Charter. This is not true for subsidiary organs whose competence is based on the secondary act that establishes them, not on the (primary) Charter. Read properly, Article VIII thus only covers action by the principal organs. This does not mean that other organs could not take action against genocide: for some of them (such as the Human Rights Council, this is 25

[44] The provision encourages registration of all treaties, irrespective of whether they are binding on member states or non-members, see Martens, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 102, mn. 19. The Genocide Convention was registered on 12 January 1951, see Article XIX, mns 3–4.

[45] Although regarding the draft version limiting the competent organ to the SC, which was controversially discussed, *supra*, mn. 8.

[46] See in particular on the ICJ *infra*, mn. 34.

[47] The list is exhaustive: see Paulus/Lippold, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 7, mn. 8.

[48] See further Articles 22, 29 UN Charter. Paulus/Lippold provide a useful list (in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 7, mn. 33).

clearly an essential aspect of their mandate).[49] However, their practice is not based on Article VIII, but on legal bases other than the Genocide Convention.

26 As regards the UN's principal organs, any organ is 'competent' in the sense of Article VIII if it can act to prevent or address genocide. Such ability cannot be measured in the abstract. Rather, each situation must be assessed in order to determine whether, in light of the situation at hand, the organ in question is competent. For instance, if the reported situation urgently requires immediate action because acts of genocide are taking place, the SC with its Chapter VII powers would be the competent organ rather than an organ which only possesses the power to make recommendations such as the GA or ECOSOC. On the other hand, if an initial investigation into a situation was required, any organ with the ability to carry out such an investigation can be considered competent.

27 As it sometimes may not always be clear which organ is competent in a particular situation, it is suggested that the requirements that determine competence must not be construed narrowly but leave sufficient flexibility. It is suggested that a state is entitled to specify which organ it believes to be competent at the time of the referral – or indeed to call upon more than one organ simultaneously. If subsequently it transpires that another organ is better placed to carry out the task, the matter can always be referred to it. As long as an organ is not obviously incompetent, it may not ignore a call by a member state.

### 2. Subsequent practice regarding the competence of UN organs

28 In line with the preceding considerations, action in the sense of Article VIII has been taken by a range of different UN (principal) organs, both in response to calls by member states and *proprio motu*. The GA has on a number of occasions taken action to engage with the crime of genocide since the coming into force of the Convention.[50] For instance, the GA has been host to discussions of alleged instances of genocide in Tibet,[51] Iraq in 1963[52] and (more prominently) Lebanon in 1982.[53] Furthermore, the GA has adopted resolutions on the events in Former Yugoslavia, Rwanda[54] and Cambodia.[55] Such practice in conjunction with the involvement of the GA in the development of the Responsibility to Protect doctrine and the

[49] See further Introduction, mns 3, 28.

[50] For instance, in 1992 the GA adopted the 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' which relates to the crime of genocide in a number of ways. UN Doc. A/RES/47/135 (18 December 1992); Schabas, Genocide in Int'l Law (2nd ed.), 542.

[51] China was accused in the GA of having committed genocide in Tibet by Cuba (UN Doc. A/PV.831, para. 126), El Salvador (UN Doc. A/PV.812, para. 127, and A/PV.833, para. 8), Malaya (UN Doc. A/PV.831) and the Netherlands (UN Doc. A/PV.833, para. 28).

[52] Iraq was accused in the GA of having committed genocide against the Kurds by Mongolia (UN Doc. A/5429).

[53] Israel was accused in the GA of having committed genocide against Palestinian refugees in the Lebanese Sabra and Shatila refugee camps by Cuba (UN Doc. A/37/L.52, add. 1 and A/37/PV.108, para. 58), the German Democratic Republic (UN Doc. A/37/PV.92), Nicaragua (UN Doc. A/37/PV.96), Madagascar (UN Doc. A/37/489, annex), Mongolia (UN Doc. A/37/480, annex), Vietnam (UN Doc. A/37/489, annex) and Pakistan (UN Doc. A/37/502, annex). See on individual criminal proceedings before Belgian courts Article IV, mn. 58.

[54] For detailed references see Schabas, Genocide in Int'l Law (2nd ed.), 543.

[55] UN Doc. A/RES/52/135; Schabas, Genocide in Int'l Law (2nd ed.), 544.

establishment of Action Plan to Prevent Genocide in 2004[56] strongly suggest that the GA could be considered competent for the purposes of Article VIII.

The SC has also dealt with instances of genocide on several occasions.[57] The SC's 29
first involvement with genocide came in 1982 with the situation in the Lebanese refugee camps of Sabra and Shatila;[58] but its most prominent engagement was related to the genocide in Bosnia and Herzegovina in 1993.[59] The SC first adopted a resolution on the prevention of genocide during the break up of Yugoslavia[60] before creating the International Criminal Tribunal for the Former Yugoslavia through a Chapter VII resolution with explicit jurisdiction over the crime of genocide.[61]

Unfortunately, despite taking proactive steps in relation to the situation in the 30
former Yugoslavia, the SC failed to take action to prevent or put a stop to genocide in Rwanda in 1994.[62] However, the SC's failure to act in this case was in no way due to any perception that it lacked authority in any way but rather a veto by permanent members.[63] The SC has subsequently adopted several resolutions on the situation in Rwanda, Burundi and Darfur explicitly referring to the prevention of genocide.[64] Such practice and the extremely broad authority the SC possesses under Chapter VII clarifies (if clarification were needed) that the SC can be considered a competent organ for the purposes of Article VIII.

Whilst the role of other UN organs has been limited in relation to subsequent 31
practice, some consideration of their operation in necessary and sheds further light on what organs can be considered competent for the purposes of Article VIII.

Since playing an instrumental role in the drafting of the Genocide Convention,[65] 32
the ECOSOC has more than once been 'the focal point of much activity concerning genocide'.[66] Although it was not directly addressed by a member state, in 1967 following a call by the Sub-Commission on the Promotion and Protection of Human Rights, the ECOSOC prepared a report on genocide.[67] Even though the report was for internal disputes not concluded until 1985,[68] the competence of the ECOSOC on genocide cannot be denied. Moreover, its powers are formulated in

---

[56] *Infra*, mn. 52.

[57] Schabas, Genocide in Int'l Law (2nd ed.), 546–55.

[58] Initiated by the Soviet Union (UN Doc. S/15419) and supported by Surinam (UN Doc. S/15406); see also *supra* fn. 53; see further on the incident Malone, The Kahan Report, *passim*.

[59] Schabas, Genocide in Int'l Law (2nd ed.), 546.

[60] UN Doc. S/RES/819 (16 April 1993).

[61] UN Doc. S/RES/827 (8 May 1993).

[62] For details Grünfeld/Huijboom, Failure to prevent Genocide in Rwanda, 199–217; Melvern, JIntCrimJust 3 (2005), 847; Schabas, Genocide in Int'l Law (2nd ed.), 547–9.

[63] Melvern, JIntCrimJust 3 (2005), 847, 854–6; Schabas, Genocide in Int'l Law (2nd ed.), 547–8. Only after the massacres had reached their peak, on 8 June 1994, the SC recognised the situation as genocide and then authorised an intervention two weeks later. Schabas, Genocide in Int'l Law (2nd ed.), 550.

[64] UN Docs S/RES/978, S/RES/1011, S/RES/1029 (all on Rwanda), S/RES1012 and S/RES/1161 (both on Burundi); UN Doc. S/RES/1366 (30 August 2001), emphasis as original; see also the comment on the later implementation of the Special Adviser on the Prevention of Genocide, *infra*, mn. 52; Schabas, Genocide in Int'l Law (2nd ed.), 553–4.

[65] GA Resolution 96 (I) addressed the ECOSOC directly. It then participated with its *Ad Hoc* Committee even in the drafting process of the Convention and thus proved its general competence on genocide issues.

[66] Schabas, Genocide in Int'l Law (2nd ed.), 555.

[67] Schabas, Genocide in Int'l Law (2nd ed.), 555 (there fn. 169).

[68] In details Schabas, Genocide in Int'l Law (2nd ed.), 555–7.

Articles 62 to 66 of the UN Charter so that the ECOSOC is also able to act upon calls according to the Charter. There is no reason to exclude the ECOSOC from the list of competent UN organs according to Article VIII.

33 Another principal organ that has dealt with issues relating to genocide is the Secretariat.[69] In providing logistical support for the entire Organization the Secretariat is indirectly involved whenever any member of UN staff is in charge of monitoring or engaging with an instance of genocide such as in Yugoslavia, Rwanda and Darfur.[70] However, aside from logistical and organizational support for other organs, the Secretariat has not been directly called upon by states under Article VIII and likewise there is no procedure for referral of a situation to the Secretariat in the UN Charter. As such, the Secretariat cannot be considered a competent organ for the purposes of Article VIII; it gets involved in cooperation with actions by other organs.

34 A further principal organ of the UN, the ICJ, is potentially significant for the operation of the Genocide Convention. The Court's role is addressed in Article IX of the Convention specifically and more generally circumscribed by its Statute and the ICJ-related provisions of the Charter. As is noted elsewhere,[71] these envisage contentious inter-state proceedings and permit Charter organs (but not member states) to make use of the ICJ's advisory role.[72] All this is possible irrespective of Article VIII. It could be asked, though, whether Article VIII could provide an autonomous basis for ICJ action. In its provisional measures order in the *Bosnian Genocide case,* the Court briefly considered the matter when noting:

> '… Article VIII, even assuming it to be applicable to the Court as one of the 'competent organs of the United Nations', appears not to confer on it any functions or competence additional to those provided for in its Statute ….'[73]

This seems to suggest that Article VIII does not add to (nor diminish from) to the Court's competences as defined by Article IX. For the scope of the Court's competences, it is irrelevant.[74]

### 3. 'actions under the UN Charter'

35 Upon receiving a referral from a contracting party a competent UN organ has the discretion to take 'actions under the Charter of the United Nations'.[75] As such, the range of possible action that can be taken by competent organs is limited to those powers it possesses under the UN Charter.[76]

36 For the General Assembly, this means that its response to genocide will typically not involve the imposition of legal obligations or measures of coercion. Its powers are mainly political;[77] they include a general competence to discuss questions of

---

[69] Schabas, Genocide in Int'l Law (2nd ed.), 571–3.

[70] See further Chesterman, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 97, mns 6–8; see further details and references in Schabas, Genocide in Int'l Law (2nd ed.), 572–3.

[71] See Article IX, mns 1, 18–49.

[72] Oellers-Frahm, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 96, mns 14–21.

[73] ICJ Reports 1993, 23 (para. 47).

[74] Lippman, HousJIntL 23 (2000–2001), 512.

[75] *Supra*, mn. 13.

[76] In the case of the GA, Articles 10 to 17 UN Charter, for the SC, Articles 24 to 26 (combined with Chapters VI, VII, VIII and XII) UN Charter, for ECOSOC, Articles 62 to 66 UN Charter.

[77] Peterson, in: Oxford Handbook on the UN, 97–116.

international concern (including those related to genocide)[78] and to recommend a particular course of action.[79] As per Article 22, this can include the creation of subsidiary organs mandated to address questions relating to genocide. Outside specific crisis situations, the GA's power to initiate studies or make recommendations as set out in Article 13 UN Charter[80] and its specific competence with respect to human rights recognised in Articles 55 and 56 may provide a basis for action. The effectiveness of such action, however, depends on the political will and cooperation of member states.

37 The SC, in contrast, has real operational powers and can impose coercive measures.[81] As it is primarily responsible for the maintenance of peace and security,[82] it is in a position to ensure compliance with the Convention in situations of crisis. While its Chapter VI powers are recommendatory, under Chapter VII of the Charter, the Council can impose a wide range of sanctions if it has determined genocidal violence to amount to a 'threat to the peace' in the sense of Article 39 UN Charter.[83] This determination depends on the political will of the SC members, and must be carried by the votes (or at least not attract vetoes) of the SC's five permanent members. However, where such political will is mustered, 'genocide, whether imminent or ongoing, practically always … [will be considered] a threat to the peace'.[84] This opens up the way for a wide range of military and non-military sanctions under Articles 41 and 42 UN Charter, but also enables the Council to condemn a situation or to install commissions for investigation purposes.[85]

38 The powers of the ECOSOC are, similar to those of the GA, of a political nature.[86] As vested by Articles 62 to 66 of the UN Charter, it can make or initiate studies, make reports and give recommendations.[87] Doing so, its functions appear complementary to those of the GA.[88] That is why, generally speaking, a distinction between the GA and the ECOSOC to identify the 'more competent' organ is not easy; and it will generally be up to states to choose which they intend to 'call upon'. On that basis, given its diminished role, ECOSOC may not be the first port of call; especially since special procedures created by the Human Rights Commission (a subsidiary organ of ECOSOC) have been transferred to the Human Rights Council (established by the GA). However, historically, it has played a considerable role, as the above discussion indicates.[89]

---

[78] Klein/Schmahl, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 10, mns 4–20.

[79] Klein/Schmahl, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 10, mns 12–41.

[80] See also on the broad interpretation of Article 13 of the UN Charter Fleischhauer/Simma, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 13, mns 1–6.

[81] Malone, in: Oxford Handbook on the UN, 117–35.

[82] Peters, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 24, mns 33–4.

[83] That it can interpret the notion of 'threat to peace' in such a way today seems undisputed, see Gaja, in: Gaeta, Genocide Convention, 402.

[84] As put by Kofi Annan in his Stockholm Proposals, 2.

[85] See for details Schabas, Genocide in Int'l Law (2nd ed.), 553.

[86] Rosenthal, in: Oxford Handbook on the UN, 136–48.

[87] Röben, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 62, mns 10–24.

[88] Rosenthal, in: Oxford Handbook on the UN, 138.

[89] *Supra*, mn. 32.

### 4. 'they consider appropriate'

39 While Article VIII entitles contracting parties to 'call upon' competent organs of the UN, the action to be taken is the one 'they consider appropriate'. This formulation raises a number of important legal issues that require further examination, including who exactly 'they' refers to and what exactly 'consider appropriate' in this context means. As regards the first issue, the term 'they' used in the English version might not only refer to the UN organs, but include the member state referring the matter. However, as the French language version, which uses 'ceux-ci', clarifies, the reference is to the UN organs only. These alone are (or rather: the requested organ alone is) thus to consider 'appropriate measures'. This does not mean that the referring state requesting action had to remain entirely passive. It can suggest measures it considers appropriate; and indeed such suggestions from states involved with or close to the situation at hand as to the best course of action are of potentially great value to competent UN organs.

40 Whilst, as demonstrated above, Article VIII confers a right on the referring state to have the issue placed on the agenda of a competent organ of the UN and to receive some form of response,[90] crucially it does not confer any right to insist on a particular course of action. By providing that competent UN organs may take whatever action 'they consider appropriate' they are afforded considerable discretion as to whether to take action, and if so, what kind of action they wish to take. What is more, if the response falls short of the referring state's hopes (or even if there is no response at all), hard and fast enforcement mechanisms are not readily available.[91] All this of course is a central weakness and the reason for a good deal of the criticism of Article VIII as providing an incomplete system for the prevention and punishment of the crime of genocide.[92] As will be shown below,[93] the more recent UN debates around the notion of a 'Responsibility to Protect' – developed outside Article VIII – have indeed sought to establish proper, specific obligation of the international community to prevent mass atrocities such as genocide.

41 Yet even the existence of a more limited duty to respond in some way, recognised in Article VIII, should not be dismissed completely. For once, debates about 'R2P' may very well have drawn inspiration from provisions like Article VIII, which at least provided some normative foothold for the idea of a UN responsibility for the prevention of genocide. Beyond that, for UN organs to be obliged to react in some form, has – potentially important – political implication that could very well affect the substance of the response. A requested organ needs to place the referred matter on its agenda and it has to engage with it, which will typically require a discussion in which the referring state can participate. Even if the requested organ decides not to act, it can only do so following a discussion. This in itself may prove important for the broader international response, at least in 'referral cases' commanding public attention. Because of the involvement of a UN organ, other states and institutions regularly become aware of the referred issue. Second, being forced to respond somehow may increase the political pressure to issue a convincing reaction

---

[90] *Supra*, mns 13, 19.

[91] To consider just two examples, contentious ICJ proceedings cannot be instituted against UN organs, while the UN's internal justice system is not open to states.

[92] *Supra*, fn. 18 and 19.

[93] *Infra*, mns 52-55.

that is 'appropriate' to the referred situation. At least in the post-Rwanda and post-Srebrenica climate, where the UN can be considered to be genuine in its commitment to genocide prevention, the increase in political pressure that Article VIII could entail might very well be relevant. Credible allegations of genocide will unlike to be simply ignored; and they might tip the scale in favour of a more intrusive response.

### IV. Procedure

No formal procedure for referral by contracting parties is set out in Article VIII or anywhere else in the Genocide Convention. As regards the procedure to be followed by the requested UN organ, the respective Rules of Procedure regulate how to deal with the referral. Apart from stipulating the process of handling referrals, these Rules also enable referring states to gauge how much time will lapse before their request is actually addressed. Whereas the SC is always on duty,[94] the GA meets generally on for annual sessions only.[95] Emergency special sessions can be convened within 24 hours and in cases of alleged genocide, might in fact well be convened; however, they need to be; 'requested by the Security Council … or by a majority of the Members of the United Nations', which so far has only happened ten times.[96] ECOSOC, lastly, meets 'as required' according to Article 72 para. 2 UN Charter.[97] Pursuant to its Rules of Procedure, its holds two sessions a year, but additional special sessions are possible.[98] While much will depend on the type of action requested, in light of these considerations, the SC appears to be the fastest and most effective organ to be called upon. Unless a motion for an emergency special session is considered, the GA, outside its regular sessions, is unlikely to be able to respond swiftly. 42

As regards the referral by the contracting party, the first (perhaps obvious) point to make is that Article VIII grants a right. Contracting parties that are in some way involved (e. g. as victim states of genocidal violence) or have knowledge of the commission of genocide can make a referral under Article VIII, but are not under a duty to do so. The failure to refer a matter to the UN thus does not amount to a breach of the Genocide Convention.[99] 43

With respect to the form of requests, the various Rules of Procedure – as well as the subsequent UN practice – provide at least some guidance. The only UN organs to which any mention regarding referral is made in the UN Charter are the GA and the SC in Article 35. Neither the Charter itself nor the Rules of Procedure of either organ make any reference to procedural requirements in terms of referrals. However, consistent practice has revealed that formal written communication is required when making such a referral.[100] 44

---

[94] Bühler, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 28, mns 9, 23.

[95] Schweisfurth, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 35, mn. 6.

[96] See GA Res 377(V) ('Uniting for Peace'), which 'invented' the procedure to be able to deal with matters of international peace and security in the case of a Security Council blockade. In the *Wall* opinion, the ICJ emphasised the GA's discretion in determining whether these conditions are met: see ICJ Reports 2004, 161, paras 28–35.

[97] Chaitidou, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 72, mn. 5.

[98] Chaitidou, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 72, mns 10–14.

[99] Robinson, Genocide Convention, 96.

[100] Schweisfurth, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 35, mn. 25.

45 Similarly, subsequent practice has shown that when making a referral to the GA or SC, no detailed substantiation of the motivations of the referring state is required and it is most probably the case that the situation is the same with regard to referrals made under Article VIII of the Genocide Convention.[101] From a practical point of view, however, a well substantiated letter of referral can have great influence on the decision of the competent organ to take action. Finally, the referring state has the option of addressing their referral to a specific UN organ (bearing in mind the availability of each organ[102]) or to the Secretary General if more than one organ is potentially competent.[103]

### D. Subsequent developments

46 Article VIII is the only explicit substantial linkage[104] between the Genocide Convention and the UN as an actor against genocide. Although the drafters of the Convention did not impose upon the UN a separate, self-standing duty to prevent and suppress genocide, Article VIII involved the Organization in the fight against genocide. Adopted as early as 1948, the provision can be considered, with the benefit of hindsight, to have been the first step towards an institutional commitment to fight genocide. Although state parties remain primarily responsible for measures against genocide, an institutional framework for an effective compliance of the conventional aims is indispensable. Beginning with Article VIII, the UN has progressively taken the lead in genocide prevention and suppression – driven, but not obliged to, by the Genocide Convention.

47 When the Genocide Convention was adopted, a duty for international organisations (and more specifically the UN) to prevent and suppress genocide did not exist. Today, however, the UN accepts that it is required to prevent genocide and in fact sees this as one of its core missions.[105] Such a development has undoubtedly been aided by the link created between states and the UN by Article VIII of the Convention.

48 However the failure of the UN as a whole to intervene to bring a stop to the Rwandan genocide at the start of the 1990s exposed the limits of the referral system whereby the initiative lay with states themselves.[106] Until then Article VIII was (at least impliedly) applied several times and some form of meaningful interaction between states and the UN in achieving the aims of the Convention seemed plausible.[107] This perception was shattered by the failure of the international community regarding the Rwandan Genocide and crucially since then a number of steps have been taken to strengthen the institutional system in order to combat

---

[101] See for further references Schweisfurth, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 35, mn. 25. Similarly, no formal requirements can be discerned regarding referral to ECOSOC, of which Article VIII Genocide Convention is the only means of state referral since no procedure is contained in the UN Charter.

[102] Bühler, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 28, mns 9, 23.

[103] Schweisfurth, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Article 35, mn. 25 (last sentence).

[104] Mere references to the UN can be found also in the preamble as well as in the rather technical Articles XI to XIV and XVII to XIX.

[105] Gaja, in: Gaeta, Genocide Convention, 405; see also Introduction, mns 56–8.

[106] See on this Grünfeld/Huijboom, Failure to prevent Genocide in Rwanda, *passim*.

[107] *Supra*, mns 28-34.

the crime of genocide. As such, the remarkable subsequent practice regarding Article VIII falls to be examined.

### I. International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)

The impact of Article VIII on international treaty-making is clear, first of all, from a perusal of subsequent treaty norms. Among these, Article VIII of the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted in 1973, is almost[108] identical: 49

'Any State Party to the present Convention may call upon any competent organ of the United Nations to take such action under the Charter of the United Nations as it considers appropriate for the prevention and suppression of the crime of *apartheid*'.[109].

The Anti-Apartheid Convention entered into force in 1976 and remains valid. The fact that its Article VIII, adopted more than 25 years later, effectively duplicates Article VIII of the Genocide Convention is significant and suggests that the approach adopted in the Genocide Convention was not considered meaningless.[110] Even at a time when genocide was not an issue of major international consideration, Article VIII of the Genocide Convention thus proved to be a blueprint for subsequent treaties on related issues.

### II. International criminal law

The development of international criminal law after the end of the Cold War has brought a significant number of developments regarding the crime of genocide. The statutes of both the ICTY and ICTR tribunals included genocide as a crime under their jurisdiction. Both SC resolutions could be (at least partly and indirectly) attributed to prior state referrals to UN organs.[111] Article VIII thus did play a role in the evolution of international criminal justice. 50

Furthermore, in the subsequent establishment of the International Criminal Court, which also has jurisdiction over the crime of genocide, the legacy of Article VIII of the Genocide Convention becomes visible.[112] To elaborate, the drafting history of the ICC Statute shows that the ability for state parties under Article 14 para. 1 to refer a situation to the prosecutor of the ICC was inspired by Article VIII of the Genocide Convention.[113] The first ILC draft of the ICC Statute of 1994 stated in its Article 25 para. 1: 51

---

[108] Only the use of the singular for 'Party' and 'it considers' is less identical than in the 'original' version of the Genocide Convention.

[109] Emphasis as original.

[110] Schabas, Genocide in Int'l Law (2nd ed.), 538.

[111] At least in the Rwandan situation, early warnings addressed to UN organs by both states (Belgium) and UN officials were numerous, see e.g. Grünfeld/Huijboom, Failure to prevent Genocide in Rwanda, 95–103, 127–39.

[112] Article 14 para. 1 ICC Statute reads as follows: 'A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.'

[113] See also Marchesi, in: Triffterer, ICC Statute (2nd ed.), Article 14, mn. 2.

'A State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.'[114]

As such, only states that were party to both the Genocide Convention and the ICC Statute would have been competent to make referrals to the ICC prosecutor under Article 25. However, it is suggested that subsequent practice under Article VIII of the Genocide Convention referred to in the Draft Statute adopted by the ICC Preparatory Committee of April 1998[115] influenced the move away from a strict link to the Genocide Convention. States that were not party to the Genocide Convention have been enabled to make referrals to the Prosecutor, as is the case in the current ICC Statute. But the spirit of Article VIII still lives in Article 14 of the ICC Stature. It can hardly be disputed that Article VIII served as a blueprint for its sister provision *vis-à-vis* the ICC.

### III. UN initiatives on genocide prevention and 'Responsibility to Protect'

52 Only a few years later, during Kofi Annan's term of office as Secretary-General, the UN took decisive steps towards a more active role in the fight against genocide. On 20 August 2001, the SC adopted its Resolution 1366 in which it confirmed the importance of the fight against genocide in the framework of conflict prevention.[116] Secretary-General *Annan* made use of this resolution and worked towards a deeper institutional commitment to prevent and supress genocide, which eventually was presented in the Action Plan to Prevent Genocide of April 2004.[117] Subsequently, in a letter to the President of the SC of 12 July 2004, *Kofi Annan* outlined the mandate for the Special Advisor on the Prevention of Genocide.[118] His or her responsibilities are to:

'(a) collect existing information, in particular from within the United Nations system, on massive and serious violations of human rights and international humanitarian law of ethnic and racial origin that, if not prevented or halted, might lead to genocide;

(b) act as a mechanism of early warning to the Secretary-General, and through him to the Security Council, by bringing to their attention potential situations that could result in genocide;

(c) make recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide;

(d) liaise with the United Nations system on activities for the prevention of genocide and work to enhance the United Nations capacity to analyse and manage information relating to genocide or related crimes.'[119]

53 With the establishment of the office of a Special Advisor the UN has documented and started to perform its duty to play an active role in the prevention and suppression of genocide.[120] From 3 May 2006, this work was supported by a newly-created Advisory Committee.[121] As the UN has pointed out, the Genocide

[114] Report of the ILC on the work of its forty-sixth session, YbILC 1994, vol. II, part 2, 45.

[115] See also Marchesi, in: Triffterer, ICC Statute (2nd ed.), Article 14, mn. 4.

[116] UN Doc. S/RES/1366 (2001), 2 (preambular paras 17 and 18).

[117] UN Press Release, archived on http://www.preventgenocide.org/prevent/UNdocs/KofiAnnansActionPlantoPreventGenocide7Apr2004.htm#links.

[118] UN Doc. S/2004/567.

[119] UN Doc. S/2004/567, 2 (para. 5).

[120] Schabas, Genocide in Int'l Law (2nd ed.), 545; see on the work of the Special Advisor http://www.un.org/en/preventgenocide/adviser/country_situations.shtml.

[121] UN Doc. SG/A/1000, http://www.un.org/News/Press/docs/2006/sga1000.doc.htm.

Convention is one and the first of the three key features of the legal framework *vis-à-vis* the Office of the Special Advisor on the Prevention of Genocide.[122]

These subsequent developments complement, rather than replace, Article VIII. 54
Even though the institutional machinery has been developed, Article VIII referrals remain an option – for treaty parties to raise awareness for threats of genocide, and for the UN to engage with them on an autonomous (treaty) basis.

Even after the establishment of the office of the Special Adviser, the cooperation 55
between states and the UN in the fight against genocide has continued to evolve. Through GA Resolution 60/1, the outcome document of the UN World Summit 2005, the UN recognised the concept of Responsibility to Protect.[123] It includes genocide prevention[124] and strengthens the political legitimacy of the Special Advisor on the Prevention of Genocide.[125] *Vis-à-vis* genocide, the concept of Responsibility to Protect signifies, in the words of the Special Advisor the following:

'1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.'[126]

These features reflect the international cooperation in the fight against genocide as it was initiated by the Genocide Convention. They confirm that states are primarily called upon to prevent and suppress genocide, but that both states and UN are under a shared duty to contribute in every possible way to the attainment of this goal. The concept of Responsibility to Protect imposes obligations on both states and the UN. It does not, though, expressly comprise a right of every state to call upon the UN if support is needed in the fight against genocide. In this regard, Article VIII retains its function in the developing system of anti-genocide cooperation.[127]

## IV. Further recent developments

One of the most recent developments was the establishment of the UN Human 56
Rights Council.[128] Created by GA Resolution 60/251 of 3 April 2006,[129] it replaced the former Commission on Human Rights and is 'responsible for promoting

[122] http://www.un.org/en/preventgenocide/adviser/mandate.shtml: '... the legal framework for the work of the Office on Genocide Prevention and the Responsibility to Protect is drawn from:
The Convention on the Prevention and Punishment of the Crime of Genocide;
The wider body of international human rights law, international humanitarian law, and international criminal law;
Relevant resolutions of the General Assembly, the Security Council and the Human Rights Council, including the 2005 World Summit Outcome Document.'

[123] Vashakmadze, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Annex on Responsibility to Protect after Article 38, mns 1–82.

[124] UN Doc. A/RES/60/1, paras 138–9.

[125] UN Doc. A/RES/60/1, para. 140

[126] http://www.un.org/en/preventgenocide/adviser/responsibility.shtml.

[127] See also Vashakmadze, in: Simma/Khan/Nolte/Paulus, Charter of the UN (3rd ed.), Annex on Responsibility to Protect after Article 38, mn. 57.

[128] Ramcharan, in: Oxford Handbook on the UN, 450–1.

[129] UN Doc. A/RES/60/251.

universal respect for the protection of all human rights'.[130] As the prevention of genocide is also a matter of human rights, the Human Rights Council can be regarded as another monitoring body competent to address questions of genocide. The Council itself is very aware of this role and has become actively involved in the fight against genocide.[131] Although politically not undisputed,[132] the Human Rights Council forms another string in the now well developed network of cooperational genocide prevention between states and the UN and thus complements the ideas expressed by Article VIII.

57 In the now developed framework of genocide prevention, Article VIII retains an important place. State referrals remain a potentially important tool of genocide prevention as states are best placed to determine whether a certain situation calls for an institutional response. This function is proved even by the most recent development of treaty making. A good example is the Arms Trade Treaty of 27 March 2013.[133] This treaty, pursuant to its Article 1, aims at establishing 'the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms' and preventing and eradicating 'the illicit trade in conventional arms and prevent their diversion.' Its Article 6 para. 3 stipulates that:

> '[a] State Party shall not authorize any transfer of conventional arms … if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, ….'

This passage has twofold relevance for Article VIII of the Genocide Convention. First, it clarifies that the transfer of arms to a genocide situation constitutes a genocide situation itself and may thus be subject of a state referral according to Article VIII. Second, the Arms Trade Treaty itself does not provide for its own provision on state referrals. Parties to the treaty are indeed 'encouraged' to pursue international cooperation (Article 15) and may request 'international assistance' (Article 16). But this is only of technical nature and covers controls of the arms transfer. If a transfer has already happened, however, states have to rely on other provisions to call upon the UN regarding that issue. For treaties like the Arms Trade Treaty, which themselves refer to genocide, Article VIII is a complementary option also to foster treaty compliance beyond the mechanisms provided by the respective treaty.

### E. Concluding observations

58 Despite frequent criticism, Article VIII is more than a merely declaratory provision of the Genocide Convention. It has foreshadowed the development of the contemporary international law system on the prevention and punishment of genocide based on cooperation between states and the UN. In fact, Article VIII can be seen as an important inspiration for the now well developed and accepted UN obligation to prevent and suppress genocide. Conversely, the recognition of such a

[130] UN Doc. A/RES/60/251, 2 (paras 1 and 2).

[131] See e.g. HRC Res. 7/25 and 22/22 (both putting forward comprehensive agendas for genocide prevention) and further the information at http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/PreventionGenocide.aspx.

[132] For its composition including states not completely providing for a decent human rights standard by their own see Ramcharan, in: Oxford Handbook on the UN, 451.

[133] UN Doc. A/CONF.217/2013/L.3.

duty goes some way towards addressing the weaknesses of Article VIII, which did not place specific obligations on the UN.

Within the framework of the Convention, the possibility of referral envisaged in Article VIII is part of the broader normative agenda aimed at ensuring the prevention of genocide. Within that agenda, the duty of states to prevent genocide, as set out in Article I, is the lynchpin of the system. As the ICJ emphasised in its *Bosnian Genocide* judgment, the duty to prevent 59

> 'has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.'[134]

Still, while not 'absorbing' the duty to prevent, Article VIII plays an important supporting role. This, too, was emphasised by the ICJ:

> 'The remaining specific provision, Article VIII about competent organs of the United Nations taking action, may be seen as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility.'[135]

Despite the harsh criticisms Article VIII has been exposed to, and its partly political function, a future reform appears not to be urgent. The meaning of the provision can well be assessed by the common means of interpretation. Admittedly, on some aspects (like e. g. the notion of 'competent UN organs') some further normative guidance would have been desirable. But on the whole, no reform is needed. This is particularly true since the recently established (and hopefully to be extended) mechanisms of genocide prevention adopted within the UN systems outweigh some of the deficits of Article VIII. 60

[134] ICJ Reports 2007, 220 (para. 427).
[135] ICJ Reports 2007, 109 (para. 159).

# Annex 29

M. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, vol. III (2016) [extract]

# Rosenne's Law and Practice of the International Court: 1920–2015

## VOLUME III
## PROCEDURE

*Fifth Edition by*

Malcolm N. Shaw QC


BRILL
NIJHOFF

LEIDEN • BOSTON

Library of Congress Cataloging-in-Publication Data

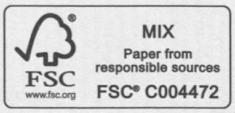
Names: Rosenne, Shabtai, author. | Shaw, Malcolm N. (Malcolm Nathan), 1947-
Title: Rosenne's Law and practice of the international court, 1920-2015.
Other titles: Law and practice of the international court, 1920-2005 | Law and practice of the international court, 1920-2015
Description: Fifth Edition / by Malcolm N. Shaw QC. | Leiden ; Boston : BRILL NIJHOFF, 2016. | Includes index.
Identifiers: LCCN 2016028965 (print) | ISBN 9789004217980 (hardback : alk. paper) | ISBN 9789004217911 (hardback : alk. paper) | ISBN 9789004217959 (hardback : alk. paper) | ISBN 9789004217966 (hardback : alk. paper) | ISBN 9789004217973 (hardback : alk. paper)
Subjects: LCSH: International Court of Justice. | International Court of Justice–History. | International Court of Justice–Rules and practice. | International courts. | Procedure (Law)
Classification: LCC KZ6275 .R67 2016 (print) | DDC 341.5/520904–dc23
LC record available at https://lccn.loc.gov/2016028965

ISBN 978-90-04-21798-0 (Set)

ISBN 978-90-04-21791-1 (Vol. I)
ISBN 978-90-04-21795-9 (Vol. II)
ISBN 978-90-04-21796-6 (Vol. III)
ISBN 978-90-04-21797-3 (Vol. IV)

---





not have jurisdiction to determine the merits.[12] In *East Timor* where again the application was formally valid and the Court formally had jurisdiction as between the parties, the Court found that Indonesia's rights and obligations would constitute the very subject matter of its judgment. Since Indonesia had not given its consent, the Court concluded that it could not exercise the jurisdiction it had because as a prerequisite, in order to decide the claims it would have to rule on the lawfulness of Indonesia's conduct in the absence of Indonesia's consent.[13]

In addition to its political function of formulating the claim or the dispute in terms suitable for decision by the Court, the institution of proceedings performs two legal functions. In the first place, a valid document instituting proceedings will seise the Court of the substance of the case and, as the Court has indicated in the passage from the *Qatar* v *Bahrain* case cited in note 3 above determine certain aspects of the procedure. Once the Court is validly seised of a case, it can exercise the entire jurisdiction that the Statute vests in it, including in particular its compulsory jurisdiction over incidental and derivative proceedings. Some of this jurisdiction requires a finding of prima facie jurisdiction over the subject of the claim or dispute. In the second place, the time of the seising of the Court may in appropriate circumstances be a matter of legal relevance, the *critical date*. This can be important for the admissibility of evidence and for determining the rights and obligations of the parties. This will vary according as the dispute is one which relates to past action when the proceedings were instituted or one which relates to a continuing and evolving state of affairs. The answer to the question whether the date of the institution of the proceedings is a fact of legal importance lies in this distinction between evolving or continuing disputes and disputes already hardened, for example a dispute arising from a single incident or situation. This distinction also shows how, when the dispute is an evolving one, the decision to institute proceedings at a given moment may be one of considerable legal difficulty.[14]

[12] However, the minority view, expressed by Judges Sir Arnold McNair and Read, to the effect that there will be a fundamental defect in the constitution of the proceedings if the real respondent is not named, even when the title of jurisdiction does not formally require that, is believed to reflect more accurately the proper interrelation of the title of jurisdiction, the instrument instituting proceedings and jurisdiction over the merits; and in light of the peculiar circumstances of the *Monetary Gold* case it is doubtful if it may be regarded as finally determining the issue. For the minority opinion, see [1954] 19, 35, 37.

[13] [1995] 90, 105 (para. 35).

[14] The date of the institution of the proceedings and the situation then existing may also

The first opportunity which the Court had of drawing attention to the difference between the institution of proceedings and its jurisdiction occurred in the *Corfu Channel* (Preliminary Objection) case. Dealing with the respondent's assumption that the institution of proceedings by application is only possible where compulsory jurisdiction exists and that where it does not, proceedings can only be instituted by special agreement, the Court said:

> This is a mere assertion which is not justified by either of the texts cited [Article 36, paragraph 1 and Article 40, paragraph 1, of the Statute]. Article 32, paragraph 2, of the [1946] Rules [now Article 38] does not require the Applicant, as an absolute necessity, but only "as far as possible", to specify in the application the provision on which he founds the jurisdiction of the Court. It clearly implies, both by its actual terms and by the reasons underlying it, that the institution of proceedings by application is not exclusively reserved for the domain of compulsory jurisdiction.
>
> In submitting the case by means of an Application, the Government of the United Kingdom gave the Albanian Government the opportunity of accepting the jurisdiction of the Court …
>
> [T]here is nothing to prevent the acceptance of jurisdiction … from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement … [T]he method of submitting the case to the Court is regulated by the texts governing the working of the Court …[15]

This was carried a stage further in the *Nottebohm* (Preliminary Objection) case. Here the question was whether a seisin, valid and substantively

be relevant to the decision whether an indication of provisional measures of protection is appropriate. That seems to underlie the reasoning of the Permanent Court in the *South-Eastern Greenland* (Prov. Meas.) case, as well as of the present Court in the *Aegean Sea Continental Shelf* (Prov. Meas.) case, A/B48 (1932) 277; [1976] 3. When the proceedings are instituted in a case of a continuing situation, an indication of provisional measures would appear to have more justification and practical value than where the dispute relates exclusively to past actions. On the relation between the institution of proceedings as a conservatory measure in itself and a formal request for provisional measures, see ch. 24, § III.346 text to n. 112.

[15] *Corfu Channel* (Prel. Obj.) case, [1947–48] 15, 27. The Court cited the dictum of the Permanent Court in the *German Interests in Polish Upper Silesia* case, to the effect that the acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement. B12 (1928) 23.

arises whether in principle such a requirement exists so that the title of jurisdiction will be interpreted as importing that condition. The Court by implication rejected this view in the *South West Africa* (Preliminary Objections) cases.[73] On the other hand, it became the basis of the Court's decision in the second phase of that case.[74] The Court made a distinction between the applicants' *locus standi in judicio ratione personae* – the subject of the 1962 judgment on the Preliminary Objections, and their *locus standi ratione materiae* – the subject of the Second Phase judgment of 1966. That is an artificial refinement of the general distinction between jurisdiction *ratione personae* and jurisdiction *ratione materiae*, and deals with the question of whether the particular applicants had a legal interest in the subject matter of the dispute.

It is clear from the repeatedly endorsed definition of 'dispute' (see chapter 9, § II.147) that for the purposes of the settlement of disputes through the International Court, conflict of legal interests is only one type of controversy that can be brought before the Court. Indeed, it is probably true to say that the objective of the settlement of international disputes is the more prominent factor in international litigation than the mere protection of legal rights and interests. The Court has emphasized this several times.[75] Taking the point of departure within this general framework, it seems that the applicant State must be able to show some direct concern in the outcome of the case.

There is here a conceptual difference between judicial settlement as a means for the pacific settlement of an international dispute, and the political settlement of such a dispute through other organs of the United Nations. By Article 35 of the Charter, for instance, any member of the United Nations may bring any dispute the continuance of which is likely to endanger the maintenance of international peace and security to the attention of the Security Council or the General Assembly. If a State taking such action should normally be able to show some sort of interest in the subject matter of the case, that interest itself must not be confused with more precise notions of legal interest usual in internal litigation.[76] In

[73] [1962] 342–344.

[74] [1966] 6.

[75] For instance, in the *Free Zones* case, A22 (1929) 13; *Barcelona Traction* (New Application) (Prel. Objs.) case, [1964] 6, 20; *Frontier Dispute* (Burkina Faso/Mali) case, [1986] 554, 577 (para. 46); *Passage through the Great Belt* case, [1990] 12, 20 (para. 35).

[76] See the important observations of Judge Morelli in the *Northern Cameroons* case, [1963] 15 at 132.

line with its pragmatic approach towards the definition of the concept of jurisdiction (see chapter 9, § II.149), the Court has recognized the absence of a common meaning ascribed to the term 'interest', and that it may have varying connotations in differing contexts. It has accordingly sought the answer in a factual analysis of the case before it.[77] In the *Barcelona Traction* (New Application) (Second Phase) case, the Court stated that an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. 'By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection: they are obligations *erga omnes*.'[78] However, the Court, in the 1978 revision of the Rules, did not introduce any new provision which could facilitate the introduction of the concept of an *actio popularis* or a class action in the International Court.

Whether the applicant State is acting to protect a recognized legal interest of its own will ultimately depend partly on the rules of general international law, partly on the title of jurisdiction, and partly on the law governing the jurisdiction and procedure of the Court (including the propriety of the Court's acting), and the Court's decision may well be influenced by broad considerations of judicial policy.[79] As an example of the first aspect, it is accepted that the right of diplomatic

[77] Ibid. 28. 'The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights and obligations of the parties, thus removing uncertainty in their legal relations'. Ibid. 34.

[78] [1970] 3, 32 (para. 33). And see C. Annacker, *Die erga omnes Verpflichtungen vor dem IGH* (1994); A. de Hoogh, *Obligations* erga omnes *and international Crimes: A theoretical enquiry into the implementation and enforcement of the international responsibility of States* (1996). For an example of a title of jurisdiction of this character, see Art. 66 (*a*) of the Vienna Convention on the Law of Treaties, 1969, regarding the jurisdiction of the Court in a dispute concerning the application of Art. 53 of that Convention, which deals with the invalidity of treaties conflicting with a peremptory norm of general international law (*jus cogens*). But in principle there is no judicial backdrop to protect rights owed *erga omnes*. See § III.288 n. 38 above. In this connection, see the *Railway Traffic between Lithuania and Poland* advisory opinion. Here the Permanent Court remarked that although Art. 23 (*e*) of the Covenant of the League of Nations provided for freedom of communication and transit for the common use of all members of the League, no third State had considered it necessary or expedient to intervene and to claim that Lithuania had violated Art. 23 (*e*). In that case, however, the obligation was not one *erga omnes*, and no general conclusion can be drawn from that observation of the Permanent Court. A/B42 (1931) 118.

[79] Cf. Jenks, *Prospects* 493.

# Annex 30

M. Ventura, "The Prevention of Genocide as a *Jus Cogens* Norm? A Formula for Lawful Humanitarian Intervention", in C. Jalloh and O. Elias (eds.), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (2015) [extract]

# Shielding Humanity

*Essays in International Law in Honour of Judge Abdul G. Koroma*

*Edited by*

Charles Chernor Jalloh
Olufemi Elias


BRILL
NIJHOFF

LEIDEN | BOSTON

Library of Congress Cataloging-in-Publication Data

Shielding humanity : essays in international law in honour of Judge Abdul G. Koroma / edited by Charles C. Jalloh, Olufemi Elias.
pages cm
Includes bibliographical references and index.
ISBN 978-90-04-23650-9 (hardback : alk. paper) -- ISBN 978-90-04-29313-7 (e-book : alk. paper)
1. International law. 2. International courts. 3. International law--Africa. 4. Koroma, Abdul G. I. Jalloh, Charles, editor. II. Elias, Olufemi, editor. III. Koroma, Abdul G., honouree.

KZ3410.S543 2015
341--dc23

2015009633

This publication has been typeset in the multilingual "Brill" typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities.
For more information, please see brill.com/brill-typeface.

ISBN 978-90-04-23650-9 (hardback)
ISBN 978-90-04-29313-7 (e-book)



This book is printed on acid-free paper.

CHAPTER 17

# The Prevention of Genocide as a *Jus Cogens* Norm? A Formula for Lawful Humanitarian Intervention

*Manuel J. Ventura*

## 1 Introduction

At the heart of this chapter lies the desire to seek a greater understanding of, and to develop, the meaning of the following words of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) ('Genocide Convention'):

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake *to prevent* and punish.
> [...]
> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate *for the prevention and suppression* of acts of genocide or any of the other acts enumerated in Article III.[1]

While many trees have been felled in the efforts to explore the prohibition on the commission of genocide, less academic time and energy has been invested into the prevention of genocide as such. Indeed, it was only in February 2007 with the International Court of Justice ('ICJ')'s judgment in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*)[2] ('*Genocide Case*') that we were first offered a detailed judicial glimpse of its substantive legal content when it held, *inter alia*, that 'the obligation of States parties is

* The author would like to thank Dr. Guido Acquaviva and Judge Sir David Baragwanath of the Special Tribunal for Lebanon for their thoughtful comments and suggestions on a prior version of this chapter.

1 Articles I, VIII, Convention on the Prevention and Punishment of the Crime of Genocide (1948) ('Genocide Convention') (emphasis added).

2 ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, ICJ Reports 2007, p. 43 ('*Genocide Case*').

 | DOI 10.1163/9789004293137_018

particular, it opined that Article XII contained elements that were self-evident, such as the stipulation that States were to do everything in their power to give full effect to UN intervention and that it felt the same about the US proposal articulated above.[81] The Netherlands suggested 'either to consider as self-evident that the new treaty does not infringe upon the rights and duties under the Charter, or to insert a general article to this effect, so that all action of the United Nations which is now desirable and permissible shall remain so in future.'[82]

Back at the *ad hoc* committee, China presented its own draft articles for inclusion into the Genocide Convention. This draft included language whereby States parties agreed to prevent and punish genocide, however it was included in the preamble.[83] This proposed preamble did not elicit debate in the committee. However, the rest of the articles were discussed line by line. Article IV of the Chinese draft is of interest to us. It stated that '[a]ny Signatory to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide.'[84] This proposed article elicited some debate in the *ad hoc* committee, with the USSR proposing to amend its wording so as to also include an obligation (not just the right) to report any violation of the convention as well as acts of genocide to the UN Security Council. This amendment was promptly rejected in a vote.[85] Notwithstanding, support for the Chinese proposal was evident and was approved (originally as Article 7 of the draft convention, but which later became Article VIII), although with amendments, to read:

> Any signatory of this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide. Any signatory to this Convention may bring to the attention of any competent organ of the United Nations any case of violation of this Convention.[86]

81 UN Doc. E/623/Add.2, 22 April 1948, in *supra* fn. 14, at p. 638. For the US proposal, see *supra* fn. 36.

82 UN Doc. E/623/Add.2, 22 April 1948, in *supra* fn. 14, at p. 638.

83 UN Doc. E/AC.25/9, 16 April 1948, Preamble, in *supra* fn. 14, at p. 833.

84 UN Doc. E/AC.25/9, 16 April 1948, Article IV, in *supra* fn. 14, at p. 833.

85 UN Doc. E/AC.25/SR.20, 4 May 1948, Mr. Morozov (USSR), in *supra* fn. 14, at p. 944–945. See also the final report of the *ad hoc* committee: UN Doc. E/794, 24 May 1948, in *supra* fn. 14, at pp. 1142–1143.

86 UN Doc. E/AC.25/SR.20, 4 May 1948, in *supra* fn. 14, at pp. 944–945 (corrected at UN Doc. E/AC.25/SR.20/Corr.1, 14 May 1948, in *supra* fn. 14, at p. 950). See also the final report of the *ad hoc* committee: UN Doc. E/794, 24 May 1948, in *supra* fn. 14, at p. 1143.

Notwithstanding the approval of Article X with a paragraph inspired by the former Article VIII,[147] it appears that it was eventually moved and renumbered to become the final Article VIII. A search of the historical record is not entirely clear on exactly how this process came to be or the discussions surrounding it. The final Sixth Committee's report merely noted the approval of Article X (including the former Article VIII language) and in a footnote explained that:

> By the rearrangement and renumbering of the articles decided upon by the Drafting Committee, the second paragraph of article X became article VIII of the final text.[148]

The final Convention, annexed to the report, contains the language of what is now Article VIII:

> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.[149]

The draft as a whole was then approved by the Sixth Committee,[150] passed on to the UN General Assembly, and was then approved despite some last minute amendments by the USSR and Venezuela on 9 December 1948.[151]

### E *Observations from the travaux préparatoires of the Genocide Convention (1948)*

What observations or conclusions can we draw from the above historical record as it pertains to the original intention and foresight of the drafters of the

147 See UN Doc. A/C.6/269, 15 November 1948, in *supra* fn. 101, at pp. 2006–2007. The approved Article X read:

> Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.
>
> With respect to the prevention and suppression of acts of genocide, a party to the present Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter of the United Nations.

148 UN Doc. A/760, 3 December 1948, in *supra* fn. 101, at p. 2027.

149 UN Doc. A/760, 3 December 1948, Annex, Article VIII, in *supra* fn. 101, at p. 2034.

150 UN Doc. A/C.6/SR.132, 1 December 1948, in *supra* fn. 101, at pp. 1919–1922.

151 UN Doc. A/PV.179, 9 December 1948, in *supra* fn. 101, at pp. 2083–2085.

# DICTIONARIES

# Annex 31

"saisir", *Dictionnaire de L'Académie Française*

*Available at:*

https://www.dictionnaire-academie.fr/article/A9S0189

## SAISIR verbe transitif et pronominal

XIe siècle. Issu de l'ancien haut allemand **sazjan*, « attribuer à quelqu'un ».

### I. Verbe transitif.

**1.** Très vieilli. Mettre quelqu'un en possession de quelque chose. Ne se rencontre plus que dans l'adage juridique *Le mort saisit le vif,* pour signifier que le défunt transmet son bien à son héritier sans que ce dernier ait besoin d'autorisation préalable.

**2.** Attraper vivement, rapidement. *Saisir quelqu'un par le bras, par les cheveux. Saisir son manteau au passage. Saisir un lapin par les oreilles. Le gardien a intercepté le ballon en le saisissant des deux mains.* Fig. *Saisir le moment favorable, saisir sa chance.*

▪ Loc. et expr. *Saisir une personne au collet,* voir *Collet*. *Saisir la balle au bond,* l'intercepter au moment où elle s'élève de terre et, fig., profiter de circonstances favorables. *Saisir une invitation, un mot au bond* (fig.), s'empresser d'en tirer parti. *Saisir l'occasion aux cheveux,* voir *Occasion*. *À saisir !* se dit, dans le langage commercial, d'une bonne affaire qu'il convient de ne pas laisser passer.

▪ Par extension. Prendre par la force, maîtriser. *Saisir une ville, une position. Les gendarmes ont saisi le voleur.* En parlant d'un trouble physique, d'une sensation, d'un sentiment, etc. S'emparer brusquement et fortement d'une personne, l'affecter brutalement. *Elle fut saisie par le froid. Être saisi de convulsions. La pitié le saisit à la vue de cette déchéance. Être saisi de joie, de peur.* Absolument. *Être saisi,* être frappé par une émotion, un sentiment, etc. si intenses qu'ils laissent coi ou qu'ils entraînent une perte des sens. *J'en suis encore saisi. Elle fut si saisie qu'elle s'évanouit.*

▪ Spécialement. DROIT. Confisquer, retenir une chose par voie de saisie. *Des dossiers compromettants ont été saisis à son domicile. Saisir des meubles, des immeubles dans le cadre d'une procédure civile. Certains objets ne peuvent être saisis pour une créance.* Par métonymie. *Saisir un débiteur.*

**3.** Prendre quelqu'un ou quelque chose de manière à pouvoir le porter, le soulever, le maintenir, etc. *Saisir une cocotte par les anses pour la retirer du feu. Pour exécuter cette figure, le patineur saisit sa partenaire par la taille.* Pron. *Les deux judokas se sont saisis par les manches du kimono.*

▪ Spécialement. MARINE. Arrimer, fixer solidement quelque chose par un cordage. *Saisir du matériel, un conteneur.*

**4.** Appréhender, distinguer par les sens. *D'ici, on saisit d'un regard tout le paysage. Je n'ai pu saisir que des bribes de leur conversation.*

▪ Fig. Concevoir nettement, comprendre. *Une nuance difficile à saisir. Elle a parfaitement saisi mon intention. Ne pas saisir le sens d'une question. Le peintre a bien saisi la ressemblance entre les deux frères.*

**5.** En termes de procédure. Solliciter une autorité compétente pour qu'elle statue sur une affaire. *Saisir la cour d'appel, la police des polices. Saisir le tribunal de commerce pour fraude. La seconde chambre du tribunal de première instance a été saisie.*

**6.** CUISINE. Mettre un aliment en contact avec une surface très chaude ou le jeter dans un liquide bouillant afin de le cuire superficiellement. *Saisir des oignons dans une poêle. Saisir un aliment dans de l'huile.* Au participe passé, adjectivement. *Un bifteck bien saisi.*

**7.** TECHNIQUE. Enregistrer des données dans une machine, dans un système, notamment en vue de leur traitement informatique. *Saisir un texte, un document. Saisir son code sur un téléphone portable.*

**II.** **Verbe pronominal.**

**1.** Se rendre maître d'une personne, d'un animal, s'emparer d'une chose, notamment par la force, par l'adresse. *Saisissez-vous de cet homme ! Se saisir d'une place forte, d'une ville. Après copulation, la mante religieuse se saisit du mâle et le dévore. Se saisir d'un couteau.* Fig. *Richard III se saisit du trône d'Angleterre. La presse s'est saisie de l'affaire.*

**2.** Prendre une chose de manière à bien la tenir. *Sa trompe permet à l'éléphant de se saisir de sa nourriture. Dans la fable, le renard se saisit du fromage que le corbeau a laissé tomber.*

# Annex 32

"recurrir", Real Academia Española, *Diccionario de la lengua española*

*Available at:*

https://dle.rae.es/recurrir

# recurrir

Conjugar

Del lat. *recurrĕre* 'volver corriendo', 'retornar'.

1. intr. Acudir a un juez o autoridad con una demanda o petición.

2. intr. Acogerse en caso de necesidad al favor de alguien, o emplear medios no comunes para el logro de un objeto.

3. intr. Dicho de una cosa: Volver al lugar de donde salió.

4. intr. *Med.* Dicho de una enfermedad o de sus síntomas: Reaparecer después de intermisiones.

5. tr. *Der.* Entablar recurso contra una resolución.

Conjugación de recurrir

| | Formas no personales | |
|---|---|---|
| | Infinitivo | Gerundio |
| | recurrir | recurriendo |
| | Participio | |
| | recurrido | |
| | Indicativo | |
| Personas del | Pronombres | Pretérito imperfecto / |

**Annex 32**

recurrir | Definición | Diccionario de la lengua española | RAE - ASALE

| Número | discurso | personales | Presente | Copretérito |
|---|---|---|---|---|
| Singular | Primera | yo | recurro | recurría |
| | Segunda | tú / vos | recurres / recurrís | recurrías |
| | | usted | recurre | recurría |
| | Tercera | él, ella | recurre | recurría |
| Plural | Primera | nosotros, nosotras | recurrimos | recurríamos |
| | Segunda | vosotros, vosotras | recurrís | recurríais |
| | | ustedes | recurren | recurrían |
| | Tercera | ellos, ellas | recurren | recurrían |
| | | | Pretérito perfecto simple / Pretérito | Futuro simple / Futuro |
| Singular | Primera | yo | recurrí | recurriré |
| | Segunda | tú / vos | recurriste | recurrirás |
| | | usted | recurrió | recurrirá |
| | Tercera | él, ella | recurrió | recurrirá |
| Plural | Primera | nosotros, nosotras | recurrimos | recurriremos |
| | Segunda | vosotros, vosotras | recurristeis | recurriréis |
| | | ustedes | recurrieron | recurrirán |
| | Tercera | ellos, ellas | recurrieron | recurrirán |
| | | | Condicional simple / Pospretérito | |
| Singular | Primera | yo | recurriría | |
| | Segunda | tú / vos | recurrirías | |
| | | usted | recurriría | |
| | Tercera | él, ella | recurriría | |
| Plural | Primera | nosotros, nosotras | recurriríamos | |
| | Segunda | vosotros, vosotras | recurriríais | |
| | | ustedes | recurrirían | |
| | Tercera | ellos, ellas | recurrirían | |
| | | | Subjuntivo | |

https://dle.rae.es/recurrir?m=form[05/01/2021 17:38:28]

**Annex 32**

recurrir | Definición | Diccionario de la lengua española | RAE - ASALE

| Número | Personas del discurso | Pronombres personales | Presente | Futuro simple / Futuro |
|---|---|---|---|---|
| Singular | Primera | yo | recurra | recurriere |
| | Segunda | tú / vos | recurras | recurrieres |
| | | usted | recurra | recurriere |
| | Tercera | él, ella | recurra | recurriere |
| Plural | Primera | nosotros, nosotras | recurramos | recurriéremos |
| | Segunda | vosotros, vosotras | recurráis | recurriereis |
| | | ustedes | recurran | recurrieren |
| | Tercera | ellos, ellas | recurran | recurrieren |
| | | | Pretérito imperfecto / Pretérito | |
| Singular | Primera | yo | recurriera o recurriese | |
| | Segunda | tú / vos | recurrieras o recurrieses | |
| | | usted | recurriera o recurriese | |
| | Tercera | él, ella | recurriera o recurriese | |
| Plural | Primera | nosotros, nosotras | recurriéramos o recurriésemos | |
| | Segunda | vosotros, vosotras | recurrierais o recurrieseis | |
| | | ustedes | recurrieran o recurriesen | |
| | Tercera | ellos, ellas | recurrieran o recurriesen | |
| | | | Imperativo | |
| Número | Personas del discurso | Pronombres personales | | |
| Singular | Segunda | tú / vos | recurre / recurrí | |
| | | usted | recurra | |
| Plural | Segunda | vosotros, vosotras | recurrid | |
| | | ustedes | recurran | |



https://dle.rae.es/recurrir?m=form[05/01/2021 17:38:28]