Annex 1

Extracts from S. Rosenne, *The Law and Practice of the International Court, Volume II* (Brill, 2016)

Rosenne's Law and Practice of the International Court: 1920–2015

VOLUME II
JURISDICTION

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Court's law, that a State will observe its treaty obligations (see chapter 4, §I.40), it interpreted Guatemala's treaty obligations – including the treaty obligation to comply with a binding judgment – in such a way as to make it easier for that country's Government to overcome any hesitation which may have been due to doubts of a domestic political or legal character.

II.156. The Temporal Factor in Jurisdiction. Time is a factor that influences the Court's jurisdiction in several ways. *Ratione personae* it is necessary that the parties to the case are parties to the Statute or have undertaken the obligations of a non-party to the Statute at the time of the institution of the proceedings. As the Court has said: 'The question whether the applicant State was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is a fundamental one.'[143] The same holds good for the respondent State. It is necessary that the parties be under the obligation to accept the jurisdiction of the Court at the time at which the determination of the existence of that obligation has to be made, normally the date of the institution of the proceedings. *Ratione materiae* it is necessary that the events which gave rise to the reference to the Court occurred during the space of time in respect to which jurisdiction had been conferred on the Court. In either event the Court's jurisdiction can be perfected in the course of the proceedings (*forum prorogatum*). The temporal element in the jurisdiction of the Court is therefore to be regarded as part of the problem of jurisdiction *ratione personae* or *ratione materiae* as the case may be. It relates to the scope of the jurisdiction.[144]

This has given rise to special terminology to express the element of time in the Court's jurisdiction. For the link of time with the jurisdiction *ratione personae*, the period within which acceptance of the jurisdiction is in force is bounded by two dates called respectively the *commencement date* and the *terminal date*. For the association of time with the material scope of the jurisdiction, the relevant date is usually termed the *exclusion date* or the *critical date* (a term which in this context must not be confused

[143] *Legality of Use of Force* (Prel. Objs.) cases, case against Belgium, [2004] 279, 293 (para. 30). See also H. Thirlway, *The Law and Procedure of the International Court of Justice* 1667 (2013).

[144] *Application of the Genocide Convention* (Prel. Objs.) case, [1996-II] 595, 617 (para. 34).

with the critical date for questions of historic title in disputes over sovereignty). Accordingly, for a dispute to come within the scope of the jurisdiction conferred on the Court, it has to have a defined relation to a given date – the *exclusion date*. The definition of this relation appears in a fuller exclusion clause of the instrument defining the Court's jurisdiction. The function of an exclusion clause is to determine whether, and if so to what extent, jurisdiction has been accepted for disputes having to do with (to use here a colourless expression) the period before the commencement date.

There is thus an important link between the function performed by the exclusion date and the function performed by the commencement date. However, the existence of that link should not lead to confusion between these two functions. It is often the case that a single date appearing in the title of jurisdiction performs the dual functions of the commencement date and the exclusion date. This does not lead to any unification of the functions. For example, if the title of jurisdiction refers to disputes 'hereafter arising', a single date determines both the date on which the obligation to accept the jurisdiction commences in general and *ratione personae*, and the date on which that obligation commenced in relation to a particular dispute, *ratione materiae*. This can lead to the conclusion that in the long run there is little practical significance in the distinction between the date on which the dispute arose and the date of the facts and situations that gave rise to the dispute, at least in so far as concerns the process of reaching a decision. The distinction between the date of the dispute, and the date of the facts and situations giving rise to that dispute, may be one of form.

Where a multilateral treaty conferred jurisdiction on the Court over disputes relating to facts or situations prior to the entry into force of the treaty as between the parties to the dispute, the Court found that such a provision does not differ in substance from the temporal jurisdiction limitations dealt with in cases brought on the basis of the compulsory jurisdiction of Article 36, paragraph 2, of the Statute (see ch. 12, §§ II.203 to 206). Accordingly, the Court found that its jurisprudence on temporal limitations of relevance in interpreting the treaty in question.[145]

Unless the title of jurisdiction contains a specific temporal limitation – the simplest form of this is disputes 'hereafter arising' – it will apply to all relevant disputes that come into existence within the period of time

[145] *Certain Property* case, [2005] 10 February (para. 43).

during which the title of jurisdiction is in force. This is so regardless of the date of the facts at the origin of the dispute. In the words of the Permanent Court:

> The Court is of opinion that, in case of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment ... The fact of a dispute having arisen at a given moment between two States is a sufficient basis for determining whether, as regards tests of time, jurisdiction exists, whereas any definition of the events leading up to a dispute is in many cases inextricably bound up with the actual merits of a dispute.[146]

States have generally drafted unilateral and bilateral titles of jurisdiction in a way which avoids this retroactivity in the jurisdiction of the Court. This limitation is not commonly found in compromissory clauses of multilateral treaties, but the point is covered by the general non-retroactivity of a treaty as set out now in Article 28 of the Vienna Convention on the Law of Treaties.

Neither the Permanent Court nor the present Court has ever used the expression 'jurisdiction *ratione temporis*' in its own statements of law (as opposed to recitals of a party's contentions). Similarly, the expression rarely appears in the separate opinions of individual judges of either Court. Both the Courts and the individual judges have usually preferred one of the more precise synonyms such as 'limitation *ratione temporis*', 'scope of the jurisdiction *ratione temporis*', 'argument *ratione temporis*', 'reservation *ratione temporis*', 'objection *ratione temporis*' and the like. The cases have always been concerned with the implications of time on the scope of the material jurisdiction. Bearing this in mind, this careful usage may be found to support the view that a clear distinction exists and must always be maintained between the different functions performed by dates in relation to the jurisdiction of the Court (see chapter 12, § II.204).

At the same time, this usage calls for some additional observations. In the first place it stresses that, in so far as concerns the scope of the material jurisdiction, the subject of the discussion properly enters into the category of a reservation, a withholding of something that otherwise would come within the scope of the obligation to accept the jurisdiction. From this it may be assumed that the correct way of looking upon time in

[146] *Mavrommatis Palestine Concessions* case, A2 (1924) 35. See also *Obligation to Prosecute or Extradite* (Belgium *v* Senegal) (Prov. Meas.) [2009] 139, 148–149 (para. 46).

Annex 2

Extracts from K. Schmalenbach, "Article 26: *Pacta sunt servanda*", *in Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018)

Article 26
Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Contents

A. Purpose and Function

Art 26 restates the pillar of treaty law[1] and the pivotal key to international law: *pacta sunt servanda*. Considering its significance, the provision is not too prominently placed in Part III of the Convention (→ MN 8). The Preamble, after all, highlights *pacta sunt servanda* by aligning the principle with two others basic corner stones of **1**

[1] *Binder* (2008), pp. 317, 321.

O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-662-55160-8_29

2. Non-reciprocal Obligations

Non-reciprocal obligations—also referred to as **objective**, **absolute**, **self-existing**, or **inherent obligations**[114]—do not result in the exchange of direct, reciprocal benefits owed to the other State Parties but in the performance of the treaty for a benefit of a community good, which is tantamount to an 'immaterial' benefit of each State Party.[115] **37**

> In its advisory opinion on Reservations to the Genocide Convention, the ICJ emphasized: "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 those 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."[116]

Because the duty to comply is not dependent on the corresponding performance by other State Parties, recourse to Art 60 paras 1–4 is precluded.[117] **38**

There is a broad consensus in the academic debate, evidenced in international practice, that **human rights obligations** are never reciprocal.[118] Today, the reciprocity clauses of early treaties on **minority rights** (*eg* Art 45 of the 1923 Treaty of Lausanne[119]) are criticized as 'anachronistic' and contrary to modern human rights law which "transcends the framework of mere reciprocity between the contracting States".[120] **39**

The non-reciprocity of provisions relating to the protection of humans in **treaties of a humanitarian character** is provided for in Art 60 para 5 (→ Art 60 MN 81–86). The extent of non-reciprocal obligations imposed by modern humanitarian law such as the four 1949 Geneva Conventions and the two 1977 Protocols is far from **40**

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[114] *Fitzmaurice* IV 46; *Simma* (1972), p. 181; 'global' reciprocity according to *Sicilianos* (2002), p. 1135.

[115] According to *Simma* (1972), p. 314, these obligations are nonetheless reciprocal although in a form which does not imply the synallagmatic interdependence of treaty performance. See also *Simma* (2008), MN 6.

[116] ICJ *Genocide Convention Opinion* [1951] ICJ Rep 15, 23.

[117] *Fitzmaurice* II 31 (Draft Art 19 para 1).

[118] ECommHR *Decision of the Commission as to the Admissibility of Application No 788/60,* 11 January 1961, 4 YbECHR 116, 140; ECtHR *Ireland v United Kingdom* App No 5310/71, 18 January 1978, Ser A No 25, para 239; IACtHR *Effect of Reservations on the Entry into Force of the American Convention* (Advisory Opinion) Case OC-2/82, 24 September 1982, Ser A No 2, para 29; Human Rights Committee, General Comment 24 (52), Reservations to the ICCPR, 4 November 1994, UN Doc CCPR/C/21/Rev.1/Add.6, para 17.

[119] 28 LNTS 11.

[120] Report of the Committee for Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe 'Freedom of Religion and Other Human Rights for Non-Muslim Minorities in Turkey and for the Muslim Minority in Thrace (Eastern Greece)', 21 April 2009, CoE Doc 11860, paras 32–33.

Dörr, O., & Schmalenbach, K. (Eds.). (2018). Vienna convention on the law of treaties : A commentary. Springer Berlin / Heidelberg.

clear, as the numerous declarations of State Parties on the occasion of the ratification of Protocol I exemplify.

> See the declaration of the United Kingdom: "The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question".[121] Similar views were taken by Egypt, France, Germany and Italy.

41 Quite contrary to State practice, the ICTY favors a much broader, entirely human-centered approach in its *Kupreškić* judgment:

> "The absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called 'humanization' of international legal obligations, which refers to the general erosion of the role of reciprocity in the application of humanitarian law over the last century. [...] Unlike other international norms, such as those of commercial treaties which can legitimately be based on the protection of reciprocal interests of States, compliance with humanitarian rules could not be made dependent on a reciprocal or corresponding performance of these obligations by other States. This trend marks the translation into legal norms of the 'categorical imperative' formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it."[122]

42 Apart from obligations aimed at protecting individuals and groups, the non-reciprocity of treaty obligations is commonly accepted in the field of **international environmental law**.[123]

3. Obligations *erga omnes partes*

43 The diffuse concept of obligations *erga omnes* is subject to extensive scholarly writing.[124] In the light of jurisprudence and academic treatises, *erga omnes* has become a legal umbrella term covering various legal effects.[125] In the context of treaty law, the notion ***erga omnes partes*** or ***erga omnes contractantes*** is used to describe treaty-based obligations, the good faith performance of which all State Parties have a legal interest in.[126]

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[121] Reservation letter of 28 January 1998 sent to the Swiss government by UK Ambassador Hulse.

[122] ICTY *Prosecutor v Kupreškić et al* (Trial Chamber) IT-95-16-T, 14 January 2000, para 517.

[123] *Tams* (2005), pp. 57–58 who furthermore expands the circle of non-reciprocal treaties to all treaties that require the harmonization of national laws.

[124] See *eg Ragazzi* (1997); *Zemanek* (2000); *Frowein* (2008).

[125] *Cf Tams* (2005), pp. 99, 155 ("legal vademecum").

[126] Whereas *erga omnes partes* obligations stem from an international treaty, the term *erga omnes* obligations is employed to denote universally recognized obligations of international customary law, owed to the international community as a whole, *cf* SR *Crawford* 3rd Report on the Law of State Responsibility (2000) UN Doc A/CN.4/507, para 106 n 195; *Sicilianos* (2002), p. 1136.

Dörr, O., & Schmalenbach, K. (Eds.). (2018). Vienna convention on the law of treaties : A commentary. Springer Berlin / Heidelberg.

Annex 3

Extracts from J. Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013)

Part III

Breach

A fourth category – a complex breach – was introduced by Ago into the Draft Articles on the first reading, but it was deleted during the second.[73]

As conceived of in ARSIWA Articles 14 and 15, no *a priori* distinction is drawn between obligations of conduct, result and prevention. State responsibility in this sense is concerned only with the existence of an internationally unlawful situation as defined by a relevant primary norm. Once the situation is identified, it is possible to determine whether the breach in question is instantaneous, continuing or composite – but beyond this, the basic contours of the law remain unaffected.

8.3.1 Instantaneous breaches

The first category of act conceived under the ARSIWA is ordinarily called, for the sake of convenience, an 'instantaneous breach'.[74] This connotes that the act and its consequences are fixed at a particular point in time.[75]

The concept is reflected in ARSIWA Article 14(1) as follows:

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

The commentary itself gives no examples as to what may constitute an instantaneous or non-continuing breach. However, the commentary to its predecessor, Draft Article 24,[76] includes a number of examples,[77] such as the military forces of one state shooting down an aircraft from another state lawfully flying over the territory of the former, the latter, a third state, or a *res communis* area (e.g. the shooting down of Iran Air

[73] Further: Crawford, Second Report, 20–9.

[74] Karl (1987), 99–100; Pauwelyn (1995), 418. The term emerges from the Draft Articles Commentary, Art. 24, §5 n. 417, which links the adjective 'instantaneous' to the general theory of internal law, and to domestic crimes such as murder, the infliction of injury, and arson. The term has also been employed by the International Court: *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 54. Salmon suggests that ARSIWA, Art. 14(1) neglects to take into account the preparation time inherent in any internationally wrongful act, however short it may be: Salmon (2010), 384–5.

[75] Salmon (2010), 384:

> The instantaneous act occurs when its conditions for existence are fulfilled and at that moment it constitutes a wrongful act. By definition, it ceases to exist at the expiration of the relatively brief time period that is necessary for its accomplishment.

[76] The wording of which was substantially similar to ARSIWA, Art. 14(1):

> The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.

[77] Draft Articles Commentary, Art. 24, §6.

Flight 655 over the Strait of Hormuz by surface-to-air missiles fired by the USS *Vincennes* on 3 July 1988[78]); the torpedo boat or submarine of a belligerent state sinking a neutral or unarmed non-combatant ship on the high seas (e.g. the sinking of the US-flagged SS *Robin Moor* by the German U-Boat *U-69* on 21 May 1941[79]); the police of one state (or its agents) killing or wounding the representative of another state; or organs of a state confiscating or destroying the building in which a foreign diplomatic mission has its headquarters (e.g. the destruction by US forces of the Chinese embassy in Belgrade on 7 May 1999 during Operation Allied Force, the NATO bombing of Yugoslavia[80]). What all these situations have in common is that the wrongful act itself can be narrowed down to a single date – virtually a single moment in time – and anything that continues afterwards represents the *effects* of the breach, rather than a continuation of the act itself.[81]

It is not always easy to separate the continuation of the illegal act from its effects. For example, in *Phosphates in Morocco*,[82] the French government accepted the jurisdiction of the Court by way of a declaration dated 25 April 1931, which provided that jurisdiction was accepted with respect to 'any disputes which may arise after ratification . . . with regard to situations or facts subsequent to such ratifications'.[83] Accordingly, one of the key tasks of the Court was to fix the date of the wrongful act relative to the declaration. The contested acts were a decision of the Moroccan Department of Mines dated 8 January 1925 depriving M. Tassara, an Italian citizen, of his property, and decrees of 1920 establishing a monopoly on the exploitation of phosphate reserves – both *prima facie* in breach of France's international obligations.

Italy attempted to bridge the temporal gulf between France's acts and its ratification of the Court's jurisdiction by claiming that the Department's decision and the legislative monopoly were continuing acts, that 'extend[ed] over a period of time, so that when they [became]

[78] Gray (2008), 162.

[79] The incident was the subject of one of President F. D. Roosevelt's famous fireside chats, in which he declared the sinking to be 'under circumstances violating long-established international law and violating every principle of humanity': Roosevelt, *The Fireside Chats of Franklin Delano Roosevelt* (2007), 84.

[80] Murphy, 1 (2002), 99–1c02.

[81] See Karl (1987), 99: 'Such acts may be preceded by long preparations and have durable effects (such as the lasting physical disability of passengers); this does not, however, stop them from being instantaneous acts.'

[82] *Phosphates in Morocco*, Preliminary Objections, (1938) PCIJ Ser. A/B No. 74.

[83] Ibid., 10.

Annex 4

Extracts from P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination* (Oxford University Press, 2016)

The International Convention on the Elimination of All Forms of Racial Discrimination

A Commentary

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5(e)(iv) The Right to Public Health, Medical Care, Social Security, and Social Services

The statement of protected rights in this sub-paragraph conflates rights listed separately in Articles 22 and 25 of the UDHR (social security and health, respectively), and Articles 9 and 12 of the ICESCR (social security, health).[89] GCs on health (GC 14) and social security (GC 19) have been adopted by the CESCR.[90] As articulated by the CESCR, the right to 'the highest attainable standard of physical and mental health' is interpreted as a rights complex embracing a 'wide range of socio-economic factors that promote conditions in which people can lead a healthy life' including food, nutrition and sanitation, housing and work conditions and a healthy environment.[91] The right is also visualized as 'related to and dependent upon the realization' of a range of other human rights',[92] and is understood as 'a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization' of the highest attainable standard of health.[93] The right to social security, on the other hand, is understood as the right to maintain benefits in order to secure protection form such as a lack of work-related income on account of sickness, disability, etc, or because of unaffordable healthcare or insufficient family support.[94]

CERD reporting guidelines commence with the assertion that '[d]ifferent groups of victims or potential victims of racial discrimination within the population may have different needs for health and social services.' Accordingly, 'States parties should (a) describe any such differences and (b) describe governmental action to secure the equal provision of these services.'[95]

CERD has not fully elaborated its understanding of the rights in 5(e)(iv), though group-related general recommendations (GR 27 on gender, GR 29 on descent-based discrimination, and GR 34 on racial discrimination against People of African Descent) include references to health and social security: in the case of the Roma, and descent/caste-

[89] Also Article 10(2).

[90] On the right to social security, see also Articles 11(1)(e) and 14(2)(c) of CEDAW; Article 26 of the CRC; and Article 61 of the CMW. Among regional instruments, the American Declaration on the Rights and Duties of Man, Articles 16 and 35, make reference to social security, as does Article 9 of the Additional Protocol to the Inter-American Convention on Human Rights in the area of Economic, Social and Cultural Rights, and Article 12 of the European Social Charter (Revised). With regard to health, the SIM human rights database lists 100 references, a number of which are not articulations of the right to health but a restriction on rights on grounds of 'public health'. Leading references to the rights include Article 12 of CEDAW and Article 24 of the CRC (also Article 3); Articles 22, 25, and 26 of the CPRD, and a number of the Convention on Migrant Workers, notably Articles 43 and 45. The right is listed extensively among regional instruments that include the ACHPR, Articles 16 and 18, and its protocol on the rights of women in Africa (Article 1), and the African Charter on Rights and Welfare of the Child (Article 20), as well as the American Declaration on the Rights and Duties of Man (Article 11) and its Protocol on Economic, Social and Cultural Rights (Article 10); Article 11 of the Revised European Social Charter enshrines 'the right to protection of health'. The African Charter on the Rights and Welfare of the child is notable to including a health provision in Article 21 on protection from harmful social or cultural practices.

[91] General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4, para. 4.

[92] *Ibid.*, para. 3.

[93] *Ibid.*, para. 9. The work of the CESCR and other bodies is complemented by the work of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: <http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx>.

[94] General Comment No. 19, *The Right to Social Security*, E/C.12/GC/19 (2008), para. 2.

[95] CERD/C/2007/1, p. 11.

based communities, particular emphasis has been placed on equal access to the goods of healthcare and social security and the involvement of affected communities in the design and implementation of programmes and projects.[96] To this basic arrangement, GR 27 adds a recommendation with regard to Roma—'mainly women and children'—to focus on 'their disadvantaged situation due to extreme poverty and low level of education, as well as to cultural differences',[97] a concern taken forward to the assertion in guidelines regarding differences in needs.[98] In practice, all the groups within the purview of the Convention are brought within the remit of the sub-paragraph, including minorities, indigenous peoples, descent-based communities, and sundry categories of non-citizens that include refugees and internally displaced persons (IDPs); there is also a strong intersectional element in many recommendations that refer to the position of women. Cases involving women belonging to Roma communities and indigenous women have generated recommendations from the Committee with regard to practices of forced sterilization.[99]

Decisions under the communications procedure have rarely addressed the sub-paragraph: the issue of access to social security benefits raised in *D.F. v Australia* in connection with a claim of discrimination on the basis of national origin was not sustained by the Committee.[100] More substantially, despite the finding of inadmissibility, the case of *Kenneth Moylan v Australia*, based generally on Articles 2(2), 5, and 6, made use of 5(e)(iv).[101] The petitioner, an Aboriginal Australian man, claimed that, in light of the lower life expectancy for Aboriginal Australians, he should have been able to access an age pension under the Social Security Act at a lower age than that set for Australians generally, between 65 and 67 years of age.[102] Special measures, he argued, were mandated by the Convention in order to close the gap between indigenous Australians and others.[103] In response, the State Party offered a narrow interpretation of 5(e)(iv), arguing that the enjoyment of the age pension, 'as distinct from social security more generally', was not required to fulfil the obligations under the Convention, and that Australian social security law was not directly or indirectly discriminatory.[104] Further, given that 5(e)(iv) 'requires the equal and not universal enjoyment of social security', the State party was entitled to set criteria to determine when social security should be available' in order to target those most in need.[105]

[96] GR 27, paras 33 and 34; GR 29, (nn) and (oo); GR 34, paras 55 and 56.

[97] GR 27, para. 34: the syntax of the sentence suggests that Roma disadvantage, etc, is community-wide; see also GR 25 on gender-related dimensions of racial discrimination, para. 2.

[98] Later recommendations concerning health issues of Roma include those on Albania, CERD/C/ALB/CO/5-8, para. 11; Bosnia and Herzegovina, CERD/C/BIH/CO/7-8, para. 12; Slovenia, CERD/C/SVN/CO/6-7, para. 10; and the UK, CERD/C/GBR/CO/18-20, para. 27 (Gypsies and Travellers).

[99] Concluding observations on Mexico, CERD/C/MEX/CO/15, para. 17; on Slovakia, CERD/C/SVK/CO/9-10, para. 13; and Vietnam, CERD/C/304/Add.127, para. 10.

[100] CERD/C/72/D/39/2006 (2008).

[101] CERD/C/83/D/D/47/2010 (2013), discussed in relation to special measures, Chapter 9.

[102] *Inter alia*, the petitioner cited GC19 of the CESCR on the right to social security, 'where it is stated that differences in the average life expectancy of men and women can also lead directly or indirectly to discrimination in the provision of benefits': *Moylan*, para. 3.2.

[103] The State party and then petitioner made extensive references to CERD GR 32 on special measures.

[104] *Moylan*, para. 4.10.

[105] *Ibid.*, para. 4.11. The petitioner disputed most aspects of the interpretation by the State party, claiming, *inter alia*, that in light of the objectively different situation of Aboriginal Australians compared to the rest of the population, mere *de jure* equality was not enough, and steps taken to address indirect discrimination would provide for equal enjoyment of the rights in question: para. 5.9.

As previously noted, the case was declared inadmissible for failure to exhaust domestic remedies, 'without prejudice to the question . . . regarding the alleged structural discrimination related to pension entitlements'.[106] In terms of Article 5, the case raises questions of the latitude in interpreting 'social security', the range of rights protected by Article 5, and in particular whether the article points, through its guarantee of equality, to substantive obligations to secure basic rights. The Committee's cautious recall of the claim regarding structural discrimination may suggest that while it was perhaps too much to expect a wholesale revision of the pension system, there was a strong case for enhanced measures to address the perceived disparities in health and life expectancy.

Reference to the sub-paragraph is often generic, repeating its formulation without a separation into constituent elements. Where elements are individuated, recommendations in the area of social security are overwhelmingly directed to the question of access and the removal of obstacles thereto such as the non-availability of appropriate personal documents[107] or other administrative hurdles to enjoying the benefits of the system such as burdensome registration systems:[108] the burdens placed members of affected groups in this respect run across the span of economic, social, and cultural rights.

Inferior access to health services and the incidence of poor health and life expectancy among minorities and indigenous peoples are regrettably frequent subjects of situations brought to the attention of the Committee. Health issues are the most commonly individuated aspects of the compound right in 5(e)(iv), including reproductive and sexual health,[109] and HIV/AIDS, testing for which should 'not infringe the principle of non-discrimination'.[110] The Committee constantly presses for the reduction of health disparities through programmes of special measures where necessary.[111] The incidence of specific conditions such as malaria and cholera have been referred to, the former in the context of environmental pollution and mercury contamination linked to mining activities affecting indigenous peoples.[112]

Health issues may also be subsumed under generalized concerns regarding environmental degradation affecting the lives of indigenous peoples and others.[113] In the case of the Western Shoshone, the Committee, basing itself on information regarding the prospective opening of a nuclear waste repository, open-pit gold mining activities, and the alleged issuance of geothermal energy leases on areas of spiritual and cultural

[106] *Ibid.*, para. 6.6. See Chapter 9.

[107] Concluding observations on Albania, CERD/C/ALB/CO/5-8, para. 14.

[108] Concluding observations on China, CERD/C/CHN/CO/13, para. 14.

[109] Detailed recommendations on sexual and reproductive health have been made to, among others, the USA: CERD/C/CO/6/Add.1, para. 33; and India, CERD/C/IND/CO/19, para. 24.

[110] Concluding observations on Moldova, CERD/C/MDA/CO/8-9, para. 13: the concluding observations relate to the 'deep concern' of the Committee that non-citizens were subjected to mandatory HIV/AIDS testing and could not take up residence in the State party if the test proved positive. See also *L.G. v Korea*, discussed in Chapter 7, where the Committee found that HIV/AIDS testing for purposes of employment violated Articles 2(1)(c) and (d), 5(e)(i), and 6; the allegations of the petitioner relating to Article 5(e)(iv) were not examined separately: *ibid.*, paras 7.5 and 8.

[111] See comments in *Moylan*, and concluding observations on Australia, CERD/C/AUS/CO/14, para. 19.

[112] Regarding Suriname, Decision 3 (62) under the early warning procedure, A58/18, para. 18, and concluding observations, CERD/C/64/CO/9, para. 15; on Guyana, CERD/C/GUY/CO/14, para. 19.

[113] With regard to adverse environmental effects through large-scale exploitation of natural resources in the Delta Region and other States, particularly the Ogoni areas, the Committee forcefully urged the taking of measures to combat 'environmental racism' and degradation: concluding observations on Nigeria, CERD/C/NGA/CO/18, para. 19; cf. *SERAC v Nigeria*, African Commission on Human and Peoples' Rights (2002), with respect to contamination of soil, water an air, with long-term health impacts.

significance to the Shoshone, urged the United States to 'pay particular attention to the right to health and cultural rights of the Western Shoshone people, which may be infringed upon by activities threatening their environment and/or disregarding the spiritual and cultural significance they give to their ancestral lands'.[114] Potential dangers to the right to health and related rights have animated calls for environmental impact statements. As with other rights, the need for appropriate indicators may be suggested as indispensable to securing full implementation. Measures of redress may also be called for.[115] Health issues are also integrated with concerns regarding poverty and malnutrition impacting upon particular communities: in such respects, the Committee has extended the vocabulary of the Convention in referring to 'the right to food'.[116] As with housing, the recommendations on the 'living conditions' of groups regularly include observations on the right to health.

Concluding observations have also paid attention to the cultural dimensions of health policy, including linguistic aspects. In the case of indigenous peoples, a number of articles in the UNDRIP address the right to traditional medicines, health practices, flora and fauna, etc, as well as non-discriminatory access to social and health services.[117] The Committee has absorbed some of this regulation into its concluding observations, though the aspect of 'need' in the guidelines as including cultural needs was part of CERD practice before the Declaration emerged in 2007. Sundry dimensions of health issues are summed up in a compendious recommendation to Mexico to draw up,

> in close cooperation with the communities concerned, a comprehensive and culturally sensitive strategy to ensure that indigenous peoples receive quality health care. The implementation of the strategy should be guaranteed by an adequate allocation of resources, the collection of indicators and transparent monitoring of progress. Particular attention should be paid to improving access to health care for indigenous women and children. The Committee underlines the need for interpreters in this area... It is important that the health system recognize, coordinate, support and strengthen indigenous health systems and use them as the basis for achieving more effective and culturally sensitive coverage[118]

Important elements emerging from the recommendation include the stress on cultural sensitivity, the linguistic dimensions of the delivery of healthcare, coordination between indigenous health systems and national systems (implying mutual respect and acknowledgement), and an emphasis on 'close cooperation' between State authorities and indigenous peoples that strongly suggests community participation in the delivery of

[114] Decision 1 (68) A/61/18, ch. II A, para. 8. Health issues are also highlighted in subsequent concluding observations regarding the Shoshone: CERD/C/USA/CO/6, para. 29, where nuclear testing, toxic waste storage, mining, and logging, 'carried out or planned in areas of spiritual and cultural significance to Native Americans', raised concerns of negative impact on the rights to own property, to health, and to equal participation in cultural activities.

[115] Among later recommendations, see CERD/C/CHL/CO/19-21, para. 13, regarding ancestral lands; reiterating and expanding on earlier recommendations, CERD/C/CHL/CO/15-18, para. 21.

[116] See in particular the interrelated set of recommendations to Guatemala: CERD/C/GTM/CO/12-13, paras 11, 12, 13, and 14.

[117] In particular, Articles 21, 24, 29, and 31.

[118] CERD/C/MEX/CO/16-17, para. 19. See also concluding observations on Colombia, CERD/C/COL/CO/14, para. 21 (Afro-Colombian and indigenous persons); Ecuador, CERD/C/ECU/CO/20-22, para. 21, which offers a succinct version of the desiderata for the enjoyment of this right in recommending 'necessary steps to ensure access to appropriate basic services and institutional health care... that are adapted to the different linguistic and cultural characteristics of indigenous peoples'.

care services. The allocation of resources for 'intercultural health' units has also been the subject of recommendations.[119]

Social security and broader issues regarding social services have also engaged attention. Many questions regarding access to social security have concerned Roma claimants;[120] other groups have also been implicated.[121] With regard to social services more generally, there is a strong Committee emphasis on the cultural dimensions of their delivery. In the case of Finland, the Committee recommended that the State party 'effectively ensure social and health services in Sámi languages to Sámi people in their Homeland'.[122] In the case of Laos, following an expression of concern regarding unequal access to public services, in part because of language barriers, the Committee recommended delivery of and access to 'culturally adequate' public services, as well as information on steps taken 'to overcome the language obstacle'.[123] In the case of Mexico, the recommendation was to guarantee the rights of all Mexicans, especially indigenous ones, to 'education, health, social security, housing, basic services and food', while 'respecting their cultural origins and consulting with the peoples who might be affected by such State initiatives'.[124] As with other rights in Article 5, the thematics of participation and cultural appropriateness run through the recommendations on the right to health.

5(e)(v) The Right to Education and Training

Questions regarding the education of members of minority communities were prominent in the League of Nations minority regime; *Minority Schools in Albania* expanded the understanding of equality and discrimination in the field of education and more widely,[125] elaborating the distinction between formal or ostensible equality, and between equality in fact and equality in substance.[126] The attention devoted to the education rights in the League schema is testament to the importance of education to the continued existence of minority groups and the perpetuation of their culture, concerns that have not abated but intensified under the stresses of globalization. With respect to a span of groups under the protection of the Convention, education in its varied forms, the complex right to education, continues to play a crucial role in the intergenerational transmission of communal culture. In the words of the UN Forum on Minority Issues:

> [e]ducation is an inalienable human right, and is more than a mere commodity or ... service ... education is a human right that is crucial to the realization of a wide array of other human rights and an indispensable agency for the expansion of human capabilities and the enhancement of human

[119] Concluding observations on Ecuador, CERD/C/ECU/CO/19, para. 20; CERD/C/GTM/CO/12-13, para. 13.

[120] Later examples include concluding observations on Albania, CERD/C/ALB/CO/5-8, para. 11; Belarus, CERD/C/BLR/CO/18-19, para. 16; Bosnia and Herzegovina, CERD/C/BIH/CO/7-8, para. 12; Ukraine, CERD/C/UKR/CO/19-21, para.15.

[121] Concluding observations on Kuwait, CERD/C/KWT/CO/15-20 (Bedoun); Mexico, CERD/C/MEX/CO/16-17, para. 18 (indigenous peoples); Yemen (Al-Akhdam), CERD/C/YEM/CO/17-18, para. 15.

[122] Concluding observations on Finland, CERD/C/FIN/CO/20-22, para. 14.

[123] Concluding observations on Laos, CERD/C/LAO/CO/16-18, para. 19; the Committee also noted, *ibid.*, the political will of the State party 'to reduce poverty in rural areas and to improve ethnic groups' enjoyment of economic and social rights'.

[124] Concluding observations on Mexico, CERD/C/MEX/CO/16-17, para. 18.

[125] *Minority Schools in Albania*, Advisory Opinion, [1935] PCIJ, Ser. A/B No. 64.

[126] P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991), Chapter 3.

Annex 35-1

Addendum to Annex 35 of Azerbaijan's Memorial, Letter from Vugar Karimov, Deputy Minister of the Ministry of Ecology and Natural Resources of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Foreign Minister of the Republic of Azerbaijan, dated 14 August 2023, No. 3-14/2-2460-D-03-08/2023 (with enclosure) (original in English)

AZƏRBAYCAN RESPUBLİKASI
EKOLOGİYA VƏ TƏBİİ
SƏRVƏTLƏR NAZİRLİYİ

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№ 3-14/2-2460-D-03-08/2023 «14» 08 2023 il

Mr. Elnur Mammadov
Deputy Minister of Foreign Affairs of the Republic of Azerbaijan

Dear Mr. Mammadov,

I write with respect to the destruction of centuries-old eastern plane trees, including trees designated as natural monuments, in the liberated territories.

As described in my previous letter dated 11 January 2023, between late November 2020 and November 2021, and again from late September 2022 to the present, employees of the Ministry of Ecology and Natural Resources ("***MENR***") traveled to the liberated territories on more than 100 occasions in order to assess and document the environmental impact of the occupation on natural areas, including protected natural monument trees.

During these field and monitoring assessments, employees of MENR observed that eastern plane trees, including those designated as protected natural monuments, in the districts of Aghdam, Fuzuli, Gubadly, Jabrayil, Kalbajar, Lachin, and Zangilan had been cut down or otherwise damaged or destroyed, while eastern plane trees in Khojavand district remained standing. The photographs of eastern plane trees in Khojavand district attached to this letter as Appendix A were taken by employees of MENR in June 2023 and August 2023 as part of those assessments.

Sincerely,

Vugar Karimov
Deputy Minister

Enclosures

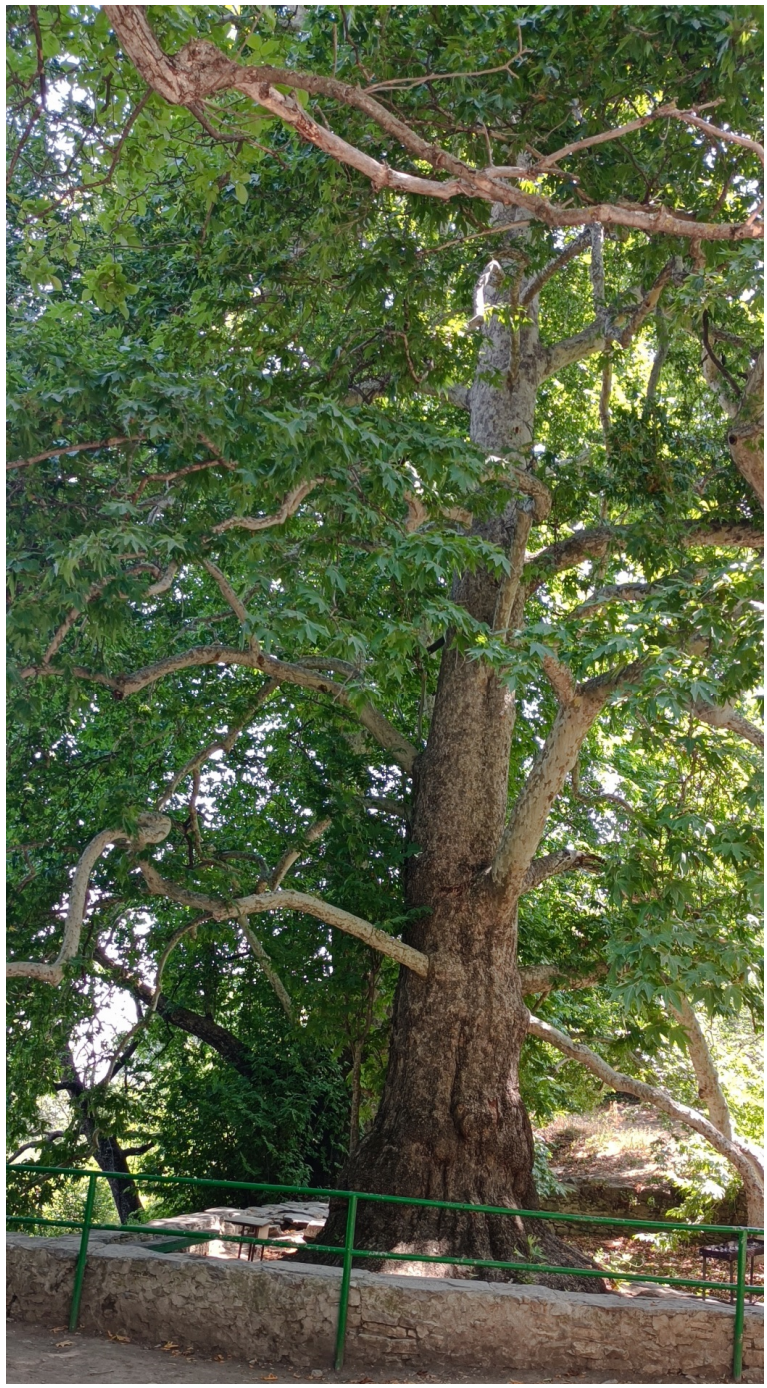
APPENDIX A:
PHOTOGRAPHS OF EASTERN PLANE TREES IN THE MAJORITY-ARMENIAN POPULATED TOWN OF HADRUT, TAKEN BY MINISTRY OF ECOLOGY AND NATURAL RESOURCES IN JUNE 2023 AND AUGUST 2023

I. Khojavand District

Figures 1 and 2: Eastern Plane Tree in the Majority-Armenian Populated Town of Hadrut (Top), and Close-up of Crosses Carved into Its Bark (Bottom), Photographed in June 2023[1]

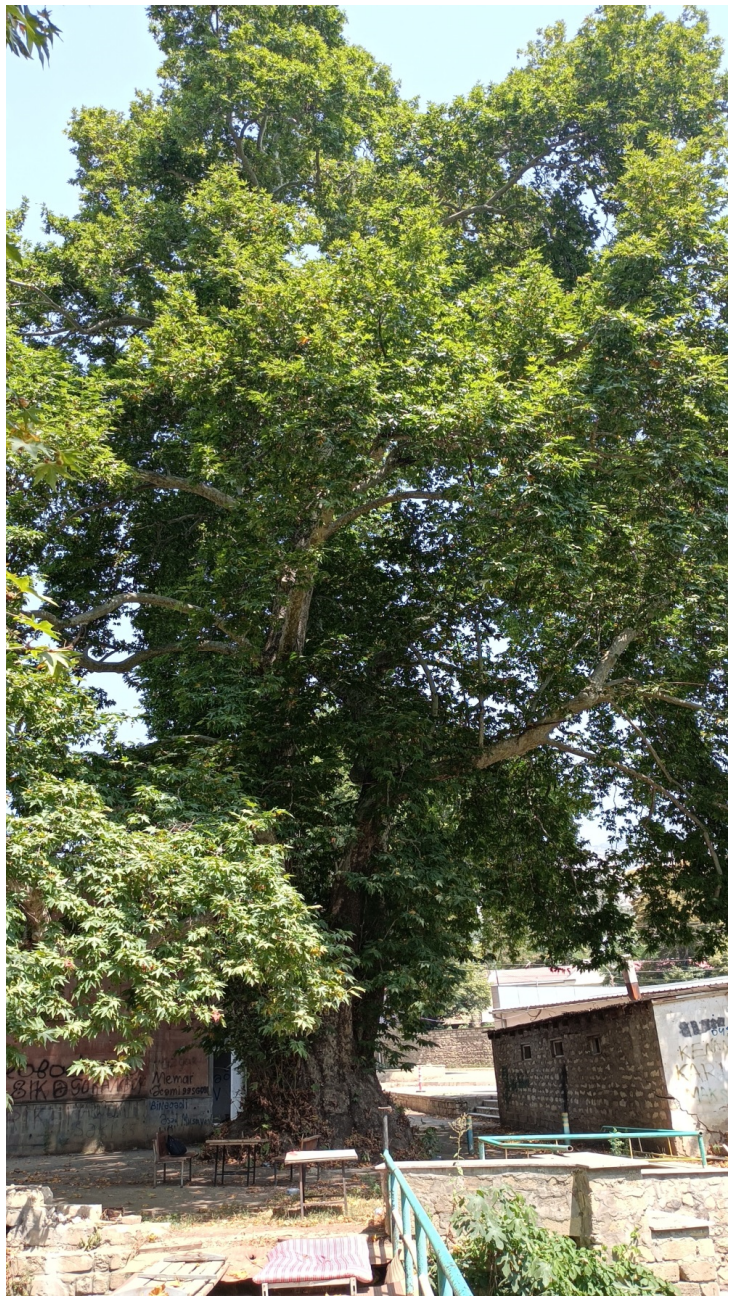
[1] Located at 39°31'26.3"N 47°02'04.7"E.

Figure 3: Natural Monument Tree in the Majority-Armenian Populated Town of Hadrut[2], Photographed on 7 August 2023[3]



[2] Located at 39°30'19.1124"N 47°1'58.026"E.
[3] Photograph taken between 10:00 and 14:00.

Figure 4: Natural Monument Tree
in the Majority-Armenian Populated Town of Hadrut[4],
Photographed on 7 August 2023[5]



[4] Located at 39°30'52.7724"N 47°2'0.2292"E.
[5] Photograph taken between 10:00 and 14:00.