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Necessity Across International Law

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Necessity Across International Law

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List of Abbreviations

AA	Ars Aequi
Aanh. Hand. I/II	Aanhangsel tot het Verslag der Mededelingen van de Eerste/Tweede Kamer der Staten Generaal
AB Kort	Administratiefrechtelijke Beslissingen Kort
AB	Administratiefrechtelijke Beslissingen
AJCL	American Journal of Comparative law
AJIL	American Journal of International Law
ASIL Proc.	American Society of International Law Proceedings
Australian YIL	Australian Yearbook of International Law
BDIEL	Basic Documents of International Economic Law
BGBl	Bundes Gesetzblatt
BNB	Beslissingen in Belastingzaken Nederlandse Belastingrechtspraak
Buffalo CLR	Buffalo Criminal Law Review
BVerfGE	Entscheidungen des Bundesverfassungsgericht
BYIL	British Yearbook of International Law
California LR	California Law Review
Calif. Western ILJ	California Western International Law Journal
CMLRev.	Common Market Law Review
Columbia JEL	Columbia Journal of European Law
Columbia JTL	Columbia Journal Transnational Law
Columbia LR	Columbia Law Review
Cornell ILJ	Cornell International Law Journal
DD	Delikt en Delinkwent
Denver JIL and Pol.	Denver Journal of International Law and Policy
ECR	European Court Reports
EJIL	European Journal of International Law
ETS	European Treaty Series
European LJ	European Law Journal

European LR	European Law Review
GA Res.	UN General Assembly Resolutions
Georgia LR	Georgia Law Review
G Washington ILR	George Washington International Law Review
GYIL	German Yearbook of International Law
Hand. I/II	Verslag der Handelingen van de Eerste/Tweede Kamer der Staten Generaal
Harvard HRJ	Harvard Human Rights Journal
Harvard ILJ	Harvard International Law Journal
ICJ Rep.	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ILM	International Legal Materials
ILR	International Law Review
IRRC	International Review of the Red Cross
JB	Jurisprudentie Bestuursrecht
JV	Jurisprudentie Vreemdelingenrecht
Kamerstukken I/II	Bijlagen bij het Verslag der Handelingen van de Eerste/ Tweede Kamer der Staten Generaal
Leiden JIL	Leiden Journal of International Law
LJN	Landelijke Jurisprudentie Nummers website with full text Dutch case law http://www.rechtspraak.nl
M en R	Milieu en Recht
MRT	Militair Rechtelijk Tijdschrift
NAV	Nieuwsbrief Asiel- en Vluchtelingenrecht
NILR	Netherlands International Law Review
NIPR	Nederlands International Privaatrecht
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
Nordic JIL	Nordic Journal of International Law
NYIL	Netherlands Yearbook of International Law
OJ	Official Journal of the European Communities
RdC	Recueil des cours
RGDIP	Revue Générale de Droit International Public
RIAA	Reports of International Arbitral Awards
RSV	Rechtspraak Sociale Verzekeringen
RV	Rechtspraak Vreemdelingenrecht
RvdW	Rechtspraak van de Week/Para>
SEW	Sociaal-Economische Wetgeving—Tijdschrift voor Europees en Economisch Recht
Stb.	Staatsblad van het Koninkrijk der Nederlanden
Stc.	Nederlandse Staatscourant
St. John's LR	St. John's Law Review
USZ	Uitspraken Sociale Zekerheid

Valparaiso Univ. LR	Valparaiso University Law Review
Virginia JIL	Virginia Journal of International Law
Yale JIL	Yale Journal of International Law
Yale LJ	Yale Law Journal
Yearbook ILC	Yearbook of the International Law Commission
ZaöRV	Zeitsschrift für ausländisches öffentliches Recht und Völkerrecht

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Part I Articles: Necessity Across International Law

Chapter 1
Necessity Across International Law: An Introduction

Tarcisio Gazzini, Wouter G. Werner and Ige F. Dekker

Abstract Necessity plays a significant role in any legal system as unpredictable or extraordinary situations can require the adoption of measures departing from the normally applicable law in order to protect basic values and fundamental interests. International law is not an exception. The admissibility of the adoption of measures on grounds of necessity has been accepted by international courts and tribunals, in state practice, including international conventions, as well as in doctrine.

Keywords Necessity · State responsibility · Conflict and security law · Humanitarian law · Human rights law · Environmental law · International trade law · Foreign investment law

Necessity plays a significant role in any legal system as unpredictable or extraordinary situations can require the adoption of measures departing from the normally applicable law in order to protect basic values and fundamental interests.

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International law is not an exception.[1] The admissibility of the adoption of measures on grounds of necessity has been accepted by international courts and tribunals,[2] in state practice, including international conventions, as well as in doctrine.[3]

When a state invokes necessity, it claims that a situation is beyond the boundaries of the normal operation of law.[4] The claim is not related to any previous violation of international law by the holder of the right affected by the necessity plea, nor does it imply any conflict between subjective rights. It rather opposes the essential interest of a state against the legally protected interest of another state. Whether the legally protected interest could be sacrificed on the altar of necessity is a fundamental question that determines the scope and limits of normalcy under international law.

In international law, measures adopted on grounds of necessity can be defined as measures that are normally unlawful but nonetheless can be resorted to by a state, under exceptional circumstances, in order to protect its essential interests against a grave and imminent danger.[5] There is no general international treaty governing the conditions for and the consequences of the adoption of measures on grounds of necessity. It is nonetheless well established in customary international law—as reflected in Article 25 of the Articles on State Responsibility elaborated by the United Nations International Law Commission (hereinafter International Law Commission)—that states can invoke necessity in order to justify a conduct which would otherwise amount to a breach of international law.

The necessity plea has an exceptional character as it can be invoked only under extraordinary circumstances, provided that no other measures consistent with or

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[1] Ago 1980-II, Part I, p. 51, '[t]he concept of "state of necessity" is far too deeply rooted in the consciousness of the members of the international community and of individuals within States. This view has been shared by the UN International Law Commission'. The essence of necessity has been captured by the EU Advocate General in *Kadi* v *Council and Commission*, case C-402/05 P, para 35, when he pointed out that 'extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions'.

[2] See in particular, *Gabčíkovo–Nagymaros Project (Hungary/Slovakia),* Judgment, ICJ Rep 1997, p. 7; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, p. 136.

[3] See in particular Crawford 2002, pp. 178 et seq.

[4] Note, however, that the principle of necessity, cannot be invoked to justify non-compliance with obligations owed to the international community as a whole, i.e., *erga omnes* obligations. These obligations have been described by the International Criminal Tribunal for former Yugoslavia as 'obligations owed towards all the other members of the international community [...] the violation of such obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member' (*Prosecutor* v *Furundzija*, 10 December 1998 in 38 ILM (1999) 317, para 151).

[5] As far as terminology is concerned, 'necessity' and 'state of necessity' are used as interchangeable. The ILC used the latter in the 1996 Draft Articles and the former in the 2001 Draft Articles. No substantial difference was attached to the change in terminology.

less disruptive of the international obligations of the concerned state are available.[6] Additionally, a state cannot invoke the principle of necessity if it has contributed to the creation of the situation of emergency.

The essays collected in this volume discuss the adoption of measures of necessity across international law, namely in conflict and security law, humanitarian law, human rights law, environmental law, international trade law, and foreign investment law. These areas have been chosen for two main reasons. In the first place, they cover a vast part of existing international law, which makes it possible to draw general conclusions on the role played by necessity in international law. Secondly, the variety of fields permits to compare inter-state disputes in which necessity is invoked (as in the case of the rules on the use of force, the protection of the environment or international trade law) with disputes between states and natural or legal persons (as in the case of the protection of human rights or international investment).

The outcomes of this special issue can be linked to the broader and topical debate on the fragmentation and the unity of the international legal order. The term 'fragmentation' is commonly used to denote the division or compartmentalization of international law into separate areas—such as trade law, human rights law, environmental law, conflict and security law, etc.—each containing their own principles, institutions and experts. The rise of specialised regimes is not necessarily a sign of a malfunctioning international legal system. On the contrary, it can be regarded as an example of international law's capacity to adapt to the increasingly complex transnational problems in several functional areas. Such problems sometimes require the creation of specific institutional frameworks to deal with them. At the same time, however, the phenomenon of fragmentation has raised concerns regarding the coherence and unity of international law. Such concerns were voiced, *inter alia,* by the ILC study group on the fragmentation of international law: 'New types of specialized law do not emerge accidentally but seek to respond to new technical and functional requirements […] In order for the new law to be efficient, it often includes new types of treaty clauses or practices that may not be compatible with old general law or the law of some specialized branch. Very often new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law. When such deviations become general and frequent, the unity of law suffers'.[7]

[6] According to judge D. Anzilotti, sep. op., *Oscar Chinn Case*, 12 December 1934, PCIJ Series A/B No. 63, p. 107, at p. 114, 'the plea of necessity […] by definition implies the impossibility of proceeding by any other method than the one contrary to law'.

[7] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report prepared by the Study Group established by the International Law Commission, U.N. Doc. A/CN.4/L.702 (July 18, 2006), at p. 15. See also the symposium hosted in 31 *New York University Journal of International Law & Politics* (1999) 679.

However, some commentators and tribunals have argued that the danger of international law's fragmentation should not be exaggerated.[8] They point, for example, to the existence of dialogues between courts operating in different functional regimes, which would countervail fragmenting tendencies in international law.[9] Another factor which is often believed to safeguard the unity of international law is the existence of general principles and general concepts of international law, such as the principle of good faith, *pacta sunt servanda* or the principle that a breach of international law involves the obligation to make reparation.[10] Such general principles would ensure a basic understanding of how to apply and interpret international law across different specialised fields. A recent arbitral tribunal on foreign investment confirmed this belief in the unifying role of the basic principles of international law, arguing that 'international law is not a fragmented body of law as far as basic principles are concerned'.[11] The ICSID tribunal added to this: '[…] and necessity is no doubt one such basic principle'.

This brings us back to the purpose and underlying idea of this special issue. Our aim is to examine whether the *principle* of necessity has indeed fulfilled the unifying role that the ICSID tribunal ascribed to it. Does the way in which necessity is invoked across international law warrant the conclusion that international law is not a fragmented body of law as far as basic principles are concerned? Or does it show that different functional regimes have developed separate ways of regulating and interpreting necessity?

It should be noted that the tension between unity and fragmentation already runs through the ILC articles on State Responsibility. In Article 25, the International Law Commission seeks to codify the general, customary rules on the invocation of necessity by a state. Yet, in article 55 the Commission sets out that the general rules regarding State Responsibility (including the rules on necessity) do not apply where the responsibility of a state is governed by specialised rules of international law. This raises the question to what extent the invocation of necessity is still governed by general rules of international law. What is the role of Article 25 of the ILC Articles, given the existence of a series of specialised regimes, each with their own rules on the invocation of necessity? Answering this question requires a study of the *concept* of necessity across different fields in international law.

For that reason the *Netherlands Yearbook of International Law* has approached some leading experts in the areas of conflict and security law, humanitarian law, human rights law, economic law, investment law, environmental law, and European law. Their preliminary reports were discussed at a seminar held at the VU University of Amsterdam in May 2009. On the basis of these discussions, each

[8] See, in particular, Conforti 2007.

[9] See, in particular, Higgins 2006.

[10] PCIJ *Chorzow Factory* (Germany v. Poland), Ser. A, no. 17, 1928, p. 29.

[11] *Sempra Energy International* v. *Argentina*, ICSID ARB/02/16, Award, 28 September 2007, para. 378.

expert was asked to reflect on at least four sub-questions relating to the concept of necessity.

(1) What is the role of article 25 of the Articles on State Responsibility and general customary law in the regulation of necessity in the particular area of international law?

Not surprisingly, it clearly emerges from the essays that the more sophisticated the rules on necessity in a given area of international law, the smaller is the role of Article 25. From this perspective, Article 25 is of limited significance in areas such as human rights and humanitarian law. In environmental law, on the contrary, Article 25 finds full application as demonstrated in the judgement of the International Court of Justice in the *Gabcikovo–Nagymaros Project* case.[12] In international economic law in general and international investment law in particular, Article 25 is often applied in a residual manner to fill gaps and *lacunae* of the relevant international treaties. As stressed in the context of investment disputes arising out of the 2001–2002 Argentine financial crisis, treaty provisions being *lex specialis* must be applied first.[13]

The provisions on necessity contained in specific international treaties are often inspired by, if not modelled after Article 25, at least in respect of the extraordinary character of the situation in which necessity is invoked and of the lack of alternative consistent with or less disruptive of the international obligations of the acting state.

(2) What is the nature of a necessity plea? Does it provide a justification for an act (thus rendering the act lawful as such) or does it provide an excuse for the performance of a wrongful act?

Necessity is construed in customary international law as a circumstance precluding wrongfulness in the sense that if the plea is successful no breach of international law would have been committed.[14] As a consequence—but only as a consequence—no issue of responsibility would arise. This is the position of the International Law Commission[15] and the International Court of Justice.[16] Such a

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[12] *Gabčíkovo–Nagymaros Project*, supra n 2.

[13] See *CMS Gas Transmission Company* v *Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic of 25 September 2007; *Sempra Energy International* v *Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment of 29 June 2010 (both decisions are published on the ICSID Website).

[14] The expression 'circumstances precluding wrongfulness' is not free from ambiguity. According to Lowe 1999, p. 406, the ILC adopted the exculpation technique which 'operates as releasing a state from the obligation in question, so that the conduct incompatible with that obligation is not wrongful in those special circumstances'.

[15] Ago 1979-I, Vol 1, p. 28, paras 51 et seq.; UN International Law Commission, YBILC 31(1980-II) Vol 2, p. 107, paras 3 et seq.

[16] *Legal Consequences of the Construction of a Wall*, supra n 2, para 142. The position of the Court is perhaps less clear in *Gabčíkovo–Nagymaros Project*, supra n 2, para 51.

construction, however, has been criticized in literature by authors who would support construing necessity as a circumstance excluding or mitigating international responsibility, but not precluding wrongfulness.[17]

If the characterization of the necessity plea in international law as justifying or excusing the performance of an unlawful act remains controversial, treaty provisions tend to be considered as primary rules affecting the content of the substantive rules they aim at departing from. This is quite evident in respect of human rights treaties and humanitarian treaties and to a lesser extent in environmental law and international economic law.

(3) Is there any cross-reference between different fields in which the concept of necessity is invoked?

International decisions related to measures adopted on grounds of necessity remain rather sparse and in the last few years concerned essentially foreign investment disputes. These decisions contain a significant amount of cross-references to the case law of the International Court of Justice (*Nicaragua,*[18] *Oil Platforms*[19] and *Gabcikovo–Nagymaros Project*[20]) and more recently to cases before WTO panels and the WTO Appellate Body.[21]

(4) Who decides in concrete cases whether the invocation of necessity was justified?

If one issue concerning the measures adopted on grounds of necessity is undisputed, this is the judicial review that a tribunal or other competent body may exercise over them. These measures are adopted unilaterally by states upon their own assessment and at their own risk. The legality of these measures, however, can be challenged before a competent international tribunal, an arbitral tribunal or other judicial bodies. As unanimously upheld by foreign investment arbitral tribunals, such a review is not limited to verifying the good faith of the concerned state but must be intended as substantial control over all conditions under which necessity could be invoked.

From the foregoing sketch of some basic aspects of the concept of necessity together with the varied and rich individual chapters of this special volume covering the selected areas, the following general conclusions can be drawn.

Necessity is as a basic legal concept in all the covered areas—conflict and security law, humanitarian law, human rights law, economic law, investment law, environmental law, and European law. Its main function is that it regulates claims

[17] See in particular, Christakis 2007, p. 11.

[18] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, ICJ Rep 1986, p. 14.

[19] *Case Concerning Oil Platforms*, Merits, ICJ Rep 2003, p. 161.

[20] *Gabčíkovo–Nagymaros Project*, supra n 2.

[21] See for instance, *Continental Casualty Company* v *Argentina*, ICSID ARB/03/9, Award, 5 September 2008.

that a situation is beyond the boundaries of the normal operation of the legal regime concerned. In the areas of law of collective security and the law of armed conflict, this function is *the* rational—or at least one of the main sources—of the legal sub-regime as such. In other words, the regulation of the use of armed force, whether in the context of the *jus ad bellum* or the *jus in bello*, is fundamentally governed by the concept of (military) necessity and by that giving these regimes their very special character. In all other areas necessity only functions as a possible ground for the justification of measures that are normally unlawful *within* the legal sub-regime. The concept of necessity, furthermore, differs in those branches in some important respects. Each sub-regime has evolved, its own principles, norms and rules and developed its own management and enforcement mechanisms. The general picture is thus one of fragmentation in the sense of a varied set of legal regimes of necessity that are connected by the fact that they are all part of the international legal system but are different regarding their substantive and institutional content as well as their operation in practice.

As a result of the divergent sub-regimes, it matters a great deal whether a societal problem is translated into the expert vocabulary of the concept of necessity of, for instance, international trade law, international investment law or international environmental law, as they are mainly governed by Article XX GATT, the bilateral investment treaty concerned, and Article 25 of the Articles on State Responsibility, respectively. However, it seems that in some instances judicial bodies are willing to mitigate these differences in that they are broadening their interpretive guidelines by looking at the interpretation of the requirements of necessity given in the case law of other areas of international law.

The treatment of necessity, including restrictions and conditions, within the different areas of law, *qua leges speciales*, largely preclude the invocation of the general principle of necessity as codified in Article 25 of the Articles of State Responsibility. In framing these legal regimes, states have incorporated necessity itself as a justification for otherwise unlawful measures, thereby excluding reliance on a general—broader or more restrictive—concept of necessity outside the legal regime concerned. The only exception in this regard is the area of international environmental law in which Article 25 of the Articles of State Responsibility seems to play a prominent role in the justification of breaches of primary obligations. The possible explanation for this difference may the fact that the specific institutional aspects of the legal regime of this branch of international law are less developed than in the other areas dealt with in the chapters of this volume.

In cases in which the general principle of necessity seem to be applicable, the view on its role is generally in line with that envisaged by the International Law Commission in its commentaries on the Articles of State Responsibility. Although the position of the Commission concerning the nature of circumstances precluding wrongfulness is in certain respects ambivalent, it appears that necessity is considered as a circumstance justifying or excusing non-compliance with international obligations. In other words, the plea of necessity as a general principle only comes into play in case a breach of an international obligation is established, in line with the basic distinction—also made by the Commission—between primary and

secondary rules of international law and the separateness between the principles, norms and rules of referent regime and the those of State Responsibility.

As a final general pattern one can point to the fact that in all covered areas the invocation of necessity is subject to a subjective–objective assessment. For sure, while the adoption of measures on grounds of necessity remains a unilateral action, the state concerned must be convinced about the existence of the state of necessity and the respect of the related conditions and restrictions. It plays thus an important role. However, that role is not all decisive: other states may object the lawfulness of the measures and—where appropriate—international courts and tribunals are the final authorities whether the claim is well founded. On the other hand, in areas where there is a mandatory system of international adjudication, such as the European Convention of Human Rights and the European Union's legal system, the state concerned is in this respect generally given a wide margin of appreciation.

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Chapter 2
Necessity and the Use of Force: A Special Regime

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Abstract This chapter examines the relevance of the principle of necessity to the international rules on the use of force. It claims that necessity has been the source of the international rules on the use of force which as independent titles manifest themselves in institutional as well as in customary forms. It also claims that the use of force constitutes a special regime of international law which is distinct from the law of state responsibility with which it however interacts.

Keywords Use of force · necessity · self-defence · Pre-emptive and preventive self-defence · Humanitarian intervention · Protection of national abroad · United Nations enforcement action · Customary law · International responsibility · Circumstances precluding wrongfulness · Justifications

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2.1 Introduction

The principle of necessity is deeply ingrained in international law.[1] Indeed, it is a multifaceted principle of international law: it is a source of international rules; a condition for the application of certain international rules as well as a circumstance precluding the wrongfulness of certain acts. On the other hand, for some, its role in international law is rather unsettling. According to Allott, it is the 'most persistent and formidable enemy of a truly human society' which can 'destroy any possibility of an international rule of law.'[2]

In this chapter I will examine the relevance of the principle of necessity to the international rules on the use of force. First, I will trace the role of necessity in this area and discuss its impact on the development of the rules on the use of force. It will be shown in this regard that necessity acted as a source of authority for varied uses of force which subsequently acquired the status of independent legal titles. I will then sketch out the content of such customary and treaty (United Nations Charter) rules on the use of force and explain how they accommodate necessity. Secondly, I will argue that the use of force constitutes a special regime of international law and explain the grounds for such proposition. Following from this, I will examine the relationship between the use of force regime and that of the law of state responsibility. It will be argued in this regard that the two regimes are distinct, but that they interact and complement each other. The chapter will finally discuss the meaning as well as the legal and theoretical implications of the designation of necessity in the law of state responsibility as a circumstance precluding wrongfulness. All in all, the central contention of this chapter is that necessity is

[1] As Roberto Ago noted, the principle of necessity is 'far too deeply rooted in the consciousness of the members of the international community and of individuals within States. If driven out of the door it would return through the window, if need be in other forms'. Ago 1980, p. 13.

[2] Allott 1988, pp. 17, 21; Stowell 1921, pp. 392–393: '… necessity strikes at the very root of international society, and makes the preservation of the separate states of greater importance than the preservation of the community of states'.

the source of rules on the use of force which form a special regime that exists and operates side by side with that of state responsibility.

2.2 Historical Overview

'Necessity' refers to a situation of emergency that justifies extraordinary action in order to protect essential interests that are in danger of being irreparably damaged. Such extraordinary action in the case under discussion here would be the use of force. Historically, the doctrine of necessity has been attendant on the right of self-preservation.[3] Self-preservation was a fundamental right of states, perhaps the most important, and encompassed the physical, human and moral preservation of the state. From such a right a number of other entitlements flowed as necessary corollaries, one of which was the use of force.[4] However, the right of self-preservation and its corresponding entitlements made state interaction unpredictable and inherently dangerous.[5] It was thus in the interest of all states to infuse some degree of predictability by prescribing the circumstances under which the right of self-preservation could justify the use of force.

Here entered necessity. 'Necessity' described the conditions that needed to be in place in order to justify the forceful protection by a state of one of its legitimate interests. Depending on the nature of the protected interest or value, the scope of the force employed was also different in nature. For example, if a state was the victim of an attack by another state, or was about to be attacked, or its conservation and development was endangered from external, even remote, threats, that situation would have justified the use of force by way of defence. Indicative in this regard is the fact that the term used to describe such actions was 'legitimate' or 'necessary' defence.[6] When nationals of a state were attacked in another state or

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[3] Rodick 1928; Weidenbaum 1938, p. 105; Stowell 1921, pp. 392–414; Partsch 2000, p. 217.

[4] Vattel 1916, Bk I, Chapter II, para 16; Bonfils 1912, para 242; Kaufmann 1935, pp. 576 et seq; Pradier-Fodéré 1885, p. 382: '[le droit de conservation] comprend tous les droits incidents essentiels pour sauvegarder l'intégrité de l'existence tant physique que morale des Etats: le droit de repousser tout ce qui peut empêcher sa propre conservation et son développement, le droit d'éloigner tout mal présent et de se prémunir contre tout danger de préjudice future, le droit de développer les conditions nécessaires a son existence perfectible.' Giraud 1934, pp. 738–739: 'Les états ont le droit et le devoir d'assurer leur conversation et leur développement. La sauvegarde de ces intérêts justifie alors le recours a la force, alors même que l'état n'est victime d'aucune agression, ou n'est pas sous une menace actuelle d'agression. … Tout état, en vertu de son existence même, a le droit d'exister, de se maintenir, de se développer. Ce droit, qu'on appelle le droit de conservation, est le premier des droits des Etats et le plus absolu. C'est le droit essentiel par excellence.'

[5] Waltz 1959, p. 111.

[6] Fiore 1868, p. 261: 'Le droit de conservation implique d'autres droit secondaires; parmi ceux-ci, non-seulement est compris le droit de repousser toute attaque extérieure contre sa propre conservation, d'ou naît le droit de légitime défense, mais encore celui d'éloigner et de repousser toutes les conditions qui pourraient nuire a sa propre conservation et empêcher le propre perfectionnement.' Stowell 1921, pp. 352–392.

when their lives were endangered, this situation justified their forcible protection. When a state suffered an injury but no redress was available or forthcoming, the situation could justify the use of force by way of reprisals to avenge the wrong and to acquire redress. When innocent people within a state were persecuted, oppressed or suffered other injustices and by doing so a humanitarian necessity was created, the use of force could be justified to put an end to such practices.[7] When the values or principles of the international public order were threatened, the use of force to maintain, restore or vindicate that order was also justified not only in political terms[8] but also in moral terms. Thus, interventions for humanity were undertaken also for 'the purpose of vindicating the law of nations against outrage' because 'it is a basic principle of every human society and the law which governs it that no member may persist in conduct which is considered to violate the universally recognised principles of decency and humanity'.[9]

From the above, a number of points can be made regarding necessity and the use of force. First, necessity was attached to the right of self-preservation. The latter provided the values that deserved protection, whereas necessity provided the threshold that justified their protection by way of force. Second, the assorted uses of force were different in scope because the protectable values also varied. It was not only the physical existence of the state but a host of interests belonging to the political, economic, legal, and social sphere of the state that deserved protection.[10] Third, protectable interests were also those of the international public order; its political interests as well as its fundamental values such as human dignity.[11] Fourth and more importantly, the aforementioned uses of force—legitimate defence, protection of nationals abroad, reprisals, humanitarian intervention, public order enforcement—whose source of authority was necessity, acquired autonomous legal existence[12] and necessity became an additional condition delimiting the application of the referent rule. As Daniel Webster opined in

[7] Stowell 1921, pp. 51–277.

[8] For example, through interventions to protect or restore the *jus publicum europaeum.* See Vagts and Vagts 1992, pp. 313–315; Verosta 1995, pp. 861–863; Stowell 1921, pp. 414–431.

[9] Stowell 1921, pp. 51–52.

[10] See also *LG&E Energy Corp. and Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 2 October 2006, para 251: 'What qualifies as an "essential" interest is not limited to those interests referring to the State's existence. … economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests'.

[11] In the same vein but with regard to environmental issues see the Separate Opinion of Judge Weeramantry in *Case Concerning the Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) Judgment of 25 September 1997, ICJ Rep (1997) p. 118: 'International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.'

[12] As Sir William Scott said in *The Gratitudine*, 'necessity creates the law'. Lord Advocate's Reference No. 1 of 2001, Scotland, Appeal Court, High Court of Judiciary, 30 March 2001, 122 ILR 631.

the *Caroline* case 'the act justified by the necessity … must be limited by that necessity and kept clearly within it'.[13]

As independent legal titles such uses of force became part of customary and/or treaty law. They became part of customary law when the relevant state practice was supported by *opinio juris sive necessitates*, the subjective element of custom.[14] International jurisprudence seems to privilege the first element, that is *opinio juris*, which according to the ICJ, is 'a belief that the practice is rendered obligatory by the existence of a rule of law requiring it'.[15] This interpretation of the subjective element of custom cannot however explain the genesis of custom when there is no prior rule or when the practice departs from existing rules. Put differently, it is unable to deal with the proto-normative act[16] which is exactly the issue here where the aforementioned uses of force emerged in a legal void. For this reason, the formula *opinio juris sive necessitates* should be given its full meaning and its two elements (*opinio juris* and *opinio necessitates*) should be treated as mutually empowering but with *opinio necessitates* preceding *opinion juris*. This construction recognises the fact that certain practices may arise out of necessity (*opinio necessitates*) and that it is only later and through repetition that legal conscience (*opinio juris*) develops with reference to these practices, in the sense of being considered as acceptable behaviour.[17] It is only at that moment that a legal proposition prescribing or proscribing certain behaviour is eventually formulated. In the case under discussion here, it recognises the fact that the aforementioned uses of force were initially spontaneous responses to the exigencies of international life and that through time and repetition, they acquired normative acceptance. This was made evident when the area became the subject of legal regulation. For example, the Covenant of the League of Nations did not outlaw war nor did it outlaw uses of force below the threshold of war.[18] Furthermore, the Pact of Paris outlawed war but permitted a broad right of self-defence as well as other uses of force short of war.[19] In sum, with the possible exception of war, customary as well

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[13] 30 British and Foreign State Papers, 196–198.

[14] Mendelson 1999, p. 155; D'Amato 1971. *Lotus* case (*France* v *Turkey*) (Judgment) [1927], PCIJ, Series A, No 10 pp. 28–29; *Asylum* case (Colombia/Peru) Judgment of 20 November 1950, ICJ Rep [1950] 1 at 266; *North Sea Continental Shelf* cases (Federal Republic of Germany/ Denmark; Federal Republic of Germany/Netherlands) Judgment of 20 February 1969, ICJ Rep [1969] p. 14, paras 70–81; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Rep [1986] p. 14, paras 183–209 (hereinafter referred to as *Nicaragua* case).

[15] *North Sea Continental Shelf* cases, para 77.

[16] *Nicaragua* case, para 186. For an opposing view see Dissenting Opinion of Judge Lachs in *North Sea Continental Shelf* cases, pp. 231–232; D'Amato 1971, pp. 47–56, 66–68; Goldsmith and Posner 2005, p. 24; Kopelmanas 1937, p. 151.

[17] *Asylum* case, p. 277; Lauterpacht 1958, p. 380; Mendleson 1999, pp. 268–293; Cassese 2005, pp. 156–160.

[18] Articles 13, 15 and 17 of the Covenant of the League of Nations.

[19] General Treaty for Renunciation of War as an Instrument of National Policy (1928) 94 LNTS 57, Article 1.

as treaty law in the pre-Charter period permitted all of the above uses of force. As far as the post-1945 law on the use of force is concerned, it is defined by customary law and by the UN Charter. The latter prohibits unilateral uses of force[20] except in self-defence,[21] and provides for collective and institutional uses of force.[22] The two bodies of law—customary and UN law—remain distinct, although they interact with, and influence, each other. As a result, the content of their respective rules may differ even if they refer to the same issue.[23]

The preceding discussion provides the backdrop against which the rules on the use of force will be considered in the remainder of this paper. More specifically, it will be shown that necessity and its associated uses of force appear in three guises. First, they take an institutional guise as part of the UN system; second, certain rules on the use of force still remain rooted in customary law but they have also received institutional recognition or indeed formal incorporation; and third, certain rules continue to exist as part of customary law only. In the following lines I will examine each category and the particular uses of force it encompasses in more detail.

2.3 Institutional Necessity and the Use of Force

2.3.1 Threat to the Peace/Breach of the Peace/Act of Aggression (Article 39, UN Charter)

The UN Charter established an institutional framework regulating the use of force by substituting unilateral uses of force with collective ones when certain situations of necessity, as defined by the system, arise. These situations are described in Article 39 UN Charter and include a threat to the peace, a breach of the peace, or an act of aggression. These are generic terms that are interpreted by a central organ, the Security Council. It is not the aim of this paper to review all the events or situations that—according to the Security Council—constitute a threat to the peace, breach of the peace, or act of aggression. What is however important to note is that the Security Council has construed these notions quite dynamically, interpreting them to include inter-state as well as intra-state conflicts, violations of human rights or of humanitarian law, terrorism, and the threat or use of weapons of mass destruction, amongst others.[24]

20 Article 2(4) UN Charter.

21 Article 51 UN Charter.

22 Chapter VII UN Charter.

23 *Nicaragua* case, paras 175–178.

24 Wallenstein and Johansson 2004, p. 18; Osterdahl 1998.

Moreover, decisions as to when a case of institutional necessity arises are made centrally and institutionally, have *erga omnes* validity,[25] and are made against the standard of the purposes of the United Nations. Security Council determinations, even if discretionary, are also constitutive of the designation of the particular situation or event as a case of institutional necessity that may subsequently give rise to institutional action including, if necessary, institutional uses of force.

2.3.2 Institutional Uses of Force (Article 42, UN Charter)

Article 42 of the UN Charter lays down the conditions according to which institutional force can be employed. Such force is necessary if two conditions are fulfilled: first, the non-forcible measures adopted under Article 41 UN Charter have proven to be inadequate, and secondly, the use of force is deemed to be necessary in order to maintain or restore international peace and security. In other words, what justifies institutional force is the need to restore or maintain international peace and security which is probably the most important aim of the UN. The question that immediately arises is whether necessity can also delimit the scope of such institutional force. In principle, the answer should be in the affirmative but any limitation that may exist *in abstracto* is amplified *in concreto* because peace and security are very elastic terms. The laxity concerning the outer limits of institutional force is however redeemed by the fact that the relevant decisions are centralised and institutional. That said, because the UN does not have its own armed forces, the Security Council nowadays authorises states, coalitions of states or other international organisations to use force in cases of emergency and in order to attain its purpose of restoring or maintaining the peace. Authorised uses of force fall within the ambit of institutional necessity described above because, prior to such an authorisation, there is an institutional determination that a case of necessity exists as well as an institutional determination of the necessity to restore or maintain the peace through force. Authorisations can however affect the institutional determination as to whether force is warranted at the particular moment. When the Security Council for example authorises states to take 'all necessary means', this is a general authorisation but the decision as to whether the events at the particular juncture justify the use of force is made by states themselves and not by the Security Council. Authorisations also affect institutional determinations of the scope of such force. In the case of authorisations it is states, not the Security Council, that actually interpret what 'peace' and 'security' mean in the specific instance, and whether they have been restored or maintained. By way of illustration, the Security Council, having determined that

[25] Article 25 UN Charter.

the invasion of Kuwait by Iraq is a breach of the peace,[26] authorised states to take all necessary means to restore the peace and to uphold its resolutions.[27] The decision however as to when to use force or when to terminate such force was taken by the coalition of states in 1991; and, in 2003, the decision as to whether peace and security had been restored or whether further action was required was also taken by the coalition of states.

2.3.3 Self-Defence (Article 51, UN Charter)

The UN Charter recognises the right of states to use force by way of self-defence under certain conditions. First, there should be a prior armed attack[28] and in this regard, the right of self-defence under the UN Charter is narrower than its customary counterpart.[29] Secondly, a state can exercise its right of self-defence until the Security Council takes measures necessary to maintain or restore international peace and security.[30] It thus transpires that states do not have an unfettered right of self-defence under the law of the Charter. This is consistent with the rationale behind the UN regime which is that of institutional control of the use of force triggered by necessity.

That having been said, the Security Council often adopts a two-pronged policy when emergency situations arise that justify self-defence. It affirms the right of states to use force in self-defence but at the same time it takes institutional action under Chapter VII. This means that states can use force in self defence irrespective of the effectiveness of UN measures. For example, when Iraq invaded Kuwait, the SC affirmed the inherent right of individual or collective self-defence whilst, at the same time, it imposed sanctions on Iraq.[31] The same formula was adopted

[26] SC Res 660 (1990).

[27] SC Res 678 (1990).

[28] *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, GA Res 42/22 (1987); *Nicaragua* case, paras 194–200, 229; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, para 41; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, ICJ Rep (2003), paras 51, 57, 71–72; *Palestinian Wall Advisory Opinion*, para 139; *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v. Uganda*) ICJ Rep (2005), paras 143–147. Brownlie 1963, pp. 272–275.

[29] Rather controversially, the ICJ extended this requirement to customary law as well. See *Nicaragua* case, para 195.

[30] 39 NYIL (2008) p. 300 at 304, 311. See also Letter dated 6 December 2001 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council, UN Doc S/2001/1171.

[31] Regarding the arms embargo imposed on Rwanda, the SC later lifted it with regard to the government of Rwanda. SC Res 661 (1990).

following the 9/11 attacks where the Security Council affirmed the right of self-defence amid institutional action.[32]

2.4 Customary-Cum-Institutional Uses of Force

2.4.1 Pre-Emptive Self-Defence

Customary international law has always recognised a broader right of self-defence, not only against actual but also against imminent attacks.[33] Pre-emptive self-defence is the gist of the *Caroline* cases, widely accepted as the *locus classicus* of the customary law on self-defence.[34] The official correspondence following this incident affirmed the right of self-defence when there is an imminent danger. According to the American Secretary of State, Daniel Webster, there had to be a 'necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation'.[35] The International Military Tribunal for the Far East also recognised the right to use pre-emptive force by upholding the Netherlands' declaration of war on Japan, due to Japan's decision to attack the Dutch colonies, even if there was no actual armed attack at the time of the declaration.[36] As far as the Nuremberg International Military Tribunal is concerned, it implicitly accepted the right of pre-emptive force when it rejected German pleas to that effect regarding their actions in Norway and Russia, due to the absence of an imminent threat of an attack.[37]

Views as to whether pre-emptive self-defence is permitted by the UN Charter have been divided. Whereas parts of the jurisprudence claim that Article 51 of the Charter has suppressed this aspect of self-defence by requiring a prior armed attack, others claim that the Charter preserves the customary right of self-defence in the word 'inherent'.[38]

State practice since 1945 tends to support the view that states can use force against imminent threats of an attack with the 'Six-Day War' as a prime example.[39] At any rate, views about the status of pre-emptive self-defence within

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[32] SC Res 1368 (2001) and SC Res 1373 (2001).

[33] For the distinction between pre-emption (against an imminent attack) and prevention (against a remote attack) see Waltzer 1977, pp. 74–85.

[34] Jennings 1938, p. 92.

[35] 30 British and Foreign State Papers, pp. 196–198.

[36] International Military Tribunal at Tokyo (1948) in: Friedman 1972, pp. 1157–1159.

[37] 41 AJIL (1947) pp. 205–207, 211–213.

[38] Bowett 1958, pp. 182–193; Diss. Op. Schwebel in the *Nicaragua* case, p. 347, para 273. In the *Nicaragua* case the ICJ did not express any view on the issue. See *Nicaragua* case, para 194.

[39] Dinstein 2005, p. 192.

the UN scheme changed radically after the 9/11 terrorist attacks and the US National Security Strategy [US NSS] of 2002.[40] For example, the UN High-Level Panel on Threats, Challenges and Change admitted in its Report that changes in the international security environment may justify pre-emptive action and went on to say that 'a threatened State, according to long-established customary international law, can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate'.[41] The UN Secretary-General went even further by saying that 'imminent threats are fully covered in Article 51, which safeguards the inherent right of sovereign states to defend themselves against an armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.'[42]

From the above it can be safely said that pre-emptive self-defence is nowadays part of the customary as well as of the UN law on self-defence.[43] Although this may not be controversial anymore, what is of critical importance is how 'imminence' is assessed. Traditionally, the assessment has been made in temporal terms, referring to the proximity of the threat.[44] However, due to the nature of modern threats, 'imminence' is nowadays assessed by taking into account factual as well as temporal factors[45] and refers to the state's capacity to defend itself against an attack by taking into consideration the nature of such prospective attack.

2.4.2 Preventive Self-Defence

Preventive self-defence is the use of force against future and remote threats of an attack. Although it has been part and parcel of the customary law on self-defence,[46] the majority of legal opinion contends that preventive self-defence falls outside the

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[40] US NSS, 6.

[41] *A More Secure World: Our Shared Responsibility*, UN Doc A/59/565 (2004) paras 188 and 189–192; US NSS, 15. Also see Response of the Secretary of State for Foreign Affairs to Second Foreign Affairs Committee, *Report on Foreign Policy Aspects of the War against Terrorism*, Cm 5739, Session 2002–2003, 7: 'It is well established in international law that the right to self-defence applies not only where an attack has occurred but also pre-emptively where an attack is imminent'.

[42] *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc A/59/2005, para 124.

[43] Pre-emptive self-defence has been endorsed by the Dutch government. 39 NYIL (2008) pp. 304, 311–312.

[44] *Case Concerning the Gabčíkovo-Nagymaros Project*, para 54.

[45] Hansard 21 April 2004 cols 370–371; US NSS (2002) 15; Wilmshurst 2006, 963–972, Principle D; Lowe 2004, p. 192.

[46] For a review of classical writers see Reichberg 2007, p. 5.

definition of self-defence as formulated in Article 51 of the UN Charter.[47] Although the ICJ did not express any view on the issue, in the *Armed Activities* case the Court took note of the Ugandan High Command's claim that the use of force by Uganda was necessary to 'secure legitimate security interests' but concluded that Article 51 UN Charter allows a state to take self-defence action within its limited parameters, and not to safeguard security interests.[48]

That having been said, there has been a noticeable change of attitude towards preventive uses of force since '9/11'. For example, the US justified their action against Afghanistan as being 'in accordance with the inherent right of individual and collective self-defence' and 'designed to prevent and deter further attacks on the United States'[49] and, in general, argued for a forward-looking right of self-defence against future threats. The 2006 US NSS states that 'under long-standing principles of self-defence we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack'.[50]

Such change of attitude is also evident in reactions to preventive uses of force particularly when they are presented as reactions to threats posed by Weapons of Mass Destruction. For instance, although the UN censured Israel for its 1981 bombing of the Osiraq nuclear reactor in Iraq[51] which for Israel was 'an elementary act of self-preservation,' in conformity with 'its inherent right of self-defence, as understood in general international law and as presented in Article 51 of the United Nations Charter',[52] international reaction to the Israeli attack on the Syrian partially constructed al-Kibar nuclear installation in 2007 was virtually inaudible.

The UN on its part takes a more cautious approach to preventive use of force. It dismisses any doctrine of preventive self-defence[53] but, instead, urges states to bring their case to the Security Council, which can authorise preventive action if it

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[47] See Attorney General, Lord Goldsmith, HL Debates 21 April 2004, Vol. 660, c370: 'It is therefore the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote.' Available at: http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm#40421-07_head0, accessed 4 April 2010. See also the Attorney General's Advice on the Iraq War. Iraq: Resolution 1441, 54 ICLQ (2005) 767, para 3.

[48] *Armed Activities case*, para 148.

[49] Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2001/946.

[50] US NSS (2006), 23. Also US NSS (2002) 15.

[51] SC Res 487 (1981).

[52] Statement before the Security Council by Mr Blum (Israel) S/PV 2280, 12 June 1981, 20 ILM (1981) 970 and 973.

[53] This position has been criticised by the USA, see 99 AJIL (2005) p. 494; US NSS (2006) 9.

satisfies itself that the threat is credible or serious.[54] In sum, the UN acknowledges that preventive action may sometimes be necessary, but tries to place such actions under institutional control because of their potential to threaten international peace and security.[55] Be that as it may, the use of factual as well as of temporal criteria in defining 'imminence' narrows the gap between pre-emptive and preventive self-defence.

2.4.3 Protection of Nationals Abroad

Operations to rescue state nationals facing extreme danger in another state when the local government was unwilling or unable to protect them were rather frequent in the pre-Charter period.[56] Rescue missions were justified under the rubric of self-defence because nationals constitute the human component of a state and their existence is important to states. Such operations are also permitted by Article 51 of the UN Charter because an attack on a national is an attack on the state or, alternatively, because the term 'inherent' in Article 51 UN Charter incorporates the full content of the customary law on self-defence.[57] This view accords with the position of some governments, such as that of the United Kingdom[58] or the Netherlands.[59] State practice also confirms the view that the right of self-defence, either in its customary or its Charter formulation, includes the use of force to protect nationals abroad. Israel, for example, invoked the right of self-defence to justify its rescue operation at Entebbe.[60] In similar vein, the US invoked the 'inherent right of self-defence, as recognised in article 51 of the UN Charter, which entitles the United States to take necessary measures to defend US military personnel, US nationals and US installations'[61] in order to justify their action in Panama in 1981 as well as to justify their actions in Grenada (1983)[62] or Iran (1980).[63] Although rescue operations have often been criticised by the General Assembly and/or the Security Council, such criticisms do not concern their legal status but evolve around issues

[54] *A More Secure World*, UN Doc A/59/565 paras 189–192; *In Larger Freedom*, UN Doc A/59/2005, para 125. This is also the position of the Dutch government. See 39 NYIL (2008) p. 312.

[55] *A More Secure World*, UN Doc A/59/565, paras 189, 191.

[56] Borchard 1915, p. 448; Offutt 1928; Ronzitti 1985.

[57] Bowett 1958, pp. 87–105; Brownlie 1963, pp. 289–301; Waldock, 1952, pp. 485–505. First report on diplomatic protection by John R. Dugard, Special Rapporteur, UN Doc A/CN.4/506, paras 47–60.

[58] 57 BYIL (1986) pp. 617–618.

[59] 39 NYIL (2008) p. 306.

[60] UN Doc S/PV.1939, paras 105–121.

[61] 84 AJIL (1989) pp. 546–548. Also Nanda 1989, pp. 494–525.

[62] Joyner (1984) pp. 131–175.

[63] 80 Dept St Bull (1989) 38.

of proportionality[64] or genuineness, as criticisms of Russia's intervention in Georgia show.[65] The self-defence character of rescue operations is also confirmed by the guidelines for 'Non-Combatant Evacuation Operations' adopted by certain states.[66] According to the British doctrine, if the local government does not grant its consent for such operations, 'intervention to protect UK nationals may be justified on grounds of self-defence (Article 51 of the UN Charter).'[67] In sum, rescue operations are an aspect of self-defence in its customary as well as its Charter formulation.

2.4.4 Use of Force for Humanitarian Purposes

The humanitarian necessity created by massacres or other outrages often led to interventions, not only to protect threatened peoples but also to restore the international order ruptured by such outrages.[68] For instance, the intervention to protect the Greeks living under Ottoman rule was justified 'no less by sentiments of humanity, than by interests for the tranquillity of Europe'.[69] The legal status of humanitarian intervention has been contested under UN Charter law. A strict interpretation of Article 2(4) of the UN Charter seems to prohibit humanitarian interventions.[70] On the other hand, it has been claimed that Article 2(4) permits humanitarian interventions to the extent that they are not against the territorial integrity or political independence of a state; nor against the UN purposes. It is not surprising then that post-Charter state practice is not always unequivocal, with states using various arguments to justify their actions without always invoking the

[64] GA Res 38/7 (1983) with regard to Grenada and GA Res 44/240 (1989) with regard to Panama.

[65] Independent International Fact-Finding Mission on the Conflict in Georgia (2009) Report, vol. II, pp. 285–289.

[66] Non-combatant Evacuation Operations, Joint Warfare Publication (JWP) 3–11 (2000), at 1–1 available at: http://www.mod.uk/NR/rdonlyres/D0302742-2103-4C9D-9CE8-D6F2E6B1860F/0/20071218_jwp3_51_U_DCDCIMAPPS.pdf, accessed 4 April 2010.

For the US Doctrine see Joint Publication 3-68 Non-Combatant Evacuation Operations (22 January 2007) available at: http://www.fas.org/irp/doddir/dod/jp3-68.pdf.

For Canada see Joint Publication Manual Non-Combatant Evacuation Operations B-GJ-005-307/FP-050 (16 October 2003) available at: http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfda/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-307%20FP-050%20-%20NEO%20Ops%20-%20EN%20(16%20Oct%2003).pdf, accessed 4 April 2010.

[67] JWP 3-51, 4A2. The US doctrine also speaks of self-defence without clarifying whether it refers to the defence of the individual or the defence of the state, supra, A-1. The same applies with regard to the Canadian doctrine, supra, 4–9.

[68] Tsagourias 2001, Chapter 1.

[69] Preamble, Treaty between Great Britain, France and Russia for the Pacification of Greece, 14 BFSP (1826–1827), 632.

[70] *Nicaragua* case, para 268.

humanitarian one.[71] The ambivalent status of this right is best captured by the views of the British Government, according to which humanitarian intervention 'cannot be said to be unambiguously illegal'.[72] Attitudes towards humanitarian interventions seem to be changing in the post-Cold War period. As with other instances that also involve force examined earlier in this section, states either invoke their customary right to use force or ascribe such a right to the UN system. Two revealing examples of the approach just described concern the Allied action in Northern Iraq in 1991 and NATO's action in Kosovo in 1999. The aim of the former was to provide humanitarian assistance to the Kurds and create an exclusion zone to protect them from attacks.[73] According to Anthony Aust, Legal Counsellor at the UK Foreign Office, 'the states taking action in northern Iraq did so in exercise of the customary international law principle of humanitarian intervention'.[74] With regard to NATO's intervention in Kosovo, Belgium argued before the ICJ that NATO's intervention 'is not an intervention against the territorial integrity or independence of the former Republic of Yugoslavia. The purpose of NATO's intervention is to rescue a people in peril, in deep distress. For this reason the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, para 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State.'[75]

The change of attitude towards humanitarian intervention is also reflected in the official positions of governments[76] and, as far as the UN is concerned, by the introduction of the 'Responsibility to Protect' doctrine [R2P].[77] According to this

[71] For example with regard to India's intervention in East Pakistan (Bangladesh) see Review of the International Commission of Jurists (June 1972) pp. 57–62.

[72] 57 BYIL (1986) p. 619.

[73] SC Res 688 (1991). The resolution was not passed under Chapter VII and did not authorise the use of force.

[74] 62 BYIL (1992) 827. Giving evidence before the Iraq Inquiry, Sir Michael Wood, former Legal Adviser to the Foreign Office, said that Britain had justified the legality of no-fly zones on the basis that they were necessary to avoid a humanitarian disaster and that unlike the US, Britain did not rely on a UN resolution for the legal authority. He also said that the Attorney Generals in 2001, the late Lord Williams of Mostyn and Lord Goldsmith, had raised concerns about the continuing legality of enforcing the no-fly zone because the humanitarian threat had faded. *The Times* 25 November 2009.

[75] *Case concerning Legality of Use of Force (Serlia and Montenegro v Belgium*, Oral Pleadings, Verbatim Record, 10 May 1999, CR 99/15 (10 May 1999).

[76] 63 BYIL (1992) pp. 824–820; 71 BYIL (2000) pp. 643–650; 72 BYIL (2001) pp. 695–696. The position of the Dutch government is more conservative but still recognises that when a humanitarian crisis looms, intervention can be justified on the basis of political or moral arguments even if the legal position is not certain. 39 NYIL (2008) pp. 307–308, 314–316.

[77] 'The Responsibility to Protect' Report of the International Commission on Intervention and State Sovereignty (2001) (hereinafter referred to as R2P). *A More Secure World*, UN Doc A/59/565 (2004) para 199–209; UN Doc A/RES/60/1; 'The Common African Position on the proposed reform of the UN: the Ezulwini Consensus' (7th Extraordinary Session of the AU Executive Council, Addis Ababa, 7–8 March 2005) AU Doc Ext/EX.CL/2 (VII).

doctrine, the international community has responsibility to protect peoples if their state is unwilling or unable to offer protection. Interventions by the international community to protect peoples should be launched when there are gross violations of human rights, there is right authority and right intention and the action is a measure of last resort.[78] Such interventions should ideally be authorised by the Security Council but, if it fails in this regard, it can be substituted by the General Assembly or regional organisations.

By introducing the R2P doctrine, the UN seems to endorse the principles and aims behind humanitarian intervention by simultaneously removing the rather charged language of intervention, and by dressing the action in institutional cloths. Still, the R2P is a political undertaking and not an enforceable obligation, as its (non-) application in the situations of Darfur[79] or Burma[80] shows. From the above, it transpires that an institutional mechanism of intervention in cases of humanitarian necessity has been introduced which hitherto remains untested but which exists alongside the old and tested customary law right of humanitarian intervention.

2.5 Customary Uses of Force

2.5.1 Forcible Reprisals

Forcible reprisals are proportionate responses to violations of international law when other means of redress are not available or forthcoming. Forcible reprisals have been part and parcel of customary law,[81] but the UN Charter seems to have proscribed them.[82] The ICJ on its part has not pronounced on their legality, but in the *Corfu Channel* case, it hinted at the existence of a residual right of forcible

[78] R2P 4.15–4.43; 6.1–6.40.

[79] Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council Decision S-4/101, A/HRC/4/80 9 March 2007 para 76. SC Res 1755 (2007); SC Res 1769 (2007).

[80] When the French Foreign Minister Bernard Kouchner suggested that the United Nations invoke the responsibility to protect the people of Burma, Kouchner's words were met with a deafening silence, New York Times, 13 May 2008, available at: http://www.nytimes.com/2008/05/13/opinion/13iht-edaalder.1.12841976.html, accessed 4 April 2010. See also European Parliament Resolution of 22 May 2008 on the tragic situation in Burma, RC-B6-0244/2008.

[81] *Naulilaa Incident Arbitration Decision* (*Portugal v Germany*) 2 RIAA (1928) p. 1012.

[82] Article 2(4) UN Charter. Declaration on Principles of International Law concerning Friendly Relations, GA Res 2526 (1970). Barsotti 1986, p. 79; Gray 2008, pp. 195–198.

reprisals outside the UN Charter.[83] In another instance, the *Nicaragua* case, the ICJ opined that a state that suffers attacks that do not rise to the level of armed attack for self-defence purposes can take proportional countermeasures without giving further guidance as to whether they also include forcible ones. In the *Oil Platforms* case, however, individual judges expressed different views on the legal status of reprisals. Whilst Judge Elaraby in his Dissenting Opinion admonished the Court for not pronouncing on the (il)legality of reprisals,[84] Judge Simma in his Separate Opinion seems to accept 'proportional countermeasures' of a military nature.[85]

State practice has been more robust in this context, particularly with regard to terrorism where condemnations of a state's forcible responses evolve around issues of proportionality or evidential matters. Hence, Bowett's description of the status of reprisals under the Charter as *de jure* unlawful but *de facto* accepted[86] is still valid; although in my view, there is today a much greater degree of legal acceptability of forcible reprisals. That said, states often treat such actions as a hybrid of self-defence[87]; in a similar vein, Dinstein speaks of 'defensive reprisals'.[88] The reason for aligning reprisals to self-defence is to provide a legal basis for such actions under the Charter, and also to highlight their deterrent character by downplaying their punitive one. Although reprisals share common purposes with self-defence—as for example in forestalling attacks—they should be distinguished therefrom. First, the aim behind reprisals is to induce another actor to cease its unlawful acts. Second, reprisals are reactions to low-level violence whereas self-defence is reaction to grave violence.[89] Third, the reprisal action may not target the source of the initial use of force.

For all of the above reasons, it is submitted here that forcible reprisals are independent titles available to states under customary law and that any 'normative drift' to stretch the meaning of self-defence in order to include reprisals is unnecessary.[90]

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[83] Waldock 1952, pp. 499–503. But see Diss. Op. Krylov in *Corfu Channel* case, ICJ Rep (1949) 3, at p. 77: 'Since 1945, i.e., after the coming into force of the Charter, the so-called right of self-help, also known as the law of necessity (*Notrecht*), which used to be upheld by a number of German authors, can no longer be invoked. It must be regarded as obsolete. The employment of force in this way, or of the threat of force, is forbidden by the Charter (para 4 of Art. 2)'.

[84] Diss. Op. Elaraby in *Case Concerning Oil Platforms*, para 1.2.

[85] Diss. Op. Simma in *Case Concerning Oil Platforms*, para 15. Judge Kooijmans is rather noncommittal. Diss. Op. Kooijmans, ibid., paras 52 and 62.

[86] Bowett 1972, p. 1.

[87] For example, with regard to US action in Sudan and Afghanistan in 1999 see 93 AJIL (1999) pp. 161–167. For Israel's action against Syria in 2003 see S/PV.4836 (2003) 7; against Lebanon in 2006 see UN Doc. S/2006/515 as well SC Res 1701 (2006).

[88] Dinstein 2005, pp. 221–231.

[89] *Nicaragua* case, para 195. For the 'accumulation of events' theory see Dinstein 2005 pp. 201, 230–231; rejected by Judge Simma. See Diss. Op. Simma in *Case Concerning Oil Platforms*, para 14.

[90] Bethlehem 2004, para 21.

2.6 Use of Force: A Special Regime

2.6.1 Characteristics of the Use of Force Regime

How does the preceding discussion link with the claim made in the introduction that the use of force is a special regime? In order to answer this question I will first provide a definition of the term ‘regime’ and then I will consider whether the use of force regime conforms to that definition.

Although there are different accounts of, and approaches to, regimes, for the purposes of this paper I will rely on Krasner’s widely accepted definition of ‘regime’ as a set of ‘principles, norms, rules and decision-making processes around which actors’ expectations converge in a given issue-area of international relations’.[91] The above definition, highlights the normative and procedural features of a ‘regime’, which not only explain its formation but also its maintenance and development. It should be noted however that regimes are not always formal and institutional constructs; informal arrangements can also qualify as regimes if the necessary convergence of interests as well as attendant rules and procedures exist. And this is particularly pertinent in international law because of the important role ascribed to custom.

As far as the use of force is concerned, it has always been an area of immense interest to states because as much as the use of force is a manifestation of state sovereignty it is also an existential threat to states: it can lead to their demise. It is thus an area that warrants regulation and common management in order to contain the destructiveness of the use of force but also direct it towards worthy purposes. In other words it is an area that can give rise to the formation of a regime and that was what gradually happened. Whereas uses of force had started as spontaneous reactions to threats facing states, their regularisation and gradual

[91] Krasner 1983, p. 2; Keohane 1984, pp. 57–56. The concept of regime or more specifically of self-contained regimes entered the international legal vocabulary in the aftermath of the *Teheran Hostages* case where the ICJ described the Vienna Convention on Diplomatic Relations as a self-contained regime. *United States Diplomatic and Consular Staff in Tehran*, (*United States of America* v *Iran*) ICJ Rep (1980), para 86. For a previous case see *Case of the S.S ‘Wimbledon’*, PCIJ, Judgment of 17 August 1923, PCIJ, Series A, Judgments, vol. 1, no. 1, pp. 23–24. See also International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, A/61/10, para 11: ‘*Special* (“*self-contained*”) *regimes as lex specialis*. A group of rules and principles concerned with a particular subject matter may form a special regime (“Self-contained regime”) and be applicable as *lex specialis*. Such special regimes often have their own institutions to administer the relevant rules’. Also ibid, para 12. The ILC flirted with the idea of regimes during the drafting of the Articles on State Responsibility [ASR] but later abandoned it. See Third Report on the Content, Form and Degrees of International Responsibility (Part Two of the Draft Articles), by Willem Riphagen, Special Rapporteur, A/CN.4/354 and Corr.1 and Add.1&2; Fourth Report on the Content, Form and Degrees of International Responsibility (Part Two of the Draft Articles, by Willem Riphagen, Special Rapporteur), A/CN.4/366 and Add.1 and Add.1/Corr.1.

acceptance endowed them with normative force. They were thus translated gradually into a set of principles, norms, and rules. It is at this point that a special regime was formed that is, when the subject of the use of force in the international relations of states was transformed from an attitudinal phenomenon to a normative one.[92]

Looking now into the principles, norms and rules of the use of force regime, its principles are those that identify the general purposes of the regime and include the principles of state sovereignty, peace, and justice. Its principles are not different from the principles that define the international order as a whole and this is because the use of force regime, albeit special, is embedded in the international order and adheres to its principles.[93] Moving now to its norms, they indicate standards of acceptable behaviour in light of its principles. In the use of force regime these are, amongst others, the norm on the non-use of force, or that on self-defence. Rules on the other hand are specific prescriptions or proscriptions that derive from norms and in the use of force regime they comprise all the customary and Charter rules on the use of force as mentioned above. As far as the functioning of the use of force regime is concerned in the sense of decision-making and enforcement, it relies on political institutions such as the Security Council as well as on legal ones such as the International Court of Justice and contains decentralised and unilateral methods such as in the form of self-defence or reprisals but also centralised and institutional ones, as in the case of Chapter VII action.

A particular feature of the use of force regime is that it is a composite regime, made up of the UN and the customary sub-regimes on the use of force. The customary one contains the 'codification of behavioural patterns that have arisen spontaneously'[94] and reflects states' contemporary attitudes towards the use of force. Its importance and continuing relevance is explained by the fact that the international order lacks permanent and universal legislative organs that can adapt the law or create new law when circumstances change, whereas revision of the UN Charter is an arduous and lengthy process. The UN sub-regime, on the other hand, is a negotiated one.[95] It sets out the rules, norms and principles pertaining to the use of force and introduces certain mechanisms for its management and enforcement. Although the UN and the customary sub-regime are distinct, they also interact with each other. What makes up the use of force regime, then, is the sum of principles, norms, and rules, as well as management and enforcement mechanisms found in customary and UN law, as they are often moulded by their mutual interaction.

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92 Puchala and Hopkins 1983, p. 62.

93 Ibid. pp. 64–65.

94 Young 1983, p. 102.

95 Ibid. pp. 99–100.

2.6.2 Use of Force Regime and the Law of State Responsibility

Being a special regime, the question that arises and merits further consideration is how the use of force regime relates to other regimes, and in particular to that of state responsibility, because the latter includes rules on necessity[96] and self-defence[97] and, more importantly, projects itself as a general regime of secondary rules concerning the legal consequences that flow from breaches of international obligations.[98]

In order to answer this question, one needs to consider in the first place how the law of state responsibility views its relationship with other regimes and in particular with the use of force regime. First, Article 55 Articles on State Responsibility [ASR] acknowledges the existence of special regimes by saying that the articles on state responsibility do not apply when issues concerning the existence of a wrongful act or the implementation of responsibility are governed by special rules.[99] Secondly, according to Article 59 ASR, the articles on state responsibility are without prejudice to the UN Charter. This means that the UN can deal with all issues pertaining the use of force, even if they touch upon issues of state responsibility. More importantly, as the Special Rapporteur noted, questions about the lawfulness of certain uses of force fall outside the law of state responsibility. The Rapporteur mentions in this respect of humanitarian intervention and military necessity which, according to him, fall outside the remit of Article 25 ASR on necessity because they concern primary rules.[100] These comments should be read in conjunction with the stipulation inserted in Article 25 ASR, according to which necessity cannot be invoked if the primary rule excludes the possibility of invoking necessity.[101] All of the above support the distinctness of the use of force regime vis-à-vis that of state responsibility and confirm the argument put forward in this paper that necessity is the source of the rules on the use of force which as primary legal titles have already taken into account considerations of necessity. It is indeed for this reason that necessity does not need to be invoked in order to justify the entitlement to use force itself. When a state for example uses force in self-defence, it asserts a right; it does not need to invoke necessity in order to justify its right of self-defence as such.

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96 Article 25 ASR.

97 Article 21 ASR.

98 Crawford 2001, pp. 14–16. *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, France-New Zealand Arbitration Tribunal, 30 April 1990, 82 ILR, paras 72–75; Linderfalk 2009, p. 53.

99 In the same vein, the ICJ opined in the *Tehran Hostages* case that the law of diplomatic relations is a special regime and in the *Gabčíkovo-Nagymaros Project* case it made similar comments with regard to the law of treaties. *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1997, para 101.

100 Crawford 2001, pp. 185–186; *Palestinian Wall Advisory Opinion*, para 140.

101 Article 25(2)(a) ASR.

More than that, one needs to consider the characteristics of the two regimes and their rationale.[102] To begin with, the use of force regime contains primary rules prescribing or proscribing behaviour whereas the law of international responsibility contains secondary rules ascribing consequences to breaches of primary rules. That said, non-compliance with the rules of the use of force regime does not imply in each and every case that there is a breach of the law or that legal consequences will follow, something which is constitutive of the law of state responsibility as was said above. Whereas it is true that violations of international law involving the use of force may trigger forcible reprisals in order to induce compliance with the law, this is not their exclusive aim; their aim is to also defend the state against further attacks. Regarding pre-emptive or preventive self-defence though, these are reactions to imminent or remote threats of an attack that, at the particular moment, do not constitute an actual breach of international law. The dispensability of 'breach' as condition of the use of force regime is even more pronounced in the Charter sub-regime. What triggers institutional uses of force is a threat to the peace, a breach of the peace, or an act of aggression according to Article 39 of the UN Charter. Whereas the latter two situations may also constitute a violation of international law—namely a violation of Article 2(4) of the UN Charter[103]—this is not the case with regard to 'threats to the peace', because there is no prohibition in international law of threats to the peace per se.

The political character of Security Council determinations under Article 39 and the fact that they are performed by a political organ in a discretionary manner,[104] is another distinguishing trait whereas the determination of a breach in the law of state responsibility is a legal one. Moreover the function of such Security Council determinations is not to pass judgment on the responsibility of a state in legal terms but to bring the situation or event under the Charter provisions on peace and security and to open the way for the adoption of measures provided for in Chapter VII of the UN Charter. Such measures can be coercive or non-coercive, but they are not equivalent to legal consequences as in the law of state responsibility; their aim is to maintain or restore international peace and security. Even if the Security Council determines that an international obligation has been breached, such a finding has no other meaning than the one provided for in Article 39 UN Charter and no other consequences than those provided for in Chapter VII of the Charter. As Kelsen put it, the role of the Security Council is 'not to maintain or restore the law, but to maintain or restore peace, which is not necessarily identical with the law'.[105]

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[102] *Legal Consequences for States of the Continued Presence of South Africa on Namibia* (*South West Africa*) *Notwithstanding Security Council Resolution* 276 (1970), Advisory Opinion, ICJ Rep (1971) p. 2, at paras 118–125; Sep. Op. Onyeama, ibid p. 148; Forteau 2006; Gowlland-Debbas 1994, p. 55.

[103] See for example SC Res 660 (1990) following Iraq's invasion of Kuwait.

[104] Seventh report on State responsibility, by Gaetano Arangio-Ruiz, Special Rapporteur, A/CN.4/446 and Add.1-2, paras 97–98. *Nicaragua* case (1984) para 95; Diss. Op. Schwebel, *Nicaragua* case (1986) 292.

[105] Kelsen 1950, p. 294.

There is also no automaticity between an Article 39 determination and the adoption of measures under Chapter VII. The Security Council may take no action whereas in the law of state responsibility a breach gives rise automatically to legal consequences.

Some examples will illustrate the points made above. The first example concerns the Security Council reaction to the invasion of Kuwait by Iraq. The Security Council's determination in Resolution 662 (1990) that the annexation of Kuwait by Iraq was null and void was made in the context of its finding in Resolution 660 (1990) that the invasion constitutes a breach of the peace as well as in the context of its task to restore international peace and security. All subsequent measures adopted by the Security Council also need to be considered within such a context. This is the case for example with the establishment of a Compensation Commission[106] after the Security Council demanded that Iraq should accept its liability under international law for its actions.[107] The Security Council did not in this case and contrary to appearances make a legal determination of responsibility. As the Well Blowout Control Claim Panel opined, the Security Council's determination of Iraq's liability was executive in character and therefore within the Council's powers in peace and security.[108] In another instance, the Security Council established the International Criminal Tribunal for the former Yugoslavia[109] and the International Criminal Tribunal for Rwanda[110] to try individuals accused of committing genocide, crimes against humanity or war crimes, having determined in previous resolutions that the violations of international law in Rwanda and Yugoslavia constituted a threat to international peace and having reminded parties of their international law obligations and of the individual responsibility for such violations.[111] However, the Security Council established the tribunals as part of its tasks in peace and security. As the Appeals Chamber of the ICTY opined, the Security Council 'resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia'.[112] The Security

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[106] SC Res 687 (1991) para 16.

[107] SC Res 686 (1991). Iraq gave it consent to that resolution. See UN Doc S/22320 (1991). In Resolution 674 (1990) Iraq was only reminded 'that under international law it is liable 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 by Iraq.' SC Res 674 (1990) para 8.

[108] Report and recommendations Made by the Panel of Commissioners Appointed to review the Well Blowout Control Claim, S/AC.26/1996/5/Annex para 67. Heiskanen 2002, p. 255. Contra see Graefrath 1995, p. 1.

[109] SC Res 808 and 827 (1993).

[110] SC Res 955 (1994).

[111] For example SC Res771 (1992), SC Res 819 (1993); SC Res 918 (1994).

[112] *Prosecutor* v *Dusko Tadić aka Dule*, Decision on the defence motion for interlocutory appeal on jurisdiction, Decision of 2 October 1995, para 38.

Council's aversion to legal determinations and to asserting legal responsibility is also evinced by its reluctance to classify a situation as an act of aggression.[113] Aggression cuts across many areas of international law. In the law of state responsibility it constitutes a serious breach of international law and entails serious legal consequences. In the use of force regime it falls within the prohibition on the use of force and also within the competence of the Security Council under Chapter VII. Aggression can also give rise to individual criminal responsibility. How aggression is defined and who determines its existence have serious legal and political consequences. The Security Council has been entrusted with the power to determine whether an act of aggression has been committed but in order to avoid the host of consequences that its determination may invite, it prefers to qualify such an act as a breach of the peace.[114] In doing so, it steers clear of the need to identify the party responsible for the act of aggression or the need to take any action at all. Even in cases where the Security Council has mentioned in a resolution that a particular state has committed acts of aggression, the determination was not under Article 39 and as for the consequences, either there were no consequences in their broader sense of Chapter VII measures or, if there were, they did not correspond to the seriousness that the use of the word aggression implies.[115]

What transpires thus from the above is that, although Security Council action under Chapter VII may resemble action provided for in the law of state responsibility, in particular when the Security Council declares that a certain situation is unlawful, or calls upon states not to recognise unlawful situations, or requests that states should cease illegal activities, or decides on issues of liability and compensation, the nature and rationale of Security Council determinations and action is different from that in the law of state responsibility. These determinations are made within the framework in which the Security Council operates, which is not that of responsibility but of restoring or maintaining international peace and security. Furthermore, any obligations that Security Council measures impose on states are by virtue of the UN Charter, not by virtue of the law of state responsibility.[116] In addition, measures under Chapter VII are not sanctions in the legal sense of the

[113] Diss. Op. Schwebel, *Nicaragua* case, para 60: 'Moreover, while the Security Council is invested by the Charter with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination. It may arrive at a determination of aggression—or, as more often is the case, fail to arrive at a determination of aggression—for political rather than legal reasons. However compelling the facts which could give rise to a determination of aggression, the Security Council acts within its rights when it decides that to make such a determination will set back the cause of peace rather than advance it. In short, the Security Council is a political organ which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to apply them'.

[114] SC Res 660 (1990) with regard to Iraq's invasion of Kuwait.

[115] See for example, with regard to South Africa SC Res 387 (1976), SC Res 571 (1985), SC Res 577 (1985); and with regard to Israel see SC Res 573 (1985).

[116] Article 25 UN Charter. Also Sep. Op. Onyeama in *Legal Consequences for States of the Continued Presence of South Africa on Namibia* (*South West Africa*) *Notwithstanding Security Council Resolution 276* (*1970*), ICJ Rep (1971) p. 2, at 148.

term; that is, institutional and coercive measures against a state that has breached an international obligation with the aim of enforcing the law.[117] The aim of such measures is to restore or maintain the peace, not to restore the law—which can nevertheless be restored incidentally. Neither are Chapter VII measures equivalent to countermeasures as defined in the law of state responsibility.[118] Countermeasures are unilateral actions directed against a state that has committed a breach of an international obligation, but their aim is to obtain cessation of the act, or reparation; that is, to achieve the legal consequences that flow from the breach,[119]whereas the aim of Security Council measures is to maintain or restore the peace.

Regarding the supervisory and enforcement mechanisms provided for in the use of force regime, they are more concerned with the management of crises in order to maintain peace and security rather than with attributing responsibility or determining legal consequences. It is for this reason that the Security Council, may restrict the legal rights of a state if that is deemed necessary to maintain international peace and security: irrespective of any breach. For example, the Security Council imposed an arms embargo on the whole of Yugoslavia in 1991 following the outbreak of hostilities[120] but it did not lift it with regard to Bosnia and Herzegovina although that state claimed that the arms embargo affected its right to defend its people against genocide.[121] The UN's concern in that instance was to contain the conflict in Yugoslavia.

Also, the SC may take a gradualist and more nuanced approach to events by first adopting non-coercive measures in order to contain the impact of certain events on international peace and security even if these events involve breaches of the peace, or violations of Article 2(4). That was for example the initial reaction to Iraq's invasion of Kuwait.[122] Security Council measures may also apply generally to all states if that is deemed necessary to maintain or restore the peace.[123] In contrast, the law of state responsibility is more monolithic in that, with the exception of serious breaches, any breach gives rise automatically to the same consequences which target the defaulting state.

Yet, on other occasions, the United Nations may even be receptive to events that at first glance appear to be outside its own rules on the use of force, as the

[117] Kelsen 1950, p. 733.

[118] Article 22 ASR.

[119] *Gabčíkovo-Nagymaros Project* paras 83–85.

[120] SC Res 713 (1991).

[121] *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [*Bosnia and Herzegovina v. Yugoslavia* (*Serbia and Montenegro*)] Order of 8 April 1993, ICJ Rep (1993) p. 3 at pp. 6–8; *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [*Bosnia and Herzegovina v. Yugoslavia* (*Serbia and Montenegro*)] Order of 13 September 1993, ICJ Rep (1993) p. 326, at p. 328 and para 41; Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, A/54/549, paras 99–102.

[122] SC Res 660 (1990) and SC Res 661 (1991).

[123] SC Res 1267 (1999).

Organisation's attempts, mentioned above, to incorporate elements of the customary law on the use of force, reveal; as well as the UN's involvement in ostensibly unlawful situations as that following the 2003 invasion of Iraq.[124]

Although there are differences between the two regimes which support their distinctness, this is not to say that there are no points of contact as well. All regimes interact with the environment which surrounds them, and all exhibit elements of openness and closure.[125] The two regimes—state responsibility and use of force—do not exist and operate in total isolation from each other but interact and even complement each other in many different ways without however losing their distinctness.

One area where the two set of regimes interact but also diverge is with regard to enforcement. A violation of the rules on the use of force may give rise to state responsibility and trigger demands for cessation, non-repetition or reparation, on the one hand[126]; on the other, such a violation can also trigger the use of force regime in the form of either UN action or state action (as self-defence). As far as UN action is concerned, it can be political but also legal. Political action refers to action taken by the Security Council or the General Assembly culminating in the use of force under Chapter VII. UN action may also trump the operation of the state responsibility regime by virtue of Article 59 ASR and Article 103 UN Charter, something that demonstrates the differences between the two regimes.

As far as legal action is concerned, it mainly refers to judicial action by the International Court of Justice. The ICJ is not only the primary judicial organ of the UN and therefore competent to enforce the rules of the UN sub-regime on the use of force, but it is also an institution of the international society that can be seized by all of its members, and can adjudicate on the basis of customary law. This was what happened in the *Nicaragua* case for example, where the ICJ performed its adjudicatory function under the customary law on the use of force because the UN regime did not apply to the case due to jurisdictional restrictions. In sum, the ICJ has overall competence with regard to the use of force regime.[127] Thus, when it pronounces on the illegality of a particular use of force and then goes on to

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[124] SC Res 1483 (2003).

[125] Judge Simma takes a more strict approach. See Simma 1985, p. 117: 'a "self-contained regime" would then be a subsystem which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of countermeasures normally at the disposal of the injured party.' See also Simma and Pulkowski 2006, p. 483. According to Crawford, if regimes should be hermetically closed 'there cannot be, at the international level, any truly self-contained regime'. Crawford 2002, p. 880. Also see 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law', Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, A/CN.4/L.682, para 152 (5).

[126] Articles 30–31 ASR.

[127] For example in the *Oil Platforms* case where the Court said that it will determine whether the use of force was lawful or unlawful, 'by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law.' *Oil Platforms*, para 42.

determine legal consequences, it performs functions according to the law of state responsibility. Recalling once more the *Nicaragua* case, the Court having established that the US had breached its obligation not to use force, went on to demand cessation of the unlawful acts and the making of reparations.[128] That having been said, when the ICJ performs its adjudicatory functions under the UN regime it needs to operate within the confines of the UN Charter, due to the fact that it is also a UN organ. Thus, and however hard the Court tries to preserve the legal and judicial character of its functions, it may have to accept certain limitations—particularly when its powers come into contact with the powers of other UN organs, such as those of the Security Council.[129] This is because the SC and the ICJ, as primary UN organs, are co-equals and both have responsibility in peace and security. As a result, while the SC and the ICJ can 'perform their separate but complementary functions with respect to the same events',[130] often the ICJ shows deference to the Security Council, the political organ.[131]

Another area where the two regimes connect but also diverge is with regard to the attribution of acts. Acts of state organs or agents are attributed to that state for purpose of the law of state responsibility as well as of the use of force. For example, an attack by the military forces of a state is attributed to that state which can thus become the target of the self-defence action. Another common criterion is that of 'effective control'. As the *Nicaragua*[132] and the *Armed Activities* cases,[133] show, the acts of entities over whom a state exercises effective control are attributed to that state. For example, an armed attack by a parastatal organisation under the effective control of a state is attributed to that state, which becomes the target of the self-defence action. In the *Bosnia Genocide Convention* case the ICJ affirmed the validity of the 'effective control' test for the law of state responsibility[134] and opined that, unless proven otherwise, this test applies uniformly to all instances of wrongful conduct. As the Court said, 'the rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*'.[135] Certain judges however called for a more nuanced approach to the 'control' test

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[128] *Nicaragua* case, p. 149; *Palestinian Wall Advisory Opinion*, pp. 201–202.

[129] *Nicaragua* case (Jurisdiction) ICJ Rep (1984) 392 at para 94–95; *Lockerbie* case, (Provisional Measures), para 43: 'the Court considers that, whatever the situation previous to the adoption of that Resolution (748 of 1992), the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures'.

[130] *Nicaragua* case (1984) para 95.

[131] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libya v. United Stats and United Kingdom*), ICJ Rep (1992) 114.

[132] *Nicaragua* case, paras 109–115.

[133] *Congo v. Uganda*, paras 157, 160.

[134] *Bosnia Genocide* case, paras 402–415.

[135] Ibid. para 401.

due to the different circumstances under which a wrongful act can be committed.[136]

The similarities however between the use of force regime and that of international responsibility as far as attribution is concerned end here because of the different needs to which each regime responds. This is evident for example with regard to uses of force by non-state actors. The effective control test due to the high degree of control it requires is not able to capture the different ways in which non-state actors are linked to states or the different degrees of organisation that non-state actors enjoy. As a result, non-state actors can cause immense damage for which no-one would be held accountable. For this reason, according to the use of force regime, a state can use force by way of self-defence against another state that exercises overall control over a non-state actor that mounted an attack[137]: or against the state that supports or tolerates such non-state actor that mounted an attack[138]. The US action against Afghanistan following the '9/11' attacks[139] provides evidence of the view that self-defence can be directed against a state that harbours non-state actors. As the UK Attorney General also stated, self-defence can be used against those 'who plan and perpetrate [terrorist] acts and against those who harbour [terrorists] if that is necessary to avert further such terrorist acts'.[140]

The divergence between the two regimes can also be explained by their different rationales. Conceptually, the law of state responsibility is based on the distinction between private and public (state) conduct. That is why it tries to establish a direct link between the wrongful act and a state. Put differently, the law of state responsibility needs to establish whether there is state conduct in order to determine whether a breach of an international obligation has been committed by that state giving rise to its responsibility. The law of state responsibility however takes a more nuanced approach to the state as an institution and the degree of control it can exercise over private or public entities. That is why it provides for different types of responsibility depending on the degree and type of state involvement. Such nuanced approach is offset by the existence of internal (state) or external (international) mechanisms, for example human rights, humanitarian law, criminal law mechanisms, which can hold such non-state entities accountable for violations of international or national law. In contrast, the use of force regime prescribes the situations under which the use of force is lawful. It emphasises the

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[136] Diss. Op. of Vice President Al-Khasawneh, *Bosnia Genocide* case, paras 36–39.

[137] *Prosecutor* v *Duško Tadić* case No. IT-94-1-A, Judgment of Appeal Chamber, 15 July 1999, paras 118–141.

[138] Simma 2002, p. 802. See also *Nicaragua* case, Diss. Op. Schwebel, ibid., para 176 and Diss. Op. Jennings, ibid. 543; Schachter 1989, p. 218.

[139] Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the president of the Security Council. UN Doc S/ 2001/946 (2001); US NSS (2002) at 5; *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States*, (2004), 326.

[140] 75 BYIL (2004) p. 823. For an overview of states' attitudes see Murphy 2002, p. 41.

harm that gives rise to lawful uses of force whereas the law of state responsibility puts emphasis on the author of the act. For this reason, traditionally, the use of force regime allowed uses of force against private actors with the *Caroline* case mentioned above being the most well-known example. However, after 1945, it became *par excellence* state-oriented as the ICJ jurisprudence reveals.[141] For the use of force regime however, the state is viewed as an institution that exercises power over people and territory and is endowed for this reason with affirmative rights and duties. Put differently, the state is seen as a collectivity making up an undivided whole. In this sense the use of force regime takes an undifferentiated approach to the state, contrary to the law of state responsibility which is more discerning in this respect. As a result, the use of force regime does not contain intermediary rules dealing with non-state actors as the law of international responsibility does, also, for the additional reason that force as an act is monolithic and its exercise in most cases affects a state. Consequently, for the use of force regime all harmful acts are attributed to the state from whose territory they emanate unless that state is not implicated in any way therein or the author of the harm is de-territorialised. In the latter case, these non-state actors become the targets of the use of force. Thus, attribution in the use of force regime does not have the narrow and specific meaning that it has in the law of state responsibility but is a general concept commensurate to the abstract and formal conception of the state in the use of force regime. UN uses of force prove the points made above. The UN can use force or authorise such force against states that pose a threat to international peace even when such a threat involves actions by 'non-State actors it harbours or supports; or whether it takes the form of an act or omission'.[142] Furthermore, the Security Council has confirmed the right of a state to use force by way of self-defence against a state that is not the actual author of an attack but from which the attack emanates. For example, in response to the '9/11' attacks, the Security Council recognised the US right to self-defence against Afghanistan[143] even if the links between Al-Qaeda and Afghanistan were not such as to make the latter the author of the attack; but instead Afghanistan was the territory from where Al-Qaeda mainly operated. At no point did the Security Council try to ascertain whether the acts were attributable to Afghanistan by using any of the attribution criteria found in the law of state responsibility. If a state is not implicated at all, then it is that non-state actor that will be targeted. This was the case with regard to the 2006 Israeli action in Lebanon. Following attacks by Hizbollah emanating from Lebanon, Israel used defensive force but claimed that its action was against Hizbollah, not

[141] *Palestinian Wall Advisory Opinion*, supra, para 139; Contra Sep. Op. Higgins ibid. paras 33–34; Sep. Op. Kooijmans, ibid. paras 35–36 and Decl. Burgenthal, ibid. para 6. Also *Congo v Uganda*, para 146. Contra Diss Op. Kateka, ibid. para 34 and Dis. Op. Kooijmans, ibid. para 28.

[142] *A More Secure World*, para 193.

[143] SC Res 1368 (2001) and SC Res 1373 (2001).

against the state of Lebanon, because of the latter's lack of involvement.[144] If the attribution criteria found in the law of state responsibility were to apply in this instance, not only would Israel have been unable to respond to the attacks but also no state responsibility would have arisen to the extent that no connection between Hizbollah and Lebanon was established with regard to the attacks, and Lebanon did not fail in its duty of due diligence. To sum up, whereas there is a certain overlap between state responsibility and the use of force on the issue of attribution, each regime has its own rationale and therefore they diverge in many respects.

Another area where the two regimes interact is with regard to uses of force that fall outside the use of force regime. In this case a state can be exonerated if its forcible action satisfies the conditions of necessity formulated in the law of state responsibility; namely that there is a grave danger, the act is the only way to safeguard an essential interest of the acting state, and does not impair an essential interest of the other state or of the international community.[145] In the *Palestinian Wall* Advisory Opinion, for example, the Court, having dismissed Israel's argument that the wall is a measure of self-defence, examined on its own motion 'whether Israel could rely on a state of necessity, which would preclude the wrongfulness of the construction of the wall' but was not convinced that 'the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.'[146]

Certain examples of uses of force that can be exonerated by necessity are uses of force by peacekeepers which are neither in self-defence nor authorised by the Security Council; uses of force similar to that in the *Torrey Canyon* incident[147] where the British bombed the ship in order to burn off the oil and prevent a possible environmental disaster; or uses of force in reaction to terrorist attacks that are not in self-defence or reprisals. For example, Turkey invoked something approximating necessity in order to justify its incursion of the Iraqi territory in its fight against militant Kurds operating from within Iraq. In a letter to the President of the Security Council, Turkey spoke of the importance it ascribes to Iraq's sovereignty as well as to its own sovereignty but, in view of Iraq's lack of authority in the northern part of the country, Turkey felt obliged to take measures 'imperative to its own security' that 'cannot be regarded as a violation of Iraq's sovereignty'.[148] Also, in 2007, the Turkish Parliament passed a motion authorising

[144] Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2006/515. Israel's right of self-defence has been recognised by the UK, Peru, Denmark, France, Argentina although they raised concerns about the proportionality of the action. S/PV.5489 (14 July 2006). It has also been recognised by the UN Secretary-General, S/PV.5492 (20 July 2006).

[145] Article 25 ASR.

[146] *Palestinian Wall* Advisory Opinion, para 140.

[147] Ago 1980, para 35.

[148] Letter dated 24 July 1995 from the Chargé d'Affaires of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, UN Doc S/1995/605 (24 July 1995). Gazzini 2006, pp. 205–206.

cross-border military action in northern Iraq. During the debates on the motion (which was adopted with an overwhelming majority), many legislators spoke of the need to respond to terrorist attacks that endanger Turkey's security.[149]

2.6.3 Necessity as a Circumstance Precluding Wrongfulness

This brings us to another issue which merits consideration: namely, the meaning as well as the consequences of the designation of necessity in the law of state responsibility as a 'circumstance precluding wrongfulness'.[150] One approach to necessity as a circumstance precluding wrongfulness is that it entails acts justified by the law; therefore, legal acts. For example, with regard to NATO's action in Kosovo, certain states invoked necessity as justification of the action. More specifically, Belgium invoked before the ICJ necessity 'which justifies the violation of a binding rule in order to safeguard, in the face of grave and imminent peril, values which are higher than those protected by the rule which has been breached.'[151] The British representative to the UN also stated that '[i]n these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable'.[152] The position of the Dutch government is equally telling. It seems to invoke necessity when it discusses humanitarian intervention, for example when it says that intervention as a last resort may be necessary in order to prevent or end a possible act of genocide even if the law is uncertain but this needs to be read in accordance with the views of the Advisory Council on International Affairs and the Advisory Committee on Issues of Public International Law contained in the Advisory Report on Humanitarian Intervention which the Dutch government has adopted, and according to which the duty to promote human rights 'forms the basis for the further development of a customary law justification for humanitarian intervention without a Security Council mandate.'[153]

Be that as it may, an interpretation of necessity as justification alludes to primary rules, not secondary ones as in the law of state responsibility, because a rule that justifies an act committed under certain circumstances prescribes a form of conduct which is condoned by the law. Also, the reason for justifying the specific act, the existence of a state of necessity, has already been accounted for in

[149] Deputy Prime Minister Cemil Çiçek told parliament: 'We have proposed this motion for the peace and welfare of our country. After accepting this motion, we will do what is necessary for the country's interests'. Available at: http://www.todayszaman.com. See also *Washington Post*, 18 October 2007.

[150] Article 25 ASR; *Gabčíkovo-Nagymaros Project*, para 51; Gardner 2007, Chapters 4 and 6; Lowe 1999, p. 405; Johnstone 2004–2005, p. 127; Christakis 2007, pp. 45–63.

[151] *Legality of Use of Force* (*Yugoslavia* v *Belgium*), Oral Pleadings, Verbatim Record, 10 May 1999, CR 99/15 (May 10, 1999).

[152] UN Doc S/PV.3988 (24 March 1999).

[153] 39 NYIL (2008) pp. 307–308.

the rule; it is not a distinct consideration applying after the breach as in the law of state responsibility. Such an interpretation of necessity as justification coincides then with the approach taken in this paper, according to which necessity has justified certain uses of force which subsequently became independent titles in their own right.

Another way of looking at necessity as a circumstance precluding wrongfulness is as an excuse. In this case, the initial use of force is illegal per se but excused because it is a consequence of the existence of a state of necessity. The difference from the previous interpretation is that in the latter case there is a *prima facie* breach which is excused whereas in the former there is no breach at all. Still, the crux of the matter is whether what is excused is the act or the author's responsibility. If it is the act that is excused, one may safely say that no breach has been committed[154] because an act that is performed under certain circumstances—a state of necessity—is not legally objectionable. In this case, the excuse plays a similar role to that of justification, as explained above, and alludes to primary rules. If excuse, however, means that the author of the act does not incur responsibility, it is only then that secondary rules are involved because it is only then that a determination is made that there is a breach, but that no consequences will flow.[155]

The ILC's position concerning the nature of circumstances precluding wrongfulness is rather ambivalent; *prima facie* it appears that the enumerated circumstances are justifications but the underlying notion informing circumstances precluding wrongfulness is that of excuses.[156] The latter approach is the correct one in view of the ILC's distinction between primary and secondary rules. According to this construction, necessity can relieve a state of responsibility for using force that falls outside the rules of the use of force regime. For example, if a state uses force other than in self-defence or reprisal against a non-state actor located in another state without the latter's consent, and in doing so it breaches its obligation to respect the sovereignty of that state, its responsibility will be excused if the use of force satisfies the conditions of necessity under the law of state responsibility. Self-defence as a circumstance precluding wrongfulness plays a similar role. As was said above, the use of force in self-defence is a primary right. Self-defence as a circumstance precluding wrongfulness though can preclude the responsibility of a state for any incidental breach of its obligations in the exercise of its primary right to self-defence. For example, it can excuse the responsibility of the defending state for breaching the territorial sovereignty of another state when it uses defensive force against non-state actors located within that state, or when it

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[154] As Ago 1980, p. 179 noted 'while the act was certainly not in conformity with an international obligation, it could not be described as wrongful if the precluding of wrongfulness was the result of a state of necessity'.

[155] *Gabčíkovo-Nagymaros Project*, para 101: '… even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty'.

[156] Crawford 2002, pp. 160–162; *Gabčíkovo-Nagymaros Project* para 48.

breaches a treaty obligation, for example to provide arms to a state that has initiated an attack.

Such uses of force excused by necessity provoke however another set of questions. The first is whether the prohibition on the use of force is a peremptory norm since necessity cannot be invoked as a circumstance precluding wrongfulness with regard to peremptory norms.[157] In the current state of international law, there is no definite list of peremptory norms and the lack of agreement as to the content of such norms is reflected in the drafting of Article 53 of the 1969 Vienna Convention on the Law of Treaties where the term appeared for the first time, as well as in the drafting of the articles on state responsibility. For example, Special Rapporteur Ago denied that all conduct infringing a state's territorial sovereignty is a breach of a peremptory norm.[158] At any rate, the general tenure is that the prohibition on the use of force is not such a norm in contrast to aggression that it is.[159]

The second set concerns the issue of declarations of illegality. In order for necessity to function as a circumstance precluding wrongfulness, there must be an initial declaration of illegality; but such declarations are neither obligatory nor common in international law. Take for example the case of NATO's intervention in Kosovo, where statements of illegality were met by other statements invoking the legality of the action, whereas a large number of states or commentators were more concerned with the moral or political aspects of the incident. The ICJ also was not able to declare on the legality of the action due to jurisdictional issues.

This raises an important question: that is, whether necessity can ever act as an excuse for uses of force because more often than not, a declaration of illegality is not made, with the actors in most cases taking a more nuanced approach; and, above all, because actions taken by invoking necessity usually create a precedent which, if repeated, can give rise to custom.[160] It should be recalled here what was previously said about custom: that, prior to any *opinio juris*, it is necessity that generates practice constitutive of custom. It thus becomes apparent that necessity can probably act as an excuse only with regard to random uses of force that are not supported at all in law, or are not supported by strong political or moral justifications. The 'illegal but justified' or 'illegal but legitimate' declarations concerning NATO's action in Kosovo fail to achieve what they purport to do.[161] As Franck admits, 'the distinction between what is justified (exculpated) and what is excusable (mitigated) is so fine as to be of pure (yet also considerable) academic interest'.[162] It is my view that the distinction is nevertheless important and its legal

[157] Article 26 ASR.

[158] UN Doc A/CN.4/318/Add.5-7 (1970), para 59.

[159] See for example Crawford 2002, p. 246.

[160] Roberts 2008, p. 179.

[161] Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned* (2004); Koskenniemi 1999, p. 159; Simma 1999, p 1. It should be emphasised that what is argued here applies only to those that treat humanitarian action under the necessity rubric.

[162] Franck 2002, p. 191.

implications are very serious because the distinction concerns the genesis as well as the status of legal rules.

2.7 Conclusion

In order to summarise the main points made in this chapter, it was first claimed that necessity is the source of authority of the rules on the use of force but these rules have subsequently become independent entitlements as part of customary or UN Charter law, whereby necessity lost its proto-normative function. Secondly, it was claimed that the use of force constitutes a special regime in international law; it is an issue-specific regime that includes its own principles, norms, and rules as well as management and enforcement mechanisms. Thirdly, it was argued that the use of force regime, because of its features and rationale, is distinct from that of the law of state responsibility but interacts therewith in certain areas. Such interaction is however conditioned by the principles and rules of the use of force regime. The law of state responsibility also offers a second level of enquiry with regard to uses of force falling outside the regime. In this case, necessity can function as a circumstance that precludes the wrongfulness of the initial use of force. The argument proposed here is that necessity in this regard can only excuse responsibility; however, due to the state of international law, the line between excuse and justification is very fine.

As a final point, it should be said that the designation of the use of force regime as a special regime should not be viewed as an affront to the unity of international law. That unity is not material or monolithic but manifests itself in the normative background against which regimes are created and operate. Hence, the use of force regime is not separate from international law; it is embedded in international law but exhibits its particular features because of the different needs and expectations of its participants in this area of international relations.

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Chapter 3
Necessity in the Law of Armed Conflict and in International Criminal Law

Gabriella Venturini

Abstract Necessity performs two distinct functions in the Law of Armed Conflict. In a wider sense, it stands as a restraining principle of LOAC, permitting the use of legally regulated violence only to the extent necessary to achieve the aims of war. In a narrower sense, it operates as a circumstance precluding wrongfulness, enabling a belligerent to perform some acts that, as a rule, would be prohibited. As far as the general principle of restraint is concerned, the main debate presently regards the definition of military objective and the requirement of definite military advantage, while the permissive function of necessity in armed conflict mainly displays its effects with regard to obligations related to the protection of (public, private, cultural) property. In International Criminal Law, the plea of military necessity (or of 'the necessities of the conflict') should only justify actions undertaken by a responsible actor after a wary evaluation of the situation in the battlefield. The plea of duress, where the accused argues that in committing the acts complained of, he/she acted under an immediate threat, should be accepted with more flexibility. As concerns State Responsibility, a critical issue is represented by the relationship between military necessity and the use of force. While *jus in bello* must always be applied equally by belligerents, states must respect the requirements of self-defence in order to be regarded as acting lawfully under *jus ad bellum*. However, the legality of the use of force is irrelevant in the area of individual criminal responsibility. Those who are engaged in an armed conflict are not concerned with its legality and therefore their behaviour must be exclusively judged on the basis of the standard prescribed by LOAC.

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3.1 Introductory Remarks

The Law of Armed Conflict (LOAC), or *jus in bello*, includes the rules of international law regulating the conduct of the hostilities in armed conflict, as well as those protecting the victims of war. Presently, the expression 'International Humanitarian Law' is preferred. In its *Nuclear Weapons Opinion*, the International Court of Justice distinguished between 'the law applicable in armed conflict' and 'humanitarian law,' the former comprising the latter.[1] However, the ICJ recognized 'the intrinsically humanitarian character … which permeates the entire law of armed conflict,' and, when mentioning the treaties that constitute 'the fabric of international humanitarian law,' the Court referred to the entire *corpus* of LOAC.[2] For the purposes of the present contribution, therefore, these two expressions may be considered as equivalent.

The ICJ also defined the law applicable in armed conflict, which is designed to regulate the conduct of the hostilities, as *lex specialis* in relation to human rights

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[1] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Rep (1996) pp. 244–245, paras 36 and 42.

[2] Ibid., pp. 256–257, paras 75–79. The Manual of the Law of Armed Conflict states that the law of armed conflict has the main purpose 'to protect combatants and non-combatants from unnecessary suffering and to safeguard the fundamental human rights of persons who are not, or are no longer, taking part in the conflict (such as prisoners of war, the wounded, the sick, and shipwrecked) and of civilians' (p. 3, para 1.9).

law.[3] In fact, historically, LOAC developed as a branch of public international law designed to regulate the conduct of armed hostilities (means and methods of war) between states, as well as to safeguard the wounded, sick and shipwrecked, prisoners of war and (more recently) civilians, long before human rights became protected under international law.[4] A number of rules pertaining to international law of peace are excluded in time of armed conflict, and special subsidiary rules and techniques of interpretation and implementation apply. According to the basic distinction between *jus in bello* and *jus ad bellum*, LOAC is equally binding on all belligerents 'without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict,' i.e., of the legality of the use of force.[5]

In case of violations of LOAC rules, not only states, but also their organs and private individuals are responsible. While, in the past, adjudication of cases in which persons were accused of war crimes was the exclusive competence of domestic courts, the last decades have seen the creation of several international and mixed tribunals. These have greatly contributed to the development of international criminal law as an autonomous branch of international law dealing with individual criminal responsibility, as well as to increase prosecutions in domestic courts.

Traditionally, LOAC did not regulate non-international (internal) armed conflict. As a result of the developments occurring in customary law and in treaties during the last decades, however, today most fundamental LOAC rules are deemed to apply in any armed conflict, irrespective of its nature.[6] Therefore, LOAC is not isolated from other branches of public international law: human rights, for example, have greatly influenced the development of LOAC rules applicable both to international and to non-international armed conflicts.

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[3] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, supra n 1, p. 240 at para 25. See also ICJ, *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory*, Advisory Opinion of 9 July 2004, ICJ Rep (2004) p. 178, para 106.

[4] See Green 2008, pp. 40–44.

[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, last paragraph of the Preamble, available at http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument. See Sassòli 2007, pp. 244–249; Green 2008, p. 23; Sloane 2009, p. 103. The distinction is corroborated by the case law of the international criminal tribunals: see the appeals judgments *The Prosecutor* v *Dario Kordić and Mario Čerkez* case No. IT-95-14/2-A (17 December 2004) para 1082 (International Criminal Tribunal for the former Yugoslavia, ICTY) and *Prosecutor* v *Moinina Fofana and Allieu Kondewa* case No. SCSL-04-14-A (28 May 2008) para 530 (Special Court for Sierra Leone, SCSL).

[6] See Moir 2002, pp. 133–159; Henckaerts and Doswald Beck 2005, Vol. I pp. xxviii–xxix; Green 2008, pp. 368–369. Opinions regarding the nature and content of such fundamental rules, however, differ widely, making them the subject of debates among scholars, courts and military experts: see *The Manual of the Law of armed conflict* 2004, pp. 388–410, paras 15.5–56.

3.2 Necessity and the Law of International Armed Conflict

The starting point of any investigation on the role of necessity in LOAC is the law of international armed conflict, where necessity—qualified as military necessity—plays a fundamental role and performs at least two distinct functions related to a belligerent's behaviour. On the one hand—if interpreted in a wider sense—necessity stands as a restraining principle of LOAC, permitting the use of legally regulated violence to the extent necessary to achieve the aims of war. On the other hand—when appraised in a narrower sense—necessity operates as a condition enabling a belligerent to perform some acts that, as a rule, would be prohibited, i.e., as a circumstance precluding wrongfulness.[7] While it is often difficult to distinguish these two types of necessity, since their features are interrelated, they produce quite different effects on the belligerent's behaviour. The restraining principle constrains their freedom of action, while the enabling condition gives them more options to choose methods and means of warfare. Therefore, these two aspects will be considered separately.

3.2.1 *Military Necessity as a General Principle of Restraint*

A well established opinion in the international legal literature maintains that LOAC as a whole represents a compromise between the opposed principles of necessity and humanity.[8] From this point of view, necessity basically means the need to militarily win the armed confrontation. In 1863, Francis Lieber first formulated a legal definition of this kind of necessity: 'Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.'[9] Lieber's principle of limited military necessity operates as a restraint on state action in armed conflict: only those measures which are indispensable to prevail over the enemy are allowed, and they must not otherwise be forbidden by international law. This principle has a restraining effect, since it imposes a restrictive standard on the exercise of warfare: a belligerent must refrain from employing any kind or degree of violence which is not actually necessary for military purposes.[10]

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[7] The difference between the two functions of military necessity has been expounded upon by a number of scholars, among which see Tucker 1957, p. 33 n 21; Pillitu 1981, p. 350; Verri 1992, p. 75; Dinstein 1997, pp. 395–397; Christakis 2007, p. 20; Kolb 2007, pp. 153–156 and 164–166; Blum 2010, p. 10.

[8] See among others, Sandoz et al. 1987, p. 392, para 1389; Jochnick and Normand 1994, p. 53; Detter 2010, p. 395; Dinstein 2010, p. 5; Blum 2010, p. 8.

[9] *Instructions for the Government of Armies of the United States in the Field* (*Lieber Code*), 24 April 1863, Art. 14, available at http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument.

[10] See Downey 1953, p. 252; O'Brien 1957, pp. 128–131; Rauch 1980, pp. 209–210; Carnahan 1998, pp. 216–217 and 230.

The basic rule which most clearly articulates this aspect of military necessity is presently stated by Protocol I of 8 June 1977, additional to the Geneva Conventions of 12 August 1949: 'In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.' Therefore, 'It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause *superfluous injury* or *unnecessary suffering*.' [emphasis added].[11]

In contemporary LOAC many examples may be found of rules incorporating military necessity as a general principle restraining belligerents' freedom in warfare. Among the most important—the customary character of which is universally recognized—are the prohibition against conducting hostilities without quarter and killing the enemy *hors de combat*; the prohibition of attacks which may be expected to cause collateral damages (i.e., losses, injury or damage to civilians or to civilian objects) that would be excessive in relation to the concrete and direct military advantage anticipated; and the obligation to suspend or to cancel an attack if it becomes apparent that it may cause the said consequences.[12] The definition of legitimate military objects also manifestly conveys the principle of military necessity in its wider meaning: 'In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'[13] Conceptually, however, military necessity does not coincide with military advantage: while the latter is a specific notion strictly connected to each particular situation of warfare, the former represents the *ratio* underlying the positive content of the rule.

Thus, in its wider meaning, military necessity is the key element of the most fundamental, substantive rules of LOAC, authorising only the use of those means and methods of warfare as are necessary to accomplish the military mission. Such necessity is a normative factor shaping the positive contents of the primary rules of LOAC, which are not affected by the 'state of necessity' as a circumstance precluding wrongfulness and as codified by the International Law Commission in Article 25 of the Draft Articles on State Responsibility. Indeed, the ILC Commentary to Article 25 recognizes that: 'As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the

[11] Protocol I, supra n. 5, Arts. 35(1) and 35(2). With reference to the means of warfare the same rule was established by Arts. 22 and 23 of the Regulations concerning the Laws and Customs of War on Land, annexed to the Hague Convention II of 29 July 1899 and to the Hague Convention IV of 18 October 1907. In its *Nuclear Weapons Opinion* the ICJ restated the customary nature of these rules (supra n. 1, pp. 256–257, at paras 77–78).

[12] Protocol I, supra n. 5, Arts. 40, 41, 51(5)(b) and 57(2)(b). On the customary character of these provisions see Henckaerts and Doswald Beck 2005, Vol. I pp. 161–169, 46–50 and 60–65. On the criterion of proportionality as a measure of necessary collateral damages see Kolb 2007, p. 169, and Franck 2008, p. 723.

[13] Protocol I, supra n 5, Art. 52(2) [emphasis added]. On this definition of military objective see Bothe et al. 1982, pp. 320–327; Oeter 2008, pp. 177–186; Dinstein 2010, pp. 93–95; Gardam 2004, p. 107.

primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity".' Then the Commentary describes military necessity as 'the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in a number of treaty provisions in the field of international humanitarian law' and points out that 'while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.'[14]

It ensues from what precedes that the principle of necessity neither conflicts with nor opposes the principle of humanity: on the contrary, it ensures that humanitarian values are taken into account during the conduct of hostilities. Indeed, necessity and humanity may be seen as two aspects of the same principle.[15] Accordingly, the current definition of military necessity describes it as 'the principle whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war.'[16]

This definition may be split into two prongs. The first prong, 'measures which are required to bring about the successful conclusion of a military operation,' relates to the wider meaning of military necessity (as a general principle of restraint), which has been dealt with in this sub-section. The second prong, measures 'not forbidden by the laws of war' brings us to military necessity as appraised in its narrower sense (as a permissive condition), which will be analyzed in next sub-section.

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[14] Draft Articles on Responsibility of States for Internationally Wrongful Acts, 'Report of the International Law Commission on the work of its fifty-third session,' ILC Yearbook, Vol II, Part One (2001) p. 84 at para 21. In the light of the above, Art. 25 of the ILC Articles does not affect military necessity as a general principle of restraint, i.e., in its wider sense. See Benvenuti 2006, pp. 136–138; see also Christakis 2007 and Kolb 2007, supra n 7.

[15] This case was made by Tucker (1957), p. 48 n 8 and further developed in his edition of Kelsen (1966), p. 115 n 112. See also O'Brien 1960, p. 68; Venturini 1988, p. 129; Greenwood 2008, p. 38; Gardam 2004, p. 7. This conclusion is supported by the recent ICRC's *Interpretive Guidance on the notion of direct participation in hostilities under IHL* (2009), p. 79. Other authors point out that the principle of humanity has a broader reach, since it also includes constraints of a deontological nature: see Sloane 2009, p. 75.

[16] See Downey 1953, p. 254; Tucker 1957, p. 364; Bothe et al. 1982, pp. 194–195; McDougal and Feliciano 1994, p. 528; Dinstein 2010, p. 6; Greenwood 2008, pp. 35–36; The Manual of the Law of Armed Conflict, pp. 21–22 para 2.2; Green 2008, p. 147. This is also the standard definition of the US Department of Defense, as well as other NATO Members.

3.2.2 Military Necessity as a Permissive Condition

Given its restraining effect on warfare as a general principle of LOAC, it may seem anomalous that military necessity also allows a belligerent to perform some acts that, as a rule, would be prohibited. *Jus in bello*, however, certainly recognizes this permissive function of necessity.[17]

At the end of the nineteenth century, an unwelcome evolution of Lieber's theory was the German doctrine of *Kriegsraison*, arguing that a belligerent could disregard any rule of *jus in bello* whenever military necessity required divergent behaviour (*Kriegsraison geht vor Kriegsmanier*). This approach, which was based on the (then) accepted doctrine of self-preservation, did in fact reverse Lieber's concept with the consequence that LOAC itself was deprived of any real binding force.[18] The German Manual of Land Warfare (*Kriegsbrauch im Landkriege*), issued in 1902, was based on the *Kriegsraison* doctrine, and it was put into operation by Germany in both World Wars.[19] Although accepted by the Court of the German Empire (*Reichsgericht*) in a few cases decided after the First World War, this doctrine was severely censured and rejected by the International Military Tribunal at Nuremberg, as well as by other tribunals which dealt with cases of war criminals after the Second World War.[20]

The reasoning behind the rejection of such a broad plea of necessity in connection with the obligations laid down by LOAC is that 'grave and imminent peril,' which epitomizes necessity as a circumstance precluding wrongfulness in peacetime, is but an ordinary situation in wartime. According to Lieber's definition, military necessity is taken into account and plays a fundamental role in the development of LOAC rules so that they do not hinder the achievement of the purpose of defeating the enemy (without, however, permitting excessive violence).[21] It would be incongruous if a state were able to invoke necessity in order to elude those obligations that were

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[17] See supra n 7. See also Sbolci 1995, pp. 655, 658 and Detter 2000, p. 394.

[18] See the works cited by Ago 1980, pp. 36–37 at paras 51–53.

[19] See Stone 1959, pp. 351–352.

[20] Judgments on pleas of military necessity before the Nuremberg Tribunal are reviewed by Dunbar 1952, pp. 442–452. See also Downey 1953, p. 253; Dinstein 1997, p. 396. Contra Jochnick and Normand 1994, pp. 93–94, arguing that the Nuremberg Tribunal accepted a broad interpretation of military necessity, not limited to aerial bombardment, but covering a wide range of wartime conduct.

[21] This concept was clearly stated by the Preamble to the Hague Convention (II) with Respect to the Laws and Customs of War on Land of 29 July 1899 declaring that: 'In the view of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war *so far as military necessities permit*, are destined to serve as general rules of conduct for belligerents.' [emphasis added]. The preamble to Convention (IV) respecting the Laws and Customs of War on Land of 18 October 1907 contains a similar provision: 'According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, *as far as military requirements permit*, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.'

precisely intended to prohibit unnecessary violence.[22] This interpretation was consolidated as humanitarian aspects achieved greater importance within the Law of Armed Conflict. It is confirmed by the Commentary to Article 25 of the ILC Draft Articles, according to which military necessity is not covered by that Article:

> *Paragraph 2* (a) [of Article 25] concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus, certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others *while not explicitly excluding necessity are intended to apply in abnormal situations of peril* for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule [emphasis added].[23]

Therefore, in LOAC military necessity may operate as a permissive condition only if it is contemplated by express provisions, to be found in the specific rules of LOAC. Any rule not including such a provision (such as, for instance, the absolute prohibition of killing prisoners of war, or of directing attacks against civilians or civilian population) must be deemed to exclude the plea of military necessity.[24]

Indeed, a great number of LOAC rules—that would be lengthy to enumerate—expressly admit derogation in circumstances of military necessity. To give but a few examples: Article 23(g) of the Hague Regulations of 1907 prohibits the destruction or seizure of enemy property, unless 'imperatively demanded by the necessities of war,' and Article 54 of the same Regulations forbids the seizure or destruction of submarine cables connecting an occupied territory with a neutral territory, except 'in case of absolute necessity.' In the four Geneva Conventions, derogations for reasons of (military) necessity are allowed from the prohibition of diverting medical establishments from their purpose; from the right of the Protecting Powers to visit the places of internment of prisoners of war; from the prohibitions of forcible transfers of protected persons from occupied territory and from destruction of public and private property.[25] Under Additional Protocol I of 1977, 'imperative' military

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[22] See Dunbar 1952, p. 452; Ago 1980, p. 37 at para 53. Ago, however, admits the application of state of necessity as a circumstance precluding the wrongfulness of conduct contrary to the international law of war where the essential interest of a State to be given preference over an inferior interest of another State 'is something other than merely that interest in ensuring the success of a military operation and defeating the enemy which is the hallmark of what is by general agreement called necessity of war' (ibid. at para 54). This argument is close to Stone's contention that: 'Neither practice nor the literature explain satisfactorily how the privilege based on self-preservation in time of peace can be denied to States at war,' Stone 1959, p. 353.

[23] ILC Draft Articles on Responsibility of States, supra n 14, at para 19 [emphasis added]. Here, military necessity is understood in its narrower sense, i.e., as a permissive condition.

[24] See Downey 1953, p. 262; Kelsen and Tucker 1966, p. 100; McCoubrey 1991, pp. 220–222; Green 2008, p. 234. This principle is recurrently stated in the principal military manuals: see e.g., The Manual of the Law of Armed Conflict 2004, p. 23, para 2.3.

[25] Art. 33 of Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; Art. 126 of Geneva Convention (III) relative to the Treatment of Prisoners of War; and Arts. 49 and 53 of Convention (IV) Relative to the Protection of Civilian Persons in Time of War. See Green 2008, pp. 251, 273, 281, 288.

necessity may allow derogations from the prohibition of starvation by a Party to the conflict within territory under its own control 'in recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion,' as well as from the prohibition of diverting materials and buildings assigned to civil defence organizations from their civil defence purpose; it may also justify limitations to the right of civil defence organizations to performing their tasks in occupied territories.[26] In all of these cases, if military necessity so requires, a belligerent is allowed to disregard a positive or negative obligation of LOAC, and often to employ a greater amount of violence in warfare.

At a closer glance, each of the above mentioned provisions is structured so as to include two distinct rules: the first prescribes the behaviour to be adopted in a given circumstance (e.g., to respect the right of the Protecting Powers to visit the places of internment of POWs), while the second allows divergent conduct if reasons of military necessity exist. Military necessity then affects the content of primary rules of LOAC by providing an inherent justification for conduct contrary to what is prescribed for ordinary circumstances of warfare.[27]

Clearly, a broad range of situations exist that may be appraised under the tag of military necessity as a permissive condition. Besides 'plain' military necessity, there is a sort of 'hard' military necessity alternatively labelled as 'absolute,' 'exceptional,' 'imperative,' 'unavoidable,' or 'urgent.'[28] Although a kind of hierarchy among these various types of military necessity may be conjectured,[29] it would be difficult to discern any substantial difference between these expressions based on state practice. But the permissive function of military necessity is also revealed by a great deal of 'soft' language recurring in LOAC: 'as far [as soon, as rapidly] as possible,' 'if circumstances allow,' 'to the fullest extent practicable,' 'feasible' and other similar wording.[30] Moreover, 'military considerations,' 'military efforts,' 'military requirements,' or 'security considerations' are also indicative of situations permitting larger freedom to belligerents.[31] These are to be

[26] Arts. 54.1, 67.4 and 62.1 of Protocol I, supra n 5. For a comprehensive review of LOAC provisions including express or implied reference to military necessity see Rauch 1980, pp. 216–218; McCoubrey 1991, pp. 230–235.

[27] Supra n. 14. In fact, as examples of rules based on military necessity, the ILC Commentary cites Art. 23(g) of the Hague Regulations of 1907, and Art. 54(5) of Protocol I, where military necessity is expressly enunciated.

[28] For example, these expressions may be found in Art. 51 of the London Declaration concerning the Laws of Naval War of 26 February 1909; in Arts. 8 and 34 of Geneva Convention (I); in Art. 53 of Geneva Convention IV; and in Art. 11.2 of the Hague Convention of 14 May 1954 for the protection of Cultural Property in the event of Armed Conflict.

[29] See Rauch 1980, and McCoubrey 1991, supra n 36.

[30] Arts. 19 of Geneva Convention (I); 19–20 and 22–23 of Geneva Convention (III); 114 of Geneva Convention (IV); 10 of Protocol I; 2(3) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons of 1980. See Rauch 1980, pp. 232, 235–236; McCoubrey 1991, p. 230.

[31] Arts. 12 and 30 of Geneva Convention (I); 18 of Geneva Convention (II); 23 and 30 of Geneva Convention (IV). See Green 2008, p. 201.

interpreted by domestic military manuals, by the operational rules of engagement of the armed forces, by the military on the field[32] and eventually—if a case arises—by national or international jurisdictions.[33]

3.2.3 Military Necessity Versus the Protection of Cultural Property

Military necessity in its narrower sense (as a permissive condition) has important effects on the fate of cultural property during armed conflict. In a well known (and very often quoted) letter of 29 December 1943 concerning the preservation of historic monuments during military operations in Italy, General Dwight D. Eisenhower wrote: 'Nothing can stand against the argument of military necessity. That is an accepted principle. But the phrase "military necessity" is sometimes used where it would be more truthful to speak of "military convenience" or even of "personal convenience." I do not want it to cloak slackness or indifference.'[34]

LOAC in force at the time General Eisenhower issued this warning did not pay special attention to the protection of cultural property. Article 27 of the Hague Regulations of 1907, however, stipulates that: 'In sieges and bombardments all necessary steps must be taken to spare, *as far as possible*, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, *provided they are not being used at the time for military purposes*' [emphasis added].[35]

It ensues that, under the 1907 law, cultural property could be attacked either if it was *not possible* to spare it, or if it was *used for military purposes*. While in the first case military necessity operates as a permissive condition, in the latter it simply coincides with the destruction of a legitimate military objective. Here, the

[32] 'In applying military necessity to targeting, the rule generally means the United States Military may target those facilities, equipment, and forces which, if destroyed, would lead as quickly as possible to the enemy's partial or complete submission.' See Powers, 'Law of Armed Conflict (LOAC) The Rules of War' http://usmilitary.about.com/cs/wars/a/loac.htm.

[33] Infra Sect. 3.

[34] Quoted by Meyer 2000, p. 23.

[35] Similarly, Art. 5 of the Hague Convention (IX) of 1907 concerning bombardment by naval forces in time of war provides that 'In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, *on the understanding that they are not used at the same time for military purposes*' [emphasis added]. See Jia 2002, p. 139. Art. 26 of the Rules concerning Air Warfare of 1923 also articulates: 'The following special rules have been adopted to permit the States to ensure a more efficient protection of monuments of great historic value situated on their territory *provided they are disposed to abstain from using for military purposes* not only such monuments and also the area surrounding them and to accept a special system for control to this end' [emphasis added].

belligerent which uses cultural property for military purposes wilfully contributes to the damages that will be inflicted on that property in warfare.

The Hague Convention for the protection of cultural property in the event of armed conflict of 1954 adopts a 'hard' definition of military necessity. Under Article 4(2) both the obligation to refrain from any use of the cultural property for purposes which are likely to expose it to destruction or damage, and the obligation to refrain from any act of hostility directed against such property (general protection of cultural property) may be waived only 'in cases where military necessity *imperatively* requires such a waiver.' [emphasis added].[36]

Under Article 11(2) of the same Convention:

> immunity shall be withdrawn from cultural property under special protection[37] only *in exceptional cases of unavoidable military necessity*, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. *Whenever circumstances permit*, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity [emphasis added].

Clearly, the loss of protection which ensues from the use of cultural property for military purposes covers a number of situations which are (or at least should be) rather objective. On the contrary, the 'imperative' or 'unavoidable' military necessity, which allows withdrawal of immunity, is to be ascertained by the commander having regard to the purpose of the military operation, and therefore involves a wider (and more subjective) leeway. For this reason, the appraisal of military necessity by the Hague Convention of 1954 has been widely criticized by the legal literature.[38]

When dealing with the general protection of civilian objects against the effects of hostilities, Article 53 of Additional Protocol I of 1977 prohibits: '(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals.'

Here, no exception with respect to military necessity is allowed; cultural property may be attacked only because of its use.[39] Accordingly, the Second Protocol to the Hague Convention of 1954, of 26 March 1999, establishes in Article 6 that:

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[36] See Frigo 1986, p. 103; O'Keefe 2006, p. 121; Forrest 2007, pp. 206–207. During the 1954 intergovernmental conference, proposals were put forward by Greece and the USSR to remove every reference to military necessity from the text under negotiation; however, the opinion prevailed that states would be more willing to implement the future treaty if the clause was kept. See Eustathiades 1960, pp. 194–198.

[37] Art. 8(1) of the Hague Convention of 1954 accords special protection to 'a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance.'

[38] See Eustathiades 1960, pp. 203–207 and Forrest 2007, pp. 199–200. See also Hladík 1999, p. 623; Seršić 1996, p. 15; Gioia 2000, p. 83; Zagato 2007, pp. 73–76.

[39] See O'Keefe 2006, pp. 215–216; and Forrest 2007, pp. 211–213.

(a) 'a waiver on the basis of imperative military necessity pursuant to Article 4.2 of the Convention may only be invoked *to direct an act of hostility against cultural property* when and for as long as (i) that cultural property has, by its function, been *made into a military objective*, and (ii) there is *no feasible alternative available* to obtain a similar military advantage to that offered by directing an act of hostility against that objective.
(b) a waiver on the basis of imperative military necessity may only be invoked *to use cultural property* for purposes which are likely to expose it to destruction or damage when and for as long as *no choice is possible* between such use of the cultural property and another feasible method *for obtaining a similar military advantage.*
(c) the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of at least a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;
(d) in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given *whenever circumstances permit.*'[emphasis added]

Indeed, letter (a) in true substance allows reprisals against cultural property, otherwise prohibited by Article 4(4) of the 1954 Convention. Letter (b) equates military necessity to military advantage, which allows a considerable margin of discretion to a commanding officer. The said officer must be a least a lieutenant colonel unless … *circumstances do not permit* (i.e., military necessity would allow a lower-ranking officer to take the decision … of invoking military necessity!). It is therefore doubtful that the purpose of fostering protection of cultural property in all circumstances has been fully achieved by the Second Protocol of 1999.

3.2.4 Military Necessity Versus the Protection of the Environment

Under traditional LOAC the environment did not enjoy better protection than that due to enemy property as provided for by Article 23(g) of the Hague Regulations of 1899 and 1907. Article 53 of the Geneva Convention (IV) of 1949 further stipulates that: 'Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the state, or to other public authorities, or to social or co-operative organisations, is prohibited, *except where* such destruction is rendered *absolutely necessary* by military operations' [emphasis added]. Consequently, attacks against, or destruction of the environment could be justified on grounds of 'absolute' military necessity. Article 147 of the same Convention includes 'unjustified destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' among the grave breaches of the Convention, as such entailing individual criminal responsibility.

Additional Protocol I of 1977 deals with environmental protection in two important provisions. Article 35(3) on methods and means of warfare proscribes 'methods of warfare which are intended, or may be expected to cause widespread,

long-term and severe damage to the natural environment.' Article 54(2), included in the chapter on protection of civilian objects, prohibits attacks against:

> … objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

Finally, Article 55(1) prohibits the 'use of methods or means of warfare which are intended or may be expected to cause such [widespread, long-term and severe] damage to the natural environment and thereby to prejudice the health or survival of the population.'[40]

No military necessity clause is included in the above mentioned rules. However, under Article 54(3) of Protocol I the prohibition of attacks against objects indispensable to the survival of the civilian population does not apply if these objects are used by the adverse party 'solely for the members of its armed forces' or 'in direct support of military action,' i.e., if they become military objects. More important, Article 54(5) allows derogation from the prohibitions of 'scorched earth' tactics by a belligerent, within its own territory, where required by an 'imperative military necessity' in defence against invasion.

On the other hand, while Article 54(2) gives some examples of specific objects (including environmental resources) that must not be attacked, Articles 35(3) and 55(1) forbid only those attacks causing a certain type of consequences (widespread, long-term and severe damage), but without giving any precision about their meaning. States like France and the United Kingdom have declared that Articles 35(3) and 55(1) do not correspond to customary law; the same assumption underlies the provisions of a number of military manuals. Moreover, the great majority of NATO Members maintain that the rules relating to the use of weapons introduced by Additional Protocol I of 1977 apply exclusively to conventional weapons, but they do not prejudice any other rule of international law applicable to other types of weapons (i.e., to nuclear weapons).[41]

The Preamble to the UN General Assembly resolution on the Protection of the Environment in Times of Armed Conflict, of 25 November 1992, states that

[40] On the protection of the environment during armed conflict in current international law see Mollard Bannelier 2001, pp. 122, 127–131, who devotes an accurate analysis to the restraining effect of military necessity on environmental warfare, while emphasizing that environmental protection is not subject to military necessity as a permissive condition. See also Falk 1992, pp. 78–95; Green 1996, pp. 417–439; Greenwood 1996, pp. 397–415; Schmitt 1997, pp. 1–109; Schmitt 2000, pp. 265–323; and Roscini 2009, pp. 155–179.

[41] See Henckaerts and Doswald Beck 2005, Vol. II Part 1, pp. 877, 882–883, 894. On the relationship between these provisions and Art. I of the ENMOD Convention of 18 May 1977, which prohibits the use of environmental modification techniques having widespread, long lasting *or* severe effects on the environment, see Antoine 1992, pp. 522–523; Bouvier 1992, pp. 560–563; Green 1996, pp. 428–429. See also The Manual of the Law of Armed Conflict, supra n 2, p. 76, paras 5.29.2–3.

'destruction of the environment, *not justified by military necessity* and carried out wantonly, is clearly contrary to existing international law.' It is not clear if the UNGA refers to the environment as property, or if it had in mind the new rules of Additional Protocol I of 1977. In any case, it eventually '*appeals* to all States that have not yet done so to consider becoming parties to the relevant international conventions' [emphasis added].[42] These conventions, therefore, are deemed to provide better protection to the environment than that offered by customary international law. In its *Nuclear Weapons Opinion*, the ICJ admitted that 'existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons,' however 'it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.'[43]

The framework for environmental protection during armed conflict set up by Additional Protocol I of 1977 has not been put to the test yet. It was argued that the destruction by Iraqi forces of Kuwaiti oil platforms in 1991 (which dumped millions of oil barrels in the Persian Gulf) was not justified on grounds of military necessity and was thus a blatant violation of the prohibition against destruction of enemy property under Article 23(g) of the Hague Regulations of 1907.[44] As regards environmental protection, however, Additional Protocol I was not applicable to that conflict. Moreover, since the prohibitions on damage to the environment contained in Protocol I do not prohibit collateral damage caused by legitimate conventional operations, they 'in all likelihood, would not apply to Iraq's actions in the Persian Gulf War.'[45] In any case Security Council Resolution 687, affirming Iraq's liability for any loss, damage (including environmental damage) and depletion of natural resources as a result of Iraq's violation of *jus ad bellum* because of its unlawful invasion and occupation of Kuwait, superseded the discussions concerning the possible role of military necessity in relation to the attacks made by Iraq.[46]

During the 1999 Balkan war, attacks on industrial facilities such as chemical plants and oil installations caused the release of pollutants in air, land and water. The Balkan Task Force (BTF) established by United Nations Environment Programme (UNEP) to investigate the environmental situation in Kosovo after the NATO bombing campaign detected at several sites serious pollution posing a

[42] GA Res. 47/37, 47 UN GAOR Supp. (No 49) at 290, UN Doc A/47/49 (1992).

[43] Supra n 1, p. 243 at para 33.

[44] See Zedalis 1990, pp. 333–349; Meyrowitz 1992, pp. 574–575; Roberts 1992, pp. 538–553; Aznar-Gómez 2001, pp. 301–334; Mollard Bannelier 2001, pp. 134–135. See also United States Department of Defense, *Conduct of the Persian Gulf War. Final Report to Congress* (October 1992), p. 624. Contra Greenwood 1996, p. 407, arguing that it was 'far from clear that all of those acts of destruction lacked a justification in military necessity.'

[45] United States Department of Defense, *Conduct of the Persian Gulf War*, supra n 44, at p. 625. In the report, the 'long term' effects on the environment, as one of the criteria for determining whether a violation has taken place, are understood to be measured in decades.

[46] Resolution 687 (1991) Adopted by the Security Council at its 2981st meeting, on 3 April 1991, para 16.

threat to human health. However, BTF found that some of these effects had built up over a period of many years, and possibly did not result from the war, but from years of environmental neglect.[47] Looking into damage caused to the environment by the campaign, the Committee established by the ICTY Prosecutor to review the NATO action questioned the customary character of Articles 35(3) and 55 of Protocol I, pointing out that their conditions for application are 'extremely stringent and their scope and contents imprecise.' Moreover, the Committee deemed the notion of 'excessive' environmental destruction unclear and the actual environmental impact of the bombing campaign 'unknown and difficult to measure.'[48] Rather interestingly, the Committee held that the related effects were best considered 'from the underlying principles of the law of armed conflict such as necessity and proportionality,' thereby evoking the function of necessity as a general principle of restraint.

3.3 The Role of International Jurisprudence

Under customary law a breach of LOAC involves two levels of responsibility: on the one hand, the state to which the violation is attributable is responsible and, accordingly, it is liable to pay compensation; on the other, the state organ—or even a private person—who has committed the violation bears individual responsibility for it before competent domestic or international jurisdictions. In the first case, the law of international responsibility has developed along the path of the (civil) law of torts, while in the second individual responsibility has been tested against the criteria of criminal law. Therefore, the jurisprudence on military necessity as a permissive condition will be considered separately for these two categories of responsibility.

3.3.1 State Responsibility

The basic rule concerning international responsibility for violations of LOAC is codified by Article 3 of the Hague Convention IV of 1907: 'A belligerent party which violates the provisions of the said Regulations [respecting the laws and customs of war on land, annexed to the Convention] 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' [emphasis added].

An article common to the 1949 Geneva Conventions (Art. 51 of Convention I, Art. 52 of Convention II, Art. 131 of Convention III, Art. 148 of Convention IV) provides

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[47] See United Nations Environment Programme and United Nations Centre for Human Settlements (Habitat) *The Kosovo Conflict* (*Consequences for the Environment* (1999), pp. 28–71.

[48] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, para 15.

that 'No High Contracting 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.' (The preceding articles of the four Conventions list the grave breaches of the Conventions that the contracting states undertake to prevent and to repress.) These provisions are meant to prevent a victor state from eluding any financial liability arising from grave violations of the Conventions by its armed forces.[49] Subsequently, in 1977, Additional Protocol I went back to the 1907 language stating in Article 91: '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' [emphasis added].

In fact, issues of international responsibility for violations of LOAC seldom arise in judicial decisions, mainly because in peace treaties states are used to mutually exonerate themselves from liability to make reparation with respect to this kind of responsibility. For this reason, the awards of the Eritrea–Ethiopia Claims Commission (EECC) on claims resulting from violations of international humanitarian law by both states during the 1998–2000 armed conflict are particularly relevant to our topic.[50]

The EECC has dealt with military necessity mainly in connection with the protection of civilians and of private property. In applying Article 23(g) of the Hague Regulations and Article 53 of Geneva Convention (IV), the Commission has given a negative definition of military necessity: 'The Commission does not agree that denial of potential future use of properties like these [buildings in a town], which are not directly usable for military operations as are, for example, bridges or railways, could ever be justified under Article 53.'[51] *A contrario*, an

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[49] See Pictet 1952, p. 420; Kalshoven 1991, pp. 840–843.

[50] The EECC was established 'to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of International Humanitarian Law, including the 1949 Geneva Conventions, or other violations of international law.' See the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Algiers 12 December 2000, Annex to the letters dated 12 December 2000 from the Permanent Representative of Algeria to the United Nations addressed to the Secretary-General and the President of the Security Council, A/55/686-S/2000/1183 of 13 December 2000.

[51] Award, Central Front—Eritrea's Claims 2, 4, 6, 7, 8 & 22 (28 April 2004) paras 86–88 at para 88. The Commission has also applied Art. 23(g) of the Hague Regulations in connection with Art. 33 of Geneva Convention (IV) prohibiting pillage and reprisals against protected persons' property, and Art. 38 of the same Convention establishing that, in principle, the situation of protected persons, both in occupied territory and in the territory of a belligerent, shall continue to be regulated by the provisions governing aliens in time of peace: Partial Award, Civilians Claims—Eritrea's Claims 15, 16, 23 and 37–32 (17 December 2004) para 126. The awards of the Eritrea Ethiopia Claims Commission are available on the website of the Permanent Court of Arbitration, http://www.pca-cpa.org/. See Sanna 2009, pp. 307–339.

imperative/absolute military necessity would allow destruction of any enemy property 'directly usable' for military purposes (like for example bridges or railways). But it appears that in most of their arguments before the EECC neither Eritrea nor Ethiopia have seriously attempted to contend that destruction of enemy property by their troops was justified by military necessity.[52] In other instances, they failed to prove that some measures taken with regard to civilians met the standards set by international humanitarian law.[53] As a result, the EECC did not analyse in depth the concept and character of military necessity as a permissive condition.

In the EECC awards concerning the conduct of hostilities and the use of weapons, the reference to military necessity is sometimes implied. For example, the Commission held that the placement of landmines, as a defensive measure in front of fixed positions, is permissible under customary international law provided that belligerents take 'reasonable precautions,' such as fences or warning signs, to protect civilians. However,

> When troops are compelled to quit their defensive positions by force of arms, as occurred then, it is understandable that *they may be unable* to remove or otherwise neutralize their mine fields. On the contrary, *they may depend* on those mine fields to slow their attackers or to channel their attacks sufficiently to allow defense and escape [emphasis added].[54]

This reasoning clearly expresses the twofold essence of military necessity: a permissive condition (*they may be unable* …) but also a criterion to regulate the use of legitimate means and methods of warfare (*they may depend* …).

Where the Eritrea–Ethiopia Claims Commission reached some objectionable conclusions is in the interpretation of the expression 'definite military advantage.' Particularly questionable are the statements that the term 'military advantage' can only properly be understood '*in the context of the military operations between the Parties taken as a whole*, not simply in the context of a specific attack'; that

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[52] For example, holding Ethiopia liable the destruction of some administrative headquarters and a hotel in the town of Tserona, the EECC observed that 'Ethiopia *does not contend* that such destruction was lawful because it was rendered absolutely necessary by military operations.' See Partial Award, Central Front—Eritrea's Claims 2, 4, 6, 7, 8 and 22 (28 April 2004) para 63. In the parallel Award on the Ethiopian claim regarding the central front, the EECC held the extensive destruction of structures within the town of Zalambessa by Eritrean forces was unlawful, since 'Eritrea has *neither alleged* nor proved such necessity.' See Partial Award, Central Front—Ethiopia's Claim 2 (28 April 2004) para 73(4) [emphasis added], and Gioia 2009, pp. 351–364.

[53] 'Taking into account the *high standard for forcible internment* indicated by Article 42 of Geneva Convention IV, the Commission believes that it was incumbent upon Eritrea to show some substantial basis for abruptly seizing and holding several thousand Ethiopians in detention, particularly as they were detained under harsh conditions. Eritrea *failed to show* that its mass detentions of Ethiopians during and after May 2000 satisfied the requirements of Article 42 of Geneva Convention IV as being "absolutely necessary" for its security.' See Partial Award, Civilians Claims—Ethiopia's Claim 5 (17 December 2004) para 104 [emphasis added].

[54] Partial Award, Central Front—Ethiopia's Claim 2 (28 April 2004) paras 50 and 95 [emphasis added].

'a definite military advantage must be considered *in the context of its relation to the armed conflict as a whole* at the time of the attack'; and even that 'there can be few military advantages more evident than *effective pressure to end an armed conflict*.'[55] The declarations regarding this notion made by Western countries at the signature or ratification of Additional Protocol I of 1977 refer to 'the advantage anticipated from *the attack as a whole* not only from isolated or specific parts of the attack.'[56] There is a self-evident difference between an 'attack as a whole' and 'military operations as a whole,' let alone 'armed conflict as a whole.' The EECC interpretation of the expression 'definite military advantage' endorses a permissive standard in the use of force by belligerents which corresponds to a rather dated concept of military necessity.[57]

In its *Jus ad Bellum* award of 19 December 2005, the EECC found Eritrea responsible of a violation of the prohibition of the use of force *ex* Article 2(4) of the UN Charter.[58] Accordingly, in its final award of 17 August 2009 on Ethiopia's damages claims, the EECC granted compensation—additional to that awarded for *jus in bello* violations—for several governmental, civic and non-governmental losses caused by legitimate acts of warfare, as well as for reconstruction and assistance.[59] Among those are US$ 1,500,000 for deaths and injuries caused by landmines, the use of which had been found lawful by the EECC, also admitting that in case of necessity a belligerent is exempted from removing or neutralizing the mine fields.[60] In other words, damages inflicted by a belligerent which resorted to armed force unlawfully, even if they are justified (possibly on the basis of military necessity) under *jus in bello*, nevertheless give way to compensation when they are directly linked to the violation of *jus ad bellum*. This innovative ruling should be interpreted in conformity with the separation between the law of armed conflict and the legality of the use of force, according to which belligerents must equally respect the requirements of LOAC and those of self-defence. For this reason, although damages caused by (lawful) belligerent acts will not give rise to

[55] Partial Award, Western Front, Aerial Bombardment and related claims—Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 and 26 (19 December 2005) para 113 [emphasis added].

[56] See Henckaerts and Doswald Beck 2005, vol. I, p. 49 [emphasis added]. Declarations made by NATO member states are available on the ICRC website http://www.icrc.orgIihl.nsf/Pays?ReadForm. See also Dinstein 2010, pp. 92–95.

[57] See Vierucci 2006, pp. 704–706, and Venturini 2009, p. 301. If military advantage should be understood as any benefit in the strive for victory, then it would be hard to see how any attack could be disproportionate (see Sloane 2009, pp. 75–76).

[58] EECC, Partial Award, *Jus ad Bellum*, Ethiopia's Claims 1–8 (19 December 2005) IV.B.1. See Weeramantry 2009, pp. 227–242.

[59] EECC, Final Award, Ethiopia's Damages Claims (17 August 2009) XII.B.1–17.

[60] The Commission held that 'deaths and injuries caused by landmines justify compensation, if they resulted from mines that were laid in the areas and during the periods for which Eritrea bears *jus ad bellum* liability. This includes deaths and injuries resulting from detonations occurring after the liability periods, and to casualties resulting from mines laid by either Party' (ibid. para 391).

liability under *jus in bello*, they may be included in the amount of compensation due for the unlawful use of force.

Although not pertaining to inter-state disputes, two additional pronouncements are worth mentioning in relation to military necessity and State Responsibility: the ICJ *Wall Opinion* of 9 July 2004[61] and the judgments of the Israeli Supreme Court of 30 June 2004 and of 15 September 2005 on the legality of the erection of the barrier in the occupied territories.[62]

The ICJ (which considered the route of the wall built in the occupied territory) first examined the issue from the point of view of those international humanitarian law provisions 'enabling account to be taken of military exigencies [i.e., military necessity] in certain circumstances.' It observed that the clause of 'imperative military reasons' contained in Article 49(2) of Geneva Convention (IV) does not apply to the prohibition of transfer of the occupier's population into an occupied territory, laid down by Article 49(6); and, with reference to Article 53, it stated that 'on the material before it' it was not possible to justify on the basis of the 'absolute necessity of military operations' the destructions of Palestinian property carried out during the building of the Wall.[63] Then the ICJ turned to state of necessity 'as recognized in customary international law' (the conditions of which are described in the terms used by Article 25 of the ILC Draft Articles) declaring that it was 'not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.'[64] Therefore, following the *Wall Opinion*, an act not justified by military necessity could still be permitted under a state of necessity as expressed by Article 25 of ILC Draft Articles. This method, which firstly applies international humanitarian law as *lex specialis* and subsequently goes back to *lex generalis* for further evaluation, tends to blur the traditional separation between *jus in bello* and *jus ad bellum* and it has been criticised for this reason.[65] Indeed, if a violation of LOAC could be justified by an 'essential interest' of the state, the whole *jus ad bellum* would loose its purpose and the old doctrine of *Kriegsraison* would revive in disguise.

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[61] Supra n 3. For a general comment see Doswald-Beck 1997, pp. 35–55.

[62] *Beit Sourik Village* v *The Government of Israel*, HCJ 2056/04 and *Mara'abe* v *The Prime Minister of Israel*, HCJ 7957/04. English translations are available at elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf; and: elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf. A thorough comparison between the ICJ Opinion and the Israeli Supreme Court's case law is offered by Feinstein and Weiner 2005, pp. 309–467. See also Watson 2005, pp. 6–26.

[63] Supra n 3, para 135. The material to which the ICJ refers is essentially the Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (A/ES-10/248 of 24 November 2003), which does not discuss the issue of military necessity. Some commentators argue that the ICJ should have analysed this aspect more in depth: see Kretzmer 2005, pp. 88–102, and O'Keefe 2004, p. 134.

[64] Supra n 3, para 140.

[65] See Sassòli 2007, pp. 251–252 and Sloane 2009, pp. 88–89. See also David 1997, p. 31 and Doswald-Beck 1997, p. 53.

The Israeli Supreme Court, on its side, relied essentially on LOAC, although the judgment of 2005 gave deference to the ICJ Opinion assuming that international conventions on human rights do apply in the occupied area.[66] The Court concluded that the construction of the 'separation fence' is motivated by security concerns for the prevention of terrorist attacks against Israeli population centres: therefore, it is permitted by LOAC, provided that compensation is given for the use of land and the needs of the local population are taken into account.[67] The Court, however, distinguished between the authority to erect the 'fence' and its route. Having regard to the latter aspect, it recognized proportionality as a standard for adjusting military necessity through three subtests that grant its specific content:

> The first subtest is that the objective must be related to the means. The means that the administrative body uses must be constructed to achieve the precise objective which the administrative body is trying to achieve. The means used by the administrative body must rationally lead to the realization of the objective. This is the 'appropriate means' or 'rational means' test. According to the second subtest, the means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means which can be used to achieve the objective, the least injurious means must be used. This is the 'least injurious means' test. The third test requires that the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means. That is the "proportionate means" test (or proportionality 'in the narrow sense').[68]

Eventually, the Court found that the injury to the Palestinian residents was not proportionate to the 'security–military' purpose of the 'fence,' because the balance between security needs and the needs of the local inhabitants was not proportionate; in other words, because it did not pass the 'least injurious means' test.[69]

The fact that the two Courts have reached different conclusions on the legality of the wall, despite their partial reference to common legal grounds, demonstrates the elusiveness of military necessity, when State Responsibility is concerned. The Israeli Supreme Court, however, had the merit of assessing military necessity by

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[66] *Mara'abe*, supra n 55, para 57.

[67] *Beit Sourik Village*, supra n 55, para 32. The legal foundation of the military commander's power to take possession of land, if this is necessary for the needs of the army in an area under belligerent occupation, was found in Art. 52 of the Hague Convention of 1907, and in Art. 53 of the Geneva Convention (IV). Quite incongruously, the Court also referred to Art. 23(g) of the Hague Convention, which on the contrary applies to the conduct of hostilities. In assessing security–military aspects, special weight was assigned to the government decisions as well as to the opinion of the Commander of Israel Defense Forces in the Judea and Samaria Area, who is responsible for security (*Beit Sourik Village*, para 28; *Mara'abe*, para 35). A number of commentators contend that the Court's interpretation of military necessity is too extensive. See Pertile 2005, p. 706; Pinzauti 2005, p. 454; Orakhelashvili 2006, p. 136.

[68] *Beit Sourik Village*, para 41.

[69] *Beit Sourik Village*, paras 84–85; *Mara'abe*, para 114. See Gross 2005, p. 581.

means of proportionality, the same principle which protects human rights during states of emergency.[70] This demonstrates that judicial review of decisions based on military necessity may be carried out by applying the common standard used to assess the legitimacy of derogation from human rights obligations in situations of public emergency.

3.3.2 Individual Criminal Responsibility

Individual criminal responsibility for LOAC violations is firmly established both in international law and domestic legal systems. In comparison, State Responsibility for the same violations is far less developed in international practice. International criminal law has greatly progressed during the second half of the past century, and military necessity has been invoked as a criminal defence before both domestic and international criminal tribunals, the jurisprudence of which is particularly relevant for the purpose of the present contribution. Indeed, most judicial decisions regarding military necessity concern individual criminal responsibility, instead of State Responsibility.

Article 6(b) of the Nuremberg Statute included among war crimes 'plunder of public and private property, wanton destruction of cities, towns or villages, or devastation *not justified by military necessity*' [emphasis added]. Both the International Military Tribunal and the other war crimes tribunals rejected the defence of necessity in cases involving summary execution of prisoners of war,[71] murder or deportation of civilians,[72] the compulsory recruitment of labour from occupied territory, or the seizure of property or goods beyond that which is necessary for the use of the army of occupation.[73] In all these instances the tribunals declared that LOAC is specifically designed for hazardous and urgent situations, and that its rules may be disregarded for reasons of military necessity only if they expressly provide for derogation.[74]

In the *Hostages* case, however, the United States Military Tribunal at Nuremberg accepted the defence of military necessity raised by the German General Lothar Rendulić, who had engaged in 'scorched earth' tactics in the Norwegian province of Finmark, during the retreat of the army commanded by him in the

[70] The role of proportionality in the protection of rights during states of emergency is extensively analysed by Oraá 1992, pp. 140–170; Svensson-McCarthy 1998, pp. 126–145 and 568–623; Cameron 2000, pp. 23–35, 134–146, 359–374 and 415–430; Cannizzaro 2000, pp. 53–99.

[71] Trial of Gunther Thiele and Georg Steinert, *Law Reports of Trials of War Criminals*, London HMSO 1947–1949, Vol. III (1948) p. 59.

[72] Trial of Heinz Eck and Four Others (*The Peleus Trial*), ibid., Vol. I (1947); Trial of Hans Albin Rauter, ibid., Vol. XIV (1949) p. 106.

[73] Trial of Wilhelm von Leeb and Thirteen Others (*The German High Command Trial*), ibid., Vol. XII (1949) p. 93.

[74] Trial of Alfried Krupp and Eleven Others (*The Krupp Trial*), ibid., Vol. X (1949) pp. 138–139.

Second World War. After finding that 'The destructions of public and private property by retreating military forces which would give aid and comfort to the enemy, may constitute a situation coming within the exceptions contained in Article 23(g)' [of the Hague Regulations of 1907], the Tribunal held:

> The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered with his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision to carry out the 'scorched earth' policy in Finnmark as a *precautionary* measure against an attack by superior forces. It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made holding that his decisions were justified based on information in his hands at that time[75] [emphasis added].

Therefore, in cases concerning individual criminal responsibility, attention shifts from objective standards (such as the proportionality test applied by the Israeli Supreme Court) to subjective criteria ('the conditions as they appeared to the defendant at the time').

Today, the main texts of reference on individual criminal responsibility for violations of LOAC are the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Rome Statute of the International Criminal Court (ICC).

Articles 2(d) and 3(b) ICTY, respectively, criminalize the 'extensive destruction and appropriation of property, *not justified by military necessity* and carried out unlawfully and wantonly'; and 'wanton destruction of cities, towns or villages, or devastation *not justified by military necessity*' [emphasis added]. Therefore, military necessity may exempt combatants from responsibility for grave breaches of the Geneva Conventions of 1949 or for violations of the laws or customs of war. The ICTY jurisprudence on these provisions is quite abundant.

In the *Blaškić* case, the Trial Chamber quite surprisingly held that 'Targeting civilians is an offence when not justified by military necessity.'[76] In the *Kordić*

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[75] Trial of Wilhelm List and Others (*The Hostages Trial*) ibid., Vol. VIII (1949), p. 69. Rendulić, however, as well as List and other defendants, was found guilty on other counts, among which the murder of hundreds of thousands of civilians. Indeed, the Tribunal observed, 'Articles 46, 47 and 50 of the Hague Regulations of 1907 make no such exceptions to its enforcement. The rights of the innocent population therein set forth must be respected even if military necessity or expediency decree otherwise' (ibid., pp. 66–67). See Dunbar 1952, pp. 451–452; Bannelier 2007, pp. 320–321. Similarly, in 1949, a British Military Tribunal in Hamburg sentenced Field Marshal Erich von Manstein for mass deportation of the civilian population while acquitting him of devastation of property (see Dunbar 1952, pp. 449–450; Bannelier 2007, p. 317).

[76] *The Prosecutor* v *Thiomir Blaškić*, case No. IT-95-14-T (3 March 2000) para 180. See Dörmann 2003, p. 132; Maison 2007, p. 328.

judgment, the Trial Chamber repeated this unfortunate statement: 'prohibited attacks are those launched deliberately against *civilians* or civilian objects in the course of an armed conflict *and are not justified* by military necessity' [emphasis added].[77]

In both cases, the Appeals Chamber providentially corrected the statements on the targeting of civilians. The *Blaškić* appeals judgement declared that 'there is an absolute prohibition on the targeting of civilians in customary international law.'[78] In *Kordić* the Appeals Chamber went further, clarifying that 'the prohibition against attacking civilians *and civilian objects* may not be derogated from because of military necessity. [emphasis added].'[79]

Dealing with the damage to assets and the methods of destruction, the *Blaškić* trial judgment established that 'To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful and wanton. The notion of "extensive" is evaluated according to the facts of the case—a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count.'[80] The Trial Chamber paid particular attention to the proportionality aspect: 'In the event that there had been [the 16 April 1993 attack on Vitez and Stari Vitez], the devastation visited upon the town was *out of all proportion* with military necessity'[81] [emphasis added]. However, the Appeals Chamber reversed the Trial Chamber's findings that Blaškić had ordered the looting and burning of civilian property, for lack of sufficient evidence to prove, under the proper legal standard, his awareness of a substantial likelihood that those crimes would be committed in the execution of his orders.[82]

In respect to several charges of wanton destruction of civilian objects—since wanton destruction not justified by military necessity cannot be presumed[83]—the Appeals Chamber on *Kordić* considered that there was insufficient evidence to determine whether the destruction of the civilian objects was militarily justifiable, and it did not further elaborate on the notion. But an important passage of the

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[77] *The Prosecutor* v *Dario Kordić and Mario Čerkez* case No. IT-95-14/2-T (26 February 2001) para 328.

[78] *The Prosecutor* v *Thiomir Blaškić* case No. IT-95-14-A (29 July 2004) para 109.

[79] *The Prosecutor* v *Dario Kordić and Mario Čerkez* case No. IT-95-14/2-A (17 December 2004) para 54 and IT-95-14/2-A Corrigendum to Judgment of 17 December 2004 (26 January 2005). See also *The Prosecutor* v *Stanislav Galić* case No. IT-98-29-A (30 November 2006) para 130. See Jia 2002, p. 135; Maison 2007, pp. 329–330, and Ailincai 2007, p. 338.

[80] IT-95-14-T, supra n 76, para 157.

[81] Ibid., para 510.

[82] IT-95-14-A, supra n 78, XIII—Disposition.

[83] IT-95-14/2-A supra n 79, para 495.

appeals judgement (upholding the Trial Chamber's decision on the issue) pointed at *discriminatory* attacks as attacks which could not be justified by military necessity.[84] Moreover, the Appeals Chamber upheld most of the Trial Chamber's findings on confinement of civilians, which, even if absolutely necessary for the requirements of state security, may never be taken on a collective basis and must respect the fundamental rights of the persons.[85]

In the recent case concerning the bombardment of the Old Town of Dubrovnik, the ICTY extensively dealt with the issue of destruction of cultural property. Given that the entire Old Town of Dubrovnik had been included in the World Heritage List since 1979, the Trial Chamber concluded that each structure or building in the Old Town fell within the scope of Article 3(d) of the ICTY Statute.[86] Coming to military necessity, the trial judgement held that:

> military necessity may be usefully defined for present purposes with reference to the widely acknowledged definition of military objectives in Article 52 of Additional Protocol I of 1977 as 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[87]

The Appeals Chamber subsequently confirmed the Trial Chamber's finding that, while the requirement that the cultural property must not have been used for military purposes may be an element indicating that an object does not make an effective contribution to military action in the sense of Article 52(2) of Additional Protocol I of 1977, 'it does not cover *the other aspect of military necessity, namely the definite military advantage* that must be offered by the destruction of a military objective'[88] [emphasis added].

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[84] Ibid., para 485: 'Based on the same evidence discussed in the section on unlawful attack on civilian objects, the Appeals Chamber is of the view that a reasonable trier of fact could have found that damage to only Muslim houses was of such nature that it could not have been caused by the fighting and was thus not justified by military necessity and that the fact that soldiers were carrying around petrol canisters shows that it was deliberate.'

[85] IT-95-14/2-T supra n 77, paras 282 and 284–285; IT-95-14/2-A supra n 79, XI Disposition.

[86] Art. 3 of the ICTY Statute: 'Violations of the laws or customs of war' provides that: 'The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.'

[87] *The Prosecutor* v *Pavle Strugar* case No. IT-01-42-T (31 January 2005) para 295. Whether a military advantage can be achieved must be decided, the Trial Chamber held on the basis of previous jurisprudence, from the perspective of the 'person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action' (ibid.).

[88] *The Prosecutor* v *Pavle Strugar* case No. IT-01-42-A (17 July 2008) para 330.

Thus the ICTY endorsed the concept expressed by Article 6 of the Second Protocol of 1999 to the Hague Convention for the protection of cultural property in armed conflict, and the related remarks may be reiterated accordingly.[89]

The Rome Statute of the International Criminal Court (ICC) refers to military necessity (or to 'the necessities of the conflict') as a circumstance justifying destruction or appropriation of property that would otherwise be war crimes both in international and non-international armed conflicts.[90] Moreover, the displacement of the civilian population for 'imperative military reasons' would not be a war crime in armed conflicts not of an international character.[91] In order to interpret these concepts, the ICC will have to rely on the applicable law, i.e., the Statute, the Elements of Crimes, the applicable treaties and the principles and rules of customary international law.[92] It is regrettable, but not surprising, that the Elements of Crimes do not contain definitions of either military necessity or similar expressions, except for the obvious statement that private or personal purposes may not substantiate military necessity.[93]

3.3.3 Necessity and Duress as Criminal Defences

In the trials of war criminals, after the Second World War, defendants often claimed that they engaged in unlawful conduct not for the needs of military operations, but because they were coerced in doing so. When entered in this sense, the plea of necessity—even if conceptually distinct—comes nearer to the plea of superior orders (the discussion of which falls outside the scope of the present contribution). In the *High Command* case, the military tribunal held that:

> The defendants in this case who received obviously criminal orders were placed in a difficult position but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defence. To establish the defence of *coercion or necessity* in the face of danger there must be a showing of circumstances such that a *reasonable man* would apprehend that he was in such imminent physical peril as to *deprive him of freedom to choose the right* and refrain from the wrong. No such situation has been shown in this case' [emphasis added].[94]

[89] Supra Sect. 2.2.3 and n 36.

[90] Rome Statute of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9 of 17 July 1998 as corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002) entered into force on 1 July 2002. See Arts. 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(e)(xii).

[91] Ibid., Art. 8(2)(e)(viii).

[92] Ibid., Art. 21.

[93] Elements of Crimes, adopted on 9 September 2002 by the Assembly of States Parties of the International Criminal Court (ICC-ASP/1/3, part II-B) pp. 28 (n. 47) and 39 (n. 61). See Dörmann 2003, pp. 81, 249, 472 and 485.

[94] Supra n 73 at p. 72. See Ambos 2002, pp. 1005–1008.

Moreover, in the *Einsatzgruppen* case, the tribunal recognized that 'there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable.'[95]

Despite the divergence between the common law and civil law conceptions, it is indeed accepted that a distinction exists between defences of coercion and necessity, the former being properly referred to as duress. The United Nations War Crimes Commission aptly recapitulated the distinction among the pleas of superior orders, duress and military necessity, as follows:

> (a) The argument that the accused acted under orders, which he had the duty to obey, when he committed the acts alleged against him. Sometimes this plea is augmented by the claim that certain consequences would ultimately have followed from disobedience, such as the execution of the person refusing to obey and/or the taking of reprisal action against his family. This may be called the *plea of superior orders.*
> (b) The argument that, in committing the acts complained of, the accused acted under an immediate threat to himself. This may be called the *plea of duress.*
> (c) The argument that a military action carried out by a group of military personnel was justified by the general circumstances of battle. This may be called the *plea of military necessity.*[96]
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> …
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> The general view seems therefore to be that duress may prove a defence if (a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; (c) the remedy was not disproportionate to the evil […] Finally, if the facts do not warrant the successful pleading of duress as a defence, they may constitute an argument in mitigation of punishment.[97]

In common law systems duress is regarded as an excuse defence, while necessity is deemed to be a justification defence.[98] Consequently, an accused may plead that he/she acted under duress when necessity does not constitute a defence, and vice versa.[99] Anglo-American jurisdictions, however, do not allow an actor to

[95] Trial of Otto Ohlendorf et al. (*The Einsatzgruppen Trial*), Law Reports of Trials of War Criminals 1948, p. 480.

[96] *Law Reports of Trials of War Criminals*, London HMSO 1947–1949, Vol. XV, Digest of Laws and Cases (1949) p. 156. See David 1978–1979, pp. 65–84.

[97] *Law Reports of Trials of War Criminals*, Vol. XV, supra n 96, p. 174.

[98] Justification defences focus on the act and not the actor: an actor has a defence of justification if, though he/she engages in conduct that otherwise would constitute an offense, that conduct is approved in the context of a choice of the lesser evil. Excuse defences focus on the actor and not the act: they exculpate an actor who engages in a prohibited conduct because he does so without possessing any of the motivations that inspire the prohibition. Admittedly, the distinction tends to blur in contemporary case law. See Westen and Mangiafico 2003, p. 864; Milhizer 2004, p. 725.

[99] See Green 2008, p. 336.

kill many innocent victims in order to protect himself or herself from an aggressor's coercive order to kill them all or to be killed, while the civil law systems in principle admit duress as a complete defence to all crimes.[100]

During the last two decades, the statutes and jurisprudence of the international criminal tribunals have greatly contributed to the development of international criminal law.[101] In the *Erdemović* case, the majority of the ICTY Appeals Chamber accepted the Prosecutor's argument that duress cannot afford a complete defence to a charge of crimes against humanity and war crimes involving the killing of innocent human beings.[102] The reasons behind this view—in the absence of any consistency among of the various legal systems of the world—rest on a 'normative' approach to the Tribunal's mandate for the development of international criminal law.[103] The Appeals Chamber, however, accepted duress as circumstance mitigating the punishment of the culprit.[104] This approach was strongly disputed by the two minority judges, who argued the absence of 'any satisfying and reasoned principle governing the exclusion of duress in the case of very serious crimes including murder' and that 'Law is based on what society can reasonably expect of its members. It should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behaviour falling below those standards.'[105]

Therefore, the precise nature of duress is far from being established in international criminal law. Sooner or later, the question will arise before the International Criminal Court. Following Article 31(1)(d) included in Part 3 of the Rome Statute dealing with general principles of international criminal law,[106] a person shall not be criminally responsible if:

> … The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to

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[100] See Westen and Mangiafico 2003, pp. 855–856.

[101] See Bantekas and Nash 2003, van Sliedregt 2003, Werle 2009, Cassese 2008.

[102] *The Prosecutor* v *Drazen Erdemović* case No. IT-96-22-A (7 October 1997) para 19. See Swaak-Goldman 1998, pp. 282–287; van Sliedregt 2003, pp. 286–288.

[103] *The Prosecutor* v *Drazen Erdemović* case No. IT-96-22-A (7 October 1997), Joint Separate Opinion of Judge Mcdonald and Judge Vohrah, paras 67, 88. See Ambos 2002, pp. 1010–1014.

[104] Ibid., para 82.

[105] *The Prosecutor* v *Drazen Erdemović*, supra n 102, Separate and Dissenting Opinion of Judge Stephen, paras 29–30, 67–68; Separate and Dissenting Opinion of Judge Cassese, para 47. See Cassese 2008, pp. 287–289.

[106] The inclusion of duress/necessity among the grounds for excluding criminal responsibility has been criticized by some authors as being contrary to the established principles of international humanitarian law, and even as instigating the commission of war crimes and crimes against humanity. See Delooz and Galand 2001, pp. 533–538. In a different perspective, Blum 2010, pp. 14, 67–69, argues that a kind of 'humanitarian necessity,' in contradistinction to military necessity, should be permitted to operate as a defence of justification in international criminal law (as well as in LOAC) under certain, highly stringent, conditions.

> cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control.

While it is clear that this provision covers threats of any kind, whether man-made or natural in origin, the relationship between necessity and duress is far less obvious and leaves a great deal of interpretation, as the negotiating history of Article 31 demonstrates.[107] In any case, duress must be kept distinct from military necessity. Indeed, while the former affects the individual irrespective of his/her military function, by prompting a reaction to an immediate threat, the latter relates to the situation in the battlefield, where decisions must be taken based on a responsible assessment of the operational needs; therefore, it must be assessed by a commanding officer or by a person exercising a comparable authority, as far a possible on objective grounds, during the conduct of military operations.[108]

3.4 Military Necessity in Non-International Armed Conflict

The concept of military necessity, either as a restraining principle of LOAC or as a circumstance allowing a belligerent to disregard its rules, developed traditionally along the path of the law of international armed conflict. In conflicts not having an international character the non-state party—being in a condition of legal inferiority compared to the governmental authorities—could not benefit from the same rights, including those derived from military necessity.

While presently a large part of LOAC rules also apply to inter-state conflicts,[109] in the law of non-international armed conflict military necessity is hidden behind different language. Several provisions of Protocol II of 1977, additional to the Geneva Conventions of 1949,[110] explicitly take into account the needs of military operations, e.g., in setting the obligations of those responsible for the internment or detention of persons whose liberty has been restricted; the rights of wounded, sick and shipwrecked to receive medical care and attention as required by their condition; and the duty of all parties to search for, to collect and to protect the wounded, sick and shipwrecked.[111] The most significant wording is contained in Article 17(1), which prohibits the forced displacement of the civilian population 'unless the security of the civilians involved or *imperative military reasons* so

[107] See Ambos 2002, pp. 1036–1037; Bantekas and Nash 2003, pp. 135–136, van Sliedregt 2003, pp. 268, Werle 2009, pp. 207–209; and Eser 2008, pp. 883–884, 886–887.

[108] See van Sliedregt 2003, pp. 295–298.

[109] Supra Sect. 2.1 and n 6.

[110] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[111] Protocol II, Arts. 5(2) ('within the limits of their capabilities'), 7(2) ('to the fullest extent practicable') and 8 ('whenever circumstances permit').

demand.' [emphasis added]. Accordingly, under Article 8(2)(e)(viii) of the Rome Statute, the displacement of the civilian population for 'imperative military reasons' would not be a war crime in armed conflicts not of an international character. Moreover, Article 8(2)(e)(xii) of the same Statute establishes that destroying or seizing the property of an adversary are serious violations of the laws and customs applicable in non-international armed conflicts '*unless* such destruction or seizure be imperatively demanded by the *necessities of the conflict*' [emphasis added].

In the preceding examples, military necessity operates as a permissive condition on the same grounds as in the law of international armed conflict.[112] More intriguing is to detect its restraining function, which should limit the amount of permissible military action in armed conflicts not having an international character. It may be argued that the practical importance of this function could even increase in that type of conflict. Since generally the governmental armed forces are in a position of superiority with respect to armed groups and to individuals directly or indirectly participating in hostilities, the former should be able to use less harmful methods and means of warfare.[113] However, in conflicts where military asymmetry is associated with legal asymmetry—since one party to the conflict is a non-state entity—the perception of what is necessary to defeat the adversary tends to expand on both sides. Therefore, the distinction between political and military objectives and necessities becomes twisted, mainly at the expense of the proportionality principle.[114] Unlike the rules applicable to international armed conflict, those binding states in non-international armed conflicts neither define the concept of military objective nor the notion of military advantage, which stem from military necessity and help in understanding the general principle. Therefore, great caution should be exercised when applying the principle of military necessity in the context of hostilities between a state and a non-state party. Further practice is needed to this regard, not only of states but also of armed movements and groups.

3.5 Concluding Remarks

The elusive nature of military necessity may be thoroughly appraised, but hardly clarified through the analysis of its different meanings. Legal scholars tend to privilege either the restraining or the permissive function of necessity in the law of armed conflict, but the connection between the limiting and the derogatory effects is so close that a clear-cut partition between them would be extremely difficult, and probably futile.

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[112] Supra Sect. 2.2.1.

[113] This view is propounded by the ICRC's *Interpretive Guidance*, supra n 15, pp. 80–81. It is, however, more convincing where reference is made to (asymmetric) international armed conflicts (see Sloane 2009, p. 105).

[114] See Geiss 2006, p. 769.

As far as the general principle of restraint is concerned, the main debate presently regards the definition of military objective and the requirement of definite military advantage. Actually, the restraining function of necessity becomes extremely important in these fields (such as the protection of the environment) where precise prohibitions do not exist in customary law, and the existing treaties are not binding for all states.

The permissive function of necessity in armed conflict mainly displays its effects with regard to obligations related to the protection of (public, private, cultural) property. What states commit themselves to fully respect in time of peace, they may need to spoil in time of war. This suggests that under the law of armed conflict those rights are not as essential as human life and integrity. In its permissive meaning, military necessity becomes particularly important in the conduct of hostilities since it may justify acts which formerly would have been qualified as legitimate reprisals, but which are forbidden by contemporary LOAC. For this reason, strict compliance with the condition of proportionality is essential.

During the last two decades, new impetus has been injected into the debate on military necessity by the considerable development of international jurisprudence. Here, different trends may be observed. As to individual criminal responsibility, it seems reasonable that the plea of duress may be accepted with more flexibility than that of military necessity (or of 'the necessities of the conflict'), which should only justify actions undertaken by a responsible actor after a wary evaluation of the situation in the battlefield.

As concerns State Responsibility, the most critical issue is represented by the relationship between military necessity and the use of force, i.e., the relationship between *jus in bello* and *jus ad bellum*. Might necessity justify under the law of peace acts that military necessity would not allow under the law of armed conflict? Although the ICJ's *Nuclear Weapons Opinion* and *Wall Opinion* seem to point in that direction, this reading would seriously hamper the observance of LOAC based on the principle of equality of belligerents, and it is clearly contrary to the wording and authoritative interpretation of Article 25 of the ILC Draft Articles. This is not to say that a state which resorted to armed force in contravention of international law does not bear responsibility for *that* violation. *Jus in bello* must always be applied equally by belligerents, but states must respect the requirements of self-defence in order to be regarded as acting lawfully under *jus ad bellum*. Compensation awarded for violation of the *jus ad bellum* does not prejudice the separation between the legality of the use of force and the law of armed conflict; on the contrary, it fosters compliance with international law by states. However, the legality of the use of force is (and must remain) irrelevant in the area of individual criminal responsibility. Those persons who are engaged (in whichever capacity) in an armed conflict are not concerned with its legality and therefore their behaviour must be judged on the basis of a single standard: that prescribed by LOAC.

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Chapter 4
State Responsibility, Necessity and Human Rights

Cedric Ryngaert

Abstract As far as the topic of 'necessity and human rights' is concerned, considerations informed by necessity mainly play a role as grounds for restricting or derogating from human rights on the basis of primary norms contained in international human rights treaties, rather than on the basis of the secondary necessity norm set out in Article 25 of the ILC Articles. The arguably exhaustive treatment of necessity-informed restrictions and derogations in those treaties largely precludes invocation of the general defence of necessity under the law of State Responsibility. Indeed, the drafters have already factored in necessity when drafting human rights treaties. In so doing, they have incorporated necessity into the law itself as a justification for limitations to human rights, thereby excluding reliance on a broader concept of necessity outside this framework. Beyond the human rights treaties, for that matter, States are very hesitant to invoke necessity as an excuse, as this would amount to admitting that their conduct was in fact unlawful (although excusable). Apart from that, 'human rights' may possibly qualify as an 'essential interest' excusing non-compliance with non-human rights related international law obligations, but it can be said that the notion of jus cogens may be a more potent tonic to set aside 'incompatible' lesser norms of international law.

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4.1 Introduction

The defence of necessity has acquired a rather bad name, as arguably it tends to undermine the rule of international law. As international legal norms are in themselves the outcome of a weighing of realist considerations, possibly imbued with a measure of idealism, it may seem doubtful whether there is a need for incorporating additional considerations of political expediency excusing,[1] or as the ILC Articles have it, 'precluding the wrongfulness' of transgressions of international law.[2] In this context, Philip Allott has used unusually stark language to lambast recourse to necessity, observing that 'the concept of state necessity is the most persistent and formidable enemy of a truly human society'.[3]

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[1] See for the reference to political exigencies and the need for compliance with international obligations not to become self-destructive: Permanent Court of Arbitration, *Russian Indemnity* case, *Russia* v *Turkey* (1912) XI RIAA 430.

[2] Compare Crawford and Olleson 2003, p. 469 (admitting that '[t]he possibilities of abuse are obvious', but nevertheless pointing out that 'in the ILC Articles [necessity is] narrowly confined, thereby implying that the Articles provide sufficient protection against abuse); also Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (hereinafter ILC Commentary). Text adopted by the International Law Commission at its 53rd session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10), Yearbook ILC, 2001, Vol. II, Part Two, Commentary (2), in fine, to Article 25, p. 80.

[3] Allott 1988, p. 17.

In the 1980 version of the necessity provision of the ILC Articles, indeed, the countervailing interests of the international community, such as human rights interests, were insufficiently accounted for. The interests to be taken into account in the balancing act between necessity and countervailing interests were those of *States*. This bilateral or contractual model of State Responsibility played down the countervailing interests of individuals, and thus appeared to widen the basis for excusing non-compliance with human rights on necessity grounds. Fortunately, the 2001 version of the ILC Article (Article 25) now unambiguously factors in the essential interests of the international community. Undoubtedly, as *erga omnes* human rights obligations qualify as such essential interests, this modification reduces the likelihood of successful recourse to necessity in order to excuse non-compliance with international human rights norms (Sect. 4.2).

In any event, state authority to invoke necessity over human rights compliance was already seriously circumscribed by primary obligations contained in international human rights treaties (Sect. 4.3). Those treaties set out a regime for emergency situations and necessity imperatives, a regime which allows for restriction of, and derogation from certain human rights obligations. The salient question addressed in this section is whether this regime should be considered as 'self-contained', in the sense of precluding recourse to the general necessity defence enshrined in Article 25 of the ILC Articles (at least with respect to the human rights obligations set out in the relevant treaties), or whether the said article can apply in the field of human rights regardless of specific conventional provisions already governing necessity. Also, this Section will inquire whether, and to what extent, the application of necessity in the limited field of human rights could feed into the interpretation of the general defence of necessity under Article 25 of the ILC Articles. To that effect, some decisions of human rights treaty-based bodies, the European Court of Human Rights in particular, and the role of the proportionality played in the relevant jurisprudence, will be scrutinized.

As the discussion in Sect. 4.3 makes clear, human rights are typically considered as essential interests that seriously circumscribe a narrow state-centered defence of necessity. It is often overlooked, however, that human rights can also *inform* the defence of necessity: under specific circumstances, it might well be *necessary* for states to refrain from complying with certain obligations in order to protect an overriding human rights interest. In Sect. 4.4, it will be examined how essential interests of the international community, such as human rights interests, can also play a role on the other side of the necessity equation.

It is noted at the outset that this contribution only addresses necessity in the framework of *State* responsibility, as opposed to individual criminal responsibility. Thus, the defence of necessity excusing violations of international criminal law by individuals, e.g., torture or crimes against humanity, will not be discussed. Such a discussion would be cast in criminal law rather than international law terms anyway, and fall outside the scope of this article, which looks primarily at State responsibility under the ILC Articles and international human rights treaties.

4.2 Invoking Necessity so as to Excuse Non-Compliance with International Human Rights Law: Human Rights as Essential Interests of the International Community Under Article 25 ILC Articles

As in the truly human society as we know it today, human rights play a prominent role, one may seriously question whether the defence of necessity can or should excuse non-compliance with state obligations under international human rights law. Admittedly, Article 25 of the ILC Articles has on its face a general scope; it does not distinguish between different substantive rules of international law. Yet in reality, the secondary norms set out in the Articles, including the defence of necessity, only *appear* to apply in an unmodulated manner across the whole spectrum of substantive norms. In fact, they should be construed in light of the character of the primary norms at stake.[4] Okowa, drawing on international court practice, has pointedly stated in this respect:

> '[I]t may be asked whether what amounts to a defence can be considered outside the framework of the relevant rule of substantive law. Given the objective character of international law, the content of the substantive rule and the values it seeks to protect will surely be relevant factors in deciding whether, on the facts of any particular case, a state was entitled to rely on one or more of the circumstances precluding wrongfulness. The fundamental nature of the values protected may also dictate that they cannot be sacrificed, whatever the circumstances confronting a state … [T]he practice of tribunals has been to contextualize defences and not to make general assumptions uninfluenced by the specific norm in question and the issues of principle which underpin it …'[5]

It is beyond doubt that human rights obligations, many of which have an *erga omnes* character, embody fundamental values of the international community. Therefore, a very high threshold for excusable behaviour in relation to transgressions of human rights obligations appears apt.[6] In any event, the text of the Articles already excludes the defence of necessity in relation to the international community's *most* fundamental values, embodied in peremptory norms of international law, or norms of *jus cogens*.[7] To the extent that certain human rights norms rise to this level, necessity can never be successfully invoked. Hence, it can be said that necessity can never excuse non-compliance with the *jus cogens*

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[4] See also in favor of modulation: Lowe 1999, p. 408 (describing the 'possibility of a rule [saying 'if special circumstances (CR: including necessity) exist, you may do *y*'] in relation to some substantive obligations, but not to others').

[5] Okowa 1999, p. 390.

[6] Compare Okowa 1999, p. 391 (discussing circumstances precluding wrongfulness in a generic manner, and giving as an example that 'human rights obligations … cannot be suspended even by way of counter-measures taken in response to a prior breach [or necessity, CR]').

[7] Article 26 of the ILC Articles provides: 'Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law'.

prohibition of torture, even in a ticking time-bomb scenario where only resort to torture can purportedly avert disaster.[8] This does not mean that such scenarios are never put forward to convince the public of the necessity of non-compliance with certain peremptory norms.

Successful reliance on necessity in relation to *other* international human rights norms which, while fundamental, do nevertheless not rise to the level of peremptory norms (these are arguably the bulk of human rights norms), is similarly circumscribed by the ILC Articles since 1999. While Roberto Ago's 1980 draft of the necessity article in the ILC Articles, then Article 33, still placed classic bilateralism and the narrowly defined interests of *States* center-stage, the post-1990 'international community'-minded mood in international legal circles, in combination with the appointment of James Crawford as ILC Rapporteur on State Responsibility, created momentum for the inclusion of community interests, such as human rights interests, in the final version of the Articles.[9] This has been denoted as the biggest change to the necessity article in the final version of the Articles.[10] Article 25 of the Articles now provides not only that necessity 'may not be invoked by a state as a ground for precluding wrongfulness of an act not in conformity with an international obligation of that state unless the act … does not seriously impair an essential interest of the state or states towards which the obligation exists', but also unless that act does not seriously impair the interests 'of the international community as a whole'. This further narrows the scope of the necessity defence, which can thus no longer be used to frustrate, to an unacceptable extent, international community interests, including the interests of humanity reflected in states' international human rights obligations.[11] These international community interests are reflected in the concept of *erga omnes* obligations, which the International Criminal Tribunal for the former Yugoslavia, in the *Furundzija* case, has usefully defined as 'obligations owed towards all the

[8] See on necessity and torture, albeit from the perspective of excusing individual criminal—as opposed to State—responsibility: Gaeta 2004, p. 785; Ohlin 2008, p. 289; Cohan 2007, p. 1587; Heller 2006, p. 779; Parry 2004, p. 145.

[9] The 'bilateral' or 'contractual' model of State responsibility embraced in the previous version of the ILC Articles has similarly been criticized on the grounds that it allows States to exculpate, on a bilateral basis, wrongdoing States, thereby 'imped[ing] the development of international towards a public order.' Cf., Lowe 1999, p. 409 (instead preferring excuse to exculpation, depending on the circumstances).

[10] Heathcote 2007, p. 56.

[11] Cf., also ILC Commentary (17) to Article 25, p. 84, which states that the essential interest relied on by the acting State invoking necessity 'must outweigh all other considerations … on a reasonable assessment of the competing interests, whether these are *individual or collective*' (emphasis added). It is not disputed that human rights reflect individual or collective interests. As such, they should be allowed to enter into competition with the necessity-informed interest of the acting State. See on the definition of the 'international community as a whole' also ILC Commentary (18) to Article 25, p. 84 (suggesting to use this term instead of the term 'international community of States as a whole', on the grounds that the latter term unduly stresses 'the paramountcy that States have over the making of international law').

other members of the international community […] the violation of such obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member'.[12]

Expanding the nature of interests to be taken into account so as to counterbalance the imperative of 'necessary' non-compliance with international obligations is a logical correction to the expansion of the necessity defence. The application of this defence has evolved from threats to the existence of the state to threats to rather vaguely defined 'essential interests'. To be fair, those 'essential interests' might also include interests relating to the human rights or human dignity of the civilian population of the state,[13] and even of the international community itself.[14] Yet it remains no less true that a vague notion of 'essential interests' risks becoming a slippery slope towards excusing *any* instance of non-compliance with international obligations, including fundamental human rights obligations. A strong counterweight, in the form of a second requirement negatively conditioning reliance on the necessity defence, is therefore appropriate: the requirement that *other* essential interests, including the international community's fundamental interests in defending human rights, not be encroached on. Evidently, the more fundamental or essential the latter interests in the case are, the less likely it will and should be that necessity is accepted as a legitimate defence. Given the fundamental social values underlying human rights, it appears therefore that a necessity defence can only in exceptional circumstances be successfully invoked, namely when the essential interests of the acting state are truly overwhelming and thereby trump any relevant human rights obligations.[15] One cannot fail to point out in this respect that such 'fundamental social values' are much more widely shared within the international community at large than the often peculiar national interests underlying a state's necessity defense, however essential and recognizable by other states these interests may be.

While, in extreme circumstances, necessity may possibly excuse non-compliance with certain human rights obligations, it appears evident that necessity can

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[12] ICTY, *Prosecutor* v *Furundzija* (10 December 1998), 38 ILM (1999) 317, para 151.

[13] ILC Commentary (14) to Article 25, p. 83 (citing the preservation of a State's people in term of public emergency, and ensuring the safety of a civilian population).

[14] ILC Commentary (15) to Article 25, p. 83 ('The extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, *as well as the international community as a whole*.') (emphasis added).

[15] Similar attention for important social values in the context of interest-balancing can be found in the international law of jurisdiction. Section 403 (2) of the US Restatement of Foreign Relations Law, which purportedly reflects customary international law, sets forth as criteria that determine the reasonableness of the exercise of jurisdiction, amongst others, '(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; … (e) the importance of the regulation to the international political, legal or economic system'. See on this interest-balancing based 'rule of reason': Ryngaert 2008, pp. 134–184.

never be invoked to excuse gross human rights violations. Although it is outside the scope of this publication to define what violations of human rights obligations are ‘gross’, or what obligations rise to the level of *erga omnes* obligations worthy of specific protection, it is apparent that some human rights are considered as more fundamental than others. This is confirmed by the conventional international human rights regime, which allows derogation from, and restrictions to only a limited number of rights. Be that as it may, as will be demonstrated in Sect. 4.2, this treaty-based approach in fact precludes wider reliance on Article 25 ILC Articles. This may make the discussion of a purported hierarchy of human rights obligations that can influence the balancing act mandated by Article 25 ILC Articles mainly of academic interest.

Returning for now to Article 25, in an interesting thought experiment, Boed demonstrated how the application of the necessity defence on the ‘international community’ approach eventually espoused by the ILC in 2001 can yield a result that might be quite different from the application of the defence on the previous, more bilateral, state-centred approach. Boed argued that the wrongfulness of a state’s border-closure to prevent large-scale influx of refugees, a measure which arguably runs afoul of the principle of non-refoulement as enunciated by Article 33 of the 1951 UN Refugee Convention (a human rights convention), can well be precluded under the latter approach (the approach that appeared dominant at the time of writing of the article in 2000), while not being excusable under the former.[16] Indeed, the balancing act pursuant to the bilateral approach merely accounts for the narrowly defined interests of *States*,[17] and underplays the more general interests of the international community in the protection of refugees. If the latter interests enter the equation, as they now do under Article 25 of the ILC Articles, the acting state’s ‘essential interest’ in closing its borders in order to ward off threats to the state’s stability, may well be trumped by the imperative of human dignity encapsulated by the criterion of interests of the international community.

It may be debatable whether the current version of the necessity article in the ILC Articles, with its emphasis on international community interests, truly reflects customary international law.[18] After all, as late as 1999, the majority of ILC members, let alone of states, were not in favor of changing the state-centred *status quo* as to the defence of necessity.[19] It possibly goes to the rapporteur’s credit that this dominant view within the ILC has changed. Whether it has changed states’ *opinio juris* is an entirely different matter. Yet it could well be that the

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[16] Boed 2000, pp. 40–43, submitting at pp. 20–25, drawing on Tomuschat amongst others, that the duty of non-refoulement applies at a State’s borders as well as within them.

[17] Former Article 33(1)(b) of the ILC Draft Articles on State Responsibility, *Report of the International Law Commission on the Work of its Thirty-Second Session*, UN Doc A/35/10 (1980), UN Doc A/CN.4/SER.A/1980/Add.1 (Part 2).

[18] It is even open to doubt whether the principle of necessity as such constitutes customary international law. See for a negative answer: Heathcote 2007, p. 89.

[19] Report of the International Law Commission on the Work of its 51st Session, UN GAOR 54th Sess., Supp. No. 10, para 49 (1999), para 388.

ILC's progressive codification has shaped new *opinio juris* on the matter. The international community's strong backlash against the alleged infringements of international law protections by the United States against the background of the war on terror, including the use of certain methods that could be qualified as torture, may provide evidence thereof.[20] On another reading this protest can of course be based on Article 26 of the ILC Articles, which excludes reliance on necessity in case of violations of norms of *jus cogens* (the prohibition of torture being an eminent example of such a norm).

4.3 The Role of 'Necessity' with Respect to Primary Obligations Contained in International Human Rights Treaties

In the previous section, it has been argued that necessity will only excuse non-compliance with international human rights law in exceptional circumstances, given the fundamental values which underlie human rights norms. This holds all the more true in case international human rights treaties themselves provide for built-in necessity considerations limiting the scope of human rights protection, which many of them indeed do. In accordance with Article 25 of the ILC Articles, the place given to necessity in the structure of the primary human rights norms may be said to exclude reliance on the general necessity defence enshrined in the Articles.

Article 25.2(a) of the ILC Articles provides that 'necessity may not be invoked by a state as a ground for precluding wrongfulness if … the international obligation in question excludes the possibility of invoking necessity'. Thus, if international human rights treaties exclude the possibility of invoking necessity, Article 25-based necessity cannot be invoked. *Prima facie*, human rights treaties *do not* exclude the invocation of necessity. Rather on the contrary: quite a number of provisions refer to necessity (emergency) as a ground for derogating from, or limiting human rights protection. For instance, Article 4 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 of the European Convention on Human Rights (ECHR), and Article 27 of the Inter-American Convention on Human Rights (IACHR) provide for the possibility of derogation

[20] Cf., Memorandum from the US Office of the Assistant Attorney General to Alberto R. Gonzales, Counsel to the President (1 August 2002) (stating that 'necessity and self-defense could justify interrogation methods needed to elicit information … and provide justifications that would eliminate any criminal liability'). It is noted, as argued below, that the United States has not relied on necessity to excuse non-compliance with relevant human rights law as a matter of *State* responsibility, however. Instead, it has mainly argued that its conduct remained within the bounds of international law. This may not have prevented other States from considering the US position as in fact informed by necessity considerations, given the sheer impossibility of squaring the detainee treatment with accepted interpretations of the relevant human rights protections.

from human rights norms in cases of emergency/necessity,[21] while listing a number of non-derogable provisions (the so-called *notstandsfeste Rechte*).[22] In addition, human rights treaties allow, with respect to a number of primary international norms governing human rights, e.g., the freedom of expression and the freedom of religion, for restrictions that are necessary ('in a democratic society') to protect certain values.[23] Necessity also features in Article 2.2 ECHR, the provision on the right to life, pursuant to which '[d]eprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use

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[21] Article 4.1 ICCPR ('In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'); Article 15.1 ECHR ('In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'); Article 27.1 IACHR ('In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation …').

[22] Article 4.2 ICCPR; Article 15.2 ECHR; Article 27.2 IACHR.

It is noted that the Human Rights Committee, which supervises implementation of the ICCPR, has held that the list of non-derogable rights in Article 4 ICCPR is non-exhaustive. Cf., Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11 (2001), paras 15 and 16. This further limits the role of necessity in relation to human rights.

See on the control by the European Court of Human Rights of the invocation of necessity with a view to derogating from the ECHR: Tercinet 2007, p. 273 (also regretting the lack of control in respect of non-derogation outside the States covered by the ECHR and the American Convention on Human Rights).

[23] E.g., Article 18.3 ICCPR ('Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are *necessary* to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'); Article 19.3 ICCPR ('The exercise of the rights provided for in paragraph 2 of this article [19—freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are *necessary*: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.') (emphasis added). Compare Articles 9.2 and 10.2 ECHR; Articles 12.3 and 13.3 IACHR (referring to restrictions to respectively the freedom of thought, conscience and religion, and the freedom of expression, that 'are necessary in a democratic society'). See also the restrictions allowed to the right to privacy (Article 8 ECHR), the freedom of association (Article 11 ECHR), the principle of non-discrimination (Article 14 ECHR), the freedom of movement (Article 2 of the Fourth Protocol to the ECHR), and the right to property (Article 1 First Protocol to the ECHR).

of force which is no more than *absolutely necessary* [...]'.[24] Finally, necessity may also come into play in the context of the European Court of Human Right's application of the margin of appreciation doctrine, pursuant to which the Contracting States have a measure of discretion in implementing conventional rights. Yet while the provisions featuring in human rights conventions, such as the ECHR, take necessity into account as an imperative justifying restrictions of human rights, they should at the same time be seen as constituting a self-contained *régime*: the fact that necessity is so exhaustively regulated by the primary norms of international human rights law suggests that, at least in relation to the human rights norms set out in the relevant treaties, necessity should, and can only, be invoked on the basis of primary human rights norms rather than on the basis of Article 25 of the ILC Articles.[25] Put differently, the international human rights obligations in question arguably exclude the possibility of invoking necessity beyond the restrictions/justifications/excuses/derogations provided with respect to the primary norms containing the obligations.

It is noted that the substantive and procedural rules regulating 'necessity' set out in the relevant human rights treaties are much more detailed and specific than the vague language of Article 25 ILC Articles. The level of specificity is designed to more strictly circumscribe the invocation of necessity by states. If the human rights treaties had not included necessity clauses, the general Article 25 ILC Articles would have been the only necessity defence available to states, and the danger would be real that states would abuse the vague notions of Article 25. Therefore, the existence of 'necessity clauses' in the human rights conventions contributes to a stronger protection of human rights. True, it would not have been fanciful to assume that the human rights supervisory bodies would have stepped in by bringing more specificity to the general defence of necessity in a human rights context. One should realize, however, that such supervisory bodies are not necessarily endowed with the power to hand down binding decisions, and if they are, that their case law does not necessarily constitute binding precedent.

Let us now explore how necessity is operationalized with respect to human rights conventions. Possibly, lessons can be learned for the application of necessity in other fields of international law. The main criterion that is used to assess whether a defense of necessity can pass muster in international human rights law is *proportionality*. By virtue of this principle, the extent of the restriction of the human right concerned should be proportionate to the legitimate aim pursued.[26]

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[24] Emphasis added. The provision lists three finalities as to absolute necessity: '*a* in defence of any person from unlawful violence; *b* in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; *c* in action lawfully taken for the purpose of quelling a riot or insurrection.'

See on necessity and the right to life in the context of 'targeted killings': Martin 2007, pp. 297–306 (considering such killings, as carried out by Israel and the United States in the context of the war on terror to be in violation of international human rights law).

[25] See also Heathcote 2007, p. 60.

[26] Vande Lanotte and Haeck 2005, p 201.

Only when the proportionality requirement is satisfied will the restriction be deemed necessary in a democratic society. Like necessity as set forth in Article 25 of the ILC Articles, proportionality involves balancing different interests, in the case the interest of complying with international human rights obligations and an essential interest that should be safeguarded against a grave and imminent peril, e.g., the security of the state. The human rights courts' proportionality assessments may therefore usefully inform the application of the necessity defense in other fields of international law.

The application of the margin of appreciation doctrine by the European Court of Human Rights in particular provides a rich source of inspiration in this respect. Pursuant to this doctrine, the Court will only intervene if the state has manifestly exceeded its discretion, thus arguably only if supranational intervention is *necessary* to protect the core of the right concerned. It is interesting to note that the margin of appreciation doctrine, which is now applicable to all conventional rights, has its origins in *state of necessity*-related claims. In 1956, the (then) European Commission of Human Rights pointed out, in relation to the state of necessity proclaimed by the United Kingdom in Cyprus, that the United Kingdom 'should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation,'[27] thereby designating the state as the first arbiter of the necessity of restricting human rights. This stance was confirmed by the European Court of Human Rights in later decisions relating to emergencies.[28] The margin of appreciation doctrine is now also applied outside the context of emergency situations, and notably informs the proportionality determination made in relation to the conventional clauses allowing for the restriction of human rights (e.g., the freedom of expression), discussed above.

[27] Commission, No. 176/56, Decision of 2 June 1956, *Greece* v *United Kingdom*, Yearbook ILC, Vol II, 176.

[28] ECtHR, *Ireland* v *United Kingdom*, Judgment of 18 January 1978, Series A, No. 25, para 207. See also *Klass* v *Federal Republic of Germany*, Judgment of 6 September 1978, Series A, No. 28, paras 42 and 49 (stating that 'the domestic legislature enjoys a certain discretion' as far as secret surveillance powers are concerned, but that these powers, 'characterizing as they do the police state, are tolerable under the Convention only insofar as strictly necessary for sagefuarding the democratic institutions …'); *Handyside* v *United Kingdom*, Judgment of 7 December 1976, Series A, No. 24, para 48 ('By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' or a 'restriction' or 'penalty' intended to meet them … Consequently, Article 10, Section 2 leaves to the Contracting States a margin of appreciation.').

Typically, such a restriction will pass muster, and is deemed proportionate to the aim pursued, if it satisfies ‘a pressing social need’.[29]

The proportionality test will also be informed by the level of consensus on a particular restriction in the Contracting States.[30] Unfortunately, as Vande Lanotte and Haeck have argued, the Court seems to provide little guidance as to how to determine a pressing social need.[31] This limits the practical value of the Court’s proportionality determinations for the application of the necessity defense in general international law, or other subfields of international law. Nonetheless, a tendency could be discerned according to which the Court appears most deferential in situations where the state invokes national security or emergency to restrict human rights on necessity grounds.[32] As such situations do not give states much time for deliberation, it is arguably inappropriate for the Court ‘to appear wise after the event’.[33] More generally, the Court’s case-law may teach us that, if state interests are directly at stake, the Court is indeed well-advised to tread cautiously: second-guessing national authorities’ determinations of necessity may antagonize Contracting Parties and ultimately decrease their support for the Court. For the general law of State responsibility, this may imply that, in extreme situations, emphasizing strict compliance with the law may do injustice to the legitimate ‘essential interests’ of states, and thereby ultimately weaken states’ support for the international legal system. Put differently, a carefully designed exception of necessity may eventually strengthen rather than weaken the international legal system.

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[29] E.g., *Handyside* v. *United Kingdom*, Judgment of 7 December 1976, Series A, Vol. 24, No. 22, para 48 (‘[I]t is not possible to find in the domestic law of the various Contracting States a uniform European concept of morals … It is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion ‘necessity’ in this context.’).

The IACtHR uses a similar yardstick to measure proportionality: ‘the just exigencies of a democratic society’. Cf., IACtHR, advisory opinion, *La Colegiación Obligatoria de Periodistas* (Articles 13 and 20 IACHR), 23 November 1985, OC-5/85, Series A, No. 5, para 67 (‘Esos conceptos, en cuanto se invoquen como fundamento de limitaciones a los derechos humanos, deben ser objeto de una interpretación estrictamente ceñida a las “justas exigencias” de “una sociedad democrática” que tenga en cuenta el equilibrio entre los distintos intereses en juego y la necesidad de preservar el objeto y fin de la Convención.’)

See on the proportionality test in relation to restrictions of human rights also Human Rights Committee, General Comment No. 27, freedom of movement (Article 12), 2 November 1999, CCPR/C/21/Rev.1/Add.9, para 14 (‘Article 12, para 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.’).

[30] Vande Lanotte and Haeck 2005, p. 203.

[31] Vande Lanotte and Haeck 2005, p. 220 (criticizing the inconsistency of the Court’s case-law in relation to the margin of appreciation doctrine).

[32] Vande Lanotte and Haeck 2005, p. 219.

[33] Cf., Cameron 2000, p. 28.

It is not entirely clear what lessons can be learned from the foregoing for the general international law of State responsibility in conjunction with the defense of necessity pursuant to Article 25 ILC Articles. What is most conspicuous is the place allotted to the proportionality principle. As such, however, this principle is not peculiar to human rights. It is applied in other fields of international law as well, and may even rise to the level of a general principle of international law. There is simply more human rights case law fleshing out the practical operation of proportionality because, unlike in other fields of international law, the human rights regime is blessed with courts having compulsory jurisdiction, and thus hearing a large number of cases where the law could be developed and fine-tuned.

As to the lessons to be learned from the application of the margin of appreciation doctrine by human rights courts, it is recalled that a more general variation of this doctrine in international law has been mooted in the literature.[34] Nevertheless, when transposing this doctrine to general international law, in the context of the necessity defense, caution is warranted. After all, the margin of appreciation doctrine is grounded on the notion that states are better informed about situations arising in their territory or within their jurisdiction than an international supervisory organ which is ordinarily less familiar with local circumstances. As such, the doctrine only appears useful in international law fields of which the subject-matter, while being of international concern nevertheless in practice has few transnational 'spill-over' aspects. Aside from international human rights law, where the doctrine has seen the light, one could cite in this respect international criminal law and international environmental law. In international criminal law, for instance, states could possibly invoke some sort of necessity defence to excuse non-compliance with its duty to prosecute international crimes. They could challenge the admissibility of a case before the International Criminal Court (ICC) (Article 17 of the Statute of the International Criminal Court), or bring pressure to bear on the ICC Prosecutor not to start investigations 'in the interests of justice' (Article 53 ICC Statute), on the grounds that non-prosecution and the upholding of amnesties are necessary to prevent the resumption of violence and bring about lasting political reconciliation.

4.4 Human Rights as an 'Essential Interest' Excusing Non-Compliance with Non-Human Rights Related International Law Obligations

Up to now in this article, the topic of necessity and human rights has been approached from the perspective of international human rights norms being infringed but excused under the assumption that an essential interest of the acting state (the state infringing on the norms) prevails over compliance with those

[34] See notably Shany 2005.

norms. A different approach to the topic, which is also considered by the ILC Articles, could also be taken, however. It is well possible that the essential interest of the acting state is co-extensive with safeguarding the human rights or the human dignity of the population or individuals of the acting state itself or even of another state.

It is noted that those human rights interests need not translate into international human rights *law*. Accordingly, there may not per se be a conflict between primary norms of international law; there is primarily a tension between different *interests*, which may be mediated by the necessity principle. In case a conflict between different norms is nevertheless apparent, one may wonder whether a human rights-friendly solution could not more readily be reached by applying the principle of hierarchy between *jus cogens* norms and other norms, assuming of course that the essential interest can really translate into a *jus cogens* norm.[35]

Emphasizing this approach, of which it is unclear whether it indeed reflects customary international law,[36] may serve to counter more general criticism of the necessity defence, since recourse to human rights-informed necessity, rather than undermining the rule of international law, may precisely strengthen the fabric of the international society by subordinating particular narrowly-defined state-centered international rules to more fundamental interests of the international community.[37] These fundamental interests are, moreover, by their very nature imbued with a greater measure of consensus and legitimacy than the idiosyncratic essential interests which states invoke unilaterally so as to excuse non-compliance with international law.[38] Still, states and commentators have not embraced the concept of essential interests of the international community wholeheartedly, fearing abuse by states proclaiming themselves as 'representatives' of the international community.[39]

To a great extent, this fear is informed by the dangers purportedly associated with the unilateral interventionist prong of the responsibility to protect, or humanitarian intervention: a military/forcible intervention by one state or group of states in another state which fails to comply with basic international human rights standards. Such an intervention is at odds with the prohibition of the use of force enunciated by the UN Charter and customary international law, but may possibly be excused on grounds of necessity. A humanitarian intervention may indeed be based on the need to safeguard the human rights of an oppressed population, a need which may be characterized as an 'essential interest' of the international community. The Commentary to the ILC Articles explicitly ruled out reliance on necessity as a circumstance precluding the international wrongfulness of a

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[35] Cf., Agius 2009, p. 95.

[36] Gaja 2007, p. 424 (pointing out that 'il y a certes encore matière à réflexion').

[37] Agius 2009, p. 80.

[38] Compare Heathcote 2007, p. 57.

[39] Cf., Gaja 2007, p. 423; Christakis 2007, p. 26 (wondering: 'S'agit-il d'instaurer ici une *actio popularis* ou d'autoriser certains Etats puissants à agir en toute illégalité en se présentant comme les mandataires de l'humanité?'; and regretting that no explanation is given in the commentary to Article 25).

humanitarian intervention, however, on the grounds that 'the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligation'.[40] In the case, the primary obligation is found in the UN Charter, which arguably sets out a self-contained *régime* relating to the use of force. This regime precludes reliance on a general secondary rule of necessity; given the risk of abuse associated with the inter-state use of force—in particular the risk that states will invoke, or rather conjure up 'humanitarian' reasons so as to justify any intervention—'necessity'-informed considerations have arguably already been given short shrift during the Charter negotiations. Thus, a humanitarian intervention, when not conducted in a multilateral UN Charter-based framework, remains wrongful under international law, although it might of course be legitimate from a political or moral perspective.

Scenarios where necessity *can* be invoked in order to safeguard the human rights of a vulnerable population are not entirely fanciful. The other contributors may well have given a number of examples of non-compliance with international norms, e.g., in the field of investment law or economic law, being excused on human rights (broadly defined)-based necessity grounds. One example, relating to the right to development and the right to water,[41] and which loosely draws on recent events, and in fact also on the 1797 arbitral case of *The Neptune*,[42] could be given here. Imagine that state X agrees with state Y to lease half of Y's arable land to grow grain for the population of X, and to import into X tons of water from springs and freshwater lakes in Y on a daily basis. Assume that this deal turns sour because it puts the population of Y at a major disadvantage, threatening its access to arable land, food, and water. Could state Y, in spite of having struck a deal with state X, renege on its commitments, and invoke necessity in order to safeguard the humanitarian interests of its own population?[43] It appears that in this situation,

[40] ILC Commentary (21) to Article 25, p. 84. Cf., Article 25.2 (a) of the ILC Articles (stating that 'necessity may not be invoked by a State as a ground for precluding wrongfulness if … the international obligation in question excludes the possibility of invoking necessity.'). It is noted that the lack of an explicit reference to the essential interests of 'the international community' in Article 25.1(a) of the ILC Articles may also be traced to the fear that such would open the door for a humanitarian intervention. Cf., Gaja 2007, p. 421.

[41] Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *The right to water* (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/2002/11. See for relevant literature, e.g., Riedel and Rothan (eds) 2006.

[42] *The Neptune*, 1797, in Bassett Moore 1929–1933, p. 372 (implying that necessity could be invoked so as to excuse the payment of compensation below the val The Economist, ue of seized foreign goods in case of famine).

[43] Compare 'Water: sin aqua non' The Economist, 11 April 2009, p. 54 ('Daewoo, a South Korean conglomerate, signed a deal to lease no less than half Madagascar's arable land to grow grain for South Koreans. Widespread anger at the terms of the deal (the island's people would have received practically nothing) contributed to the president [of Madagascar]'s unpopularity. One of the new leader's first acts was to scrap the agreement.'). See on the right to development: Declaration on the Right to Development, adopted by UN General Assembly Resolution 41/128 of 4 December 1986.

reneging on the deal may well be 'the only way for [state Y] to safeguard an essential interest [of its population] against a grave and imminent peril'.[44] Obviously, it remains to be seen whether the act of reneging 'does not seriously impair an essential interest of [state X, i.e., the state towards which the obligation exists].'[45] If, as a result of state Y's act, the population of X would suffer disproportionally, because it sees its access to food seriously hampered, the pendulum may swing in the direction of X, and Y's necessity defence might fail. Yet the point was to demonstrate here that the necessity defence can be harnessed to protect human rights rather than to erode them.

It is pointed out that in this example, based on an international agreement, the rule of fundamental change of circumstances (*rebus sic stantibus*) can also be resorted to, not with a view to excusing non-compliance with the agreement, but as a ground for suspension or termination of the agreement.[46] In the *Gabcikovo-Nagymaros Project* case, the International Court of Justice held that a party can invoke necessity as a circumstance precluding wrongfulness in the context of State responsibility and at the same time invoke the limitative grounds for suspension or termination of a treaty under the law of treaties.[47] Accordingly, a state, such as Y, can invoke both the rule of *rebus sic stantibus* as enshrined in the Vienna Convention on the Law of Treaties and the defence of necessity as codified in the ILC Articles on State Responsibility so as to justify or excuse its behaviour.

The example eventually also elicits the question as to how, in specific situations, necessity should exactly be distinguished from distress as a circumstance precluding wrongfulness. Conceptually, the difference between necessity and distress is clear. Necessity involves a conscious choice between different options on the part of the state invoking it, and the state balances the state interest in complying with the international obligation concerned with the interest in protecting a greater good. In contrast, in situations of distress, which is set forth as a circumstance precluding wrongfulness in Article 24 of the ILC Articles,[48] the state invoking distress may theoretically have a choice, yet, as the Commentary has it, 'the choice is effectively nullified by the situation of peril'.[49] And unlike a state invoking necessity, a state invoking distress does not have a moment of deliberation to choose between compliance with international law and other

[44] Article 25.1 (a) of the ILC Articles.

[45] Article 25.1 (b) of the ILC Articles.

[46] Article 62 of the Vienna Convention on the Law of Treaties (1969).

[47] *Case concerning the Gabčíkovo-Nagymaros Project* case (Hungary/Slovakia), ICJ Rep 1997, para 47.

[48] The provision states: 'The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care'.

[49] Commentary (1) to Article 24 of the ILC Articles, p. 78.

legitimate interests of the state, confronted as it is with 'the immediate [interest] of saving people's lives.'[50]

So far, distress has been primarily invoked in relation to aircraft or ships entering state territory or maritime zones where stress of weather, or mechanical or navigational failure jeopardized the life of persons.[51] It has not been invoked to excuse violations of international human rights obligations. The ILC Commentary, for that matter, makes it clear that distress 'does not extend to more general cases of emergencies, which are more a matter of necessity'.[52] Accordingly, the wrongfulness of restrictions to human rights in emergency situations may only be precluded by recourse to necessity.

Stating that distress will normally not be the appropriate vehicle to preclude the wrongfulness of violations of human rights is not the same as stating that human rights considerations are completely alien to cases of distress. In fact, the essential interest to be protected, and which may excuse non-compliance with the international obligation of respect for territory or maritime zones, is co-terminous with the human right to life, as enshrined in, amongst others, Article 6 ICCPR. Therefore, distress as such fits squarely under the heading of this section: 'human rights as an 'essential interest' excusing non-compliance with non-human rights related international law obligations.' To the extent that an international obligation is breached with a view to saving a person's life, distress rather than necessity should thus be invoked. In the example that we gave, the international deal cited may limit the local population's access to arable land, food and water, and may threaten its subsistence and survival. Yet the immediacy of saving those persons' lives is not apparent. Accordingly, it appears sensible to rely on necessity rather than distress so as to excuse non-compliance with that deal.

4.5 Concluding Observations

In spite of the theoretical appeal of a topic such as 'necessity and human rights'—a topic covering the invocation of necessity in order to excuse non-compliance with international human rights obligations on the grounds of, typically, the national interest of states, as well as the invocation of necessity in order to excuse non-compliance with a lesser norm of international law on the grounds that a higher human rights-laden value prevails—in the final analysis, one may wonder whether in practice the topic is of much relevance. After all, as far as the second prong of the topic is concerned, the national interest of the acting state (i.e., the state invoking necessity as a defence) will ordinarily not be co-extensive with local or foreign individuals' human rights interests, and if it is, the notion of *jus cogens*

50 Ibid. (in fine).

51 Ibid. Commentary (2–3), pp. 78–79.

52 Ibid. Commentary (7), p. 80.

may be a more potent tonic to set aside 'incompatible' lesser norms of international law. More importantly, as to the first prong, for a state to invoke necessity as an excuse would be tantamount to admitting that its conduct was in fact unlawful. Indeed, while necessity may preclude the *wrongfulness* of the conduct, the *unlawfulness* of the conduct arguably remains (with the attendant duty to provide reparation), although this is admittedly unclear from the preparatory works of the ILC Articles. One may assume that a state, rather than owning up to the unlawful character of its conduct by seeking (necessity-informed) excuses, will rather argue that the conduct concerned did not violate international law in the first place. In so doing, it may preclude the need for a necessity defence. It should, by way of example, be borne in mind in this respect that the controversy over the alleged use of torture by the United States in the war on terror was not primarily cast in necessity terms. Rather, the argument went mainly that the international definition of torture left some leeway for states to subject detainees to treatment that caused pain and suffering but did not lead to organ failure or death,[53] and thus, that what the United States did was in fact lawful under international law ('we don't do torture') and need not be excused.

Accordingly, given the opprobrium which will inevitably be cast on states that violate such basic norms of the international community as international human rights norms, it is expected that necessity will only very rarely be invoked so as to excuse non-compliance with international human rights norms. Indeed, the author has not been able to identify one single instance of a state invoking necessity as an excuse for non-compliance with international human rights law.

Nonetheless, considerations informed by necessity have a continuing role to play as a ground for restricting or derogating from human rights on the basis of primary norms contained in international human rights treaties, as opposed to the secondary necessity norm set out in Article 25 of the ILC Articles. It may be submitted that the arguably exhaustive treatment of necessity-informed restrictions and derogations in those treaties, *qua leges speciales*, largely precludes invocation of the general defence of necessity under the law of State responsibility.[54] In other words, the drafters have already factored in necessity when drafting human rights treaties. In so doing, they have incorporated necessity into the law itself as a justification for limitations to human rights, thereby excluding reliance on a

[53] Memorandum from the US Office of the Assistant Attorney General to Alberto R. Gonzales, Counsel to the President (1 August 2002) (the so-called Bybee Memorandum); Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defence (9 January 2002) (the so-called Yoo Memorandum).

[54] Commentary (3) to Article 21 of the ILC Articles on State Responsibility, p. 74, Article 21 being the article relating to self-defense, appears to support this statement. The Commentary states: 'Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.' Necessity may be considered as partly overlapping with a broadly defined concept of self-defense.

broader concept of necessity outside this framework. It is noted that this justificatory role of necessity differs conceptually from the role played by necessity under the ILC Articles, which appear to consider necessity as a circumstance *excusing* non-compliance with international obligations (and hence, in fact, as a circumstance undermining the protection conferred by the law). Still, also under international human rights law, necessity, precisely because it *justifies* restrictions and thus vindicates the narrow interests of the acting state, is not looked at with a particularly benevolent eye by the human rights bodies supervising the implementation of the treaties. Indeed, it can be gleaned from the case-law of the European Court of Human Rights that the state has to advance good reasons to cut back on human rights protection on necessity grounds,[55] although, as is known, the Court does leave states some leeway ('margin of appreciation') to determine what is 'necessary in a democratic society'.[56]

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[55] Cf. e.g., European Court of Human Rights, *Manoussakis* v *Greece*, judgment of 26 September 1996, 1996-IV 1346 (1996) 23 EHRR 387, para. 44, under the heading 'Necessary in a democratic society' ('The restrictions imposed on the freedom to manifest religion … call for *very strict scrutiny by the Court*.') (emphasis added).

[56] See however, Cameron, who stated, when discussing *Leander* v *Sweden*, judgment of 26 March 1987, Series A, No. 116, that the wide margin of appreciation left to States in effect shifts to the applicant the burden of proving that the measures adopted by the government are not proportionate to the aim to be achieved. Cameron 2000, p. 224.

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Chapter 5
A Necessity Paradigm of 'Necessity' in International Economic Law

Asif H. Qureshi

Abstract This article focuses on the management of circumstances of calamity generally in IEL, as well as calamity as a necessity in international economic relations in the framework of State Responsibility. The focus on calamity as a necessity defence to State Responsibility is however from a 'necessity paradigm'—i.e., from the view point of responding effectively to circumstances of calamity, which call for a necessary response, wherein the calamity is the centre of focus. This is in contrast to the stand-point of State Responsibility wherein honouring State Responsibility is central and informs the response to the necessity circumstance (the 'State Responsibility paradigm'). The necessity paradigm of calamity is grounded mainly on justice and development imperatives, along with the conclusion that the State Responsibility paradigm can be incomplete in its response to the calamity; as well as incoherent from the perspective of the world economic order as a whole. The general focus on calamity in International Economic Law adopted here is with specific reference to its key spheres viz., international monetary and financial law within the framework of the IMF; international trade in the context of the WTO; International Development Law, particularly with reference to international investment practice; and finally with an examination of global economic crisis management.

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5.1 Introduction

Our capacity to respond to circumstances of necessity is a measure of our humanity; our foresight in its occurrence a measure of our skills in survival and progressive development; and the manner in which we prevent and respond to it a measure of our sense of justice. In international economic relations states of necessity have played a significant role in the birth of international economic institutions, in their subsequent development, and in informing state behaviour. In state practice circumstances of necessity are acknowledged to absolve a state from its international responsibility mainly where the national measure is the only way in which the state in question is able to safeguard an essential interest against a grave and imminent peril.[1] In bilateral and multilateral treaty practice too different genre of necessity circumstances are catered for, and in different ways. The

[1] Article 25 of the ILC Draft Articles on State Responsibility (hereinafter referred to as the Draft Articles):
'1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.' See also *Gabcikovo—Nagymaros Project* ICJ 1997 (Hungary claimed 'state of ecological necessity').

challenge for international economic relations is to accord the due recognition to situations of necessity such that the necessity can be dealt with effectively, consistently and in a coherent manner. The call of International Economic Law (IEL) is not so much to be driven by situations of necessity but rather to be led by foresight, sensitivity and humanity in their identification and alleviation.

This article focuses on the management of circumstances of necessity generally in IEL, as well as necessity in international economic relations in the framework of State Responsibility. The focus on the defence of necessity to State Responsibility is, however, from a 'necessity paradigm',—i.e., from the view point of responding effectively to circumstances of necessity, wherein necessity is the centre of focus. This is in contrast to the stand-point of State Responsibility wherein honouring State Responsibility is central and informs the response to the necessity circumstance (the 'State Responsibility paradigm'). The necessity paradigm of necessity is grounded mainly on justice and development imperatives, along with the conclusion that the State Responsibility paradigm can be incomplete in its response to necessity; as well as incoherent from the perspective of the world economic order as a whole. The general focus on necessity in IEL adopted here is with specific reference to its key spheres, viz., international monetary and financial law within the framework of the International Monetary Fund (IMF); international trade in the context of the World Trade Organization (WTO); International Development Law, particularly with reference to international investment practice; and finally with an examination of global economic crisis management.

5.2 States of Necessity in International Economic Relations: Theory

A circumstance of 'necessity' confronted by a state in its international economic relations can be a consequence of or response to non-economic causes, for instance humanitarian, ecological, or related to national security. Equally it can be caused by economic phenomena. Thus, the economic emergency giving rise to a necessary response may be domestic, for instance of a monetary nature resulting in a serious national balance of payments problem and shortage of liquidity; or of a trade nature, where serious harm occurs to a domestic industry arising from a sudden influx of imports, or a lack of access to essential supplies; or of a development nature with a situation characterised by serious poverty, impending famine and mass unemployment. Equally, such circumstances may have their origin internationally.

Circumstances of necessity can be considered from different stand-points. From an *internal stand-point* necessity is descriptive of a defensive reaction by those in the midst of it, involving them to depart from their State Responsibility, where such a course of action is essential, urgent, and/or arising out of it. This is

the genre of necessity that legal analysis clearly recognises in general international law and international agreements. From *an external stand-point* necessity connotes a circumstance that compels or ought to compel some kind of a positive response from third parties, for example as a consequence of poverty, famine, natural disaster, political conflict. In IEL this kind of necessity is set mainly although not exclusively at the level of bilateral and multilateral agreement, soft law and state discretion. As civilisation marches forward the mainly voluntary nature of this response may well change, and deserves deeper exploration of the extent to which in legal analysis it may actually have changed now. Certainly, from the perspective of international distributive justice,[2] in particular J Rawls[3] 'differential principle', some responses to certain situations of necessity may be called for as a matter of justice, and therefore are non-optional.

The external stand-point also has a discrete sub-set viz., the *collective stand-point*, where a circumstance of necessity invokes a communal response, for example where there is an economic crisis that involves the international economy as a whole; where the domestic circumstances have an impact on the global economy; or where important communal values are at stake, for example the environment. The possibility of this collective response may or may not be institutionalised in international organisations.

In sum, these three standpoints describe different types of necessity. First, there is the 'necessity' that operates as a defence to the performance of international obligations, for example in circumstances involving national defence; economic emergency; or ecological necessity (*necessity as a defence*). This conforms to the internal standpoint. Second, there is the 'necessity' the response to which is generally considered to be set in a voluntary framework, where necessity calls for a course of action or pushes for a normative response, for example aid to alleviate poverty, or access to essential supplies of energy and food (*necessity as a normative force*). This conforms to the external stand-point. It is not however to be confused with every course of action, rather it is concerned only with immediate state response to a circumstance of necessity, for example food aid to alleviate immediate famine, as opposed to assistance for the building of a dam to augment the supply of water and energy, and thereby contribute to the elimination of poverty in a longer time framework. Third, there is the 'necessity' which calls for international crisis management, for example the recent global financial crisis (*necessity as a crisis*). This conforms to the collective stand-point. Necessity as a normative force and as a crisis need not necessarily be mutually exclusive. However, in necessity as a crisis, the necessity itself has a collective dimension, touching on the collective whilst also

[2] See for example Garcia 2007, pp. 461–481.

[3] Rawls 1971.

eliciting a response from it. Necessity as a normative force encompasses both the collective and individual response to a particular necessity situation, as well as a crisis with an international dimension.

There are several reasons for distinguishing the different forms of necessity and indeed picturing them together. First, the purpose of this internal/external distinction is mainly to shed light on who the necessity circumstance places the onus of identifying it, as well as triggering a response to it, either initially or primarily at a given time. Although, it is not intended necessarily as a judgement with respect to where the devolution of responsibility to respond to the state of necessity as such rests, nor to validate thereby a situation of necessity. Thus, necessity as a defence is internal because it is pictured initially internally, although it may need some form of validation as a circumstance of necessity from an external stand-point. Equally the merit of the normative response to necessity is informed by the internal perspective, and the circumstances of the necessity. Second, by distinguishing the different types of necessity it is possible not only to highlight the need for different responses but also consistency in the responses to the necessity circumstances. Thus, only by crafting an ensemble of the phenomena of necessity is it possible to consider individual circumstances of necessity in their proper context. Finally, this holistic analytical approach to necessity not only serves to clarify but also underlines the necessity focus of the phenomenon of necessity.

There are several considerations which underpin the propriety of responses to circumstances of necessity. First, national and international responses to circumstances of necessity are grounded in justice. National and international responses to a state of necessity constitute resources for international distribution in the framework of international distributive justice. Therefore, it is necessary to revert to a Rawlsian international original position behind a veil of ignorance.[4] Foregoing compliance with international responsibility, engaging in the collective acts of responses to states of necessity, and responding individually to such circumstances—all involve in some form or another the distribution of resources. Here all the participants would set a framework for responding to states of necessity knowing that a state of necessity could inflict them at some point. Moreover, their capacity to respond would be informed by their particular states of endowment. Furthermore, the obligation to respond will also be informed by the operation of Rawl's differential principle[5]—in inviting differential treatment in circumstances of necessity where such response would assist the least disadvantaged in society. In Rawl's international original position necessity would be a discreet focus offering a complete, coherent and complementary set of responses. It would not be set as an appendage to international

[4] Rawls 1971; and see also for example Garcia 2007, pp. 461–481.

[5] Ibid.

compliance issues, nor would it have a voluntary character. Responses to circumstances of necessity are thus grounded in justice. The historical development of the international law on State Responsibility and the growth of international institutional responses to circumstances of necessity separately have meant that the approach to necessity has not been holistic and therefore its justice underpinning has not been readily apparent.

Second, circumstances of necessity have a development dimension. Necessity circumstances can be symptoms of underdevelopment. By the same token responses to circumstances of necessity partake of the development effort. Whilst the 'necessity paradigm' at first sight might echo a traditional perception of development[6] in terms of economic growth alone, along with its propensity to displace State Responsibility,[7] the modern more inclusive conception of development encompassing as it does for instance the environment and human rights issues, reinforces a 'necessity paradigm' of responding to necessity, inviting a holistic appraisal of what constitutes a 'necessity'. Obstacles to development call for the same broad approach as our positive efforts in the process of ensuring development. Moreover, the received wisdom of focusing on necessity in terms of State Responsibility in isolation is tendentious from a development perspective, as it is not helpful in the evolution of a coherent approach to the phenomena of development.

However, a potentially broad spectrum of development related circumstances of necessity, begs the question whether from the internal standpoint a given economic necessity is descriptive of a circumstance of necessity, in the sense of 'an essential interest against a grave and imminent peril' *qua* Article 25 of the Draft Articles, or is really descriptive of certain problems of development? This question arises and is posited from the 'State Responsibility paradigm' (i.e., that stand-point which places State Responsibility upper most and characterises its scope narrowly). It is, and is based on the misconception that necessity as a defence is a static concept operating at all levels, including international agreements. In practice however much of international economic relations are defined in treaty law, where Article 25 of the Draft Articles has been somewhat displaced, and the notion of necessity is set in the broad spectrum of necessity circumstances generally. Moreover, this response is accompanied by some psychological resistance to the idea that macroeconomic conditions can actually equate with circumstances of grave and imminent peril. It is also accompanied by the belief that conflating development issues with circumstances of necessity will open up a Pandora's door. The reality is that *some* economic conditions, which are development related or precipitated by underdevelopment,

[6] Bradlow 2005, pp. 47–85.

[7] See for example the movement for the New International Economic Order wherein it has observed that all national and international goals have been subordinated to the development imperative. Roessler 1998, p. 213.

for example famine, do partake of an emergency. And since they do they are appropriately placed in the spectrum of circumstances of necessity.

Third, responses to circumstances of necessity need to be adequate, and consistent. The external and collective stand-points to circumstances of necessity focus directly on necessity in terms of what is and should be the response in *alleviating* a circumstance of necessity. However, with respect to necessity within the context of State Responsibility, the absolving of the state of its international responsibility is mainly proffered as a *palliative* to relieve the circumstance of necessity. It is in a sense incidental in terms of the relief for the circumstance of necessity. The necessity precludes the wrongfulness of the state act taken in response to it—an act within an array of necessary responses to deal with the circumstance of necessity. Considered in the wider context of the set of necessary measures to address the necessity circumstance—the absolving of the state of wrongfulness is but one consideration in the overall effort in responding to the circumstance of necessity. Indeed, in this set of efforts to respond to the necessity circumstance, there would be acts of a positive nature taken to alleviate the emergency situation. The act of absolving in this context is but a neutral albeit facilitating act alongside the positive measures to deal with the circumstance of necessity. Moreover, it is illogical to construct different approaches to responses with respect to the same necessity phenomenon. Furthermore, just as responding to necessity through the absolving of State Responsibility is part of an overall strategy and quest in its alleviation, compliance with State Responsibility is part of an overall international apparatus for the maintenance of stability in the international order. However, stability in the international order can only be sustained if that order can adequately respond to and pre-empt circumstances of necessity. In short, this *alleviating/palliative* dichotomy belies the fundamental and underlying goal of all stand-points with respect to necessity—namely how circumstances of necessity can best be pre-empted and alleviated adequately and consistently.

Fourth, safeguards in according responses to states of necessity need to be proportionate and set within a necessity paradigm. Legitimate circumstances of necessity as a defence to State Responsibility in international economic relations must capture the right balance between the need to recognise such circumstances and the potential for their abusive invocation. The received preoccupation in legal scholarship[8] from the internal standpoint (necessity as a defence) has placed emphasis on the objective of ensuring compliance with State Responsibility as opposed to addressing the necessity circumstance as such. By the same token the strict parameters that are set for its invocation are intended to ensure that it is invoked appropriately. Without adequate safeguards necessity in all its forms can result in abuse and waste. However, unduly strict limitations can

[8] See for example Bjorklund 2008.

displace the primary focus which is to address the state of necessity. Moreover, necessity as a defence in the Draft Articles[9] is set alongside internationally wrongful acts, such as breach of an international obligation, international crimes and delicts. In the circumstances, the parameters of necessity from the State Responsibility paradigm have been constructed somewhat narrowly.

Fifth, the international institutional and legal apparatus for responding to circumstances of necessity need to be coherent. In particular, the State Responsibility paradigm of necessity needs to be re-evaluated and the defence of necessity considered from a 'necessity paradigm'. How we respond from the external/collective stand-points of necessity is connected with the way we respond to the internal standpoint, including the way we characterise it. The former will inform the later; and the later the former. Moreover, given the connections and common foundations, a contextual analysis of circumstances of necessity in terms of State Responsibility calls for its analysis from a necessity paradigm. In international economic relations the legitimacy of circumstances of necessity compelling departures from State Responsibility is grounded in our sense of humanity, justice and development aspirations. Moreover, this recognition plays the important function, with respect to certain situations of necessity that interface with other normative goals and regimes, of facilitating a more coherent and non-fragmented international order. Furthermore, without the recognition of certain national priorities international economic co-operation would simply not be possible.

Finally, it is to be noted that the content of IEL when formulated through the medium of agreements is informed by a high state of consciousness and thus conceptions of necessity can be diverse and wider in scope. The consensus that informs an international agreement is shaped by a proactive process involving reason, persuasion, foresight; and not mere reaction and self-interest. For example, conceptions of 'essential interest' and 'grave and imminent peril' can in theory through consensus become elastic; and may well be informed by the extent to which the law is developed in the particular area. Necessity derived from the practice of states *qua* Article 25 of the Draft Articles, is the construct of a lower level of consciousness, rooted as it is in practice rather than informed foresight; and therefore more limited in its conception and scope. Moreover, constructs of 'necessity' may well be more limited with stricter parameters in bilateral agreements than in multilateral agreements. In the former holding the bilateral partner to its side of the bargain may be more of a preoccupation. In multilateral agreements the burden of an undermining of State Responsibility by a party can be dispersed. Furthermore, it is set against a communal purpose and therefore necessity has a wider interpretative spectrum.

In conclusion the three different states of necessity namely: necessity as a defence to State Responsibility; necessity as a normative force compelling

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[9] Article 25 ILC Responsibility of States for Internationally Wrongful Acts.

assistance; and necessity as a crisis calling for management, involve mainly three specific lines of enquiry:

- How to identify in a timely fashion a situation of necessity in the different forms that it occurs?
- How to respond at the state and international institutional levels to the different circumstances of necessity in a coherent manner?
- How to ensure that necessity in all its forms does not become an opportunity for abuse?

At a more fundamental level these questions are underpinned by principles:

- of distributive justice; and
- the development process.

Moreover, the international approach to responding to situations of necessity both at the policy level and legal analysis needs to be coherent and effective.

5.3 International Practice

The international practice in responding to states of necessity in the key spheres of international economic relations is set within the general normative frameworks of the WTO; international development/investment law; and the IMF. In addition, the international response to necessity as a crisis is considered further in a discreet section, to reflect the analytical framework of states of necessity adopted here; to mirror the international practice of responding to global economic crisis outside the strict parameters of the existing Bretton Woods related institutions in particular the IMF; and to develop further an analysis of necessity as a crisis generally. The institutional focus on the IMF and the WTO here is because these are the premier institutions in the fields of international monetary and trade law. Both institutions provide the basic international constitutional framework for their respective spheres.

5.3.1 Necessity in the Framework of the World Trade Organization

Briefly, the functions of the WTO involve ensuring market access for goods and services in Member countries, through certain WTO disciplines. The WTO is also, although in a more limited manner, concerned with ensuring access to supplies from another country (market supply). The WTO disciplines ensure market access through tariff reduction, elimination of non-tariff barriers, (e.g., Trade Remedies, Technical Standards and Sanitary and Phytosanitory), non-discrimination in trade and the prohibition of quantitative restrictions. Similarly, market supply is ensured through for example reduction of export

tariffs, elimination of quantitative restrictions on exports, and ensuring freedom from transit.

Where a member of the WTO departs from honouring an obligation other members may be denied a market access benefit they are entitled. Members may need to forego or facilitate a market access benefit entitlement in order to alleviate and/or facilitate a member's necessary and legitimate domestic concerns. These concerns are institutionalised in the WTO disciplines, reflecting necessity as a defence, and to a lesser measure necessity as a normative force. In sum, the recognised responses may be in the form of permitted market access restrictions, or the according of benefits albeit in the form of market access, in relation to certain circumstances of necessity. In general the WTO's capacity to respond to situations of necessity is atypical, in particular with respect to necessity as a crisis; and less prominent than that of the IMF.

More particularly, the WTO engages in situations of necessity mainly in three ways: long term crisis prevention; the empowerment of Member States to deal with different types of emergencies, and necessity as a defence. Thus, in the WTO the customary international law defence of necessity appears to have been displaced through the express articulation of different necessity circumstances. At any rate thus far outside the framework of the outlined necessity circumstances in the WTO, necessity as a defence has not been invoked in WTO disputes. Indeed, whereas the ILC Draft Articles on State Responsibility have been invoked to reinforce the existence of customary practices in other respects,[10] there has been no reference thus far to Article 25 of the ILC Draft Articles. This may be because necessity as a defence (for example necessity as national security, and as a balance of payments crisis which are set out in the WTO) can be conceptually of a different genre, from the other circumstances in the WTO, wherein a Member is empowered to deal with different types of emergency/necessity circumstances, for example with respect to health or the environment. Whereas the former partakes of a defence to continued compliance with obligations, the later is an actual empowerment to deal with certain societal goals. Although it may be argued both result in departures from normal obligations the intent however is different. Thus, with respect to necessity circumstances generally, a member is enabled, in times of a national economic emergency to depart from its market access commitments and impose import restrictions, for instance in the event of a balance of payments problem; or a sudden upsurge of imports that is harmful to its domestic industry or national security. Here a member of the WTO is allowed to depart from WTO obligations and others forego a market access benefit they are entitled to. In the same vein, a member can impose import/export restrictions in response to a domestic or international health or environmental crises. Although, it is to be noted that not all health and environmental measures partake of the same degree of peril and urgency, even if the member of the WTO is empowered to pursue such objectives.

[10] See for example EC-Commercial Vessels (Panel) and US-Cotton Yarn (AB).

Both these circumstances of defence and empowerment are set within well defined parameters which are justiciable and objectively verifiable. They have also given rise to much jurisprudence in the WTO.

This conceptual difference between the different genres of necessity circumstances set out in the WTO is not to be conflated with the use of the 'necessity condition' in order to invoke the different types of exceptions, for example set out in the General Agreement on Tariffs and Trade (GATT) Article XX of 1994. That 'necessary' condition is a description of the circumstances in which the exceptions may be invoked. It does not inform necessarily the exception of the character of a circumstance of necessity. Be that as it may there is merit in gaining insights into how the 'necessity' for the application of a measure resulting in a departure from WTO obligations has been interpreted in Article XX of GATT 1994, in particular for a comparative exercise in IEL of the application of necessity as a defence. In this context the recent WTO Appellate Body (AB) clarification of the necessity condition in Article XX of GATT 1994 in Brazil-Measures Affecting Imports of Retreaded Tyres is in point.[11] The Appellate Body in that case set out a holistic approach to the determination of the necessity condition asserting that what constitutes necessary involves a 'weighing and balancing process'. In particular, the AB placed importance in this exercise of the value of the objective of the measure departing from the WTO norms; the contribution of the measure to the objective sought, and the restrictive impact of the measure to international trade.[12] With respect to the assessment of the contribution, the AB clarified that this can be both quantitative and/or qualitative, so long as there is a genuine and material relationship of ends and means; including that the measure is apt to produce such a relationship. In the circumstances by no means is the condition of necessity in the application of a measure involving a departure from WTO norms under Article XX of GATT 1994 a strict one. Indeed, one may even observe a certain shifting of position here in comparison to the previous description of the requirement by the AB in the Korea—Beef case[13]:

> '[…] the reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable". Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX (d). But other measures, too, may fall within the ambit of this exception. As used in Article XX (d), the term "necessary" refers in our view to a range of degrees of necessity. At a one end of this continuum lies "necessary" understood as "indispensable"; at the other, is "necessary" taken to mean as "making a contribution to". We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".'

[11] WT/DS332/AB/R.

[12] Ibid., para 139–143. See also *Worldtradelaw.net* DSC on the case.

[13] *Korea-Beef* case WTO AB (WT/DS169/AB/R: 2000).

Moreover, the liberal holistic approach is consistent with the conceptual difference identified herein, namely between necessity as a defence and the circumstances of societal value which the WTO empowers a member to deal with. In short the condition of 'necessary' for the invocation of exceptions in the WTO itself differs according to the type of exception involved. Thus, the WTO concept of 'necessary' for the application of a measure under an exception is similar in outline alone but not identical to 'necessary' in necessity as self-defence, as reflected in Article 25 of the ILC Draft. Moreover, the actual necessity circumstances which allow for departures from WTO norms themselves differ and are not necessarily identical to the circumstance of necessity described under Article 25 of the ILC Draft viz., 'grave and imminent peril'.

More specifically, with respect to necessity as a defence *qua* national security, a member of the WTO is empowered in the interests of its essential security interests to depart from its WTO obligations in trade and services[14] with reference to specifically outlined national security situations, viz., in terms of disclosure of information to the WTO; with respect to trade in fissionable materials and armaments; in 'time of war or other emergency in international relations', or 'by reason of its obligations under the UN charter for maintenance of international peace and security'. The essential security interest exception is thus not a general national security exception, although the subset of situations referring to 'emergency in international relations' has a wider scope than the others. Article XXI of GATT 1994 has not been frequently invoked nor has it been subject to authoritative clarification through WTO jurisprudence thus far.

Generally, the interpretation of what constitutes 'essential security interest' under Article XXI of GATT 1994 appears to be a liberal one, particularly given that members of the WTO have been given a broad discretion in the determination of its scope.[15] Indeed, the provision has been considered as being self-judging.[16] However, the general consensus seems to be that the exception is the subject of a mixed subjective/objective review. The word 'essential security interest' being interpreted in a subjective manner[17] subject to an obligation to make such a determination in good faith [Vienna Convention on the Law of Treaties (VCLT) Article 27] along with a test of proportionality. Whereas the words 'taken in time of war or other emergency in international relations' are to be interpreted objectively.[18]

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[14] See Articles XXI of GATT 1994; XIV of GATS and 73 of TRIPs.

[15] See for example Van Den Bossche 2008, p. 665.

[16] See for example *Nicaragua* v *US*, ICJ 1986 para 222.

[17] Endorsed by WTO members, GATT Council in 1985 when establishing panel US/Nicaragua case; publicists (AJIL 93, 1999, p. 424).

[18] Based on textual and contextual interpretation of GATT 1994 & publicists. See for example AJIL 93, 1999.

The liberal scope of the provision is reinforced by the fact that Article XXI is not accompanied by a chapeau introducing disciplines in the manner in which it is implemented, as in Article XX of GATT 1994 dealing with general exceptions. The practice in GATT/WTO also suggests a liberal interpretation. Thus, in the context of information disclosure requirements and trade in armaments, the United States considers it 'contrary to its security interests—and to the security interest of other friendly countries—to reveal the names of the commodities that it considers to be the most strategic'.[19] In the same vein, when a Panel was established in the US-Trade Measures Affecting Nicaragua,[20] its terms of reference precluded it from examining the validity or motivation of the US in resorting to Article XXI of GATT 1994.[21] Finally, 'essential security interest' in the framework of the WTO does not at any rate in practice imply a circumstance threatening or connected with the very 'existence and independence' of the state as considered in investment disputes with reference to Article 25 of the Draft Articles.[22]

However, this latitude is not unconstrained. First, there are notification requirements—with respect to services this is specifically stated in GATS, and in relation to GATT 1994 this requirement is found in a decision of the Contracting Parties to GATT.[23] Second, in the invocation of the Article there is an expectation that Members will take into consideration the interests of third parties.[24] Third, it is unlikely that 'essential security interest' and 'other emergency in international relations' would encompass economic emergency, given that various departures from WTO obligations are already catered for consequent upon different types of economic emergency situations.[25] Fourth, Article XXI of GATT is widely considered to be justiciable.[26] One reason for this is its context which is set alongside other exceptions which are justiciable.[27]

Finally, the extent to which the provision is self-judging has been questioned. Thus, in one International Centre for Settlement of Investment Disputes (ICSID) arbitration, the Tribunal noted that the question of Article XXI being self-judging is not settled, and the fact that the provision is justiciable reinforces

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[19] GATT/CP.3/38,9 cited in Van Den Bossche 2008, p. 665.

[20] L/6053(October 1986).

[21] Ibid.

[22] See *Enron Corporation* v *Argentine Rep* (2007); *CMS Gas Transmission Co* v *Argentine Rep* (2005); *LG&E Energy Corp* v *Argentine Rep* (2006); *Sempra Energy International* v *Argentine Rep* (2007).

[23] See Contracting Parties Decision Concerning Article XXI of the General Agreement L/5426, 29S/23.

[24] Ibid.

[25] See also for a similar conclusion Schloeman and Ohlhoff 1999, p. 444.

[26] Schloeman and Ohlhoff 1999, p. 424; and Van Den Bossche 2008, pp. 664–669.

[27] See Schloeman and Ohlhoff 1999, p. 440.

this.[28] Such pronouncements have been supported in academic analysis wherein it has been pointed out that there are elements in the provision which give rise to objective analysis.[29] The ICSID Tribunals have however not been consistent in their interpretation. In one case[30] it has been regarded as self-judging in reliance of a suggestion by the International Court of Justice that Article XXI of GATT is self-judging, because it expressly refers to the Member considering whether it is for its essential security interest.[31] In a later case as pointed above doubt was cast on this.[32] However, a definitive clarification of Article XXI of GATT 1994 can only occur within the WTO. Moreover, reliance without further ado in investment arbitration with respect to Bilateral Investment Treaties (BITS) on the scope of Article XXI of GATT 1994 is misplaced. First, the scope of Article XXI of GATT 1994 is informed by the wider set of necessity circumstances in which the national security exception is placed than that which accompanies BITS. Second, in some measure the configuration of national sovereignty (and therefore the scope of national security along with international agreements) differs according to whether it is set in a bilateral or multilateral context.

In the same vein, the WTO Appellate Body had to grapple with the determination of an 'economic emergency' arising from a balance of payments problem in India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products.[33] Although here the case did not centre on the question of subjective/objective review, the parallel is there in that India was arguing for a political process of determination rather than a strictly judicial one. In that case India argued that its balance of payments problem was not to be the subject of judicial determination but rather one to be determined by the WTO Balance of Payments (BOP) Committee (a political organ of the WTO). The AB ruled that the Panel had the competence to adjudicate on India's restrictions imposed for balance-of-payments purposes, despite the WTO BOP Committee's input in the process of the determination. However, it is still pertinent to consider some of the reasons why India preferred to have the establishment of its balance-of-payments problems considered by the BOP Committee. From the perspective of developing countries it is to be noted that the right to impose restrictions for BOP purposes is an important expression of the Special and Differential standard. Allowing for a purely legal appraisal of BOP undermines this standard. The determination of BOP problems involves questions of judgment. And therefore this raises questions with respect to panellists' ability to properly engage in such an evaluation given their mainly trade background. The AB failed to address seriously the central question of whether BOP related questions lend themselves well to analysis from a hard law perspective.

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[29] Schloeman and Ohlhoff 1999, p. 444. See also Emmerson 2008, pp. 135–154.

[30] *CMS Gas Transmission Co* v *Argentine Rep* (2005) para 371.

[31] *Nicaragua* v *US*, ICJ 1986, para 222.

[32] *Sempra Energy International* v *Argentine Rep* (2007) paras 384 and 385 relying on Matushita, Shoenbaum and Mavroidis 2006, pp. 594–598.

[33] (AB: 1999).

From the perspective of necessity as a defence with respect to a member's balance of payments problem the prior question, prior to the question how it is determined, is whether all kinds of a country's balance of payments problem fall within a necessity circumstance—viz., necessity as a defence. The circumstances of necessity are informed by the provisions of the WTO agreements. However, it may be noted that not all balance of payments imbalances can be said to fall within the realms of necessity as a defence under General International Law. Indeed, the US challenge in the WTO to the Indian invocation of this defence was in a sense underpinned by this very consideration.

The WTO also facilitates development (and thereby responds to development related states of necessity, and prevents crisis situations from arising) in particular of developing countries, mainly through the provision of special and differential treatment (S&D) for developing countries—in terms for instance of the scope and manner of the implementation of WTO obligations; and through the recognition of the relationship between trade and development. Indeed, the current round of multilateral trade negotiations under the Doha Round, are intended to integrate the needs of developing countries better within the multilateral trading system. Thus the Doha Declaration launching the Round, *inter alia*, specifically alludes to the role of trade in economic development, the alleviation of poverty and the vulnerability of least developing countries. However, given that development concerns per se do not necessarily encompass necessity as a normative force the WTO setting for necessity as a normative force is weak but preventative of such circumstances arising in the future.

Indeed, that questions of 'necessity' feature in multilateral trade discourse and are considered of importance is highlighted by the reasons for the collapse in July 2008 of the Doha Round of trade negotiations. One main cause for this, was the disagreement over the Special Safeguard Mechanism in the agricultural sector. This mechanism involves the raising of tariffs temporarily in response to sudden import surges and price depressions. The disagreement between the developed and some developing countries centred on the question of the level of volume of import surge causing harm to a Member's food security, livelihood security and rural development needs that would trigger the use of safeguards.

To conclude, necessity as a defence to State Responsibility within the framework of the WTO can potentially be relevant in terms of (1) market access commitments, and (2) commitments to ensure access to supplies of goods and services. At the national level there is strong emphasis on preventing abuse of such a defence. In the Doha negotiations, it is an open question whether the failure to understand some of the developing countries' sensitivity to the need for an effective response to a situation of necessity in the agricultural sector, is symptomatic generally of an inadequate response thus far to states of necessity as they concern developing countries. Certainly with respect to necessity as a normative force compelling assistance, the approach in the Doha negotiations has been piece-meal. Thus far there has been a lack of success and a general perception that S&D provisions are weak. Finally, the WTO institutionally is not geared for crisis management in the event of an 'international trade crises'. Its 'consensus' decision making process and

its dispute settlement mechanism are not geared adequately to responding to international emergency situations in the sphere of international trade.

5.3.2 *'Necessity' in the Framework of International Development Law*

IDL[34] has responded to necessity mainly in the form of necessity as a normative force, within IDL; and necessity as a defence, in international investment practice.

5.3.2.1 Necessity in International Development Law

International Development Law embraces circumstances of necessity in the form of necessity as a normative force where circumstances of necessity are symptomatic of underdevelopment. IDL embraces necessity as a crisis where the crisis is precipitated by underdevelopment or to avert in the future such a circumstance of necessity. The place of necessity as a defence is however limited. It may feature in contractual arrangements.

Necessity as a normative force in IDL is facilitated both through an institutional framework, as well as a form of a normative regime. Firstly, there are the international development organisations such as the World Bank Group whose operations touch upon and respond to very specific emergency situations. The World Bank Group for example has a number of emergency loan programmes that not only are 'humanitarian' responses to natural disasters, for instance the Emergency Tsumani Reconstruction Project, Cyclone Emergency Rehabilitation Projects, Emergency Food Security Support Project, and manmade conflicts such as its Emergency Post-Conflict Assistance Project, but also in response to economic emergencies, for example, its Emergency Agricultural Productivity Support Project, and the Emergency Energy Assistance programme. Some of these describe circumstances of necessity as such, whilst others may be considered of a development nature.

Second, there is the substantive normative framework of IDL which essentially embraces soft law regimes. These regimes have a two-fold function: in defining obligations towards situations of necessity; and in acknowledging and clarifying for the international consciousness of states, circumstances of necessity. Such acknowledgment and clarification may conceivably have significance in legal discourse—and in absolving obligations in the arrangements of international rights and duties. In particular, IDL descriptions of circumstances of necessity represent the processes of transforming our moral consciousness of necessity into our legal sense and order.

[34] International Development Law is defined here to include International Investment Law.

Of particular note here is the Right to Development[35] and the Millennium Development Goals (MDGs).[36] The MDGs focus on states of necessity (for example, the eradication of extreme hunger and poverty) and long-term

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[35] Extract of The Declaration on the Right to Development. GA Res 41/128 of Dec 1986 Proclaims the following Declaration on the Right to Development:

Article 1:

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2:

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from.

Article 3:

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.

3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4:

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

[36] At the Millennium Summit in September 2000 international community adopted the UN Millennium Declaration, committing the international community to achieve the Millennium Development Goals by 2015. The Millennium Development Goals (MDGs) are: 1. Eradicate extreme hunger and poverty; 2. Achieve universal primary education; 3. Promote gender equality and empower women; 4. Reduce child mortality; 5. Improve maternal health; 6. Combat HIV/AIDS, malaria and other diseases; 7. Ensure environmental sustainability; 8. Develop a global partnership for development.

prevention through development related goals (for example, environmental sustainability and the establishment of a global partnership for development).

The right to development focuses both on the process of the realisation of the right of development, as well as the right to development itself. With respect to the process of achieving the right to development this involves transparency, accountability, participation (i.e., a rights based approach). The substantive aspects of the right focus on fundamental freedoms and human rights—economic, social, cultural, civil and political rights, including the right to food, the right to health, the right to education, the right to housing.

The right to development places the primary obligation on the state. There is, however, an obligation on the international community to create conditions for the realisation of the right to development. Indeed, there is an obligation placed on states to co-operate in facilitating the right to development. This co-operation can focus on states of necessity such as resolving debt problems, decreasing commodity prices, export earning instabilities, protectionism in developed countries, and inadequacies of the international financial system.

Both the right to development and the Millennium Development Goals are incomplete norms of soft law nature, in that they are heavily orientated in their articulation in terms of rights and goals, without corresponding orchestration of binding obligations. They are however forces in the normative push arising from states of necessity. They partake both of circumstances of necessity and development. The difference between circumstances of necessity and development can be relative, and informed by time. Today's electricity shortages in Karachi, Pakistan, are symptoms of underdevelopment but may well be tomorrow's description of a state of dire necessity.

Finally, IDL is not only facilitative of development (and in that manner inhibiting circumstances of necessity) but also partakes of binding norms. Thus, Vaughan Lowe asserts with reference to the role of International Law in international economic relations:

> That role is facilitative: there is no sense in which international law requires states to redistribute wealth or establish fairer terms of international trade. International law is simply the means by which states resolved to do those things can establish a robust framework of commitments to do so. When they create such a framework, they transform the stage. It ceases to be an area in which action is dictated by the free play of foreign policies and the laws of the market and becomes an area governed by rules and procedures.[37]

It is suggested that this observation is somewhat controversial in its generality. With respect to the suggestion that the role of International Law is 'exclusively' facilitative in the redistribution of wealth and in the establishment of fairer terms of international trade, a number of responses are invoked. First, it is not possible to logically de-couple activity in International Law that is

[37] Lowe 2007, p. 189.

exclusively facilitative from its normative impact—which manifests itself in General International Law. Facilitative acts can have the propensity to generate rights in International Law. Thus, if as a matter of evidence the overwhelming thrust of international efforts in international economic relations is facilitative of the redistribution of wealth and the establishment of fairer terms of international trade; or the overwhelming cumulative effect of international efforts in international economic relations are such; is there not a case that this overwhelming practice, impacts upon the development of General International Law towards the creation of obligations relating to redistribution of wealth and fairer terms of international trade? Or at the least it contributes towards the shaping of the goals of the international economic order, which in turn informs and shapes state practice (including perceptions of state practice) and the interpretation and application of International Economic Law. Second, it does not follow from the proposition that because the role of International Law is facilitative only with respect to an obligation to redistribute wealth or the establishment of fairer terms of international trade, that International Law does not have a normative role in other respects connected with the redistribution of wealth or fairer terms in international trade, for example an obligation to *consider* the redistribution of wealth or the establishment of fairer terms of international trade; or a duty to *cooperate* with respect to these. Finally, in 2010, it is surely questionable whether international lawyers can rely so readily on the observation that International law does not mandate redistribution of wealth or fairer terms of international trade—an observation that echoes traditional International Law and relations. International relations and International Law have surely moved on to a stage of development wherein such an assertion cannot be sustained without sufficient justification. Thus, the basis of such an assertion is not clear. It is certainly the case that substantial multilateral economic practice exists which is imbued with the spirit of fairness and redistribution—not to mention domestic state practice. Moreover, it is questionable whether the development of International Law with respect to 'redistribution of wealth' can be conflated with the 'establishment of fairer terms of international trade'. The nature and pace of development with respect to the regimes that underpin these fundamental questions in international economic relations are different. In sum this discourse on the nature of the binding elements of IDL has a bearing on how elements of necessity within IDL are acknowledged and responded to.

5.3.2.2 Necessity in International Investment Law

Finally, of note are the international investment flows that take place within the framework of IDL broadly defined. The practice of international investment takes place generally within a framework of bilateral investment agreements (BITs) and against the background of the World Bank Group. BITS are mainly intended to protect and promote foreign investment in a host state; whereas the World Bank

Group act as facilitators for investment. There is no obligation in IDL to compel state or foreign private investment.

Necessity in the sphere of International Investment Law has latterly arisen mainly in the form of necessity as a defence. However, this is not to assert that all other forms of necessity do not have a potential role. Necessity as a normative force can have a bearing on state investment decisions, for example, the urgent need to invest to forestall climate change, the spread of Aids, and financial melt downs. In the same vein appropriate investment now can have a specific long term role in crisis prevention (necessity as a crisis). state investment decisions and the structuring of international channels of investment can be informed by circumstances of 'necessity as a crisis'—to prevent the crisis and/or to respond to it. Much of international investment however is channelled through private sources and therefore has a commercial and/or developmental function. Much of the international institutional structure in investment is oriented towards development goals. Specifically targeted international investment for future crisis prevention is sparse although beginning to come forth, as for instance state investment in failed states like Afghanistan, in order to prevent the spread of international terrorism, along with its implications for the global economy. Moreover, some existing international institutional investment mechanisms can be discerned. Thus, under the auspices of the Multilateral Investment Guarantee Agency (MIGA) insurance is available for foreign investment in the event of a 'crisis' precipitated by for example a 'breach of a contract' by a government, or the 'non-honouring of sovereign financial obligations'. In sum, although such necessity related investment generally has a weak normative and institutional basis acknowledging it serves to give a discreet focus to it—one that partakes of development but with an investment setting. Indeed, the international community may be said to have moved in this direction through the Monterrey Consensus.[38]

In terms of necessity as a defence one question that has arisen is whether the protection afforded by the host state where the investment is taking place can be suspended during an emergency—i.e., whether the host state can be absolved of honouring its obligations in the event of a national economic emergency. A number of recent arbitration cases[39] decided under ICSID involving the Argentinean state and its responsibility under the Argentinean and US bilateral investment agreement shed some light on the scope of the economic necessity

[38] See Monterrey Consensus of the International Conference on Financing for Development, UN, 2002, available at http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf, last visited 13 January 2010.

[39] *Enron Corporation* v *Argentine Rep* (2004); *CMS Gas Transmission Co* v *Argentine Rep* (2005); *LG&E Energy Corp* v *Argentine Rep* (2006); *Sempra Energy International* v *Argentine Rep* (2007); *Continental Casualty Company* v *Argentine Rep*, ICSID case No. ARB/03/0 Award September 2008.

defence in investment disputes. Some of the cases[40] with common facts may be summarised as follows. Certain foreign US based corporations involved in gas distribution/transportation invested in Argentina. This investment took place under an Argentinean investment regulatory framework which included, *inter alia*, the Argentinean Convertibility Law of 1991. This legislation fixed the Argentinean currency to the US dollar (ultimately valued in dollars not the depreciating Argentinean currency), and which formed the basis of calculating the various tariffs imposed by the US companies for gas distribution and transportation. Between 2001 and 2003, the Argentinean economy suffered an economic crisis. This crisis has been described as follows[41]:

> 232: All the major economic indicators reached catastrophic proportions in December 2001. An accelerated deterioration of Argentina's Gross Domestic Product (GDP) in December 2001, falling 10–15% faster than previous years. Private consumption dramatically dropped in the first quarter of 2001, accompanied by a severe drop in domestic prices. Argentine experienced at this time widespread decline in the prices and in the value of assets located in Argentina. The Merval Index experienced a dramatic decline of 60% by the end of December 2001. By mid-2001, Argentina's country risk premium was the highest worldwide rendering it unable to borrow on the international markets, and reflecting the severity of the economic crisis …
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> 234. Unemployment reached almost 25%, and almost half of the Argentine population was living below poverty. The entire healthcare system teetered on the brink of collapse. Prices of pharmaceuticals soared as the country plunged deeper into deflationary period, becoming unavailable for low-income people. Hospitals suffered a severe shortage of basic supplies. Investment in infrastructure and equipment for public hospitals declined as never before… At the time, one quarter of the population could not afford the minimum amount of food required to ensure their subsistence … disease followed … government forced to decrease its per capital spending on social services by 74%.

In response to this economic crisis Argentina took a number of measures including the passing of the 2002 Emergency Law. This legislation, *inter alia*, eliminated the calculation of tariffs with reference to the US $. The arbitrators had to decide whether the economic crisis was sufficient to justify the invocation of the defence of necessity with respect to the various measures taken in response to the economic crisis. Whether the crisis could absolve Argentina from responsibility in relation to the various departures from obligations contained in the US/Argentine BITS of 1991 consequent upon the measures taken in response to the crisis—viz., obligations in relation to creeping expropriation; derogation from fair and equitable treatment; and legitimate expectations; arbitrariness; discrimination and the Umbrella Clause.

In addressing this question, the Arbitrators had to clarify whether the 'national security defence' in the US/Argentine BITS encompassed 'economic emergency'; and if so whether the economic emergency was to be determined by

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[40] *Enron Corporation* v *Argentine Rep* (2004); *CMS Gas Transmission Co* v *Argentine Rep* (2005); *LG&E Energy Corp* v *Argentine Rep* (2006); *Sempra Energy International* v *Argentine Rep* (2007).

[41] *LG&E Energy Corp* v *Argentine Rep* (2006).

Argentina, or was to be decided objectively; and finally what approach was to be taken in the interpretation of the emergency defence in the US/Argentine BIT.

The relevant legal provision involved Article XI of US/Argentine BIT & General International Law (as per Article 25 of the ILC Draft Articles). Article XI states:

> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

The arbitrators rightly decided in favour of incorporating economic emergency in the notion of 'national security' on the basis that[42]:

> 238: … To conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the government to lead. When a state's economic foundation is under siege, the severity of the problem can equal that of any military invasion.

In Continental Casualty Company[43] the Tribunal seems to have gone further asserting:

> The protection of essential security interests recognised by Article XI does not require that 'total collapse' of the country or that a 'catastrophic situation' has already occurred before responsible national authorities may have recourse to its protection.

On the question of the manner of the review to determine the existence of the economic emergency, it was concluded that the review must be objective and not dependent on Argentina's conclusion of such an emergency. However, it is to be noted that in Continental Casualty Company the Tribunal observed[44] that the 'objective assessment must contain a significant margin of appreciation for the state applying the particular measure: a time of grave crisis is not the time for nice judgements, particularly when examined by others with the disadvantage of hindsight'. This is probably the right decision, although in the framework of the WTO and the IMF there are some discernable differences in practice and approach, with a greater level of deference to the state's perception and determination of its national security interests.

The objective review conclusion raises a number of questions. Is there a material difference between the national security exception in BITS and the economic emergency exception in BITS? Is it such that when it comes to an economic emergency as opposed to national security different considerations come into play with respect to the question of the objective review of the

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[42] *LG&E Energy Corp* v *Argentine Rep* (2006).

[43] *Continental Casualty Company* v *Argentine Rep*, ICSID case No. ARB/03/9 (2008) para 180.

[44] Ibid.

economic emergency? In the Argentinean cases the two have been treated as being alike.

The approach to interpretation adopted in BITS of the economic emergency provision has been strict. This interpretative approach is understandable but also questionable. The strict approach is based firstly on the fact that an economic emergency is a necessity unlike a *force majeure* which is involuntary. However, this begs the question why the presence of the physical act or event should be so critical to the determination of the voluntariness of the action in the matrix of a *force majeure* defence? Is it not conceivable that the circumstance of an economic emergency might be as debilitating as a physical impossibility of performance, as appears to have been conceded? Second, the restrictive approach has been justified on the basis that the object and purpose of BIT suggest a restrictive approach to interpreting the economic emergency exception given that the agreement is precisely intended to deal with the protection of the investor in times of crisis.[45]

There are several problems with such an analysis. First, this is not a correct interpretation of the objects and purposes of a BIT. It is certainly the case that BITS are intended to deal with investment protection including particularly when the host state is in difficulty. However, it is less clear if BITS are intended to afford protection in the *extraordinarily* difficult circumstances of an economic emergency. Second, as a matter of treaty interpretation, if there is a provision in a treaty which refers to an economic emergency situation, it needs to be given effect to. This arises from the duty to interpret in good faith and by the principle of effective treaty interpretation. A treaty interpreter is not free to render redundant terms in a treaty.[46] Third, as has been noted in EC-Tariff Preferences (AB) and EC-Hormones (AB) the principles for interpreting exceptions are those set out in Articles 31–33 of the VC. An exception by itself without further ado does not call for a stricter interpretation. This does not squarely fit with the suggestion that there needs to be a mandatory restrictive interpretation of a BIT's emergency provision in the Enron case. Finally, investment agreements afford protection only if there is an 'investment', in the sense of a contribution to the development of the host state. In the event of an economic emergency when honouring the investment obligations undermines this *sin qua non* is there not a case for re-visiting the continued honouring of those obligations. Thus, it is not clear that the objects and purposes of BITS necessarily call for a strict approach to the interpretation of the economic emergency exception.

[45] In the Enron arbitration—'… the Tribunal asserted that the very object and purpose of the treaty was to apply in situations of economic difficulty and hardship in order to guarantee the rights of the treaty's beneficiaries.' 'Thus, interpreting the essential security interest provision in a manner resulting in an escape route from the treaty could not be reconciled with the object and purpose.' The Tribunal thus concluded that a 'restrictive interpretation of any such alternative is mandatory'. (Bjorklund 2008, p. 504).

[46] See for example WTO EC-Sugar Subsidies (Panel) para 7.151.

It will be noted that in the cases mentioned herein involving Argentina despite the clarifications made on the question of review of the national security interest and interpretative approaches adopted, three different Tribunals found no state of emergency whereas two found a state of economic emergency to exist on identical facts.[47] These divergences call for some kind of a clarification.

Another aspect of the jurisprudence of note is the reliance on the WTO practice with respect to the requirement of 'necessary' under Article XX of GATT 1994 in the Continental Casualty case.[48] The Tribunal decided to rely for the interpretation of 'necessary' under Article XI of the Argentine/US BIT on its formulation under Article XX of GATT 1994 as set out in Korea/Beef and Brazil Tyres on the basis that Article XI of the Argentine/US BIT is modelled on previous US FCN treaties which in turn reflect Article XX of GATT 1994, instead of the requirement of 'necessary' under customary international law.[49] However, whilst this reliance from a development perspective of necessity and from a 'necessity paradigm', is welcome, given the liberal holistic WTO interpretation of the requirement of necessary as set out in Brazil/Tyres, it is however somewhat sloppy. First, the 'necessary' requirement relied upon pertains to a conceptually different circumstance—namely circumstances wherein a member of the WTO is empowered to respond to certain agreed societal values considered worth pursuing. Second, the reliance is based on a weak link—namely that the FCN 'reflect' Article XX of GATT 1947 contra 'based upon'. Finally, the deliberate exclusion of customary international law is not legally sound. At the least it should have additionally been taken into account.

Moreover, the issues for the determination of an economic emergency need to be considered from a development perspective. From such a perspective, the factors that establish the presence of an essential security interest in the economic sphere may be summarised as follows. First, this is a mixed question of law and fact. Second, the criteria determining the parameters of the economic emergency are questions of law. Third, this is a relative concept and dependent upon the level of development of the host state. Finally, the 'relevant rules of international law'[50] will inform treaty interpretation. Therefore the interpretation of this BIT's provision includes not only the relevant and non-displaced customary rules on necessity, but also other relevant norms, for example the right to development.

In conclusion, the following observations may be made with respect to the different types of necessity in IDL. First, in so far as necessity as a defence to state Responsibility is concerned, there is recognition, albeit strict of this defence

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[47] *Enron Corporation* v *Argentine Rep* (2004) Defence failed; *CMS Gas Transmission Co* v *Argentine Rep* (2005) Defence failed; *Sempra Energy International* v *Argentine Rep* (2007) Defence failed; *LG&E Energy Corp* v *Argentine Rep* (2006) Defence succeeded! *Continental Casualty Company* v *Argentine Rep*, ICSID case No. ARB/03/9 (2008) Defence succeeded!

[48] *Continental Casualty Company* v *Argentine Rep*, ICSID case No. ARB/03/9 (2008).

[49] Para 192.

[50] See Article 31 of the Vienna Convention on the Law of Treaties.

in international investment disputes which encompass economic emergencies. Second, with respect to necessity as a normative force compelling assistance, generally here the obligations are of a soft law character. In particular, the progress in the implementation of the MDG has been slow, whilst the nature of the right to development is incomplete.[51] Finally, in relation to necessity as a crisis calling for management, the nature of the crisis situations here tend to be more non-economic, for example, famine, disease, natural disasters, political conflicts. For these the institutional structures are there—although the resources not on the same scale as for instance those spent in managing the recent financial crisis.

5.3.3 *'Necessity' in the Framework of the International Monetary Fund*

Historically the IMF itself was set up in response to a state of necessity—namely the economic depression of the inter-war years. The IMF's core functions involve providing when needed international liquidity for the world economy, assistance for temporary balance of payments disequilibrium, ensuring exchange rate stability and a multilateral payments system. Given these functions the IMF can be said to be one of the lead institutions in international economic relations, in order to deal with both national and international monetary/financial emergencies. This 'emergency' focus is reinforced by the mandate of the IMF, as set out in Article 1 of its Articles of Agreement.

With respect to necessity as a normative force and as a crisis the IMF responds to different types of economic emergencies mainly as follows. The IMF lends subject to conditions foreign exchange to member countries in response to their temporary balance of payments problems.[52] The balance of payments problems may partake of a crisis or have a development character where for instance the problem is of a structural nature. The IMF also maintains an oversight of the world monetary and financial situation with a view to averting and managing national and global economic crisis. To this end it engages in regular consultation exercises with its members with respect to their domestic economy and its worldwide impact, particularly to maintain exchange rate stability.[53]

The IMF's record in responding to circumstances of national emergencies has been controversial. Thus, in the East Asian Crisis[54] arising out of the contagion of currency speculation in the region, the IMF failed to anticipate the crisis.

[51] See for example Sen 1999.

[52] Article V of the IMF Articles of Agreement.

[53] Article IV of the IMF Articles of Agreement.

[54] Thailand, Malaysia, Korea, Philippines and Indonesia.

Moreover it has been suggested that the IMF policies themselves viz., the IMF push for capital liberalisation, along with its Washington Consensus approach,[55] may have contributed to the crisis.[56] More specifically the difficulty with the Fund has been as follows. First, its capacity for global financial crisis management of certain magnitude is in practice inadequate. For example, in the current global financial crisis, arising as a consequence of the US subprime housing market 2007, the Fund has been involved in lending to a number of states, e.g., Hungary, Ukraine, Iceland and Pakistan. However, the IMF total usable resources as at August 2008 were only $257 billion. These are set to rise to a total of $750 billion as a result of a recent pledge by the G20 in April 2009. Despite this pledge the amount at the disposal of the IMF is to be contrasted with the $28 trillion dollars lost from stock markets last year[57]; the IMF estimate of the refinancing needs of emerging markets alone at some $1.8 trillion in 2009[58]; and the billions used to rescue various financial institutions in the US and Europe, along with the estimated further injections needed.[59] The IMF cannot therefore adequately assist the lead developed countries, including the US in crisis of certain magnitudes.

Second, the IMF has institutionalised national crisis management through its different lending facilities for access by individual members. The Fund over the years has built up a number of different facilities focusing on different paradigms of necessity circumstances. Thus, the IMF has set up the Emergency Financing Mechanism (EFM); the Exogenous Shock Facility (in response to commodity prices, natural disasters, conflicts, crisis in neighbouring countries causing disruption to trade), the Short-Term Liquidity Facility and the Poverty Reduction and Growth Facility. However, the terms of the lending (i.e., Conditionality) through the various IMF facilities directed at different types of balance of payments problems have aroused concern and controversy on economic development[60] and

[55] See Stieglitz 2002, Chap. 4.

[56] Ibid.

[57] International Herald Tribune, 17 December 2008. $28 trillion is equivalent to approximately $4,300 for every man, woman and child on the face of the earth.

[58] See IMF *Global Financial Stability Report* (April 2009), available at http://www.imf.org/external/pubs/ft/gfsr/2009/01/pdf/text.pdf

[59] According to the IMF the estimated needed amounts are as follows: 'The first calculation assumes that leverage, measured as tangible common equity (TCE) over tangible assets (TA), returns to levels prevailing before the crisis (4% TCE/TA). Even to reach these levels, capital injections would need to be some $275 billion for US banks, about $375 billion for euro area banks, about $125 billion for UK banks, and about $100 billion for banks in the rest of mature Europe. The second illustrative calculation assumes a return of leverage to levels of the mid-1990s (6% TCE/TA). This more demanding level raises the amount of capital to be injected to around $500 billion for US banks, $725 billion for euro area banks, $250 billion for UK banks, and $225 billion for banks in the rest of mature Europe.' See IMF *Global Financial Stability Report* (April 2009) available at http://www.imf.org/external/pubs/ft/gfsr/2009/01/pdf/text.pdf

[60] See for example Stiglitz 2002, p. 15; Independent Evaluation Office of the IMF: An IEO Evaluation of Structural Conditionality in IMF-Supported Programs (2008); and Killick 1984.

justice grounds[61]—in particular as not being sensitive to the need for safety nets in economic policy making. Third, there has been criticism of IMF decision making processes which touch upon its management of economic emergencies. In the circumstances there had been latterly a decline in IMF lending, although the recent financial crisis has seen an upturn in the lending. Finally, IMF efforts of crisis prevention and management through surveillance have been criticised for not being effective in terms of developed states.

The Fund has however responded to some of the criticism. It has brought in institutional reforms in its voting and quota system.[62] The IMF also brought reforms generally with regard to IMF Conditionality through a revised guideline on Conditionality[63]; and more recently the Fund responded again to some of its criticisms by instituting a major overhaul of its lending framework.[64] This overhaul involves, *inter alia*, modernising Conditionality through more reliance on *ex-ante* conditionality and the establishment of a Flexible Credit Line to provide large financing. It remains to be seen whether this is a sufficient overhaul. In June 2007, the IMF responded to criticism of its surveillance mechanism by sharpening its process of the identification of symptoms of economic crisis[65] and increasing the frequency of its consultations.[66] The success of this decision remains to be seen, although the IMF surveillance mandate is now recognised as being limited.

In conclusion the IMF has not been able to effectively identify and respond to many kinds of crisis situations, particularly in relation to developed states. It has not been able to cope with crisis of a certain magnitude. More significantly the

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[61] See for example Garcia 2007, pp. 461–481.

[62] IMF Board of Governors Resolution on Quota and Voice Reform in the IMF April 2008.

[63] See IMF Guidelines on Conditionality EB Decision No. 12864-(02/102) 25 September 2002. See also Qureshi and Ziegler 2007, Chap 10.

[64] IMF Survey 24 March 2009, available at http://www.imf.org/external/pubs/ft/survey/so/2009/new032409a.htm

[65] 15. …Fund shall consider the following developments as among those which would require thorough review and might indicate the need for discussion with a member:
1. Protracted large-scale intervention in one direction in the exchange market;
2. official or quasi-official borrowing that either is unsustainable or brings unduly high liquidity risks, or excessive and prolonged official or quasi-official accumulation of foreign assets, for balance of payments purposes;
3. (a) the introduction, substantial intensification, or prolonged maintenance, for balance of payments purposes, of restrictions on, or incentives for, current transactions or payments, or (b) the introduction or substantial modification for balance of payments purposes of restrictions on, or incentives for, the inflow or outflow of capital;
4. the pursuit, for balance of payments purposes, of monetary and other financial policies that provide abnormal encouragement or discouragement to capital flows;
5. fundamental exchange rate misalignment;
6. large and prolonged current account deficits or surpluses; and
7. large external sector vulnerabilities, including liquidity risks, arising from private capital flows.

[66] See IMF EB Decision June 2007. See IMF EB Decision June 2007. On the reasons for the IMF failure in the recent financial crisis see: IEO IMF Performance in the Run-Up to the Financial and Economic Crisis (2011) and IMF: The Fund's Mandate: An Overview (Jan 22, 2010)

IMF's approach to crisis management has been reactive rather than proactive—picking the broken pieces as best it can from the fall out of the crisis. Thus, despite the predictions of the recent financial crisis, despite its magnitude, despite the failings in the international response to it, despite a sense of a *déjà vu* about it, and despite the assumed mandate of the Fund to address global crisis, the IMF role has been described astonishingly as a mere 'crisis responder'.[67] On the other hand the idea of being proactive in crisis management appears somewhat in the background, with 'pre-emption and prevention' being absent, and early warning systems as 'work in progress'. Although, this may well be the appropriate current chronological response given the recent financial crisis—i.e., responding to the crisis and then focusing on future preventative measures.[68]

With respect to necessity as a defence to observance of IMF obligations there are two specific provisions in the IMF Articles which deal with such a situation. First, national departures from IMF exchange control disciplines are allowed on grounds of national or international security defence.[69] National or international security is not defined although in investment disputes in ICSID arbitration the national security defence in bilateral investment agreements has been interpreted to include economic emergency.[70] It is unlikely that this interpretation would be followed in the IMF here, since the Fund already has mechanisms to deal with situations of economic emergency for its members. Indeed the reasons why the disciplines on exchange controls were introduced in the first place may well have a bearing on this question. However, a member's determination of its national security interest is presumed to be appropriate unless the IMF challenges this.[71]

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[67] See 'Financial crisis shapes IMF work priorities', in IMF Survey, 18 December 2008 wherein it is reported as follows: 'The International Monetary and Financial Committee and the G-20 leaders have emphasized the central role of the Fund as a crisis responder and a developer of ideas', IMF Managing Director Dominique Strauss-Kahn said. 'We will take this mandate forward to help restore global financial stability and stimulate sustained economic growth'.

[68] See First Deputy Managing Director John Lipsky in 'Financial crisis shapes IMF work priorities', in IMF Survey, 18 December 2008 wherein he states: 'The IMF is intensifying work on early warnings and the monitoring of systemic and country vulnerabilities … In general, this is a complex task that requires bringing together expertise and information that, by its nature, tends to be scattered, …'.

[69] Exception from Article VIII, Section 2 (a) of Articles of Agreement of the IMF. IMF EB Decision No. 144, 14 August 1952.

[70] *Enron Corporation* v *Argentine Rep* (2007); *CMS Gas Transmission Co* v *Argentine Rep* (2005); *LG&E Energy Corp* v *Argentine Rep* (2006); *Sempra Energy International* v *Argentine Rep* (2007).

[71] EB Decision No. 144, 14 August 1952:—'A member intending to impose restrictions on payments and transfers for current international transactions that are not authorized … And that in the judgment of the member, are solely related to the preservation of national or international security, should whenever possible, notify the Fund before imposing such restrictions … Unless the Fund informs the member within 30 days after receiving notice form the member that it is not satisfied that such restrictions arte proposed solely to preserve such security, the member may assume that the Fund has no objection to the imposition of the restrictions.'

Thus, the determination of a Member's security interest is very much the province of the Member imposing the restrictions on payments and transfers for current international transactions. The only substantive constraint by way of a safeguard in the invocation of this defence is that the imposition of exchange controls need to be 'solely to preserve such security'.[72]

Second, the IMF can protect its own position in an emergency. It can suspend certain of its operations, including provision of loans,[73] 'in the event of an emergency or the development of unforeseen circumstances threatening the activities of the Fund'. The suspension can only take place for one year and has to be decided by an 85% majority of the total voting power. Again the emergency and unforeseen circumstances have not been defined. Here it is submitted an economic necessity would clearly qualify as the necessity is defined with reference to 'circumstances threatening the activities of the Fund'. Unlike Article 25 of the Draft Articles the defences are still available even if the IMF or the Member State has contributed to the state of necessity. Moreover, under the IMF there is no requirement of 'grave or imminent peril' as in the Draft Articles.

One particular question that the necessity paradigm of the defence of necessity posits is what interplay is there between the IMF recognition of a circumstance of necessity and the responsibility of a state with respect to its other international obligations. Certainly with respect to WTO obligations IMF acknowledgment (or otherwise) of a state of necessity (viz., a balance of payments problem) has a bearing with respect to the undertaking of WTO obligations.[74] This interplay however is set within the framework of the special relationship between the IMF and the WTO and the specific balance of payments exception in GATT 1994. The question therefore remains whether it has a bearing outside the context of the WTO. In relevant investment arbitration under ICSID[75] where necessity has been invoked as a defence by Argentina, there is little evidence of reference being made by the Arbitration Tribunals in question to the IMF, nor does it appear that its expert opinion was sought with respect to the nature of the state of the Argentinean economic crisis in question. In ICSID arbitration a state of necessity under customary international law has

[72] IMF EB Decision No. 144, 14 August 1952.

[73] Article XXVII of the IMF Articles of Agreement.

[74] See WTO Appellate Body Report: India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, AB-1993-3 (23 August 1999).

[75] *Enron Corporation* v *Argentine Rep* (2007); *CMS Gas Transmission Co* v *Argentine Rep* (2005); *LG&E Energy Corp* v *Argentine Rep* (2006); *Sempra Energy International* v *Argentine Rep* (2007).

been equated to a situation compromising the very existence of the state and its independence.[76] And in Sempra[77] it was stated that 'International Law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle'. It is an open question whether this high threshold for necessity defined in terms of the very 'existence of the state and its independence' will be appropriate in informing IMF practice. Certainly, where necessity is defined *lex specialis* IMF practice in terms of a wider concept may have a bearing qua Article 31 of the Vienna Convention on the Law of Treaties.

In conclusion there is no express general necessity defence to the performance of IMF obligations. This can be explained by the existence of other institutionalised responses to circumstances of necessity in the IMF, including built in mechanisms for non-compliance, for example the possibility of obtaining a waiver in the event of non observance of IMF conditions in the framework of an IMF loan arrangement. Moreover, aside from the obligations with respect to the multilateral system of payments and those under IMF Conditionality, the Fund's effective normative framework is limited. In any event in general the IMF approach to responding to circumstances of necessity has been pre-emptive and alleviative rather than palliative; open in terms of a recognition of the diversity of circumstances of necessity, in particular of an economic nature. With respect to necessity as a defence, unlike Article 25 of the Draft, the parameters set for the invocation of the defence are flexible.

5.4 International Mechanisms Focusing on Global and National Economic Crisis Identification and Management

The phenomenon of global and national economic crisis involves both questions with respect to its recognition and its management. The later focuses on the responsibility of the international community and states with respect to the question whether and if so how to respond to the crisis, including dealing with the legal repercussions provoked in terms of alleviative or palliative measures, as the case may be.

A fundamental question that a global economic crisis provokes, in particular from a legal perspective is the question of defining it. In fact there are two separate enquiries here—one which relates to definition and another which involves the methodology for determining the existence of the global economic crisis.

[76] See for example *Enron Corporation* v *Argentine Rep* (2007) para 306.

[77] *Sempra Energy International* v *Argentine Rep* (2007) para 378.

The question what comprises a 'global economy' and indeed whether there is a global economy as such with a life of its own is pre-eminently the subject of economic analysis—as indeed the question what comprises a global economic crisis. However, legal discourse has to be set against some sense of this question—in particular given that the discourse on global crisis does not take place against any agreed conception of what a 'global crisis' in fact is. Much of the sense of the global crisis comes from its location in certain key developed states. The policy makers involved in constructing a formal international apparatus for global economic crisis prevention and management need to appreciate the different nuances which the description 'global economic crisis' captures.

A global economic crisis assumes the existence of a global economy. A global economy exists in a number of forms. First, there is a *global economy par excellence*. This is independent of the existence of national economies. It is of course the case that the global economy is an assimilation of all the national economies and very much connected with it. Therefore the global economy is informed and coloured by the existence and state of the disparate national economies. However, the independent national economies are now set against the background of the phenomenon of globalisation, facilitated by the pillars of liberalisation in goods, services, and capital investment under the Bretton Woods related international economic institutions; along with regional and bilateral economic arrangements. This setting has generated a volume of international economic activity (trans-border) that can be pictured independently of the internal domestic economies that are severally assimilated in the global economy. This global economic activity receives its stimulus both from the state of the internal domestic economy of origin, as well as from the stimulus received externally from destination economies. Second, there is the *global economy aggregated* that consists of the assembly of domestic economies and that partakes both of the global economy *par excellence* and the national domestic economies aggregated. Third, there is the *global economy in different segments* that comprises of the different economies of the world economy—for example, the traditional key generators of national and global economic activity, the modern generators, the non-generators and the negative generators. This is a picture of the global economy seen from a micro level. All three dimensions of the global economy identified here are underpinned in one form or another by interdependence.

The key questions in determining an economic crisis involve constructing indicia of an economic crisis, along with a threshold that triggers the characterisation of a crisis. Moreover, crisis in the global economy can be a descriptor of the global economy in any of the senses described above. Thus, a crisis in the global economy *par excellence* focuses on the international economy as such. A crisis in *global economy aggregated* involves global economy as a whole including all its constituents. On the other hand a crisis focusing on the *global economy in different segments* refers to a particular segment of the global economy. The particular global crisis matrix chosen will be informed by the objectives of the crisis prevention and management

apparatus being negotiated. However in terms of the traditional preoccupations of the international economic order a crisis in the global economy *par excellence* and the *global economy aggregated* in that order of hierarchy ought to be of particular concern. A crisis in the *global economy in different segments* would be significant if the segment in question substantially impacted on and overwhelmed the rest of the global economy. There may be some self-interest at a political level that might inform the choice of the matrix. For instance for developing countries it may be of import to emphasise the *global economy aggregated* matrix since their domestic economies will be better weighted in this formula. Equally the choice of the matrix may inform the necessary appropriate response as well as the nature of any legislative responses necessary.

The international mechanisms for global and national economic crisis identification and management are generally dispersed amongst international institutions, not effectively co-ordinated as between states, often ad hoc and certainly inadequate. There is no holistic institutionalised approach to crisis identification, prevention and management. Moreover, the international decision making involved in responding to situations of crisis, such as it is, is not necessarily inclusive.

As has been stated earlier the lead international organisation with near universal membership in international crisis management in the economic sphere is the IMF. This is because the monetary and financial state of the world economy is at the very heart and soul of the world economic system. However, other international institutions are also of note in so far as monetary and financial crisis are concerned. In particular the Bank for International Settlements (BIS) along with the Financial Stability Forum, and the International Organisation of Securities Commission. At an informal institutional level of note are the Groups of 7/10, and 20.[78] In addition, the ICJ and other tribunals (e.g., under ICSID) also have a role, albeit somewhat of a subsidiary nature, mainly in the process of the determination of crisis situations in legal disputes.

The need for an objective international system of identification of national economic emergencies, national economic emergencies that have international implications, and situations giving rise to an international crisis—is apparent, as is the need for a coordinated and organised management of the crisis. However, despite this the range of options for international economic crisis identification and management is dispersed (sometimes leading to conflicting determinations and advice) and effectively still in the reign of a few select states who can determine the crisis and mobilise initiative as they seem fit. In practice there is no evidence that the Security Council has interpreted thus far its mandate on 'peace and security' as including an economic crisis although there is nothing precluding such an interpretation.

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[78] See Lastra 2006, p. 450.

In fact, it is the G20[79] which has been at the forefront of responding to the current international financial crisis for example with the November 2008[80] and April 2009 Declarations, along with the G20 Leaders Statement at the Pittsburgh Summit in September 2009. The November 2008 Declaration aimed at ensuring that the recent global crisis does not happen again. Thus, it was a

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[79] See G20 website: 'informal forum that promotes open and constructive discussion between industrial and emerging-market countries on key issues related to global economic stability'.

[80] G20 Declaration of the Summit on Financial Markets and the World Economy November 2008:

1. We, the Leaders of the Group of Twenty, held an initial meeting in Washington on November 15, 2008, amid serious challenges to the world economy and financial markets. We are determined to enhance our cooperation and work together to restore global growth and achieve needed reforms in the world's financial systems.

2. Over the past months our countries have taken urgent and exceptional measures to support the global economy and stabilize financial markets. These efforts must continue. At the same time, we must lay the foundation for reform to help to ensure that a global crisis, such as this one, does not happen again. Our work will be guided by a shared belief that market principles, open trade and investment regimes, and effectively regulated financial markets foster the dynamism, innovation, and entrepreneurship that are essential for economic growth, employment, and poverty reduction.

Root Causes of the Current Crisis

3. During a period of strong global growth, growing capital flows, and prolonged stability earlier this decade, market participants sought higher yields without an adequate appreciation of the risks and failed to exercise proper due diligence. At the same time, weak underwriting standards, unsound risk management practices, increasingly complex and opaque financial products, and consequent excessive leverage combined to create vulnerabilities in the system. Policy-makers, regulators and supervisors, in some advanced countries, did not adequately appreciate and address the risks building up in financial markets, keep pace with financial innovation, or take into account the systemic ramifications of domestic regulatory actions.

4. Major underlying factors to the current situation were, among others, inconsistent and insufficiently coordinated macroeconomic policies, inadequate structural reforms, which led to unsustainable global macroeconomic outcomes. These developments, together, contributed to excesses and ultimately resulted in severe market disruption.

Actions Taken and to Be Taken

(...)

7. Against this background of deteriorating economic conditions worldwide, we agreed that a broader policy response is needed, based on closer macroeconomic cooperation, to restore growth, avoid negative spillovers and support emerging market economies and developing countries. As immediate steps to achieve these objectives, as well as to address longer-term challenges, we will:

Continue our vigorous efforts and take whatever further actions are necessary to stabilize the financial system.

Recognize the importance of monetary policy support, as deemed appropriate to domestic conditions.

Use fiscal measures to stimulate domestic demand to rapid effect, as appropriate, while maintaining a policy framework conducive to fiscal sustainability.

Help emerging and developing economies gain access to finance in current difficult financial conditions, including through liquidity facilities and program support. We stress the International Monetary Fund's (IMF) important role in crisis response, welcome its new short-term liquidity facility, and urge the ongoing review of its instruments and facilities to ensure flexibility.

specific response to the recent economic crisis. It did not propose any radical constitutional reforms in the international economic system in order that the international economy will be better able to identify and respond in future to any type of economic emergency. No new crisis management institutional organs were to be set for crisis detection, prevention and management in the economic sphere. The Declaration did however reinforce the role of the IMF in crisis management. The substantive principles for reform of financial markets were couched in terms of general principles. They did not contain any set of

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(Footnote 80 continued)
Encourage the World Bank and other multilateral development banks (MDBs) to use their full capacity in support of their development agenda, and we welcome the recent introduction of new facilities by the World Bank in the areas of infrastructure and trade finance.
Ensure that the IMF, World Bank and other MDBs have sufficient resources to continue playing their role in overcoming the crisis.
Common Principles for Reform of Financial Markets
9. We commit to implementing policies consistent with the following common principles for reform.
Strengthening Transparency and Accountability: we will strengthen financial market transparency, including by enhancing required disclosure on complex financial products and ensuring complete and accurate disclosure by firms of their financial conditions. Incentives should be aligned to avoid excessive risk-taking.
Enhancing Sound Regulation: we pledge to strengthen our regulatory regimes, prudential oversight, and risk management, and ensure that all financial markets, products and participants are regulated or subject to oversight, as appropriate to their circumstances. We will exercise strong oversight over credit rating agencies, consistent with the agreed and strengthened international code of conduct. We will also make regulatory regimes more effective over the economic cycle, while ensuring that regulation is efficient, does not stifle innovation, and encourages expanded trade in financial products and services. We commit to transparent assessments of our national regulatory systems.
Promoting Integrity in Financial Markets: We commit to protect the integrity of the world's financial markets by bolstering investor and consumer protection, avoiding conflicts of interest, preventing illegal market manipulation, fraudulent activities and abuse, and protecting against illicit finance risks arising from non-cooperative jurisdictions. We will also promote information sharing, including with respect to jurisdictions that have yet to commit to international standards with respect to bank secrecy and transparency.
Reinforcing International Cooperation: We call upon our national and regional regulators to formulate their regulations and other measures in a consistent manner. Regulators should enhance their coordination and cooperation across all segments of financial markets, including with respect to cross-border capital flows. Regulators and other relevant authorities as a matter of priority should strengthen cooperation on crisis prevention, management, and resolution.
Reforming International Financial Institutions: We are committed to advancing the reform of the Bretton Woods Institutions so that they can more adequately reflect changing economic weights in the world economy in order to increase their legitimacy and effectiveness. In this respect, emerging and developing economies, including the poorest countries, should have greater voice and representation. The Financial Stability Forum (FSF) must expand urgently to a broader membership of emerging economies, and other major standard setting bodies should promptly review their membership. The IMF, in collaboration with the expanded FSF and other bodies, should work to better identify vulnerabilities, anticipate potential stresses, and act swiftly to play a key role in crisis response.

concrete proposals. Moreover their contribution was in terms of the reinforcement of existing principles that are relevant to the financial markets. Indeed, much of the Declaration was in the nature of rhetoric and according to one commentator[81] 'from the day the promises were made 'members of the group began implementing new measures that distort trade'.

The G20 April 2009 Declarations[82] go somewhat further. Together, they provide for augmenting both the IMF and World Bank[83] financial resources for economic crisis management; strengthening the financial sector through regulatory reform and institution building for crisis identification and management[84] through calls for further reforms of the IMF and the re-establishment of the Financial Stability Forum (an institution whose membership draws essentially from G20 countries) as the Financial Stability Board (FSB). The FSB would engage in financial and macroeconomic crisis identification and its management and co-operate with the IMF for this purpose. With respect to the 'poorest and most vulnerable' the G20 call on 'the UN, working with other global institutions, to establish an effective mechanism to monitor the impact of the crisis'. These Declarations whilst welcome will need to be assessed in terms of how they are actually implemented. Moreover, they reflect very much a G20 focus in response to the recent financial crisis, with a call on the UN almost as an addendum to reflect on the impact of the crisis on the poor and vulnerable.

In sum, the following may be stated in relation to current approaches in designing the architecture for future crisis management. First, the future architecture in crisis management is being informed by the nature and causes of the recent financial crisis. Second, more weight in the consensus process is being given to the countries where there has been a concentration of cause and impact. Finally, and related the process is not adequately taking into account the 'victim' countries of the crisis, both in the process of identification and management of the crisis.[85]

[81] Jeffrey Schott quoted in the New Straits Times Malaysia (19 December 2008).

[82] The three G20 April 2009 London Declarations: (1) The Global Plan for Recovery and Reform (2 April 2009); (2) The Declaration on Delivering Resources through the International Financial Institutions (2 April 2009); (3) The Declaration on Strengthening the Financial System (2 April 2009).

[83] I.e., 'voluntary bilateral contributions to the World Bank's Vulnerability Framework, including the Infrastructure Crisis Facility and the Rapid Social Response Fund'.

[84] I.e., 'provision of early warning of macroeconomic and financial risks and the actions needed to address them'.

[85] See IMF Survey December 2008. In this respect the following report is in point: 'Strauss-Kahn stressed that the IMF will be working closely with other international institutions. One such close partner will be the Financial Stability Forum (FSF), an organization based in Switzerland that brings together senior representatives of national financial authorities from 12 mainly developed countries and representatives from various financial institutions and regulatory bodies. The FSF has said it plans to expand its membership to also include emerging market countries. On 13 November the IMF and the FSF published a joint letter saying they intend to step up cooperation in key areas such as early warning exercises and improving supervision and regulation of the financial sector.' See now the call for a Global Economic Coordination Council in the Stiglitz Report (The New Press: 2010).

5.5 Conclusion

Necessity in international economic relations is inadequately recognised as a discreet set of issues that call for specific focus at a policy level or in legal analysis. Consequently, the differing genres of necessity identified here with respect to the same subject matter are not considered coherently as an ensemble. For example, it is not clear how a financial crisis resulting in a departure of governmental responsibility giving rise to the defence of necessity is to be considered, given a back ground of possible or actual protection under MIGA, or other multilateral assistance to manage the particular financial crisis. In the same vein, the apparatus within which the similar types of necessity are set in different spheres of international economic relations are not adequately coordinated. Thus, the comparative analysis in the different spheres of IEL reveals differences and nuances in aspects of the determination and response to a necessity circumstance. For instance, there are differences in the trade/monetary spheres with respect to how the essential security interest is determined, although this may be explained by the nature of the security involved. In principle whether the emergency is in the trade, monetary or investment spheres, the policy considerations underlying their determination through an objective review are the same in all the economic spheres—although possibly different in the non-economic sphere.

From a legal perspective the different types of necessity identified in this work have some serious short-comings. First, necessity as a defence to non-compliance from the State Responsibility paradigm is very restrictive. Second, necessity as a normative force has played a weak role in informing international responses to circumstances of necessity. Finally, necessity as a crisis still has the capacity of surprise despite the variety of history lessons. This is because the international institutional framework for crisis prevention and management is not well founded. One common theme of the treatment of necessity in international economic relations is that generally a less than generous approach is adopted in its determination, with too much emphasis on its potential abuse. This calls for a reorientation of necessity from a 'State Responsibility' to a 'necessity' paradigm.

Situations of necessity are in the realms of the extraordinary. Therefore, the normal development of international economic relations may on one view be better resourced without factoring it in. However, where the situation of necessity can threaten the very foundations of international economic relations, and where the circumstances are not beyond imagination and are probable, they need to feature in the matrix of the development of international economic relations. Moreover, nation states may not commit to global economic government that undermines their capacity to govern their domestic economic systems. However, in so far as extraordinary economic circumstances are concerned, the root causes and repercussions of which are set within a globalised borderless

interdependent world economy—the setting up of a world economic forum specifically for global economic crisis management may not go amiss.[86]

The principles to guide the decision making in the identification and formulation of the national and international responses to the different circumstances of necessity should include the following:

- Alacrity—through early response systems. This is of particular relevance to necessity as a crisis, and as a normative force.
- Flexibility—in evaluating the condition and recognition of the diversity of necessity conditions. Taking into account that necessity is a relative concept. Recognising that early diagnosis calls for flexibility and judgment. This is of particular significance to necessity as a defence.
- Good governance in decision making. This has particular relevance to necessity as a normative force and as a crisis.
- Coherence,[87] balance and proportionality in the configuration of 'identification, response and safeguards'.

Moreover, the substantive response in particular must partake of humanity, justice and developmental goals. These principles are grounded in notions of 'due process' and 'justice'. Justice calls for alacrity, individualised response, consistency as well as good governance. Humanity partakes of justice, and has a role in circumstances where there is a margin of appreciation. Indeed, this is already established in practice in the investment sphere. Humanity in the broader sense cannot be excluded in the configuration of a response to a circumstance that has by definition a realm in disaster.

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[86] For a similar recent suggestion to prevent genocide and mass atrocities see Report headed by Madeleine Albright and former Secretary William Cohen. Report suggests 'early warning and prevention system for the next US administration to consider in the US to analyse threats of genocide and mass atrocities around the world and consider appropriate preventive action'. Item reported in Herald Tribune, 17 December 2008.

[87] See for example McCormick 1978; Dworkin 1998.

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Chapter 6
Necessity in Investment Arbitration

August Reinisch

Abstract A number of investment cases in the aftermath of the Argentine economic crisis 2001/2002 have addressed important issues of state of necessity. The tribunals affirmed that the codification of this defence in the 2001 ILC Articles on State Responsibility largely reflects customary international law and they rejected the argument that the highly complex nature of necessity characterized it as a non-justiciable political question. ICSID and other tribunals have also concurred on some crucial aspects of the necessity defence, like the potential qualification of economic emergencies as necessity situations or the fact that necessity can be invoked only in extreme cases. Nevertheless, the application of these principles to the actual situation in Argentina led to divergent and partly conflicting outcomes. After assessing the relationship between derogation clauses contained in many investment treaties and state of necessity this contribution focuses on specific aspects which entitle a State to invoke necessity as a ground for not fulfilling its obligations. It pleads for a proportionality approach in determining whether the actual measures adopted should be regarded as the only means to safeguard State interests. Similarly, it supports a nuanced assessment concerning the contribution element by requiring that it be substantial.

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6.1 Introduction

Economic emergencies have been a rather novel feature in investment and, in particular, in International Centre for Settlement of Investment Disputes (ICSID) arbitration. The cases against Argentina in the aftermath of its economic crisis at the turn of the millennium have kept investment tribunals busy in assessing the impact of such emergencies on a host country's obligations vis-à-vis foreign investors both under customary international law as well as under bilateral investment treaties (BITs) and other international investment agreements.[1] Meanwhile, tribunals have rendered awards in *CMS* v *Argentina*,[2] *LG&E* v *Argentina*,[3] *Enron* v *Argentina*,[4]

[1] There are currently some 30 ICSID cases and an unknown number of other investment proceedings pending. See in general, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending.

[2] *CMS Gas Transmission Company* v *Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, 44 ILM 1205 (2005).

[3] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v *Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, 46 ILM 40 (2007).

[4] *Enron Corporation and Ponderosa Assets, L.P.* v *Argentine Republic,* ICSID Case No. ARB/01/3, Award, 22 May 2007.

Sempra v *Argentina*,[5] *BG Group Plc* v *Argentina*,[6] *Continental Casualty Company* v *Argentina*,[7] and *National Grid* v *Argentina*.[8] Necessity was also a major issue in the *CMS* v *Argentina* annulment decision,[9] while it was only pleaded but not addressed in *Metalpar* v *Argentina*.[10] Whereas the majority of these cases have been instituted under the ICSID Convention, *BG Group Plc* v *Argentina* and *National Grid* v *Argentina* are BIT arbitrations conducted pursuant to the UNCITRAL Rules. For purposes of analysing the relevance of the necessity defence, there does not appear to be any difference between ICSID and non-ICSID cases.

Most of the above-mentioned cases were brought on the basis of the 1991 Argentina/US BIT[11] and all concerned the same factual background of emergency measures adopted by the Argentine government after 2000. All tribunals addressed the impact of an economic emergency on host State obligations at length and have been widely commented upon.[12]

It is well known that *CMS* and—following *CMS*—*Enron*, *Sempra*, *BG Group*, and *National Grid* came to the conclusion that the Argentine situation could not justify the abrogation of investment obligations under the applicable BITs, while *LG&E* and *Continental Casualty* found that the economic crisis constituted a state of necessity precluding the wrongfulness of BIT violations. This is neither the place to go into the details of this split of opinions, nor to elaborate on the broader impact of inconsistent investment arbitration awards.[13]

Rather, this contribution will look at the role and possible limits of ICSID or investment arbitration in general in the case of economic emergencies and thereby address a number of issues that have arisen in the mentioned investment disputes. The first one is jurisdictional and it is linked to an objection routinely raised by Argentina, arguing that the question whether a situation qualifies as an economic

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[5] *Sempra Energy International* v *Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007.

[6] *BG Group Plc* v *Argentina*, UNCITRAL Award, 24 December 2007.

[7] *Continental Casualty Company* v *Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008.

[8] *National Grid plc* v *The Argentine Republic*, UNCITRAL Award, 3 November 2008.

[9] *CMS Gas Transmission Company* v *The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007.

[10] *Metalpar S.A. and Buen Aire S.A.* v *The Argentine Republic*, ICSID Case No. ARB/03/5, Award, 6 June 2008.

[11] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments, signed on 14 November 1991, entered into force on 20 October 1994.

[12] See Alvarez and Khamsi 2009 p. 379; Binder 2009a p. 608; Bjorklund 2008a, p. 495; Bjorklund 2009, p. 479; Burke-White and Staden von 2007, p. 307; Christakis 2007, p. 897; Gazzini 2008, p. 450; Gazzini 2009; Kurtz 2007; Kurtz 2008, pp. 30, 31, available at http://www.jeanmonnetprogram.org/papers/08/080601.pdf; Leben 2005, p. 19; Reinisch 2007, p. 191; Schill 2007, p. 265; Waibel 2007, p. 637.

[13] See in particular, Reinisch 2007 and Waibel 2007.

emergency is an extra-legal issue beyond the jurisdiction of arbitral tribunals. Secondly, it will briefly highlight some of the major issues addressed by investment tribunals, such as the proper international legal standard of a state of necessity, the question whether state of necessity encompasses situations of economic necessity, and, if so, whether the threshold of necessity has been reached in specific cases. Next, it will deal with the relationship between economic emergency clauses in investment agreements and state of necessity under general international law. Finally, this contribution will briefly reflect on the adequacy of the existing law on state of necessity for the solution of situations of economic emergencies.

6.2 Economic Emergency as a Non-Legal Question, Outside the Scope of ICSID Jurisdiction

Emergency situations in general are sometimes characterized as extra-legal issues outside the scope of judicial or even legal appraisal. Thus, attempts have also been made to question whether investment tribunals have jurisdiction to decide on economic emergency measures.

This debate is linked to the issue whether state of necessity can be regarded as a legal rule precluding wrongfulness or whether it is a concept outside the law. The ILC and, in particular, its Special Rapporteur Roberto Ago discussed this issue and finally concluded that assertions that state of necessity would be outside legal appraisal should be rejected.[14] The Commentary to the finalized Article 25 still briefly reflects this debate in its reference to the notorious phrase 'necessity knows no law',[15] invoked as a justification to remove measures aimed at the self-preservation of a State from any legal restrictions, which the ILC characterizes as a 'classic case of an abuse'.[16]

On a procedural/jurisdictional level a similar argument is sometimes raised when respondent States argue that the assessment whether an economic emergency

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[14] Ago 1980, pp. 5–7.

[15] Cf., the speech in the Reichstag by the German Chancellor, von Bethmann-Hollweg, on 4 August 1914, containing the well-known words 'wir sind jetzt in der Notwehr; und Not kennt kein Gebot!' ('we are in a state of self-defence and necessity knows no law'), in Jahrbuch des Völkerrechts, p. 728, trying to justify the occupation of Luxembourg and Belgium by Germany in 1914 on the ground of the necessity.

[16] Commentaries to the draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its 53rd session (2001), reprinted in: Report of the International Law Commission on the work of its 53rd session, Official Records of the General Assembly, 56th session, Supplement No. 10 (A/56/10) [hereinafter ILC Commentary], p. 195, fn. 398.

exists cannot be properly qualified as a 'legal dispute'. If successful this claim may be crucial since the existence of a 'legal dispute' is a jurisdictional requirement for ICSID[17] investment arbitration tribunals.[18]

This argument is comparable to the political questions doctrine relied upon in some domestic legal systems. In general, however, international courts and tribunals have been very reluctant to admit this argument. For instance, the International Court of Justice clearly rejected it in the *Nuclear Weapons*[19] and the *Wall* advisory opinions.[20]

Nevertheless, Argentina has routinely raised the non-justiciability of its emergency reactions as a jurisdictional bar to ICSID cases. ICSID tribunals have not been willing to uphold such challenges though. The bottom-line of investment tribunals appears to be that, even if an issue has political elements, as a long as it is phrased in legal terms it is also a legal dispute and may give rise to judicial or arbitral dispute settlement.

A good example of the reaction of ICSID tribunals is provided by the Decision on Jurisdiction of the *CMS* tribunal which held:

> The ICSID Convention and the jurisdiction of the tribunal established under it were conceived as a system of adjudication of legal disputes arising directly out of an investment, a premise that is specifically included in Article 25(1) of that Convention. This definition excludes quite clearly two kinds of disputes. First, it excludes non-legal questions and, second, it excludes disputes that do not arise directly out of the investment concerned.
>
> It follows that, in this context, questions of general economic policy not directly related to the investment, as opposed to measures specifically addressed to the operations of the business concerned, will normally fall outside the jurisdiction of the Centre. A direct relationship can, however, be established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments.[21]

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[17] Article 25 Convention on the Settlement of Investment Disputes between States and Nationals of Other States [hereinafter ICISD Convention], 18 March 1965, 575 UNTS 159, provides: 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally'.

[18] See Schreuer 2008, p. 959.

[19] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 1996 (I), 234, para 13 ('[…] the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.').

[20] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, 155, para 41.

[21] *CMS Gas Transmission Company* v *Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003; 42 ILM 788 (2003); 7 ICSID Rep 492 (2003), paras 26, 27.

As a result, the *CMS* tribunal concluded that it had jurisdiction. In other words, if a respondent State invokes necessity—either as a rule of customary international law precluding the wrongfulness of its actions or as a situation covered by an emergency clause in an applicable investment agreement—ICSID and other investment tribunals are likely to regard the fulfilment of the preconditions of necessity as a matter over which they have jurisdiction.

Beneath the legal issue whether investment tribunals have jurisdiction to assess questions of economic emergencies lies, of course, a difficult policy issue whether investment arbitrators should be deemed sufficiently competent—not in a formal jurisdictional sense, but in a substantive one regarding their suitability to review complex macro-economic policy decisions—to sit in judgment over economic emergency situations and in particular over the measures adopted by States facing such situations.

Some investment tribunals have recognized this problem and tried to address it by distinguishing between general economic policy measures which they would not scrutinize and specific measures infringing investor rights. For instance, the *CMS* tribunal held:

> On the basis of the above considerations the Tribunal concludes on this point that it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts.
>
> While conceptually the line between one and the other matter is clear, in practice whether a given claim falls under one or the other heading can only be established in light of the evidence which the parties will produce and address in connection with the merits phase of the case. Counsel for the Republic of Argentina has rightly explained that the distinction made 'may have great relevance with regard to liability or responsibility.' This means in fact that the issue of what falls within or outside the Tribunal's jurisdiction will be subsumed in the determination of whether a given claim is or is not directly connected with specific measures affecting the investment.[22]

This reasoning demonstrates that investment tribunals are aware of the difficulty to distinguish between the two theoretically separable aspects.

A related problem is the issue of the potential self-judging nature of at least some aspects of the invocation of necessity. The paradigmatic self-judging clause can be found in the security exception of Article XXI(b) GATT according to which

> [n]othing in this Agreement shall be construed […] to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests.[23]

However, in general, clauses which permit contracting States to determine unilaterally whether the conditions for derogating from their treaty obligations are

[22] Ibid., paras 33, 34.

[23] Article XXI(b) General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194.

present or not are not frequent in international economic law.[24] In particular, BITs usually do not contain self-judging clauses. Among the rare exceptions is a provision in the recent US-Uruguay BIT which provides:

> Nothing in this Treaty shall be construed: […] to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[25]

In particular, the BIT provisions in the Argentine cases do not contain such language. For instance, Article XI of the Argentina/US BIT, applicable among others in the *CMS*, *LG&E*, *Enron*, *Sempra*, and *Continental Casualty* cases, merely provided:

> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.[26]

Nevertheless, Argentina invoked a right to unilaterally determine whether its action was necessary. This claim was rejected in the *CMS* case as well as in the other ICSID cases. The *CMS* tribunal adopted a restrictive interpretation with regard to the potential self-judging character of security interest clauses and was:

> […] convinced that when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly. The examples of the GATT and bilateral investment treaty provisions […] are eloquent examples of this approach. The first does not preclude measures adopted by a party 'which it considers necessary' for the protection of its security interests. So too, the U.S.-Russia treaty expressly confirms in a Protocol that the non-precluded measures clause is self-judging.[27]

This reluctance to permit parties to determine the scope of their international obligations is of course also shared by other international courts and tribunals which have not abstained from reviewing the public interest of certain state measures where they had doubts about their conformity with international law. The need for this review has been aptly described by Judge Anzilotti in his well-known separate opinion[28] in the *Oscar Chinn* case. Specifically contemplating the invocation of a 'state of necessity' he opined:

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[24] Even where economic law treaties contain such clauses, it is often considered that dispute settlement bodies should be able to conduct a good faith review. See e.g., Akande and Williams 2003, p. 365.

[25] See Article 18(2) US-Uruguay BIT, signed 25 October 2004, entered into force 1 November 2006, available at http://www.unctad.org/sections/dite/iia/docs/bits/US_Uruguay.pdf

[26] Article XI Argentina-US BIT (1994), signed 14 November 1991; entered into force 20 October 1994; available at http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf

[27] *CMS* v *Argentina*, supra n 2, para 370.

[28] According to the then Special Rapporteur on State Responsibility, Roberto Ago, 'the verbal clarity and lucid reasoning of this opinion make it one of the most famous statements of position on the question of necessity." Eighth Ago 1980, Report, para 41.

> It is clear that international law would be merely an empty phrase if it sufficed for a State to invoke public interest in order to evade the fulfilment of its engagements.[29]

Argentina did not merely claim that it could self-judge the necessity of its emergency measures under the BIT provisions; it similarly asserted that it had the power to decide on the existence of a state of necessity under customary international law suggesting that the review jurisdiction of the ICSID tribunals should thus be a limited one. Also this assertion was rejected by the *CMS* tribunal insisting on its task to check compliance with the preconditions to invoke necessity under Article 25 of the ILC Articles on State Responsibility. The tribunal concluded:

> that this judicial review is not limited to an examination of whether the plea has been invoked or the measures have been taken in good faith. It is a substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness.[30]

While all investment tribunals concurred that neither Article 25 of the ILC Articles nor Article XI of the Argentina/US BIT were of a self-judging nature, they displayed different attitudes as to the 'margin of discretion' they would allow States when applying emergency measures. This was particularly stressed by the *Continental Casualty* tribunal which reasoned that 'a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight.[31]

6.3 State of Necessity as an Issue of General International Law

To date the qualification of economic emergencies as grave enough to amount to a state of necessity has given rise to partly conflicting assessments, although it appears that a majority view can already be discerned. Central to this issue is the question whether an economic emergency amounts to a state of necessity as codified in Article 25 of the ILC Articles on State Responsibility. This article provides:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
>   (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>   (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

[29] *Oscar Chinn, 1934*, PCIJ, Series A/B, No. 63, p. 65, at p. 112 (separate opinion Judge Anzilotti).

[30] *CMS* v *Argentina*, supra n 2, para 374.

[31] *Continental Casualty* v *Argentina*, supra n 7, para 181.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

   (a) The international obligation in question excludes the possibility of invoking necessity; or
   (b) The State has contributed to the situation of necessity.[32]

6.3.1 State of Necessity and Economic Emergencies

A preliminary issue is whether the concept of a state of necessity encompasses economic emergencies. The tribunal in the *Russian Indemnity* case, though rejecting that an extremely difficult financial situation justified the non-repayment of loans, recognized that necessity[33] may, in principle, be exceptionally available in the sense that:

> the obligation for a State to execute treaties may be weakened if the very existence of the State is endangered, if observation of the international duty is […] *self-destructive*.[34]

Apart from the *Russian Indemnity* case, however, other case-law on this issue is limited.[35] Thus, it has been unclear whether economic emergencies qualify as necessity. In this respect the investment cases against Argentina made an important clarification. All of them found that, in principle, severe economic or financial difficulties may give rise to a state of necessity.

According to the *CMS* tribunal:

> [a] first question the Tribunal must address is whether an essential interest of the State was involved in the matter. Again here the issue is to determine the gravity of the crisis. The need to prevent a major breakdown, with all its social and political implications, might have entailed an essential interest of the State in which case the operation of the state of necessity might have been triggered.[36]

The *LG&E* tribunal equally stressed that the concept of necessity includes economic necessity and asserted even more explicitly than the *CMS* tribunal that:

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[32] Article 25 ILC Articles on State Responsibility, reprinted in supra n 16.

[33] The ILC Commentary rightly characterizes what the tribunal refers to as *force majeure* as an incident of necessity. ILC Commentaries, supra n 16, p. 197.

[34] '[…] l'obligation pour un Etat d'executer les traités peut fléchir «si l'existence même de l'Etat vient à être en danger, si l'observation du devoir international est … *self destructive*.» *Affaire de l'Indemnité Russe* (*Russian Indemnity* case), XI UNRIAA p. 443 (1912).

[35] See however, the brief remarks of the Permanent Court of International Justice under the label of *force majeure* in *Serbian Loans*, 1929, PCIJ, Series A, No. 20, 39/40 ('*Force majeure*.—It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State, […].") and in *Société Commercial de Belgique*, 1939, PCIJ, Series A/B, No. 78.

[36] *CMS* v *Argentina*, supra n 2, para 319.

> what qualifies as an 'essential' interest is not limited to those interests referring to the State's existence. As evidence demonstrates, economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests.[37]

Focusing more on Article XI of the Argentina/US BIT, the tribunal in *Continental Casualty* held:

> A severe economic crisis may thus qualify under Art. XI as affecting an essential security interest, in the broad sense described by the Tribunal above. The Tribunal is comforted in this approach by previous ICSID awards in other arbitrations brought against Argentina (although perhaps their discussion of the issue does not as clearly distinguish between the requirements of Art. XI and Art. 25 of the ILC text). Those ICSID tribunals have recognized, in general terms, that 'there is nothing in the context of customary international law or the object and purpose of the treaty that could on its own exclude major economic crises from the scope of Art. XI,' even if they have taken a different evaluation *in concreto* as to the gravity of the Argentine economic crisis.[38]

6.3.2 Extreme Cases Only

Although there is some disagreement over the factual assessment what amounts to a sufficiently extreme situation, ICSID tribunals have been rather consistent in interpreting Article 25 ILC Articles as requiring a very high threshold. After all, Article 25 speaks of 'a grave and imminent peril'.

According to the *CMS* Tribunal:

> The Tribunal is convinced that the crisis was indeed severe and the argument that nothing important happened is not tenable. However, neither could it be held that wrongfulness should be precluded as a matter of course under the circumstances. As is many times the case in international affairs and international law, situations of this kind are not given in black and white but in many shades of grey. It follows that the relative effect that can be reasonably attributed to the crisis does not allow for a finding on preclusion of wrongfulness.[39]
>
> In the end the tribunal found that 'the Argentine crisis was severe but did not result in total economic and social collapse.[40]

Also the *LG&E* tribunal endorsed the view of an extremely grave nature of situations of a state of necessity. It relied on the ILC's long-term Special Rapporteur by stating that:

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[37] *LG&E*, supra n 3, para 251.

[38] *Continental Casualty*, supra n 7, para 178.

[39] *CMS* v *Argentina*, supra n 2, paras 320, 321.

[40] Ibid., para 355.

> The interest must be threatened by a serious and imminent danger. The threat, according to Roberto Ago, "must be 'extremely grave' and imminent".[41]

Contrary to the *CMS* tribunal, however, the *LG&E* tribunal found that 'essential interests of the Argentine state were threatened in December 2001. It faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace'.[42] Ultimately, the tribunal concluded that 'from 1 December 2001 until 26 April 2003, Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests'.[43] As a result, during that period, Argentina was found to be exempt from responsibility.

6.3.3 Conflicting Interpretations of State of Necessity

The contradictory assessments of state of necessity by the first two ICSID awards in *CMS* v *Argentina*[44] and *LG&E* v *Argentina*[45] created considerable irritation in the investment arbitration community. Although the two tribunals concurred on a number of important aspects concerning the necessity defence under international law,[46] their conflicting assessment of the actual state of affairs prevailing in Argentina during the same critical period created a disturbing situation, demonstrating for critics the lack of predictability of the system of investment arbitration.[47]

By now a number of other ICSID tribunals as well as the *CMS* Annulment Committee have had the chance to contribute to the consolidation of many unsettled questions in this regard. Indeed, tribunals like those in *Enron*[48] and *Sempra*[49] devoted considerable space to discuss the issue of necessity and 'examined with particular attention'[50] the *CMS* and *LG&E* decisions. The *Sempra* tribunal emphasized that the major difference between the conflicting awards lied 'in the assessment of the facts'.[51] On the basis of these facts, however, the *Enron*

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[41] *LG&E* v *Argentina*, supra n 3, para 253.

[42] Ibid., para 257.

[43] Ibid., para 226.

[44] *CMS* v *Argentina*, supra n 2.

[45] *LG&E* v *Argentina*, supra n 3.

[46] For a detailed comparison on the two awards see the contributions cited supra in n 12.

[47] On the question of precedent and the systemic risks of an absence of consistent case-law see also Bjorklund 2008b, p. 265; Kaufmann-Kohler 2007, p. 357; Reinisch 2008b, p. 495; Reinisch 2008a, 107.

[48] *Enron* v *Argentina*, supra n 4.

[49] *Sempra* v *Argentina*, supra n 5.

[50] Ibid., para 346.

[51] Ibid.

and the *Sempra* tribunal concurred with the *CMS* tribunal in finding that the requirements of necessity under customary international law as embodied in Article 25 of the ILC Articles on State Responsibility had not been met.[52] Similarly, the tribunals in *BG Group*[53] and *National Grid*[54] found that Argentina's actions could not be justified on the basis of necessity.

It was the 2008 award of *Continental Casualty* which re-animated the debate. By holding that Argentina's emergency measures were permissible under Article XI of the Argentina/US BIT, it cast doubt on the fragile consensus apparently found in the majority of the earlier cases. Since the *Continental Casualty* tribunal relied less on the customary international law standard of state of necessity than on the applicable BIT's derogation clause it will be addressed in more detail in the subsequent paragraphs.

6.4 Economic Emergencies Under Derogation Clauses Contained in Investment Agreements and as Potential Ground for Precluding Wrongfulness Under General International Law

The investment cases brought against Argentina demonstrate that the economic emergency argument can be raised under two different legal regimes:

(a) It may be invoked under the applicable investment agreement in the form of so-called non precluded measures, excepted measures, safeguards, or derogation clauses; or
(b) it may be raised under general international law in the form of the defence of state of necessity.

What is less clear is whether these two forms of 'defences' may be raised alternatively, cumulatively and whether there is a specific order in which they should be invoked.[55] Also ICSID tribunals have grappled with the correct relationship between these two types of legal defences. Some tribunals have considered the treaty clauses as 'codification' of customary international necessity, while others have stressed their separate function: Treaty clauses are primary rules; if their preconditions are fulfilled there is no treaty violation. A state of necessity

[52] Ibid., para 355; *Enron* v *Argentina*, supra n 4, para 313.

[53] *BG Group* v *Argentina*, supra n 6.

[54] *National Grid* v *Argentina*, supra n 8.

[55] See in particular, Buffard 2009, pp. 97–118; Binder 2009b, pp. 119–151; Binder 2009, pp. 608–630.

excludes the unlawfulness of a treaty violation. Thus, the fulfilment of the customary international law requirements of necessity will only exclude international responsibility for an otherwise unlawful act.

In the *CMS* award, the relationship between the two legal regimes was not openly addressed. Rather, the tribunal directly started with an analysis of the availability of the customary international law defence of state of necessity and relied on the applicable treaty clause of Article XI Argentina/US BIT only in passing so as to confirm its findings on customary law.[56]

This approach was made even more explicit in *Enron* and *Sempra* where the tribunals found that the emergency clause of the Argentina/US BIT could not be regarded as a self-judging clause and held that this:

> Treaty provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined.[57]

Conflating these two standards has been severely criticized by the *CMS* annulment committee[58] which demonstrates that the relationship between the customary international law defence of state of necessity and a treaty-based necessity clause remains problematic. The ad hoc committee stressed that, in spite of some similarities, Article 25 of the ILC Articles on State Responsibility and the emergency clause of the Argentina/US BIT were 'substantively different' and should thus be kept apart. The BIT provision was what the committee termed a 'threshold requirement' which implied that if its condition were fulfilled the substantive obligations under the BIT would not apply.[59] Whereas Article 25, as a 'secondary rule' was an excuse which was only relevant once it had been decided that there had otherwise been a breach of those substantive obligations.[60]

> The Committee observes first that there is some analogy in the language used in Article XI of the BIT and in Article 25 of the ILC's Articles on State Responsibility. […] However, Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25 is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.[61]

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[56] *CMS* v *Argentina*, supra n 2, para 374 ('[…] It is a substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness.').

[57] *Sempra* v *Argentina*, supra n 5, para 376. Similarly, *Enron* v *Argentina*, supra n 4, para 334.

[58] *CMS Gas Transmission Company* v *The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007.

[59] Ibid., para 129.

[60] Ibid.

[61] Ibid.

The *CMS* annulment committee also briefly discussed a potential *lex specialis/lex generalis* relationship between Article XI of the BIT and in Article 25 of the ILC's Articles on State Responsibility. It held that if both were to be regarded as primary rules, they 'would cover the same field and the Tribunal should have applied Article XI as the *lex specialis* governing the matter and not Article 25'.[62] Since it found, however, that Article XI of the BIT was a primary rule and Article 25 of the ILC Articles was secondary one, it did not rely on the *lex specialis* reasoning.

Thus, the ad hoc committee found that the *CMS* tribunal had committed an error of law by failing to first consider whether there had been a breach of the BIT and whether such breach was excluded by the BIT's emergency clause. It stated that '[o]nly if it concluded that there was conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded in whole or in part under customary international law.'[63] Since this mistake amounted only to a 'manifest error of law' and not to a 'manifest excess of power' pursuant to Article 52 ICSID Convention,[64] the ad hoc committee refused to annul the award in this respect.[65]

Even though the *CMS* award remained intact in this respect, the annulment decision had a clear impact on other necessity cases. The UNCITRAL tribunal in the *BG Group* case clearly followed the suggested sequencing by first examining the availability of a BIT based defence and the turning to an examination whether a violation of the BIT standard could be justified under state of necessity.[66] Since the BIT clause of the Argentina/UK BIT[67] invoked did not contain a security exception similar to Article XI Argentina/US BIT but entailed only a non-discrimination obligation in case of compensation for losses suffered as a result of, inter alia, a state of emergency the tribunal rejected Argentina's defence. The *BG Group* tribunal likewise rejected Argentina's customary international law defence of state of necessity. It did so in a particularly sweeping way. First, it held

[62] Ibid., para 133.

[63] Ibid., para 134.

[64] Article 52(1) ICSID Convention provides: 'either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based'.

[65] On the proper standard of review exercised by annulment committees see Schreuer 2003, p. 17; Schreuer 2003, p. 103; Houtte van 2003, p. 11; Marboe 2009, p. 200.

[66] *BG Group* v *Argentina*, supra n 6, para 388.

[67] Article 4 Argentina/UK BIT ('Investors of one Contracting Party whose investments in the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.").

that 'Article 25 may relate exclusively to international obligations between sovereign States'.[68] It thus concluded that the necessity defence would be 'of little assistance to Argentina as it would not disentitle BG, a private investor, from the right to compensation under the Argentina-UK BIT'.[69] Suffice it to note that such a limited (personal) scope of application of the necessity defence under international law has not been relied upon by any other investment tribunal yet.[70] Second, in an *obiter dictum* the tribunal found that the strict requirements for the invocation of state of necessity were not fulfilled.[71]

The most recent necessity case in investment arbitration, though coming to a different conclusion, also adopted the sequencing approach clearly laid down by the *CMS* annulment committee.[72] Rejecting the *Enron* and *Sempra* approach to view Article XI of the Argentina/US BIT as an interpretative aid to the customary international law necessity standard, the *Continental Casualty* tribunal[73] first tested the applicability of the treaty clause and reserved an examination of state of necessity to the situation where a treaty breach had been established.

It addressed the relationship between the treaty-based exceptions clause and the customary international law defence of necessity at length. According to the *Continental Casualty* tribunal,

> Art. XI restricts or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met. In fact, Art. XI has been defined as a safeguard clause; it has been said that it recognizes 'reserved rights', or that it contemplates 'non-precluded' measures to which a contracting state party can resort.[74]

The applicability of a state of necessity, however, implies that:

> [...] an act otherwise in breach of an international obligation ('not in conformity' with it) is not considered wrongful, and does not therefore entail the secondary obligations attached to an illicit act, thank to the 'exceptional' presence of one of the conditions that under international law preclude wrongfulness, here necessity.[75]

The *Continental Casualty* tribunal thus concluded that:

> the invocation of Art. XI under this BIT, as a specific provision limiting the general investment protection obligations (of a 'primary' nature) bilaterally agreed by the

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[68] *BG Group* v *Argentina*, supra n 6, para 408.

[69] Ibid.

[70] It was, however, similarly interpreted by the German Constitutional Court in the *Argentine Bondholders* case, Bundesverfassungsgericht [BVerfG], 2 BvM 1/03, Decision of May 8, 2007, available at (http://www.bverfg.de/entscheidungen/ms20070508_2bvm000103.html. See also Reinisch 2008c, pp. 3–34.

[71] *BG Group* v *Argentina*, supra n 6, para 410.

[72] *CMS* v *Argentina*, Decision on Annulment, supra n 58.

[73] *Continental Casualty* v *Argentina*, supra n 7.

[74] Ibid., para 164.

[75] Ibid., para 166.

> Contracting Parties, is not necessarily subject to the same conditions of application as the plea of necessity under general international law.[76]

In spite of this conceptual differentiation, the Tribunal acknowledges some similarities, in so far as both concepts 'provide flexibility in the application of international obligations' and it stated that it would consider the 'customary concept of necessity' in the interpretation of Article XI Argentina/US BIT.[77]

However, in reaching its conclusions, in particular when assessing whether Argentina's measures had been 'necessary' under Article XI Argentina/US BIT, the *Continental Casualty* tribunal was less guided by Article 25 of the ILC Articles on State Responsibility than by the interpretation given by GATT/WTO panels to the notion of necessity under Article XX GATT. The tribunal held:

> Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law.[78]

On this basis, the ICSID tribunal found that 'Argentina's conduct in the face of the economic and social crisis conformed, by and large, with the conditions required for derogating from its obligations under Art. XI of the BIT.[79]

What is even more interesting from a broader perspective on state of necessity is the fact that the *Continental Casualty* tribunal for the first time clearly broadened its interpretative guidelines by looking not only at other investment cases. Rather, it expressly invoked Article XX GATT and its related case-law for assessing a necessity plea. It appears premature, however, to make already a general appraisal whether GATT/WTO law will have a marked influence on necessity issues before investment tribunals. Nevertheless, the *Continental Casualty* case may be regarded as a first example of adjudicatory cross-fertilization in international economic law.

6.5 Is the Existing Law Adequate or is it too Strict?

In the past, ICSID tribunals only had to adjudicate on Argentina's economic emergency measures adopted between in 2001/2002. The cases decided so far demonstrate that the traditional state of necessity may be a very high threshold to overcome in order to excuse non-fulfilment of BIT obligations.

Where investment tribunals did not hold that they could decide a dispute solely on the basis of an emergency clause contained in the applicable BIT—as in the *Continental Casualty* case—they addressed the individual prerequisites of the

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[76] Ibid., para 167.

[77] Ibid., para 168.

[78] Ibid., para 192.

[79] Ibid., para 233.

customary international law standard of necessity, as enshrined in Article 25 of the ILC Articles on State Responsibility, at quite some length. From a policy perspective, two aspects appear particularly problematic.

6.5.1 The Article 25 'Only Way' Requirement

One very problematic aspect under Article 25 ILC Articles on State Responsibility is its requirement that the measures adopted by a State in order 'to safeguard an essential interest against a grave and imminent peril' be the 'only way' for that State.[80] The Argentine example demonstrates that it is very hard to ever argue that certain economic emergency measures are the 'only way' to counteract economic difficulties.

The principle was endorsed both by *CMS* and *LG&E.* According to the *CMS* decision, '[t]he [necessity] plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient.'[81] Similarly, the *LG&E* decision affirmed that 'the act must be the only means available to the State in order to protect an interest'.[82]

The difficulty is aptly summarized in the reasoning of the *CMS* tribunal:

> A different issue, however, is whether the measures adopted were the 'only way' for the State to safeguard its interests. This is indeed debatable. The views of the parties and distinguished economists are wide apart on this matter, ranging from the support of those measures to the discussion of a variety of alternatives, including dollarization of the economy, granting of direct subsidies to the affected population or industries and many others. Which of these policy alternatives would have been better is a decision beyond the scope of the Tribunal's task, which is to establish whether there was only one way or various ways and thus whether the requirements for the preclusion of wrongfulness have or have not been met.[83]

One may be tempted to say that under such a standard any measure adopted would fail the test of Article 25 because there will always be an alternative.

The *LG&E* tribunal came to a different conclusion, equally upholding the requirement that the Argentine measures constituted the 'only means'. It found that in the circumstances of December 2001,

> an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed.[84]

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[80] See text supra at n 32.

[81] ILC Commentaries, supra n 16, 203; relied upon in *CMS*, supra n 2, para 324.

[82] *LG&E* v *Argentina*, supra n 3, para 250.

[83] *CMS* v *Argentina*, supra n 2, para 323.

[84] *LG&E* v *Argentina*, supra n 3, para 257.

What is remarkable here is that the tribunal did no longer assess whether the specific measures adopted were the 'only way' to address the economic crisis but rather the tribunal stated that 'an economic recovery package'—any package—was required in order to cope with the crisis.

Since the *Continental Casualty* tribunal relied on Article XI Argentina/US BIT in concluding that Argentina did not breach its BIT obligations, its findings on the customary international law 'only means' requirement of Article 25 must be taken *cum grano salis*. Nevertheless, the tribunal hinted at the *LG&E* award's direction by stating that also a different economic policy by the respondent State would not have put the claimant in a better position.[85]

In general, it seems that the strict 'only means' or 'only way' requirement under Article 25 ILC Articles on State Responsibility is indeed a very high threshold that may call for a more lenient application so as to permit some practical scope of application. In the case of economic emergencies, in particular, one could conceive of investment tribunals to incorporate considerations of adequacy and proportionality when assessing the appropriateness of the measures taken by host States to counter a state of necessity.[86]

6.6 The Issue of Contribution

Another highly problematic aspect of the law of necessity as codified in Article 25(2)(b) ILC Articles on State Responsibility is the requirement that a State invoking necessity must not have contributed to the situation of necessity.[87]

It was the fulfilment of this requirement where the *CMS* and the *LG&E* tribunals disagreed considerably, although they concurred on the underlying principle that a State's contribution to a state of necessity excluded the possibility to invoke it. On the one hand, the *CMS* tribunal found that:

> government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.[88]

This approach was endorsed by the tribunals in *Enron*[89] and *Sempra*,[90] while the *LG&E* tribunal, on the other hand, concluded that there was:

> no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity.[91]

[85] *Continental Casualty* v *Argentina*, supra n 7, para 230.

[86] See Reinisch 2007, p. 201.

[87] See text supra at n 32.

[88] *CMS* v *Argentina*, supra n 2, para 329.

[89] *Enron* v *Argentina*, supra n 4, paras 311–312.

[90] *Sempra* v *Argentina*, supra n 5, paras 353–354.

[91] *LG&E* v *Argentina*, *supra* note 3, para 257.

Obviously, this result could only be reached by introducing a questionable burden of proof rule according to which the claimant has to prove that the respondent State had contributed to the state of necessity. This was rather unorthodox because normally a State wishing to rely on necessity, or any other ground precluding the wrongfulness of its behaviour, has to establish the preconditions for such a defence.

An interesting approach was taken by the *Continental Casualty* tribunal. First, it found that the ‘contribution’ element was relevant in its discussion whether the measures adopted under Article XI Argentina/US BIT were ‘necessary’. It then considered that Argentina’s contribution to the crisis could not preclude the invocation of the BIT’s emergency clause because its economic policies were ‘recommended by the IMF and received its massive financial assistance, as well as the political support of the United States’.[92]

What has played a surprisingly minor role in the investment cases decided to date is the level and intensity of the contribution to a state of necessity by the host state. This may be explained by a literal interpretation of Article 25(2)(b) of the ILC Articles on State Responsibility which speaks of ‘contribution’ only. It seems worthwhile, however, to consider a certain threshold to be relevant for the contribution of respondent States in order to exclude their invocation of necessity. According to the ILC Commentary ‘the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral.’[93] This should be particularly stressed when assessing economic policy measures. Any economic crisis is usually the result of a combination of external and internal factors. Thus, it would appear appropriate to require a certain substantial degree of contribution in order to trigger its exclusionary effect.

Decisions which point into this direction are *CMS* which held that Argentina’s policies ‘significantly contributed’ to the crisis[94] and *National Grid* in which the tribunal rejected Argentina’s reliance on necessity primarily because its contribution to the crisis had been substantial.[95]

6.7 Conclusions

The survey on necessity cases in investment arbitration has demonstrated that Article 25 of the ILC Articles on State Responsibility plays a major role in the assessment whether the non-observance of BIT obligations may be justified in situations of economic emergency. Investment tribunals have discussed this article at length. In particular, in the cases stemming from Argentina’s financial crisis at the turn of the millennium Article 25 has played a central role.

[92] *Continental Casualty* v *Argentina*, supra n 7, para 235.

[93] ILC Commentaries, supra n 16, 205; relied upon in *CMS* v *Argentina*, supra n 2, para 328.

[94] *CMS* v *Argentina*, supra n 2, para 329.

[95] *National Grid* v *Argentina*, supra n 8, para 262.

At the same time, investment tribunals have also relied on non precluded measures or derogation clauses in BITs which may be regarded as provisions of a more specialised regime. After some initial uncertainty about the proper relationship between such treaty-based emergency defences and Article 25, the approach of the *CMS* annulment committee appears to have become the prevailing standard. Thus, investment tribunals are required to look first at treaty clauses which may permit certain emergency measures, implying that a State acting in accordance with such clauses does not violate its BIT obligations. Only where such treaty clauses are not available or a State's action amounts to a breach of such clauses and/or the investment law obligations more generally, the secondary rules of State responsibility including Article 25 will come into play.

In other words, a state of necessity is primarily seen as a justification for behaviour that would otherwise be unlawful. Necessity belongs to the secondary rules of international law and it precludes the wrongfulness of wrongful behaviour, mostly in the form of BIT obligations.

Investment tribunals usually first assess whether there was a violation of the applicable BIT and then consider whether such breach may be justified by Article 25. Where a BIT derogation clause is relied upon tribunals may also first analyse whether its preconditions are applicable since such finding may make a closer analysis of BIT violations superfluous.

The cases decided to date indicate that the derogation clauses in BITs provide a more lenient standard for State measures than the rather high thresholds applicable under Article 25 of the ILC Articles on State Responsibility. The most important decision relying on a BIT derogation clause, *Continental Casualty*, demonstrates that a State need not fulfil all the rather restrictive requirements under Article 25 in order to be excused for its non-compliance with BIT obligations.

The *Continental Casualty* award is also of particular relevance because it is the first investment decision on the merits that deals at length with the GATT/WTO jurisprudence on the necessity standard of Article XX GATT. Though specifically referring to this jurisprudence in order to interpret the derogation clause of the applicable BIT, the tribunal's analysis demonstrates an increasing willingness of investment arbitration panels to take into account other fields of international (economic) law, thereby acknowledging their interconnectedness.

All investment tribunals addressing economic emergencies until now have found that the determination whether a state of necessity existed at a certain period is to be made by them and not within the exclusive powers of the respondent State invoking necessity. Similarly, on the basis of the wording of applicable derogation clauses in BITs these are generally not of a self-judging nature which would deprive tribunals of their jurisdiction to assess necessity.

Finally, the overview of the existing case law has demonstrated that the rules governing state of necessity as codified in Article 25 of the ILC Articles on State Responsibility may not be regarded as fully adequate for dealing with all practical problems arising in international investment arbitration. Some of the preconditions for the application of the necessity defence, like the 'only means' requirement or the absence of any contribution to the state of necessity, appear to be overly

restrictive as formulated in Article 25. However, investment tribunals have shown their willingness to apply the rules on necessity in a way that makes them practically useful.

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Chapter 7
Necessity in International Environmental Law

Malgosia Fitzmaurice

Abstract This essay investigates the institution of necessity in international environmental law. The point of departure is the analysis of Article 25 of the International Law Commission (ILC) Articles on State Responsibility regarding its applicability to the particular field of international environmental law. The special feature of the plea of necessity in international environmental law is that it has developed through the case-law. Without doubt, the plea of necessity can be invoked in international environmental law. However, (as in other areas of international law), it remains an exception. This was confirmed by the International Court of Justice which made clear that the invocation of necessity is very problematic. There are some unresolved issues concerning the plea of necessity in international environmental law, such as the question of the precautionary principle. The inclusion of the precautionary principle in the concept of necessity appears to give rise to a certain degree of difficulty, mainly deriving from the seemingly irreconcilable requirements of the 'imminence of peril' and scientific uncertainty represented by the precautionary principle. In the view of the present author, the complex and exceptional legal character of necessity in general and as applied in international environmental law in particular, will deter States from invoking it; therefore, the available practice will remain very scarce and to a certain degree inconclusive, as has already been evidenced by the available case law, analyzed in this essay.

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7.1 Introduction

This essay will investigate the institution of necessity in international environmental law. The point of departure will be the analysis of Article 25 of the International Law Commission (ILC) Articles on State Responsibility[1] regarding its applicability (or not) to this particular field of international law. This essay will be specifically focused on the legal aspects of the state of necessity in international environmental law, as cross-cutting general issues of necessity in international law will be dealt with elsewhere in the present volume.

There are several issues which will be dealt with in analysing the plea of necessity in international environmental law. The focal issue of this essay will be the identification of elements of and the grounds for the plea of necessity in international environmental law. To this effect an in-depth analysis of the relevant case law will be provided, as one of the particular features of necessity in international environmental law is its development through the jurisprudence of international courts and tribunals and through certain international incidents (see below).

[1] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Session, Supp. No. 10, p. 43, UN Doc A/56/10 (2001). See also Crawford 2001.

There is also the set of other, related issues of fundamental importance, which will be discussed below, i.e., the relevance of Article 25 of the Articles on State Responsibility to international environmental law and the question whether the state of necessity in international environmental law is part of the body of norms of customary international law (or its progressive development). Further, the state of necessity in international environmental law will be compared with other areas of international law and the cross-fertilisation of the state of necessity in international environmental law with other branches of international law will be discussed. The problems whether necessity is a primary or secondary rule of international law and whether it is a substantive or procedural rule will be considered. It will be also investigated whether necessity provides a justification or an excuse for the commission of international wrongful acts; and, finally, the problem of the role of international courts and tribunals (third parties) in analysing the state of necessity in international environmental law will be addressed. Following the examination of the relevant case law and doctrine, the final conclusions of each and every one of the above issues will be provided in Sect. 7.

This article will have the following structure: an outline of issues concerning Article 25 of the Articles on State Responsibility; a survey of state practice and the relevant case law and their analytical overview in order to identify the elements of the state of necessity in international environmental law; and, finally, a discussion of certain unresolved issues.

7.2 A Brief Introduction to Article 25 of the Articles on State Responsibility

It must be mentioned from the outset that Article 25 of the Articles is a culmination of a long process of the drafting of these Articles by the International Law Commission (ILC), which was based on the practice of states and the relevant case law. In this section of the essay, a very brief, general description of the plea of necessity will be presented and its elements will be identified in order to investigate their relevance and applicability in the case of international environmental law. Roberto Ago, a Special Rapporteur of the ILC in his Report on Circumstances Precluding Wrongfulness, not only presented the general issues concerning the state of necessity but also had foreseen its possible application in relation to the environment.[2] Historically, necessity was subsumed under the doctrine of self-preservation, at present largely abandoned. As Agius observes, the 1837 *Caroline* case was an example of the doctrine of necessity within a historical context in

[2] Ago 1980, State Responsibility, Document A/CN.4/318/ADD.5-7; Addendum to the eighth report on State Responsibility, pp. 14–70. See also, Document A/CN.4L.318, Draft Articles on State Responsibility. Text adopted by the Drafting Committee: Articles 33–35, reproduced in document A/CN.4/SR.1635. paras 42, 53 and 62.

which the concepts of self-preservation, self-defence and necessity were intertwined. The same author correctly explains that it was 'an application of the necessity excuse rather than self-defence: the relevant justification was not dependent on the existence of a prior, wrongful act or attack …'[3] However, in the modern concept of the plea of necessity some element of a right not to abide by international undertakings if sufficiently vital interests of the state are at stake was preserved and 'in practice an obligation of a state to execute treaties can be weakened if the very existence of the state is endangered.'[4]

The modern concept of necessity as it is understood today, i.e., as the circumstance precluding the wrongfulness of an act, is reflected in Article 25 of the Articles on State Responsibility.[5] In the present essay, however, a brief description of the legal aspects of the state of necessity will only be provided in so far as it regards the modern form of this institution, not its historical development.[6]

The plea of necessity is recognised by states and international courts and tribunals as a circumstance precluding wrongfulness; however, not as unequivocally as the other forms.[7] James Crawford also stressed the unique character of the state of necessity as compared with other circumstances precluding wrongfulness (see more below).[8] As the Special Rapporteur observes, these particular characteristics of the state of necessity indicate that it will only be exceptionally available as an excuse for the non-performance of an international obligation and its invocation is very strictly limited.[9] The conditions under which the state of necessity can be invoked by a state must concern the 'essential interest' of a state; that interest must threatened by 'a grave and imminent peril'; the act which is challenged must be the 'only means' of safeguarding this interest; and that act must not 'seriously impair

[3] Agius 2009, p. 99.

[4] Ibid., p. 98.

[5] The discussion on this Article may be found in: International Law Commission, Fifty-first session, 1999, Crawford, Second Report on State responsibility, A/CN.4/498/Add.3, pp. 27–33; see also ILC Yearbook 1999, Vol II, Part II, A/CN.4/SER.A/1999/Add.1 (Part 2), pp. 82–84. Art. 25: '1. Necessity may not be invoked by a State as a ground for precluding wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only means for a State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exits, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or the State contributed to the situation of necessity.'

[6] Apart from the work of the ILC which presents the historical development of the state of necessity, there are recent publications which are also relevant, such as Agius 2009, and pp. 95–135.

[7] See e.g., the Arbitral Award in the *Rainbow Warrior* arbitration, which emphasised the controversial character of Art. 33 of the ILC Draft on State Responsibility. UNRIAA, Vol XX, 1990, p. 253.

[8] Crawford 2001, p. 178.

[9] Ibid., p. 178.

an essential interest of the state towards which the obligation existed.' According to the International Court of Justice (ICJ) judgment in the *Gabcikovo–Nagymaros Project* case '[t]hose conditions reflect customary international law.'[10] It may also be added that the extent to which a particular interest is essential 'depends on all circumstances and cannot be prejudged.'[11] Finally, a peril has to be objectively established and not merely assessed as possible. It has to be imminent in the sense of proximate.[12]

7.3 Necessity in International Environmental Law: Introductory Remarks

Ago observed that, based on instances in which the plea of necessity may be invoked, it is incontrovertible that an 'essential interest' of a state, which may be threatened by a 'grave and imminent' danger, may in fact concern the measures adopted by a state in order to 'ensure the survival of the fauna or vegetation of certain areas on land or at sea or to maintain the normal use of those areas, or, more generally, to ensure the geological balance of a region. It is primarily in the last two decades that safeguarding the ecological balance has come to be considered as an "essential interest" of all states.'[13] However, as it was observed in the Introduction, State practice and the relevant case law will constitute the most important part of the analysis of the plea of necessity in international environmental law.

7.3.1 The Relevant Practice of States and the Case Law

This section will look at, in particular, the legal construct of the plea of necessity in international environmental law. The purpose of this Section is thus to synthesise the analysis of the relevant case law from the point of view of the invocation of the state of necessity in international environmental law.

Despite the relatively recent interest in environmental protection, the nineteenth century *Fur Seals* controversy and the *Fur Seals* arbitration concerning the protection of biodiversity (analysed below) contributed to a clarification of certain issues regarding the modern, contemporary notion of necessity and it remains a classical example of the application of this concept regarding international environmental law.

[10] *Gabcikovo–Nagymaros Project (Hungary* v *Slovakia*), ICJ Rep (1997), pp. 40–41, paras 51–52.

[11] Crawford 2001, p. 183.

[12] Ibid.

[13] Ago 1980, p. 27, para 33.

7.3.1.1 The 1893 Fur Seals Controversy and the 1893 Bering Fur Seals Fisheries Arbitration (Great Britain v. the United States)

This case was triggered by the excessive (unsustainable) hunting of seals by British and American hunters off the territorial sea of Russia. In anticipation of the start of the hunting season, the Russian government issued a Decree prohibiting the hunting of seals in areas of the ocean contiguous to its territorial sea, which, however, were undisputedly part of the high seas and therefore open to all states. This action by the Russian government was explained in a letter to the British Ambassador from the Russian Minister of Foreign Affairs. He said that these steps had to be adopted due to an 'absolute need' for 'an immediate provisional measure' in view of the 'imminence' of the hunting season. He further emphasized the 'essentially precautionary temporary character' of these measures, 'which were taken under the pressure of exceptional circumstances.'[14] At the same time, the Russian Minster of Foreign Affairs expressed his willingness to enter into an agreement with Great Britain to settle, in a permanent manner, the question of hunting for seals in this area, which resulted in the conclusion of an agreement in 1893.

Ago summarises this case in the following words: '[t]his position is therefore interesting as an affirmation of the validity of the plea of necessity in international law, and also because it brings out several of the conditions enumerated above as having to be fulfilled before one can even consider whether a situation of "necessity" justifies action by a state which is not in conformity with an international obligation: namely, the absolutely exceptional nature of the alleged situation, the imminent character of the danger threatening a major interest of the state, the impossibility of averting such a danger by other means, and the necessarily temporary nature of this "justification", depending on the continuance of the feared danger.'[15]

Ago contrasted the above *Bering Fur Seal* controversy with a similar situation concerning the hunting of fur seals off the coast of one of the islands under the sovereignty of the United States in the Bering Sea (which ultimately led to the *Bering Sea Fur Seals* Arbitration, see below). The United States government extended the domestic application of its national fishery regulations beyond its territorial waters in order to prohibit the operations of Canadian seal hunters. The United States government argued that the hunting methods used by Canadian seal hunters resulted in the massacre of these mammals to the detriment of the commercial interests of the American seal hunters. The action of the United States government was met with protests by the government of Great Britain which claimed that Canadian seal hunters operated in the high seas and therefore their action was legal. This dispute was brought before the Arbitral Tribunal on the basis of the 1893 Treaty. According to Ago the similarities between these two

[14] Ibid.

[15] Ibid.

cases were only superficial. First of all, the United States government did not assert the existence of exceptional circumstances of 'necessity' as a ground for the temporary adoption of measures in order to deal with an 'imminent' ecological danger, but relied on the concept of 'self-protection', meaning the right to take action anywhere for the protection of its own interests and those of its nationals. Further, the Russian Foreign Affairs Minister approached other governments and suggested the conclusion of an international agreement against common danger which would mean that a state would 'desist from activities incompatible with its international obligations.'[16] The Tribunal rejected the argument of the United States and took the view that the action by the United States government was based on the idea of protectionism and the granting of a monopoly concerning commercial interests to the United States' fishermen, thus denying access to other rightful users of the high seas. Ago concluded that '[i]t would therefore be quite wrong to regard the Tribunal's award as a rejection of the concept of "necessity" and, in general as a precedent for denying the admissibility of that concept in international law.'[17]

The legal grounds on which the United States claimed the legality of its regulations was, however, more complicated than just pure protectionism. In fact the United States introduced a very novel and modern approach to the common interest of mankind which was not based on traditionally understood property rights, but on a doctrine of the common property of mankind.[18] The United States argued that it was acting as a trustee for the benefit of mankind and therefore should be permitted to discharge its duties as a trustee.

It may be observed that the concept of the common property of mankind relates to matters which transcending the classical bilateralism of international law and were not addressed by traditional notions of the concept of necessity. Human Rights, the protection of the global environment and obligations *erga omnes* required a new approach to necessity in order to accommodate the multilateralism of relations between states and the emergence of new types of international obligations (see below on this issue, Sect. 7.5).

According to Ago the *Bering Fur Seals* controversy is a clear example of the plea of necessity. As noted above, he contrasted the actions of the Foreign Minister of Russia (the instance of the classical plea of necessity) and that of the United States government (the unilateral protection of the individual interests of the US seal hunters).

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[16] Ibid., p. 28, para 34.

[17] Ibid.

[18] The United States argued as follows: 'The coffee of central America and Arabia is not exclusive property of these two nations; the tea of China, the rubber of South America, are not the exclusive property of those nations where it is grown; they are, so far as not needed by the nations which enjoy the possession, the common property of mankind; and if nations which have custody of them withdraw them, they are failing their trust, and other nations have a right to interfere and secure their share.' *Pacific Sea Fur Seal Arbitration* 1893, Moore 1898, p. 853.

Therefore, the present author is doubtful whether this case is as straightforward as Ago claimed and that the US actions can be exclusively classified as a unilateral act adopted in order to protect the commercial interests of US citizens.

The overall complexity of issues concerning the exploitation and the protection of fur seals coupled with legally challenging and intricate pleadings of the parties to the dispute show how multifaceted and lacking clarity the issue of necessity is. The US approach as summarised by Ago does not reflect the full extent of the legal argument presented by this state, as it was not only based on the idea of the protection of the interests of the US hunters. As observed above, the US government also relied on the concept of a trusteeship in the adoption of certain unilateral measures in order to save biodiversity in the interest of all nations and future generations. Such reasoning appears to have had a similar purpose as that underlying the action of the Russian government, which justified unilateral measures on the basis of a necessity (an essential interest) to save the seal species. It may be argued, of course, that not all core elements of this concept were present in the US approach, such as the ‘only means’ measure. In the view of the author of this essay, however, the most fundamental elements of this concept were included in the US approach, i.e., the protection of the ‘essential interest’ of the community of states and the ‘imminent peril’ to the conservation of seals. This Arbitration gave rise to the conclusion of the 1911 North Pacific Fur Seal Convention between Japan, the United States and Russia, which in fact was one of the first international treaties which attempted to prohibit the hunting of seals outside the limits of the national jurisdiction of the parties to the Treaty.[19]

Brief Conclusion

The *Fur Seal* controversy is a very good example of reaffirming the existence of the plea of necessity in international (and perhaps environmental) law. It also fulfilled several conditions enumerated for the consideration of a plea of ‘necessity’, namely the absolutely exceptional nature of the alleged situation, the imminent character of the danger threatening a major interest of the state, the impossibility of averting such a danger by other means, and the necessarily temporary nature of this ‘justification’, depending on the continuance of the feared danger.

As to the *Fur Seals* arbitration, it brought for the first time a new element of community interests in introducing the concept of the common property of mankind.

[19] Rothwell 1996, p. 376.

7.3.1.2 The Torrey Canyon Incident

The *Torrey Canyon* incident was not a case brought before any of the international courts and tribunals, but an ecological disaster. It is important, however, as it may be regarded as typical from the standpoint of the fulfilment of conditions that '… we consider essential in order for the existence of a "state of necessity" to be recognised …'[20]

This case concerned a massive spill of crude oil off the British coast, but outside its territorial sea, on the high seas. After 2 days nearly 30,000 tonnes of oil had spilled into the sea. This was the first oil-spill incident at sea on such a massive scale and there was no experience in dealing with such situations. The attempts to contain the spill were unsuccessful. However, after the *Torrey Canyon* had broken into three pieces, and 30,000 tonnes of oil had spilled into the sea, the British government decided to bomb the ship in the hope that incendiary bombs would burn off the oil. The bombing of the ship did not elicit any adverse reactions either from the private (the owner of the ship) or public authorities. However, the British government decided to bomb the ship, if necessary against the wishes of the owner (who had anyhow abandoned the ship). The British government did not offer any legal excuse for its action. It emphasised on several occasions, however, that the situation in question posed an extreme danger and that the bombing of the ship was the only possible measure after failed attempts to salvage the situation by any other means. Ago analysed the case as an example of the application of the state of necessity. Even if the shipowner had not abandoned the wreck of the tanker and had objected to its bombing, the action of the British government, outside its jurisdiction, would have been recognised as lawful, since it fulfilled the requirements for a state of necessity.[21] The spill of crude oil threatened the essential, ecological interests of Great Britain, constituted an imminent peril and the destruction of the ship (its bombing by aircraft) was the only effective measure to divert the peril. However, it may be said that the lack of any adverse reactions to the British destruction of the oil tanker further supports the argument in favour of the existence of the state of necessity and the lawfulness of its use (under certain conditions) in general and under international environmental law.

This incident also illustrates one of the elements of the state of necessity, i.e., the principle of balancing the interests or proportionality. International law requires that the action of a state acting on the grounds of necessity does not impair the interests of another state.[22] The International Law Commission, while deliberating its draft Article 33 on the state of necessity, stated as follows:

> … there had to be taken into account proportionality between the interest the State wanted to protect and the interest sacrificed through non-compliance with the international obligation. A State should not claim to be protecting an interest of some importance if it

[20] Ago 1980, para 35.

[21] Ibid., p. 28, para 35.

[22] Ibid.

> breached an obligation towards another State that protected an interest of equal of greater importance to that other State. If in other words, the interest sacrificed must be inferior to the interest protected, particularly since originally one had been legally protected and the other had not.[23]

As Agius noted, the interest of preventing serious pollution was without doubt higher 'than the ship owner's subjective rights or the interest of other states that no state engages in actions outside its territorial waters.'[24]

The *Torrey Canyon* incident gave rise to the 1969 International Maritime Organisation Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties. Article 1, para. 1 of this Convention states that the Parties to this Convention may take 'such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from the pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.'

The wording of the Convention clearly indicates that the adoption of measures on the high seas is lawful in cases of 'grave and imminent danger.' Therefore the Convention sanctions the use of necessity as a circumstance precluding wrongfulness. This constitutes further evidence that the plea of necessity is an established institution under international law.

Ago noted, however, that 'any measures taken must, of course, be proportionate to actual or threatened damage.'[25] In the same context, Ago also referred to a provision in the 1977 Informal Composite Negotiating Text (then Article 222) that subsequently became Article 221 of the 1982 United Nations Law of the Sea Convention.[26]

Brief Conclusion

The *Torrey Canyon* incident was interesting from the point of view of balancing the interests which 'the state wanted to protect and the interest sacrificed through non-compliance with the international obligation.' It was an implicit application of the state of necessity as 'the only way' to avert the ecological disaster. Another interesting element was the lasting value of this incident as it originated the

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[23] ILC Yearbook, supra n 2, p. 156.

[24] Agius 2009, p. 30.

[25] Ago 1980, p. 29.

[26] Article 221: 'Measures to avoid pollution arising from maritime casualties. 1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences. 2. For the purposes of this article, "maritime casualty" means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.'

International Maritime Organisation Convention Relating to Intervention on the High Seas and the relevant Article in the 1982 Law of the Sea Convention.

7.3.1.3 The 1998 Fisheries Jurisdiction Case (Spain v. Canada) (Jurisdiction)[27]

The subject-matter of this case was the regulation of fisheries by the 1994 Coastal Protection Act (Bill 29) within the regulatory area of the Northwest Atlantic Fisheries Organization (NAFO), which defined the 'NAFO Regulatory Area' as 'that part of the Convention Area of the Northwest Atlantic Fisheries Organization that is on the high seas …'[28]

The government of Canada argued that the measures under the NAFO were inefficient in protecting straddling fish stocks in the area of the Grand Banks which, according to the Canadian government, were threatened with extinction. The Act stated as follows: '(d) that some foreign fishing vessels continue to fish for those stocks in the NAFO Regulatory Area in a manner that undermines the effectiveness of sound conservation and management measures, declares that the purpose of Section 5.2. is to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding, while continuing to seek effective international solutions to the situation referred to in paragraph (d)'. 'The new Section of the Act added that: "5.2. No person, being aboard a foreign fishing vessel of a prescribed class, shall, in the NAFO Regulatory Area, fish or prepare to fish for a straddling stock in contravention of any of the prescribed conservation and management measures."'

This Act bestowed wide powers on the national authorities.[29] This case bears similarities to the *Russian Fur Seals* incident discussed above, as it also concerns unilateral measures adopted to protect marine biodiversity outside the limits of national jurisdiction.

On the basis of the Act, on 9 March 1995 the Estai, a Spanish fishing vessel, was intercepted and boarded on the high seas about 245 miles from the Canadian coast, in the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area (Grand Banks area), by Canadian government vessels.

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[27] *Fisheries Jurisdiction* (*Spain* v *Canada*), Jurisdiction of the Court, Judgment, ICJ Rep 1998, p. 432.

[28] Judgement, p. 439.

[29] 'A protection officer may (a) for the purpose of ensuring compliance with this Act and the regulations, board and inspect any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area; and (b) With a warrant issued under Section 7.1, search any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area and its cargo. (2) A protection officer may exercise the powers referred to in paragraph 7 (b) without a warrant if the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be practical to obtain a warrant. 8.1. A protection officer may, in the manner and to the extent prescribed by the regulations, use force that is intended or is likely to disable a foreign fishing vessel.' Ibid., pp. 440–441.

This action by the Canadian government was met with protest from the government of Spain which contended that it was unlawful under international law and 'in no way be justified by presumed concern to conserve fisheries in the area, since it violates the established provisions of the NAFO Convention to which Canada is a party.'[30] The EU also adopted an approach which did not agree with the measures adopted by Canada and on 10 March 1995 it sent a *Note Verbale* to the Canadian Department of Foreign Affairs and International Trade which included the following statement: 'The arrest of a vessel in international waters by a state other than the state of which the vessel is flying the flag and under whose jurisdiction it falls, is an illegal act under both the NAFO Convention and customary international law, and *cannot be justified by any means* [italics added]. With this action Canada is not only flagrantly violating international law, but is failing to observe normal behaviour of responsible states …This serious breach of international law goes far beyond the question of fisheries conservation. The arrest is a lawless act against the sovereignty of a Member State of the European Community.'[31]

The Canadian Department of Foreign Affairs and International Trade claimed the necessary character of this action in a *Note Verbale* to the Spanish Embassy in Canada, in which it was stated that '[t]he Estai resisted the efforts to board her made by Canadian inspectors in accordance with international practice' and that 'the arrest of the Estai *was necessary* [italics added] in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen.'[32]

On 16 April 1995, an 'Agreement between the European Community and Canada on fisheries in the context of the NAFO Convention' was initialled and signed. On the basis of this Agreement the Community and Canada agreed on proposals which would 'constitute the basis for a submission to be jointly prepared and made to the NAFO Fisheries Commission, for its consideration and approval, to establish a Protocol to strengthen the NAFO Conservation and Enforcement Measures.' Canada decided to 'repeal the provisions of the Regulation of 3 March 1995 pursuant to the Coastal Fisheries Protection Act which subjected vessels from Spain and Portugal to certain provisions of the Act and prohibited these vessels from fishing for Greenland halibut in the NAFO Regulatory Area.' Canada would regard as a breach of the Agreement 'any systematic and sustained failure of the European Community to control its fishing vessels in the NAFO Regulatory Area which clearly has resulted in violations of a serious nature of NAFO conservation and enforcement measures.'[33]

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[30] Ibid., p. 443, para 20.

[31] Ibid.

[32] Ibid.

[33] Ibid., pp. 443–444, para 21. It may also be mentioned that on 8 September 1995 the Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks was singed. This Agreement introduced a stricter set of measures than in classical international law. It excludes the participation of third States in fishing in high seas which are subject to a conservation regime and introduces far-reaching enforcement measures.

The Memorial of Spain analysed the action taken by Canada. It did not argue, however, that the plea of necessity on the part of Canada was unlawful, but mainly rested its case on the alleged breach by Canada of customary international law by violating the principle of the freedom of the seas (including the freedom of fisheries).[34]

The above described Canadian measures (the Act and the subsequent action resulting in the arrest of the ship and the ship's master) were justified by the necessity of conserving fish stocks. It must be observed that the plea of necessity was neither explicitly invoked by Canada nor was it commented upon by Spain. The plea of necessity is only implicit from the wording in the written communication by Canada ('the arrest of the Estai *was necessary* [italics added] in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen').

Crawford is of the view that Spain's silence regarding the plea of necessity means that '… the plea of necessity was not rejected a priori.'[35]

According to the present author, Spain's silence regarding the plea of necessity can in all likelihood be considered to be a case of not considering it as a plausible argument, rather than its 'non-rejection.'

There are several similarities between this case and the *Fur Seal* controversy and the *Fur Seal* arbitration in which unilateral measures were adopted by both Russia and the United States in order to protect fur seals (however, as it was observed above, for different reasons). This case involves treaty law (the NAFO agreement), the implementation of which to a certain extent justified, according to Canada, the adoption of unilateral conservation measures regarding the protection of halibut stocks outside its territorial jurisdiction, but within the NAFO Regulatory Area. In contrast, the subject-matter of the *Fur Seals* case exclusively related to the protection of fur seals in the high seas. Furthermore, Canada in its written Memorial submitted that Spain must have been aware of the state of halibut stocks, as a member of the European Union, as the NAFO had frequently warned its Member States about this problem. Therefore, it may be said that Canada implicitly considered the breach of good faith by Spain.[36] Therefore, there are more factors justifying the reliance on the state of necessity by Canada regarding the adoption of unilateral measures leading to the arrest of the ship and the ship's master. However, Spain, in condemning the action by Canada, relied on an

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[34] Mémoire de Royaume d'Espagne (ICJ September 1995, Ch. II), available at: http://www.icj-cij.org/docket/files/96/8591.pdf

[35] Crawford 2001, p. 33, para 285.

[36] '… il est inconcevable que l'Espagne ne fasse aucune mention de la crise de la conservation des ressources halieutiques dans l'Atlantique Nord- Ouest …' Memorial available at: http://www.icj-cij.org/docket/files/96/8593.pdf, para 45.

argument based on the principle of general international law, i.e., the freedom of the high seas (including the freedom to fish).[37]

Although, as it was observed above, the plea of necessity was not relied upon explicitly, the language of the Counter-memorial submitted by Canada did employ the language (albeit in a weak form, see n 38, below) used in the context of the plea of necessity, emphasising the urgent necessity of adopting measures aiming at reversing the danger of the extinction of halibut stocks.[38]

Anyhow, since this case was dismissed on jurisdictional grounds, the Court never analysed it on the merits and, therefore, it was not presented with an opportunity to develop an argument addressing the state of necessity.

The practice of states and the cases discussed above do however indicate one common feature of necessity, i.e., its only temporary character. After a brief period, measures imposed on this basis were revoked and were followed by the conclusion of international agreements in order to make certain permanent institutional arrangements which originated from measures imposed on the basis of the state of necessity, as was the case in relation to both conservation and the oil pollution.

Brief Conclusion

The *Spain* v *Canada* case clearly indicates the complicated and unclear character of the plea of necessity. Unlike the previously analysed case and instances, this one exemplifies a very weak form of this institution. The imposition of measures on the basis of necessity by Canada was not even addressed by Spain. Canada relied on

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[37] 'La liberté des mers, un principe juridique plusieurs fois centenaire, est à l'origine d'une grande partie du droit de la mer moderne. Le contenu essentiel de ce principe (liberté de pêche, liberté de navigation, et juridiction exclusive de l'État sur les bateaux battant pavillon national) s'élabora et se consolida au fil des siècles, et fut considéré universellement comme la meilleure protection des intérêts de la communauté internationale dans son ensemble.' Mémoire du Royame d'Espagne, 1995 (Compétence) (para 1), supra n 34.

[38] 'Le Parlement, constatant que les stocks chevauchants du Grand Banc de Terre-Neuve constituent une importante source mondiale renouvelable de nourriture ayant assuré la subsistance des pêcheurs durant des siècles, que ces stocks sont maintenant menaces d'extinction, qu'il est absolument nécessaire que les bateaux de pêche se conforment, tant dans les eaux de pêche canadiennes que dans la zone de réglementation de l'OPAN [OPANO], aux mesures valables de conservation et de gestion de ces stocks, notamment celles prises sous le régime de la Convention sur la future coopération multilatérale dans les pêches de l'Atlantique nord-ouest, faite à Ottawa le 24 octobre 1978 et figurant au numéro 11 du Recueil des traités du Canada (1979), et que certains bateaux de pêche étrangers continuent d'exploiter ces stocks dans la zone de réglementation de l'OPAN [OPANO] d'une manière qui compromet l'efficacité de ces mesures, déclare que l'article 5.2 a pour but de permettre au Canada de prendre les mesures d'urgence nécessaires pour mettre un terme à la destruction de ces stocks et les reconstituer tout en poursuivant ses efforts sur le plan international en vue de trouver une solution au problème de l'exploitation indue par les bateaux de pêche étrangers.' Contre-Mémoire du Canada, 1996, para 28, available at: http://www.icj-cij.org/docket/files/96/8593.pdf

only one of the elements of necessity in justifying the adopted measures, i.e., 'the necessary character.' It did not mention, for example, 'imminent peril' or that the adopted measure was 'the only way' of acting.

We may presume that the actions of Canada were based on the balancing of interests principle: on the one hand, the interests of the conservation of biological diversity and, on the other, those of Spanish fishermen. According to Canada, the latter interests were of less significance.

The plea of necessity by Canada is not very clear. It is quite difficult to define the source of this plea, i.e., whether it originated from this state's rights under the NAFO Agreement, or whether it was a completely unilateral act in the implementation of its new fisheries law, or perhaps a combination of both. One thing is quite certain, however, i.e., that the structure of the plea of necessity in Article 25 of the ILC Articles provides a more legally sophisticated structure of necessity than this case evidences and that the plea of necessity in this case does not exactly fulfil all the required elements set out in this Article.

7.3.1.4 The Gabcikovo–Nagymaros Case[39]

The *Gabcikovo–Nagymaros* is a classical case not only regarding necessity in international environmental law, but also in general international law. It deals with many fundamental issues of this institution, such as a further analysis of the general aspects of this plea and the relationship between state necessity (and generally the law of state responsibility) and the law of treaties.

In the *Gabcikovo–Nagymaros* case the ICJ presented a most comprehensive analysis of necessity within the context of international environmental law (as well as from the point of view of general questions pertaining to necessity). This case is also an excellent example of a difficult relationship between the areas of the law of treaties and the law of state responsibility (in particular in relation to the circumstances precluding wrongfulness) which at times are almost impossible to distinguish and as is evidenced by this case. This issue will be discussed in the present essay, as this relationship was crucial to this case and played a prominent role in the Judgement of the Court.

Due to the very complicated issues in this case, first a brief description of the factual and legal problems will be presented in order to set the scene for the subsequent analysis of the relevant legal problems. The case originated from various questions stemming from the 1977 Treaty Concerning the Construction and Operation of the Gabcikovo–Nagymaros System of Locks between Czechoslovakia and Hungary. As Lammers observed, this case created a host of issues relating to the law of treaties and the law of State responsibility. The first group of issues related to the various grounds for the termination of a treaty submitted by Hungary (e.g., supervening impossibility of performance; fundamental change of

[39] Generally on this case see Lammers 1998, pp. 287–320.

circumstances; material breach; reciprocal non-compliance etc.) and the second one to questions of State responsibility and the relationship between the law of treaties and the law of State responsibility (a state of necessity as a circumstance precluding the wrongfulness of an act, the application of countermeasures etc.). The 1977 Treaty was supplemented by two Protocols. Political changes in Europe had influenced the implementation of the Treaty. In 1989, Hungary suspended and subsequently terminated the Treaty with the Slovak Republic (which became a Party to the Treaty after the so-called 'velvet revolution' which led to the creation of two states: the Czech and Slovak Republics). The Slovak Republic started to put into operation the alternative so-called 'Variant C' solution. The main justification for Hungary to suspend and terminate the 1977 Treaty was the existence of a so-called 'a state of ecological necessity.'[40] Hungary, in its Memorial, set out all the elements of the state of necessity, prior to arguing that the ecological situation due to the erection of the system of locks and dams justified resorting to this plea. Hungary understood 'the strict limits of customary international law in allowing pleas of necessity, and nevertheless contends that under the explicit circumstances of this case, it was necessary for Hungary to terminate the 1977 Treaty, as it did by Declaration of 19 May 1992.'[41] Hungary in particular singled out the threats to the health and vital interests of the population, in particular in the Szigetköz region. Hungary further argued that the ecological dangers were of an 'exceptional' character; were 'imminent' and threatened 'a major interest' of the state; and were, finally, impossible to avert by other means. The essential character of the interests involved related to severe pollution; a threat to the quality of drinking water; agriculture; and the essential interest of Hungary in maintaining its natural environment.[42] In conclusion there was the requirement of 'essentiality', as Hungary argued that this requirement had been 'abundantly' met in order to protect public health, welfare and the environment. Hungary also emphasised the imminent nature of the peril, particularly after the putting into operation of 'Variant C.' Finally, Hungary stressed the unavoidable character of the decision to terminate the project. It argued that '[t]he termination of the 1977 Treaty was the last possible legal reaction to Czechoslovakia's illegitimate and persistent refusal of meaningful negotiations, which was only underscored by Czechoslovakia's perseverance with Variant C in spite of Hungary's urgent invitations to discontinue work as highly damaging and incompatible with the 1977 Treaty.'[43] Hungary stressed the fact that it did not contribute to the occurrence of the state of necessity.[44]

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[40] Judgment, supra n 10, para 40. See also the Memorial of the Republic of Hungary, Vol I, 2 May 1994.

[41] Memorial of Hungary, p. 283.

[42] Ibid., pp. 287–288.

[43] Ibid., p. 291.

[44] Ibid.

The Slovak Republic presented a vigorous reply to the Hungarian assertions on the existence of a state of necessity. It first dwelt on this issue in relation to the law of treaties (see below, Sect. Sect. 7.4.2.4). Further, it argued that an 'ecological state of necessity' did not exist either at the time of suspending the works, or at the time of termination. The Slovak Republic suggested that at the time the best possible evidence of the expected environmental impact was offered. It also claimed that Hungary did not believe at the moment it unlawfully suspended, abandoned and terminated its performance under the 1977 Treaty that a state of necessity existed. The Memorial stated as follows '[t]o invoke a State of necessity, a State must believe it exists. And it must have held that deep and genuine belief at the moment to act contrary to its international obligations.'[45] The Slovak Republic asserted that the actions of Hungary were rather dictated by financial difficulties and its own perceptions of its energy needs rather than a state of necessity.[46] Further, it submitted in its Memorial that Hungary refused to participate in negotiations concerning such issues as water purity. Finally, it argued that Hungary's invocation of the state of necessity ignored the provisions of the 1977 Treaty, which has its own dispute settlement procedure based on objective data and its own built-in mechanism for constant monitoring. 'Full use of such mechanisms therefore precluded the unobserved development of any situation which could be characterised as a state of necessity and any negative developments could be resolved within the 1977 Treaty framework.'[47] The Memorial further argues that other relevant treaties contained similar provisions.

The Memorial of the Slovak Republic regarding the requirements of necessity indicates that this state adopted a different approach to this issue. It may be observed that it relied on two main arguments against the invocation of the state of necessity by Hungary. One is what may be called 'a subjective approach', i.e., the true belief of a state (Hungary) that the necessity exists; and the second one is the lack of recourse by Hungary to the dispute settlement procedure. These requirements, as may be noted, do not correspond with what the former Article 33 and the subsequent Article 25 provide. This is yet another example of the complexities of this institution of international law and essentially the lack of any agreement by states as to what constitutes such a plea.

As Lammers observed in his essay there were several questions which could have been raised and were raised by the Court regarding necessity: 'what is to be understood by a necessity, under what conditions may it be invoked, and what are the legal consequences of such a state of necessity?; to what extent can a state of necessity be regarded as part and parcel of existing international law?; to what extent can (transboundary) detrimental interference with the environment or the utilisation of natural resources give rise to a state of necessity; to what extent could Hungary in *the present case* validly invoke a state of necessity in order to justify

[45] Memorial Submitted by the Slovak Republic, Vol I, 2 May 1994, p. 320.

[46] Ibid., p. 325.

[47] Ibid., p. 332.

an otherwise unlawful suspension and an abandonment of works that it was committed to perform under the 1977 Treaty?; and finally, to what extent would a state of necessity free a state invoking such a state from a duty to pay compensation for damage caused to another state?'[48]

The Court analysed the state of necessity against the background of Article 33 of the ILC 1980 Draft Articles. The Court also ascertained that the state of necessity, together with its requirements, is a circumstance precluding wrongfulness recognised by international customary law, as drafted in Article 33 of the 1980 Draft Articles.[49] The Court confirmed that the state of necessity was not confined to circumstances constituting traditional grounds for its invocation, such as a grave danger to the existence of the state itself, the maintenance of conditions in which essential sources can function, the keeping of internal peace, but can also be invoked in cases of necessity for the 'ecological preservation of all or parts of its territory.' The Court, following the findings of the International Law Commission, also acknowledged that safeguarding the ecological balance can be considered as an 'essential interest' of all states.[50] However, the Court confirmed the exceptional character of this circumstance precluding wrongfulness and stringent conditions attached to its invocation. In doing so the Court referred to customary international law.[51]

It may also be added that Slovakia expressed some doubts as to the existence in international law of an 'ecological state of necessity.' The extension of the possible instances of invoking such a plea would seriously undermine the stability of the law of treaties.[52] Slovakia further pleaded that even if a 'state of ecological necessity' existed in international law, Hungary did not provide sufficient scientific evidence to back up its claim.[53]

In this case the Court questioned the existence, in 1989, of the threat of 'a grave and imminent peril' and whether the suspension and termination by Hungary of the 1977 Treaty and the abandoning of the works was the only method of safeguarding its essential interest against this peril. The Court addressed the ecological uncertainties which were mentioned by Hungary regarding the erection of the Gabcikovo–Nagymaros barrage system. Regarding these 'uncertainties', the Court analysed the required elements of the state of necessity. It stated that 'these serious necessities might have been that they could not, alone, establish the objective existence of a "peril" in the sense of the component element of a state of necessity.'[54] The Court further explained what is understood under the idea of

[48] Lammers 1998, pp. 298–299.

[49] Judgment, supra n 8, para 51.

[50] See e.g., Boed 2000, p. 12.

[51] Judgment, supra, n 10, para 51, p. 40, see also Okowa, 1999, pp. 389–411.

[52] Oral arguments, Mr Tomka, CR.97/15, p. 54.

[53] Memorial of the Slovak Republic, supra, n 39, para 4.8.

[54] Judgment, supra, n 10, para 54.

'peril' in the context of the state of necessity. The word 'peril' 'certainly evokes the idea of 'risk' and this is exactly what distinguishes 'peril from material damage.'[55] A state of necessity can only exist with a 'peril' 'duly established' at 'the relevant point of time.' Further, the Court added 'the mere apprehension of a possible "peril" is not sufficient to establish the state of necessity.'[56] This follows the requirement that a 'peril' constituting the state of necessity has to be at the same time 'grave' and 'imminent.' The Court analysed the notion of 'imminence.' It is synonymous with 'immediacy' or 'proximity' and, according to the ILC, an 'extremely grave and imminent peril' must be a threat to a state's interest at the actual time. The Court added, however, that in its view a 'peril' appearing over a long period of time might be considered 'imminent' 'as soon as it is established at the relevant point of time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.'[57] Against this background of general considerations of the state of necessity, the Court analysed the case of the Gabcikovo–Nagymaros system of locks and barrages. The Court made a detailed analysis of all parts of the project from the point of view of alleged state of ecological necessity. As to the Nagymaros portion of the project, the Court examined the impact on the environment of the upstream reservoir and expressed the view that the dangers alleged by Hungary were of an uncertain character and therefore there was no 'grave and imminent' peril at the time of the suspension and abandonment of the works by Hungary. Regarding the presumed dangers stemming from the lowering of the riverbed downstream of Nagymaros and the alleged resulting harm to drinking water supplied to Budapest, the Court observed that the bed of the Danube in this area had already been lowered before 1980 for building materials. Therefore the peril invoked by Hungary had already been present before 1989, and could not entirely be ascribed to work on the Nagymaros dam. The Court stressed that even if the erection of the system in this area would have created serious risks, Hungary had at its disposal other means than the suspension and abandoning of the project. The use of more costly techniques, according to the Court, was 'not determinative of the state of necessity.'[58] Regarding Hungary's plea of necessity in relation to the quality of the ground and surface water in the area of Dunakiliti and the Szigetköz and the effects on fauna and flora, the Court was of the view that the peril alleged by Hungary was uncertain and was to be considered in the long term. Further, the Court stated that Hungary had at its disposal other means to address the dangers it apprehended (such as controlling, to a certain extent, the distribution of water between the bypass canal, the old Danube bed and the sidearms).[59] In general the Court concluded that regarding the

[55] Ibid.

[56] Ibid.

[57] Ibid.

[58] Ibid., para 55.

[59] Ibid., para 56.

Nagymaros and Gabcikovo projects, the perils which were invoked by Hungary, without prejudging their possible gravity, had not been established to a sufficient degree in 1989, their 'imminence' was not without doubt and Hungary had at its disposal, at least at that time, other means to address the issue at hand (the alleged peril), without having recourse to the suspension and subsequent termination of the treaty. A vital issue for the determination of the existence of the state of necessity is who can authoritatively make such a factual assessment: a state claiming necessity or a third party? It may be inferred from the judgment in the *Gabcikovo–Nagymaros* case that 'the current position is that the assessment must indeed be determined by a state, but that such an assessment may be scrutinised by affected parties, the international community as a whole and, as seen from case law, international legal bodies to which the case may be rendered. The very idea behind regime building efforts in the field of state responsibility builds upon the desire not to give much latitude to states, as regards the circumstances under which they may deviate from their international undertakings.'[60]

The Court stated that having taken into consideration the social and political circumstances in Hungary in 1989, even if it had been established that there was a state of necessity in 1989 linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission, to bring it about. Further, the Court did not feel that it was necessary to consider whether Hungary, by proceeding as it did in 1989, 'seriously impair[ed] an essential interest' of Czechoslovakia, within the meaning of Article 33 of the 1996 Draft of the International Law Commission. This finding certainly did not prejudge, according to the Court, the damage Czechoslovakia claimed to have suffered on account of the position taken by Hungary.[61]

Brief Conclusion

The Court in this case confirmed many legal characteristics of the state of necessity which could have already been drawn from other environmental cases. First of all, the Court incontrovertibly reiterated that ecological concerns can give rise to the invocation of the plea of necessity. It also further analysed fundamental components of the state of necessity, such as the requirement of 'imminence.' It clarified the question of who decides on the factual existence of necessity and it came up with a two-tiered test: the first tier comprises a subjective test, i.e. firstly the state itself decides on the existence of the state of necessity. However, it cannot be the sole judge thereof. Therefore a second tier is introduced, the objective one,

[60] Agius 2009, p. 16.

[61] Judgment, supra n 10 paras 57 and 58, pp. 45–46.

applied by other states (the community of states) or judicial bodies. The Court also analysed the notion of 'imminence.' It is synonymous with 'immediacy' or 'proximity' and, according to the ILC, an 'extremely grave and imminent peril' must be a threat to the state's interest at the actual time. However, the Court added that in its view a 'peril' appearing over a long period of time might be considered 'imminent' 'as soon as it is established at the relevant point of time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.' However, some issues were not fully resolved. In the view of the present author, the Court did not deal in a persuasive manner with fundamental differences between the law of treaties and the law of state responsibility. Also some of the Court's legal analysis of the elements of necessity (such as the above-mentioned notion of 'imminence') is very complicated and it is difficult to envisage how such a definition of the concept of imminence will be reflected in the practice of states. It may also be noted that although it ascertained, on several occasions, its reliance on customary international law regarding necessity and Draft Article 33, it introduced elements which were not essential parts of the construct of the state of necessity, such 'a subjective approach', i.e., the true belief of a state (Hungary) that the necessity exists.

7.4 A Summation of the Issues Raised as a Result of the Analysis of the Doctrine and the Practice of States and the Relevant Case Law. The Questions of the Legal Construct of a State of Necessity in International Environmental Law

7.4.1 Introduction

Having critically analysed the doctrine, the practice of states and the relevant case law, certain tentative answers can be given in order to elucidate the legal construct of the state of necessity in international environmental law. State practice and each and every case analysed in this essay was concluded with observations as to its significance in relation to the application and clarification of the plea of necessity. This section, however, will summarise the findings and offer a further more general, critical analysis of the question posed in the Introduction to the present essay.

It has to be stated that not all cases which were analysed in the preceding parts of this essay are equally illuminating in this respect. It is an incontrovertible fact that the *Gabcikovo–Nagymaros* case has proven to be the most prominent in contributing to the clarification issues raised regarding the plea of necessity in international environmental law.

7.4.2 The Analysis of the Issues Raised: Doctrinal Considerations

7.4.2.1 The Grounds for Invoking the State of Necessity in International Environmental Law

It may be said that the case law and practice of states preceding the *Gabcikovo–Nagymaros* case, although perhaps in an incomplete manner, contain certain elements which had formed the construct of the plea of necessity in customary international law. The most instructive in this respect remains the *Bering Sea Fur Seals* controversy and arbitration. As indicated above, from a doctrinal point of view Ago identified several elements in this case that became the constitutive parts of the plea of necessity in customary international law and which are enshrined in Article 25 of the Articles on State Responsibility, i.e., (a) whether a situation of 'necessity' justifies action by a State which is not in conformity with an international obligation; (b) the absolutely exceptional nature of the alleged situation; (c) the imminent character of the danger threatening a major (essential) interest of the state; (d) the impossibility of averting such a danger by other means, and (e) the necessarily temporary nature of this 'justification', depending on the continuance of the feared danger. The *Torrey Canyon* incident and the *Canada/Spain Fisheries* case were less illuminating as the *Torrey Canyon* was never adjudged and the *Canada/Spain Fisheries* case was terminated on a jurisdictional basis and, as it was observed above, it constituted a very 'weak' example of the plea of necessity. However, without being explicit (or fully conforming to all the requirements of the plea of necessity), both of them had adopted the language of the state of necessity, i.e., the *Torrey Canyon* case highlighted the element of the uniqueness of the measures adopted which were the 'only available method of averting an extreme danger to the essential interest of the state.' In the second of these cases, the language used in relation to halibut stocks, such as 'threatened with extinction' and the necessity of taking 'urgent action necessary to prevent further destruction of these stocks and permit their rebuilding', indicates that the adopted measures relied, at least to a certain extent, on the legal construct of the plea of necessity. It may also be noted that both *Fur* Seals and the *Torrey Canyon* gave rise to the conclusion of the relevant Convention and to the inclusion of Article 221 in the 1982 Law of the Sea Convention.

7.4.2.2 The Relevance of Article 25 to Necessity in International Environmental Law; State of Necessity and Customary International Law

In two cases: the *Gabcikovo–Nagymaros* case and the Advisory Opinion in the *Wall* case, the Court relied on the legal construct of the state of necessity in Draft Articles 33 and 25 respectively.

The International Court of Justice stated that the 1980 ILC Draft Article 33 on State Responsibility codified existing customary international law regarding the state of necessity. In the *Gabcikovo–Nagymaros* case the Court referred to customary international law as recognising a state of necessity as an exceptional circumstance precluding wrongfulness and relied on the above-mentioned Article in order to analyse the components of the state of necessity. The Court adopted the same approach in other cases, such as in the 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in which it referred to the *Gabcikovo–Nagymaros* case and Article 25 of the Responsibility Articles.[62] Interestingly, however, as it was observed above, the Court in the *Gabcikovo–Nagymaros* case broadened the defining components of the plea of necessity by the element of subjectivity.

Progressive Development of International Law and the State of Necessity

The suggested inclusion (subsequently abandoned by the ILC) of the precautionary principle in the text of the Article 25 would have amounted to a progressive development of the state of necessity in international environmental law (see below, Sect. 7.5). Apart from this problem, however, the present author has raised the issue which has not been discussed previously in relation to the plea of necessity, i.e. the question of the common property of mankind (the point pleaded by the United States representative in the *Bering Sea Fur* Arbitration, see above, Sect. 7.3.1.1) and which for a long period of time undoubtedly remained in the progressive development of international law, subject to controversy, which was evidenced by the discussion surrounding the inclusion of the concept of the common heritage of mankind, as enshrined in Part XI of the 1982 Law of Sea Convention (the presentation of which exceeds the scope of this study). This development gave rise to the modern formulation of Article 25 1 (b) which takes into consideration the multilateralism of international obligations, thereby transcending its inherent bilateralism.

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[62] '[a]s the Court observed in the case concerning the *Gabcikovo–Nygymaros Project* (Hungary/Slovakia), "[t]he state of necessity is a ground recognized by customary international law" that "can only be accepted on an exceptional basis"; it "can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met" (ICJ Rep I997, p. 40, para 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be "the only way for the State to safeguard an essential interest against a grave and imminent peril" (Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts; see also the former Article 33 of the Draft Articles on the International Responsibility of States …' *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, p. 136 at para 140, p. 195.

7.4.2.3 States of Necessity and Other Areas of International Law

It may be stated that the state of necessity as applied in international environmental law does not appear to have developed many particularly significant features (apart from the dilemma of the precautionary principle). In fact, the way in which this principle evolved corresponds with its parallel development in other branches of law. Therefore, it is probably correct to surmise that the state of necessity in international environmental law is rooted in customary international law and the formulation of Article 25 of the Articles on State Responsibility reflects this. However, as indicated by the *Gabcikovo–Nagymaros* case, states are not entirely certain when the plea of necessity can be invoked in international environmental law (and what its main elements are) and it appears that there is a certain degree of confusion as to how it relates to the law of treaties. In its pleadings Slovakia seemed to dwell mainly on the subjective element of the state of necessity (the conviction of a state that it is entitled to invoke it), with a lesser degree of consideration being accorded to its other pertinent components. Another important issue which was raised in this case was the relationship between specific clauses on the dispute settlement procedure and the plea of necessity, the existence of which, it was argued, should preclude to some extent the possibility of its invocation. The same problem arose in the *Wall Advisory Opinion,* but here the Court also decided that there was no need to consider it[63] and therefore this problem remains open.

7.4.2.4 Cross-Fertilisation with Other Branches of International Law

In the *Gabcikovo–Nagymaros* case, the Court attempted to disentangle certain issues regarding the relationship between the plea of necessity and the law of treaties. It most importantly distinguished between the termination of treaties (the realm of the law of treaties) and the consequences of such an action (the realm of state responsibility). The author of this essay, however, is in agreement with other writers who are of the view that the Court has missed the opportunity, which this case presented, of a further and more profound clarification of the essential but unclear relationship between the law of treaties and the law of State responsibility.[64] In fact, the *Gabcikovo–Nagymaros* case is a perfect example evidencing the cross-fertilisation between various branches of international law.

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[63] '[I]n this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation … Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question.' Ibid., para 140, pp. 194–195.

[64] Wellens 1998, p. 793. See also Lefeber 1998, pp. 609–623.

The Law of Treaties and the Law of State Responsibility (the State of Necessity)

As was stated above, one of the questions raised in the context of this case was the relationship between the termination of treaties and the state of necessity, a frequent subject of confusion and misconception. Crawford explained that circumstances precluding wrongfulness 'operate more as a shield than a sword.' While they may protect the state against an otherwise well-founded accusation of wrongful conduct, they do not strike down the obligation, and the underlying source of the obligation, that the primary rule is not affected by them *as such.* As the Special Rapporteur reminds us, this issue was already raised by Fitzmaurice in 1959, during the work of the International Law Commission on the codification of the law of treaties.[65] This question was raised in the *Rainbow Warrior* arbitration, where the Arbitral tribunal upheld the distinction between the law of treaties and the law of state responsibility: the law of treaties was applied for determining the continuing existence of the treaty and the law of state responsibility was applied for determining the consequences of breaching the treaty.[66] The difficulties regarding the clear-cut distinction between these two regimes may have their sources in the fact that although '… the law of state responsibility is separate from the law treaties, *albeit* the two sets of norms to some degree regulate the same fields and the same situations … Nevertheless, international practice has confirmed that whenever state responsibility is incurred, the state has a right to invoke the circumstances precluding wrongfulness, as well as defences under the law of treaties.'[67]

However, in the present case the Court made important statements to further clarify this relationship. It said as follows: '[a] determination of whether a convention is not in force and whether it has not been properly suspended or denounced, is to be made pursuant to the law of treaties.' On the other hand, '[t]his position is therefore interesting as an affirmation of the validity of the plea of necessity in international law, and also because it brings out several of the conditions enumerated above as having to be fulfilled before one can even consider whether a situation of "necessity" justifies action by a state which is not in conformity with an international obligation: namely, the absolutely exceptional nature of the alleged situation, the imminent character of the danger threatening a

[65] Crawford 2001, (the 1999 Report), para 224, p. 8. Fitzmaurice stated as follows: '[s]ome of the grounds justifying non-performance of a particular treaty obligation are identical with some of those justifying the *termination* of a treaty. Yet … the two subjects are quite distinct, if only because in the case of termination … the treaty ends altogether, while in the other [situation] … it does not in general do so, and (if a paradox) is permissible, the non-performance is not only justified, but "looks towards" a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present.' Sir Gerald Fitzmaurice, Fourth Report, ILC Yearbook, Vol II, p. 41 (1959), cited in Crawford 2001, para 224, p. 8.

[66] See Crawford 2001, para 224, p. 9, *Rainbow Warrior* arbitration, supra, n 5, See also on this subject, Agius 2009, p. 44.

[67] Agius 2009, pp. 43–44.

major interest of the state, the impossibility of averting such a danger by other means, and the necessarily temporary nature of this "justification", depending on the continuance of the feared danger of the extent to which a suspension or denunciation of the convention, seen as incompatible with the law of treaties, involves the responsibility of the state which proceeded to it, is to be made under the law of state responsibility.' Thus the Vienna Convention of 1969 confines itself to defining—in a limitative manner—the conditions in which a treaty may be lawfully denounced or suspended; while the effects of a denunciation or suspension as not meeting those are, on the contrary, expressly excluded from the scope of the convention by operation of Article 73. It is moreover well established that, 'when a state has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect'[68] and further…'[e]ven if a state of necessity is found to exist, it is not a ground for the termination of a Treaty. It may be only invoked to exonerate from its responsibility a state which has failed to implement a Treaty. Even if found justified, it does not terminate a Treaty: the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but—unless the parties by mutual agreement terminate the treaty—it continues to exist. As soon as the state of necessity ceases to exit, the duty to comply with treaty obligations revives.'[69]

In the view of many authors the *Gabcikovo–Nagymaros* case appears to be something of a paradox: on the one hand, the Court unconditionally supported the principle of the stability of treaties and the view that all the grounds for the invocation of the termination of treaties must be treated with caution[70]; on the other hand, it acknowledged that a state has a wide range of defences (in this case the state of necessity) exculpating it from responsibility for the breach of a treaty.[71]

7.4.2.5 The State of Necessity in International Environmental Law and Primary and Secondary Rules in International Law

Crawford, as a Special Rapporteur, was adamant that the invocation of defences available under state responsibility 'do not strike down the obligation, and the underlying source of the obligation, the primary rule, is not affected by them *as such*.'[72] He further argued that '[t]hus it is doubtful whether a circumstance

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[68] *Gabcikovo–Nagymaros* case, supra, n 10, para 47.

[69] Ibid., para 101, p. 63, see also para 38, p. 47.

[70] Fitzmaurice 1998, p. 344.

[71] See e.g., Agius 2009, p. 74. Okowa 1999, pp. 393–394. However, Lefeber in his essay is of the view that there are visible distinctions between the law of treaties and the law of state responsibility in the termination of a treaty (e.g. in invoking the plea of *force majeur* and Article 61 of the 1969 VCLT).

[72] Crawford 2001, 1999 Report, para 224, p. 8.

precluding wrongfulness could ever render *definitively* inoperative any primary obligation.' What it can do is to provide justification for non-compliance which lasts as long as the conditions for relying on the given circumstance are met. If the primary obligation terminates, then so too does the need to rely on Chapter V … Rather than saying that a circumstance precluding the wrongfulness renders the obligation 'definitively or temporarily inoperative', it is clearer to distinguish between the existence of a primary obligation, which remains in force for the state concerned unless otherwise terminated, and the existence of a circumstance precluding the wrongfulness of conduct not in conformity with that obligation.'[73]

In the *Gabcikovo–Nagymaros* case the primary obligation was contained in the 1977 Treaty (including all subsequent agreements). The plea of necessity belonged to the secondary rules of State responsibility regulating the consequences of Hungary's suspension and the subsequent termination of the treaty. In the *Bering Sea Fur Seals* controversy the primary rule was the law concerning the conservation of seals. The consequences of the 'unlawful' application of these rules outside Russia's jurisdiction belonged to the realm of State responsibility (secondary rules). Therefore, it may be concluded without any doubt that the plea of necessity in the area of international environmental law also belongs to secondary rules.

7.4.2.6 The Invocation of the Plea of Necessity in International Law as Justification and as an Evidentiary (Procedural) Norm

In the view of the present author, the International Court of Justice and the International Law Commission did not adopt a more nuanced approach, existing in municipal law, which distinguishes between 'justification' or 'excuses' in the application of the plea of necessity (as well as other circumstances precluding wrongfulness). The ILC Rapporteurs Ago and Crawford appear to use these terms interchangeably, as a means to be invoked by a state to justify (or excuse) an otherwise wrongful act.

In the *Gabcikovo–Nagymaros* case the Court first established the breach of an international obligation and then considered the plea of necessity as a possible justification for such a breach, not the other way around (this was the stance of Hungary as well, which admitted the breach and 'justified' it on the basis of the plea of necessity). In this case, the state of necessity played, to some extent, a substantial role. On this basis Hungary attempted to redefine its obligations under international law, i.e., to terminate a project. However, it may be also said that the plea of necessity played a procedural, evidentiary role. Hungary pleaded that that scientific evidence submitted to the Court constituted proof which justified the termination of the 1977 Treaty on the grounds of necessity.

[73] Ibid., para 226, pp. 9–10.

7.4.2.7 The Role of the Third Party in the Invocation of the State of Necessity

The Court in the *Gabcikovo–Nagymaros* case established that a state cannot be the sole judge of its plea of necessity. The state has to be convinced about the existence of the state of necessity before invoking it; however, other states and international courts and tribunals are the final judges as to whether such a plea was well founded. Therefore, the role of international courts and tribunals in this respect is crucial as they are objective bodies which are empowered to adopt a final, binding decision. A purely unilateral action by a state invoking a state of necessity was considered to be unfounded under international law, as was commented upon by Ago, regarding the US imposition of its domestic regulation on the hunting of seals outside US territorial jurisdiction. It may be observed, however, that similar action by Russia, after consultation with other states, was considered to be a properly executed plea of necessity. Nevertheless, in the view of the author of this essay, the divisive line between the behaviour of the US and Russia was very fine. The US action was not purely commercial, but was also in the name of mankind, as was pleaded by it before the Arbitral Tribunal, which finally resolved the dispute. It may be said that third party adjudication is probably the best way of assessing the lawfulness of the plea of necessity, as other states may have their own interests at stake, as was clarified by the Court in the *Gabcikovo–Nagymaros* case.

7.4.2.8 The State of Necessity in International Environmental Law and Other Defences in the Law of State Responsibility

The plea of necessity is also different from other defences. Crawford explained as follows: '[u]nlike consent … self-defence … or countermeasures …, it is not dependent on the prior conduct of the injured state. Unlike force majeure …, it does not involve conduct which is involuntarily coerced. Unlike distress …, necessity consists not in danger to the lives of individuals in the charge of a state official, but in a grave danger either to essential interests of the state or of the international community as a whole.'[74]

The plea of necessity in international environmental law in its general structure and requirements conforms to this institution in other areas of international law. It is an inconvertible view that the plea of necessity is a very exceptional circumstance precluding wrongfulness, as the Court stated in the *Gabcikovo–Nagymaros* case. It is also (like other circumstances precluding wrongfulness) only of a temporary character. The most fundamental requirements regarding the state of necessity are codified in Article 25 of the Articles on State Responsibility. However, it may be added that the distinguishing feature

[74] Crawford 2001, p. 178.

of the state of necessity in international environmental law is its development through the case law.

7.5 The Balancing of Interests, the Environment and the Interests of the Community of States

Environmental matters and ecology transcend the classical bilateralism of international law.[75] For example, in the case of global Multilateral Environmental Agreements (MEAs), non-performance by one party defeats the whole purpose of the treaty (e.g., the protection of the ozone layer, or the prevention or control of climate change). It may be noted that from a doctrinal point of view the differentiation between the legal character of various types of multilateral obligations is very challenging due to their much nuanced differences.[76] Generally speaking, however, the earlier readings of drafts of Article 33 (which preceded the present Article 25) were subject to criticism for not sufficiently considering the emergence of obligations *erga omnes* and multilateral regimes such as those on human rights and, we may add, international environmental law, as its formulation of the state of necessity was predicated upon a bilateral balancing of interests by the states concerned.[77] The formulation of Draft Article 33, which was based on a balancing of the contrasting interests of two states, ignored the need for creating and upholding certain fundamental standards for the international community.[78]

Crawford explained why the original formulation of Article 33(1)(b) was not well adjusted to the consideration of obligations *erga omnes*. As an example he gave the interest of Ethiopia and Liberia is the South Africa cases, whose private interests appeared to be unclear as distinct from the public interest in compliance with the relevant norm. Crawford explained: '… South Africa could not have invoked necessity against those states on the basis that no essential interest of theirs was seriously impaired. The relevant interest for that purpose was of the people of South West Africa itself.'[79]

Crawford clarified that many obligations *erga omnnes* involve peremptory norms, which were entirely excluded from the scope of the previous Article 33. He further noted that in the case of an obligation *erga omnes* in specialist fields of

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[75] Generally on the subject see also Simma 1994, 1989, pp. 821–844; Simma and Paulus 1998, pp. 266–277.

[76] For general issues of the typology of international obligations see Fitzmaurice 1957, p. 31; Fitzmaurice 1959, p. 46; and James Crawford, Third Report on State Responsibility, Fifty-second session, Geneva, 1 May–9 June, 10 July 18 August 2000, A/CN.4/507, paras 82–119. See also 2001 Draft Articles on State Responsibility, in particular Articles 42 and 48, available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

[77] Boed 2000, pp. 19 and 41–44.

[78] Ibid., p. 19.

[79] Crawford 2001, Crawford 1999 Report, para 290, p. 36.

human rights or peace and security, the obligation itself may exclude reliance on necessity.[80] As a result of a discussion paragraph 25 1 (b) was added:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless… the act does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

This provision seems to address the situation where a state may not invoke necessity if an obligation owed to the international community as a whole is seriously harmed. What seems to be at stake in the above-mentioned State practice and cases is that the state of necessity is invoked in the interest of the wider international community, which would fall within the scope of Article 25(1)(b), even if this is not explicitly mentioned.

Judge Weermantry expressed his strong support for greater concern for the community of interests in relations between states and the international litigation of such interests in the *Gabcikovo–Nagymaros* case. He made the following statements: ‘But can momentous environmental issues be decided on the basis of such *inter partes* conduct? In cases where the *erga omnes* issues are of sufficient importance, I would think not. This is a suitable opportunity, both to draw attention to the problem and to indicate concern at the inadequacies of such *inter partes* rules as determining factors in major environmental disputes. I stress this for the reason that *inter partes* adversarial procedures, eminently fair and reasonable in a purely *inter partes* issue, may need reconsideration in the future, if ever a case should arise of the imminence of serious or catastrophic environmental danger, especially to parties other than the immediate litigants …We have entered an era of international law in which international law subserves not only the interests of individual states, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating states, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation. When we enter the arena of obligations which operate *erga omnes* rather than *inter partes,* rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual state self-interest, unrelated to the global concerns of humanity as a whole.’[81]

An example of the application of the state of necessity within the context of the protection of the community of interests is the case of the *Fur Seals* arbitration (see above), in which the unsustainable hunting of seals conflicted with the common heritage of peoples (as pleaded by the United States).

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[80] Ibid., para 290. See also Crawford 1999, p. 459.

[81] Separate Opinion of Judge Weeramantry, Judgement, supra n 10, p. 118.

It may be added that the recognition of the interests of the community of states within the realm of the state of necessity does not solve the question of *locus standi* before the International Court of Justice.[82]

7.6 Certain Unresolved Issues

One of the main issues underlying Article 25 is the question of scientific uncertainty, which is closely related to the subject-matter of the precautionary principle. As Crawford observed, with regard to the stringent formulation of 'peril' in Article 33, it provides no room for further consideration to be given to conservation and the environment or to the safety of large structures in which there may be scientific uncertainty, subject to different views of various experts on what constitutes a grave and imminent peril and whether the means suggested are the only ones available in these particular circumstances. The question arose whether the power accorded to the person responsible should be the same as in the case of distress in the context of saving lives where a certain degree of discretion is given to the agent in question, acting on the basis of a reasonable belief in the situation of distress.[83] Crawford compared the plea of distress with that of necessity and concluded that the former covers the protection of individual human lives whilst the latter contains a wider spectrum of contingencies. In relation to the state of necessity there is a requirement to safeguard against peril which can be assessed as an extremely serious risk. Crawford explained that by its definition a peril would not have occurred, and it cannot be required to expect the invoking state to prove that it would certainly have occurred otherwise. In the *Gabcikovo–Nagymaros* case the Court stated that a state relying on necessity cannot be the sole judge that the existence of scientific uncertainty was not sufficient in itself to establish the existence of an imminent peril. Crawford argues that although this is the right approach, on the other hand neither should a measure of scientific uncertainty disqualify a state from relying on this in pleading a state of necessity if 'the peril is established on the basis of the evidence reasonably available at the time (as based, for example on a proper risk assessment procedure').[84] This approach, according to Crawford, is consistent with Principle 15 of the Rio Declaration.[85]

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[82] On this issue see extensively Tams 2005. See also on *locus standi* and *erga omnes* obligations in environmental matters, Fitzmaurice 2010, pp. 17–57.

[83] Crawford 2001, Crawford 1999 Report, para 289, p. 34.

[84] Ibid., para 289, p. 35.

[85] Principle 15: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' See on this principle e.g., Trouwborst 2002, 2006 and Fitzmaurice 2009, pp. 1–67.

The Special Rapporteur raised the question whether Article 33 should be amended to expressly incorporate the precautionary element. He further added that the cases for and against were evenly balanced, 'but given the need to keep the defence of necessity within tight bounds, and the possibility of reflecting that element in the commentary, no change has been made.'[86]

According to some authors the main problem of reconciling the legal nature of the state of necessity with the precautionary principle is the 'imminence' of the 'peril' contrasted with scientific uncertainty which is the core of the precautionary principle. The question of how to define an 'imminent peril' which is uncertain and cannot be confirmed by science could also be raised.[87] Foster also perceives yet another difficulty, i.e., the characteristic of ecological harm as being long term. She explains that the long-term nature of processes which may result in ecological harm should be distinguished from the issues of the level of scientific uncertainty concerning the harm. She correctly observes that '… in practice the two points will be connected and both require to be considered in the light of the precautionary principle. Arguably, on balance overall, harm becomes "imminent" at the point when it appears reasonable for a state invoking necessity to conclude, based on all the available knowledge, that preventive action must be taken.'[88] Several critical comments were raised regarding the treatment of ecological necessity by the Court in the *Gabcikovo–Nagymaros* case. The main thrust of this criticism was the Court's inability to fully appreciate the role of scientific evidence in cases of ecological peril, i.e., problems with the provision of fully documented and conclusive evidence in such cases.[89] The inclusion of the precautionary principle in the concept of necessity appears to give rise to a certain degree of difficulty, mainly deriving from the seemingly irreconcilable requirements of the 'imminence of peril' and scientific uncertainty represented by the precautionary principle.

Apart from the above considerations, however, the heart of the matter regarding the role of the precautionary principle in the plea of necessity (not addressed by many authors) is that the precautionary principle belongs to primary rules and the state of necessity to secondary rules. Therefore, the precautionary principle cannot be incorporated into the matrix of necessity because it originates in different categories of norms.

The question may thus be posed whether there is a possibility for circumventing this obstacle through recourse to extra-legal means for the justification of the state of necessity. The possible answer to this problem perhaps lies in approaching the precautionary principle only as part of the evidence substantiating the plea of necessity if 'the peril is established on the basis of the evidence reasonably

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[86] Crawford 2001, para 288, p. 35.

[87] Foster 2008, p. 277.

[88] Ibid., p. 277.

[89] See in particular: Dobos 2001–2002, p. 397.

available at the time' (as based, for example, on 'a proper risk assessment procedure' (see Crawford's comments above)).

States could thus broaden their plea of necessity by the inclusion of supporting evidence without full evidential value. The role of this evidence would further strengthen the plea of necessity, without attempting to include it as part of the plea of necessity and as such bearing the close scrutiny of international judicial bodies from the point of view of the very strict application of the element of 'imminence' (apart from the doctrinal impossibility of such an inclusion, see above).

7.7 Concluding Remarks

In conclusion it may be said that the plea of necessity can be invoked in international environmental law, which was already noted by Ago, and confirmed by the International Court of Justice in the *Gabcikovo–Nagynaros* case. However, (as in other areas of international law), it remains an exception. According to the present author the interpretation by the International Court of Justice of the constituent elements of the plea of necessity, as applicable in international environmental law, made the invocation of necessity very problematic. For example, the Court offered a very strict understanding of 'imminence' and on the question of who decides on the factual existence of necessity and it came up with two-tiered test: the first tier comprises a subjective test, i.e., firstly the state itself decides on the existence of the state of necessity, and, secondly, an objective test has to be applied by the community of states or judicial bodies. States also appear to be confused as to the relationship between the state of necessity and the law of treaties, an issue which has not been resolved by State practice and the jurisprudence of international courts and tribunals. In the view of the present author, the complex and exceptional legal character of necessity in general and as applied in international environmental law in particular, will deter states from invoking it; therefore, the available practice will remain very scarce and to a certain degree inconclusive, as has already been evidenced by the available case law. The example of the *Spain/Canada* dispute clearly indicates that the legally sophisticated construct of necessity in Article 25 is not always reflected in the practice of states.

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Chapter 8
The Notion of Necessity in the Law of the European Union

Panos Koutrakos

Abstract This article discusses how the EU legal order deals with cases where Member States deem that the principle of necessity justifies a deviation from EU law. It analyses the various exceptional clauses laid down in primary and secondary EU law, and discusses the tensions which their application may raise in the context of the Union's idiosyncratic constitutional order. It assesses the broad powers with which national courts are endowed, and highlights the dynamic nature of the Union's approach to accommodating potential deviations. Finally, it focuses on an area at the core of national sovereignty, namely defence, and outlines the gradually shifting approach to its economic aspects which the Union institutions have developed over the years.

Keywords Necessity · Exceptional clauses · EU law · National sovereignty · Defence industries

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8.1 Introduction

There are various aspects of the notion of necessity and its implications for the multilayered and idiosyncratic constitutional order of the European Union which are worthy of analysis. For instance, the Lisbon Treaty, which entered into force on 1 December 2009, envisages the emergence of a collective sense of belonging by imposing duties on Member States in extraordinary circumstances. To that effect, it introduces two novel provisions. The first is the solidarity clause in Article 222 of the Treaty on the Functioning of the European Union (TFEU). This provides for the joint action by the Union and its Member States 'if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster' and requires that the Union 'shall mobilise all the instruments at its disposal, including the military resources made available by the Member States'. The second provision is the mutual assistance clause in Article 42(7) of the Treaty on the European Union (TEU) which reads as follows:

> If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Both clauses raise a host of questions about the nature of the duty they impose on Member States, the conditions under which the latter are expected to comply with it, and the specific ways in which their compliance is envisaged to manifest itself. (Koutrakos 2011)

Another aspect of the status of necessity under EU law is how it affects the position of Member States as fully sovereign subjects of international law when they act in areas of EU competence, or in ways which may affect EU law. It is this aspect which will be the subject matter of this article, as it relates to the balance of power between Member States and the Union within the Union legal order, itself an issue of fundamental significance. The Union, as the Community in the pre-Lisbon days, is founded on the principle of limited competence. In accordance with Article 5(1) TEU, '[t]he limits of Union competences are governed by the principle of conferral' which is defined in Article 5(2) TEU[1]:

[1] In the pre-Lisbon constitutional arrangements, the principle of conferral which governed the European Community was set out in Article 5 EC. On the principle of limited competence, see Dashwood 1996, p. 113.

> … the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

Therefore, any analysis of the notion of necessity within the Union legal order is centered on the locus of power within its constitutional architecture. In terms of the semiotics of this architecture, it is noteworthy that, in the Lisbon Treaty, that is the most recent expression of the Union's primary charter, provisions on competence start off with a reference to the limits of the Union's competences.

This analysis focuses on the effects of the Union legal order on the right of the Member to rely upon the concept of necessity, and examines the ways in which EU law accommodates this right in cases where its exercise deviates from EU law. It is structured as follows. First, it examines the provisions set out in the EU Treaties which enable Member States to deviate from the four freedoms. Second, it examines clauses laid down in secondary measures adopted by the EU institutions which justify deviations from their provisions. Third, it analyses the provisions set out in primary law which recognise the right of Member States to deviate from the entire corpus of EU law under certain extraordinary circumstances.

8.2 Exceptional Clauses in Primary Law

The Union legal order acknowledges the right of Member States to deal with exceptional circumstances by deviating from EU law. It does so by setting out exceptional clauses in both primary and secondary legislation. In the context of the foundational substantive principles of EU law, that is the four freedoms, such exceptions are laid down in Article 36 TFEU regarding free movement of goods,[2] Articles 45(3) TFEU and 52 TFEU regarding free movement of persons,[3] Article 62 TFEU regarding free movement of services and Article 65 TFEU regarding free movement of capital.[4]

These provisions enable a Member States to impose restrictions in order to protect certain interests which may be in conflict with free movement and which are deemed worthy of such exceptional protection. These interests are set out in primary law and include, invariably, public policy, public security and public health. They also include certain other interests a reference to which may vary in different TFEU provisions.[5]

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[2] Ex Art. 30 EC.

[3] Ex Articles 39(3) EC and 46 EC.

[4] Ex Article 58 EC.

[5] For instance, Art. 36 TFEU also refers to public morality, the protection of health and life of animals or plants; the protection of national treasures possessing artistic, historic or archaeological value, and the protection of industrial and commercial property.

In terms of the philosophy of these exceptions, it would be wrong to assume that the relevant provisions grant the Member States the right to protect the social interests to which they refer by deviating from EU law. Instead, they acknowledge the right which each Member State has as a fully sovereign subject of international law to protect the social interests deemed more important, in a case of conflict, than the economic freedoms set out in the EU Treaties.

On the other hand, it would also be wrong to assume that the Member States enjoy complete discretion as to whether and, if so, how to protect these interests. In fact, there are certain parameters within which the Member States must act. This may be recognized in primary law. Article 36 TFEU, for instance, provides that prohibitions or restrictions on the free movement of goods 'shall not … constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. Early attempts of Member States to instrumentalise such exceptions in order to escape EU law controls were rebuffed by the European Court of Justice (ECJ). In *Simmenthal*, it was made clear that 'Article [36 TFEU, ex Article 30 EC] is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article'.[6]

Therefore, the interpretation of the exceptional clauses laid down in the EU Treaties has been based on the premise that they 'deal with exceptional cases which are clearly defined and which do not lend themselves to any wide interpretation'.[7] This tenet applies both to principles set out in the EU Treaties[8] as well as secondary legislation.[9]

In particular, the requirement of compliance with the principles of necessity and proportionality has been a constant in the ways in which necessity requires that national authorities deviate from EU law provisions.[10] Within this context, one of

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[6] Case 35/76 [1976] ECR 1871, para 14. See also Case 153/78 *Commission* v *Germany* [1979] ECR 2555, para 5.

[7] Case 13/68 *Salgoil SpA* v *Italian Ministry for Foreign Trade* [1968] ECR 453, 463; Case 222/84 *Marguerite Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 26.

[8] Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219, paras 27 and 27; Case 46/76 *Bauhuis* [1977] ECR 5, para 12; Case C-30/77 *R* v *Boucheraeu* [1979] ECR 1999, para 33, Case 72/83 *Campus Oil* v *Minister for Industry and Energy* [1984] ECR 2727; Case C-54/99 *Association Église de Scientologie de Paris* v *The Prime Minister* [2000] ECR I-1335, paras 17–18.

[9] Case 222/84 *Johnston*, supre n 7, para 36; Case C-116/91 *Licensing Authority South Eastern Traffic Area* v *British Gas* [1992] ECR I-4071, para 12; Case C-45093 *Eckhard Kalanke* v *Freie Hansestadt Bremen* [1995] ECR 3051, para 21; Case C-335/94 *Hans Walter Mrozek and Bernhard Jäger*.[1996] ECR I-1573, para 9; Case C-321/96 *Wilhelm Mecklenburg* v *Kreis Pinneberg—Der Landrat* [1998] ECR I-3809, para 25; Case C-273/97 *Angela Maria Sirdar* v *The Army Board and Secretary of State for Defence* [1999] ECR I-7403, para 23; Case C-285/98 *Tanja Kreil* v *Bundesrepublik Deutchland* [2000] ECR I-69, para 22.

the parameters which the Court examines is the existence of secondary legislation and the extent to which this protects the interest which a Member State seeks to protect: if the answer to this question is affirmative, then the deviation from EU law is not justified as, by purporting to protect an interest already protected at EU level, such a deviation is no longer necessary. Therefore, not only is the exercise of the right of the Member States to act when they deem that necessity so requires assessed *in concreto* by Europe's judges, but the latter assessment is also carried out in the light of EU law and the activities of the EU legislature.

In relation to the public security proviso, in particular, the Court of Justice has traditionally afforded some leeway to the Member States. This is exemplified in the *Campus Oil* judgment.[11] This preliminary reference was about an Irish rule that importers of petroleum products should purchase a certain proportion of their requirements from the only state refinery at a fixed price. The Irish government argued that the restriction on free movement of goods which that requirement entailed was justified on public security grounds: it was essential that the state should be able to rely upon crude oil at all times, and, to that effect, it ought to ensure the viability of the only Irish refinery.

This case illustrates clearly the different interests which underpin the application of EU law once a Member States seeks to rely upon the notion of necessity. On the one hand, the Court delineates in its judgment the authority of the Member State to act in broad terms, so much so that it is prepared to approach the prior intervention by the Union legislature in a more flexible manner than its previous case-law might have tolerated. It pointed out that the Community had adopted secondary legislation dealing with difficulties in supplies of crude oil and petroleum products. However, it held that, such measures notwithstanding, the Member States do not have 'an unconditional guarantee that supplies will in any event be maintained at least at a level sufficient to meets its minimum needs'.[12]

It, then, held that an interruption of supply of petroleum products was justifiable under the public security exception as such products, 'because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its services but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them'.[13] This approach suggests that, once necessity touches upon the most vital interests of the state, and therefore, gives rise to the core of the functions which a state carries out in order to protect its citizens, there is more leeway for autonomous action, the presence of EU secondary legislation in the area notwithstanding.

However, to tolerate and sanction the choices made by the Member States is not tantamount to rendering them beyond the Union legal framework altogether.

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[11] Case 72/83 *Campus Oil*, supra n 8.

[12] Ibid., para 31.

[13] Ibid., para 34. See also Case C-503/99 *Commission* v *Belgium* (*re: golden shares*) [2002] ECR I-4809, para 46.

In *Campus Oil,* the Court went on to determine whether the Irish restriction was proportionate. It pointed out that the quantities of petroleum products to which the purchasing obligation referred should not exceed the minimum supply requirements of the state 'without which the operation of essential public services and the survival of its inhabitants would be affected'.[14] It is interesting that the Court should engage in quite a detailed examination of what the proportionality test would entail: 'the quantities of petroleum products whose marketing can be ensured under such a system must not exceed the quantities which are necessary, so far as production is concerned, on the one hand, for technical reasons in order that the refinery may operate currently at a sufficient level of its production capacity to ensure that its plant will be available in the event of a crisis and, on the other hand, in order to that it may continue to refine at all times the crude oil covered by the long-term contracts which the State concerned has entered into so that it may be assured of regular supplies'.[15]

The Court is seen to have taken a 'pro-state' approach in *Campus Oil*.[16] However, it is not only the detailed analysis and strict application of the principle of proportionality[17] which may question this view. It is also the clearly narrow terms in which the notion of public security was defined. Indeed, the circumstances in which the notion of public security as construed by the Court would apply would be truly quite exceptional.[18] In a subsequent action against Greece,[19] the Court was asked to deal again with a system of ensuring minimum stock of petroleum products and the Community measure already mentioned in *Campus Oil* which imposed such a requirement on Member States.[20] The Greek authorities, however, had enabled the companies bound to store petroleum products to transfer that obligation to refineries based in Greece provided that they had purchased such products from these refineries during the previous year. The Court found this provision contrary to the principle of free movement of goods: it aimed to protect an interest of an economic nature and, in any case, 'the objective of public security could have been achieved by less restrictive measures without it being necessary to make the transfer of the storage obligation to refineries established in Greece conditional upon the obligation to obtain supplies of petroleum products from those refineries'.[21]

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[14] Ibid., para 47.

[15] Ibid., para 48. On the different approaches to the construction of the principle of proportionality by the Court in the context of primary free movement exceptional provisions, see Barnard 2009, p. 273.

[16] Barnard 2007, p. 82.

[17] See Tridimas 2006, p. 226.

[18] See also Craig and de Búrca 2008, p. 700.

[19] Case C-398/98 *Commission* v *Greece* [2001] ECR I-7915.

[20] Council Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products (OJ, English Special Edition 1968 (II), p. 586.

[21] Supra n 8, para 31.

The judgment in *Commission* v *Greece* clearly suggests that the *Campus Oil* principle by no means provides Member States with a *carte blanche* when they claim that necessity related to public security entails a deviation from EU law. In its rather short judgment, the Court merely referred to the arguments made by the late Advocate General Colomer in his Opinion, without even repeating them. It is interesting that the latter had expressed deep skepticism about the Greek arguments, and required a detailed and specific explanation of how public security entailed the adoption of the illegal measure.[22]

Viewed along a strict and elaborate approach to the application of the principle of proportionality, the judgment in *Campus Oil* acknowledges the duty of the Member States to protect their citizens, whilst subjecting its exercise to Union law control. It is noteworthy that the latter is mediated through national courts. In *Campus Oil,* the Court follows a constant theme of its case-law and leaves the application of the principle of proportionality to national courts.[23] All in all, the judgment is not couched in language of deference, but one of balanced coexistence of the rights of Member States as fully sovereign subjects of international law and the obligations imposed under the Community legal order.

So far, this analysis has focused on the interpretation of public security in the context of deviations from EU law in cases where Member States deem these necessary. The starting point for the tensions described above is the assumption by the Member States that there is an area reserved to their sovereign powers the exercise of which should be immune to the disciplines imposed by the EU's rules. This assumption has manifested itself in different contexts over the years. A striking example was provided in the area of sanctions against third countries. In *Centro-Com*, the British government argued that it reserved the power to deviate from EC rules imposing economic sanctions against Serbia in order to ensure their effective application, because such a deviation constituted a foreign policy choice which was beyond the scope of the Community legal order.[24]

The Court of Justice accepted that foreign policy was not covered by EC law. However, it added that 'while it is for Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless respect the provisions adopted by the Community in the field of the common commercial policy provided for by Article [207 TFEU, ex Article

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[22] See for instance, para 44 of his Opinion, to which the judgment referred, which reads as follows: 'As regards the risk for the distribution system of an industrial unit which is vital for national security, I am of the view that the defendant Government has not shown that, in order to protect national security, it is essential to link the transfer of the storage to the obligation to acquire the products. I myself see no reason why, if under the present system the refineries can store their own products, they cannot, under a system governed by the laws of the market and of free competition, store the products which the marketing undertakings acquire from other Member States'.

[23] In the area of free movement of goods, see Jarvis 1998, Chs. 6 and 7.

[24] Case C-124/95 *Centro-Com* [1997] ECR I-81.

133] of the Treaty'.[25] The same conclusion was reached in relation to similar claims for reserved powers in the areas of monetary powers,[26] registration of vessels,[27] social policy,[28] taxation,[29] health care,[30] and services liberalisation.[31] This case-law, and the need for Member States to take into account the law of the European Union when the policy choices which they deem necessary deviate from EU law have prompted a sitting Judge at the Court of Justice, writing in an extra-judicial capacity, to argue that '[t]here is no nucleus of sovereignty that Member States can invoke as such against the Community'.[32]

8.3 Exceptional Clauses in Secondary Law

Provisions similar to the primary exceptional clauses mentioned above are also laid down in secondary EU legislation. For instance, Council Regulation 3285/94 on imports from third countries enable Member States to deviate from its provisions and impose prohibitions, quantitative restrictions or surveillance measures on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property.[33] Similar provisions are set out in other EU instruments, and they refer to such non-economic interests either expressly,[34] or by reference to

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[25] Ibid., para 27.

[26] See Joined Cases 6/69 and 11/69 *Commission* v *France* [1969] ECR 523, para 17; Case 57/86 *Greece* v *Commission* [1988] ECR 2855, para 9; Case 127/87 *Commission* v *Greece* [1988] ECR 3333, para 7.

[27] Case C-221/89 *Factortame and Others* [1991] ECR I-3905, para 14.

[28] C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779, para 40.

[29] Case C-264/96 *ICI* v *Colmer* [1998] ECR I-4695, para 19; Case C-334/02 *Commission* v *France* [2004] ECR I-2229, para 21; Case C 446/03 *Marks & Spencer* [2005] ECR I 10837, para 29; and Case C 524/04 *Test Claimants in the Thin Cap Group litigation* [2007] ECR I 2107, para 25.

[30] Case C-120/95 *Decker* [1998] ECR I-1831, paras 22 and 23; Case C-158/96 *Kohll* [1998] ECR I-1931, paras 18 and 19; Case C-157/99 *B.S.M. Geraets-Smits and H.T.M. Peerbooms* v *Stichting Ziekenfonds VGZ and Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, para 46.

[31] Case C-475/98 *Commission* v *Austria* [2002] ECR I-9797, para 132.

[32] Lenaerts 1990, p. 220.

[33] Council Regulation 3285/94 [1994] OJ L 275/1, Art. 24(2)(a)(i).

[34] For instance, Council Regulation 2603/69 on common rules on exports [1969] OJ L 324/25, amended by Regulation 3918/91, [1991] OJ L 372/31 (Art. 11).

the exceptional clauses set out in the Treaties.[35] Furthermore, there may be special exclusions depending on the subject-matter of the set of rules in question.[36]

In its interpretation of such clauses, the Court has adopted the balanced approach which underpins its judgment in *Campus Oil*. This has become apparent in the area of export controls, and in particular their application to dual-use goods, that is goods of both civil and military application. This area provided scope for considerable debate between the Commission and the Member States. The former argued that, as exports are trade measures, exports of dual-use goods fell within the scope of Community law pursuant to ex Article 133 EC (now Article 207 TFEU). The implications of this position would be considerable: this central provision of the Common Commercial Policy (CCP) had long been held by the Court to confer upon the Community (now the Union) exclusive competence, hence allowing Member States to act on their own only on the basis of a specific EU law authorization.[37] On the other hand, the Member States argued that, because of their nature, exports of dual-use goods fell within the sphere of foreign and security policy and, as such, could not be subject to the principles of EU law in general and CCP in particular.[38]

In its case law, the Court of Justice struck the balance between these differing approaches. On the one hand, it made it clear that the foreign implications of the national measures would not render them immune to EC law control. In *Leifer,* it held as follows[39]:

> … national rules whose effect is to prevent or restrict the export of certain products fall within the scope of the common commercial policy within the meaning of Article [133] of the Treaty.

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[35] See for instance, Council Regulation 227/77 on Community transit [1977] OJ L 38/1, Art. 10 as interpreted by the Court in Case C-367/*89 Criminal Proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC* [1991] ECR I-4621, paras 17–18.

[36] See for instance, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114, Art. 14 on secret contracts and contracts requiring special security measures. However, there is also a provision in the preamble (para 6) according to which '[n]othing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty'.

[37] For the early authorities, see *Opinion 1/75 (re: OECD Local Cost Standard*) [1975] ECR 1355; Case 41/76 *Donckerwolke* [1976] ECR 1921, *Opinion 1/78 (re: International Agreement on Natural Rubber)* [1979] ECR 2781; Case 174/84 *Bulk Oil* [1986] ECR 559. For an analysis, and references to more recent case law, see Eeckhout 2004, pp. 9 et seq, and Koutrakos 2006, pp. 1 et seq.

[38] For an analysis of this debate, see Koutrakos 2001.

[39] Case C-83/94 *Criminal Proceedings against Peter Leifer and Others* [1995] ECR I-3231, paras 10–11. See also Case C-70/94 *Fritz Werner Industrie-Ausrustungen GmbH* v *Federal Republic of Germany* [1995] ECR I-3189, paras 10–11.

> The fact that the restriction concerns dual-use goods does not affect that conclusion. The nature of those products cannot take them outside the scope of the common commercial policy.

Therefore, the Court refuses to delineate an area where reliance upon necessity would enable Member States to act wholly independently from EU law. As national action is viewed as within the scope of EU law, the Court, then, deals with the question whether a national restriction on exports may be justified as necessary to protect public security. It answers in the affirmative, and construes the latter concept widely, encompassing both internal and external security.[40] In doing so, the Court construes the scope for Member States to act in wide terms too. In *Leifer* it accepts that,[41]

> … depending on the circumstances, the competent national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State within the meaning indicated above. When the export of dual-use goods involves a threat to the public security of a Member State, those measures may include a requirement that an applicant for an export licence show that the goods are for civil use and also, having regard to specific circumstances such as inter alia the political situation in the country of destination, that a licence be refused if those goods are objectively suitable for military use.

Consistently with settled case law, it is for national courts to ascertain whether the national measures are necessary and proportionate. In doing so, they must take into account the discretion which the Court of Justice acknowledges that national authorities enjoy.

This balance between what the Member States may do when they deem it necessary, and what EU law requires them to do in order to comply with its principles is not always easy to strike. In the area of exports of dual-use goods, for instance, the Council adopted in 1994 a set of rules which combined a EC law measure and a CFSP common position: the former introduced a cautious version of the principle of mutual recognition whereby the competent national authorities would have the right to refuse to grant export authorisations if they deemed that to do otherwise would undermine a set of specific principles related, amongst others, to arms embargoes and non-proliferation of weapons of mass destruction; the latter laid down these principles, hence providing the *modus operandi* of the EC measure, along with the scope of products whose exports were subject to the latter measure.[42] However, following the *Werner* and *Leifer* case-law, it became clear that these rules were contrary to EU law. The Council duly amended them and set

[40] See Case C-367/89 *Richardt*, supra n 35, para 22; Case C-83/94 *Leifer*, supra n 39, para 26; Case 70/94 *Werner*, supra n 39, paras 25–27. In the latter case, and with reference to German legislation on external trade, the Court accepts that public security would be undermined by the risk of serious disturbance to foreign relations or to peaceful coexistence of nations (para 27).

[41] Ibid., para 35.

[42] See Council Regulation 3381/94 setting up common rules on exports of dual-use goods [1994] OJ L 367/1 and Decision 94/942/CFSP, [1994] OJ L 367/8. For a critical analysis of these rules, see Koutrakos 1998, p. 235.

out common rules in a single EU law instrument which refers to the Court's case-law expressly in its preamble.[43]

8.4 Wholly Exceptional Clauses

The above analysis dealt with the extent to which the Union legal order enables Member States to deviate when they deem it necessary. The exceptional clauses examined above enable national authorities to deviate from specific EU law principles and rules provided that certain conditions are met. However, there are two further clauses in primary law which are defined as 'wholly exceptional'[44] for two reasons: on the one hand, there is no limit to the type of measure which a Member State may adopt and, on the other hand, in adopting such a measure, the state in question may deviate from the entire body of EU law.

These provisions are laid down in Articles 346 TFEU (ex Article 296 EC) and 347 TFEU (ex Article 297 EC). The former is about trade in and production of arms, munitions and war materials, and the latter is about extraordinary circumstances related to national and international security.

8.4.1 Article 347 TFEU

Article 347 TFEU (ex Article 297 TEU) reads as follows:

> Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

The poor drafting of the above provision is striking.[45] The reference, first, to the consultation amongst Member States and then to the national deviation from EU law, as well as the use of the term 'called upon' may suggest that, rather than conferring a right upon them, Article 347 TFEU acknowledges the inherent duty of

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[43] Council Regulation 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, [2000] L 159/1, amended a number of times and repealed recently by Council Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items [2009] OJ L 134/1. For a different view of the legal regime on exports of dual-use goods, see Dashwood 2008, p. 354.

[44] Case 222/84 *Johnston*, supra n 9, para 27. See also the Opinion of AG Jacobs in Case C-120/94 *Commission* v *Greece* (*re: FYROM*) at para 46.

[45] For an analysis of ex Article 297 EC, see Koutrakos 2000, p. 1339, and Stefanou and Xanthaki 1997.

the Member States to act as fully sovereign subjects of international law. After all, the four sets of circumstances mentioned therein under which Member States may deviate from the entire *corpus* of EU law are exceptional in their significance and touch upon the very core of the function of the state and, therefore, the latter's sovereignty. That they render the action of the state necessary hardly seems worthy of further analysis.

However, the wholly exceptional nature of the circumstances which may necessitate national action and its implications notwithstanding, Article 347 TFEU clearly sets out certain parameters within which the Member State are expected to act. These may be divided in three categories. The first consists of substantive conditions: it is only in the circumstances laid down therein that a Member State may deviate from EU law. The second is procedural: the Member State which would deem it necessary to act in such circumstances should consult with other Member States in order to adopt a common approach aiming to protect the internal market. There is also another dimension in this which involves the Commission. According to Article 348 subparagraph 1 TFEU (ex 298 subparagraph 1 EC),

> If measures taken in the circumstances referred to in Articles 346 and 347 have the effect of distorting the conditions of competition in the internal market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaties.

The above are duties imposed under primary law, and the Member States are bound by the duty of cooperation which is set out in Article 4(3) TEU in terms more elaborate than in the previous constitutional arrangements:

> Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

The conditions set out in Article 347 TFEU and implied by the duty of cooperation are not the only reminders that the wholly exceptional role of Member States should be carried out within EU law parameters. Article 348 subparagraph 2 TFEU (ex Article 298 subparagaph 2 EC) sets out an extraordinary procedure for judicial review. It reads as follows:

> By way of derogation from the procedure laid down in Articles 258 and 259, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 346 and 347. The Court of Justice shall give its ruling in camera.

It follows from the above that quite what it is that necessity makes Member States choose to do and under which conditions may not be dissociated from the Union legal order even in cases of extraordinary seriousness. This is entirely consistent with the picture which emerged from the analysis of the exceptional clauses set out in primary and secondary Union law. However, the 'wholly

exceptional' nature of the circumstances set out in Article 347 TFEU and the Article 348 TFEU procedure raise questions about the enforcement of the EU law conditions outlined above. What is the level of supervision which the Commission and the Member States are prepared to exercise? What is the intensity of control which the Court of Justice deems appropriate? To what extent are Member States free to determine how best to respond to what they deem to be a serious threat to their ability to protect their citizens and their duty to protect their, as well as the international, security?

The record and the practice of the relevant actors so far, or rather the lack thereof, only allude to the answer to this question: there has only been one action brought against a Member State under Article 298 EC. Given the maturity of the Union legal order, this suggests reluctance by both the Commission and Member States to challenge choices made by a state in circumstances which the latter deems exceptional. This case was Case C-120/94 *Commission* v *Greece (re: FYROM)* the subject-matter of which was the embargo imposed by Greece against FYROM (Former Yugoslav Republic of Macedonia).[46] The Commission alleged a violation of ex Article 297 EC (now Article 347 TFEU). The Court delivered no judgment on this case, as the embargo was lifted and the Commission withdrew the action early enough. However, Advocate General Jacobs delivered an Opinion which touched upon the most central issues raised when a state deems that a deviation from EU law is necessary in order to protect vital interests.

In his Opinion, he analyses the relevant issues with considerable clarity, detachment, and subtlety. Whilst he affirms the existence of the role of both Community supervision by the Commission and judicial review by the Court in the areas dealt with under ex Articles 297 EC and 298 EC (now Articles 347 and 348 TFEU), he points out that the 'scope and intensity of the review that can be exercised by the Court is … severely limited on account of the nature of the issues raised' and continued as follows[47]:

> There is a paucity of judicially applicable criteria that would permit this Court, or any other court, to determine whether serious international tension exists and whether such tension constitutes a threat of war. The nature of the problem is encapsulated in remarks made by an English judge in a rather different context: 'there are … no judicial or manageable standards by which to judge these issues, or to adopt another phrase … the court would be in a judicial no-man's land'.

Therefore, given 'the extremely limited nature of the judicial review that may be carried out in this area',[48] he confines it, in essence, to determining whether reliance upon ex Article 297 EC (now Article 347 TFEU) involves manifest errors or abuse of power. He argues that 'the question must be judged from the point of view of the Member State concerned' and elaborates as follows[49]:

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46 [1996] ECR I-1513.

47 Ibid., para 50.

48 Ibid., para 60.

49 Ibid., para 54.

> Because of differences of geography and history each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Community institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third state. Security is, moreover, a matter of perception rather than hard fact. What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless.

Examining whether 'in the light of all the circumstances, including the geopolitical and historical background, Greece could have had some basis for considering, from its own subjective point of view, that the strained relations between itself and FYROM could degenerate into armed conflict',[50] he concludes as follows[51]:

> I do not think that it can be said that Greece is acting wholly unreasonably … even if [the threat of war] may be long-term and remote …

The very careful wording of this conclusion is noteworthy,[52] as is the absence of any reference to the procedural aspects of ex Article 297 EC (now Article 347 TFEU) and the failure by Greece to comply with them.[53] The latter notwithstanding, the analysis put forward by Advocate General Jacobs, and the issues which it tackles, is linked to the overview of the construction of 'necessity' and its implications by the Court of Justice in relation to the exceptional clauses in primary law. They both suggest a nuanced and balanced approach to the tensions between state sovereignty and the Union legal order, judicial supervision and discretion enjoyed by the executive: the rejection of any claim by the Member States to a *domaine reservé* is accompanied by an acknowledgment of their discretion to determine how best to protect their security; the requirement that reliance upon the notion of necessity, purported to justify a national deviation from EU law, be subject to EU control is followed by an understanding of this notion in sufficiently broad terms to accommodate national concerns; the full application of EU control mechanisms entails the active involvement of national courts which are entrusted with the application of the principle of proportionality.

It becomes apparent that the management of necessity by Member States within the parameters set by the Union legal order does not lend itself to the convenience

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[50] Ibid.

[51] Ibid., para 56.

[52] Further in his Opinion, AG Jacobs points out that 'what matters is not so much that Greece's fears may be unfounded but rather that those fears appear to be genuinely and firmly held by the Greek government and, it would appear, by the bulk of the Greek people. Where a government and a people are fervently convinced that a foreign State is usurping a part of their cultural patrimony and has long-term designs on a part of their national territory, it would be difficult to say that war is such an unlikely hypothesis that the threat of war can be excluded altogether. If such matters were to be judged exclusively by what external observers regarded as reasonable behaviour, wars might never occur' (para 58).

[53] See the criticism in Koutrakos 2000, pp. 1356–1359.

of a straightforward assessment: it requires a careful balancing exercise between differing interests, it is based on the application of general principles on the basis of quite specific, and often difficult to assess, circumstances, and involves the interaction of a range of actors. This multilayered system has no place for maximalistic positions which would either render EU law inapplicable and the role of Member States immune to EU control, or would dictate an uncompromising application of EU mechanisms with no regard for the specific challenges that necessity raises for national authorities.

However, the range of options which may be taken in between these two extremes is infinite, as the criteria against which necessity is measured are inherently indeterminate. Similarly, the role of the Union institutions (legislature, executive, and judiciary) in this balancing exercise is far from straightforward and may evolve over time pursuant to their interactions with national authorities. The remaining part of this analysis will examine how these have evolved in the context of trade in and production of armaments, munitions, and war material.

8.4.2 Article 346 TFEU[54]

Article 346 TFEU reads as follows:

1. The provisions of the Treaties shall not preclude the application of the following rules:

   (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

   (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

For a long time, this rather obscure provision of the EU Treaty was viewed as placing defence industries beyond the reach of EU law entirely. A broad interpretation of its wording was used to substantiate this: on the one hand, the scope of products which fell within the scope of Article 346 TFEU was viewed as potentially unlimited; on the other hand, the circumstances under which Member States could deviate from EU law were ignored or viewed as merely indicative of the general status of the defence industries as directly linked to national sovereignty.

[54] This section draws upon Koutrakos 2009, p. 307.

Therefore, the Member States were only too keen to presume that measures regulating their defence industries would be beyond the scope of EU law.[55] This approach was tolerated by the EU institutions.[56] It is interesting that the European Parliament confined itself to arguing regularly for the deletion of Article 346 TFEU,[57] as if that would be the only way for preventing the erroneous and misguided interpretation of its proviso. The elusive character of the list mentioned in Article 346 (2) TFEU did not help either: it was only published in the *Official Journal of the European Union* forty-three years following its adoption in a response by the Commission to a question by the European Parliament.[58]

However, a careful reading of Article 346 TFEU suggests that this approach is incorrect. First, the proviso of Article 346(1) TFEU is confined to the products which are described in the list mentioned in Article 346(2) TFEU. Therefore, the reference to 'the production of or trade in arms, munitions and war material' was not envisaged as an open-ended category of products. This suggests that at no point was it envisaged that dual-use goods, that is products which may be of both civil and military application, should be regulated by national measures deviating from the entire body of EU law. Such an argument is supported both by the content of the list mentioned in Article 346(2) TFEU, and the reference to the effects that such measures should not have on 'products which are not intended for specifically military purposes' in Article 346(1)(b) TFEU.

Second, measures adopted by a Member State under Article 346 TFEU are not *ipso facto* justified; instead, the deviation from EU law which they entail must be 'necessary for the protection of the essential interests of [national] security'. This is quite an emphatic statement that, rather than being merely a public security clause, Article 346(b) EC should be invoked only when the protection of the core of national sovereignty is at stake.

Third, any reliance upon Article 346 EC should take into account the effects which its deviation from EU law may have on the status and movement of other products which fall beyond its rather narrow scope. In effect, this provision suggests that national measures deviating from EU law as a whole should not be adopted in a legal vacuum. Instead, Member States are under a duty to consider the implications that such measures may have for the common market.

Fourth, Article 348(1) TFEU provides for the involvement of the Commission in cases where reliance upon Article 346 TFEU by a Member State would lead to distortions of competition. This provision should be interpreted in the light of the

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[55] In relation to public procurement, see COM (2004) 608 final *Green Paper on Defence Procurement*, p. 6.

[56] See Koutrakos 2001, pp. 175–182.

[57] See for instance, Resolution A3-0260/92 on the Community's role in the supervision of arms exports and the armaments industry [1992] OJ C/284/138 at 142 and Resolution on the need for European controls on the export or transfer of arms [1995] OJ C/43/89 at 90, Resolution A3-0260/92 [1992] OJ C/284/138 at 142.

[58] Written Question E-1324/01 [2001] OJ C/364E/85. In the meantime, it had only been published in academic analyses: see Wulf 1993, p. 214.

duty of loyal cooperation enshrined in Article 4(3) TEU (ex Article 10 EC). In other words, a Member State invoking Article 346 TFEU is under a legal duty to cooperate with the Commission in order to adjust any ensuing distortions of competition to the EU law.

Finally, any deviation from EU law under Article 346 TFEU is subject to the jurisdiction of the Court of Justice. The reference to the 'improper use of the powers provided for in Article … 346' in Article 348(2) TFEU refers both to the substantive conditions which need to be met by a Member State invoking Article 346 TFEU (namely those regarding its scope of application, the assessment of 'essential interests of security') and the procedural ones (that is the duty to cooperate with the Commission inferred from Article 348(1) TFEU).

It follows from the above that, according to a strict reading of Articles 346 TFEU and 348 TFEU, Member States may regulate their defence industries by deviating from EU law only in so far as such a deviation is confined to a specific class of products, is exercised in accordance with certain principles, and is subject to the jurisdiction of the Court of Justice to ascertain whether it amounts to an abuse of power.

This interpretation has gradually been accepted as a matter of EU law. This has been due to a variety of factors, three of which are particularly significant, namely the case-law of the Court of Justice, the considerable structural and financial difficulties of the defence industries since the 1990s, and the emerging political climate in the EU which is marked by the development of the European Security and Defence Policy.

8.4.2.1 The Case Law

In its first judgment on the applicability of ex Article 296 EC (new Article 346 TFEU), the Court of Justice left no doubt as to the strict interpretation of this provision. In Case C-414/97 *Commission* v *Spain*,[59] the Court dealt with Spanish legislation exempting from VAT intra-Community imports and acquisitions of arms, munitions and equipment exclusively for military use. The Sixth VAT Directive excluded aircraft and warships. The action against Spain was brought because the relevant Spanish rules also covered an additional range of defence products. The Spanish government argued that a VAT exemption for armaments constituted a necessary measure for the purposes of guaranteeing the achievement of the essential objectives of its overall strategic plan and, in particular, to ensure the effectiveness of the Spanish armed forces both in national defence and as part of NATO.

In its judgment, the Court ruled as follows[60]:

[59] Case C-414/97 *Commission* v *Spain* [1999] ECR I-5585.

[60] Ibid., para 22.

> Spain has not demonstrated that the exemptions provided for by the Spanish Law are necessary for the protection of the essential interests of its security. It is clear from the preamble to [the relevant national] Law that its principal objective is to determine and allocate the financial resources for the reinforcement and modernization of the Spanish armed forces by laying the economic and financial basis for its overall strategic plan. It follows that the VAT exemptions are not necessary in order to achieve the objective of protecting the essential interests of the security of the Kingdom of Spain.

It, then, concluded that[61]:

> the imposition of VAT on imports and acquisitions of armaments would not compromise that objective since the income from payment of VAT on the transactions in question would flow into the state's coffers apart from a small percentage which would be diverted to the Community as own resources.

This suggests a robust approach which, rather than viewing Article 346 TFEU as a *carte blanche* for Member States in the area of defence industries, requires that the Member States substantiate how the deviation from EU law they deem necessary meets the substantive conditions set out in primary law. This approach was adopted 4 years later by the Court of First Instance,[62] and was reaffirmed by the Court of Justice more recently in Case C-337/05 *Commission* v *Italy*,[63] and Case C-157/06 *Commission* v *Italy*.[64]

These cases were about the purchase of Augusta helicopters for the use of police forces and the national fire service by a negotiated procedure in contravention of EC public procurement legislation which provided for a competitive tendering procedure.[65] This was a long-standing practice in Italy, and the government did not contest that the helicopters in question were clearly for civilian use, and that their military use was only potential.

Both cases are about the same practice and raise the same issues. This analysis will focus on Case C-337/05 where the judgment was rendered by the Grand Chamber. The Court first reaffirmed the strict interpretation of the exceptional clauses set out in the Treaties[66]:

> It cannot be inferred from those articles that the Treaty contains an inherent general exception excluding all measures taken for reasons of public security from the scope of Community law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, would be liable to impair the binding nature of Community law and its uniform application.

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61 Ibid., para 23.

62 Case T-26/01 *Fiocchi* [2003] ECR II-3951.

63 [2008] ECR I-2173.

64 [2008] ECR I-7313. This, along with Case C-337/05, are annotated in M Trybus, (2009) 46 CMLRev 973.

65 In particular, Articles 2(1)(b), 6 and 9 of Council Directive 93/36/EEC coordinating procedures for the award of public supply contracts [1993] OJ L 199/1.

66 Supra n 63, para 43.

It then pointed out that[67]

> It is clear from the wording of that provision that the products in question must be intended for specifically military purposes. It follows that the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts. The supply of helicopters to military corps for the purpose of civilian use must comply with those same rules.

The argument of the Italian government that a deviation from the EC public procurement rules was necessary in order to protect the confidentiality of information about the production of the purchased helicopters was dismissed by the Court as disproportionate. It was pointed out that no reasons were presented to justify why the confidentiality of the information communicated for the production of the helicopters manufactured by Agusta would be less well guaranteed were such production entrusted to other companies, in Italy or in other Member States.[68]

The Court was no more sympathetic to the final arguments by the Italian government that, because of their technical specificity, the manufacture of the helicopters in question could be entrusted only to Agusta, and that it was necessary to ensure the interoperability of its fleet of helicopters, in order, particularly, to reduce the logistic, operational and pilot-training costs. It responded as follows[69]:

> In this case, the Italian Republic has not discharged the burden of proof as regards the reason for which only helicopters produced by Agusta would be endowed with the requisite technical specificities. In addition, that Member State has confined itself to pointing out the advantages of the interoperability of the helicopters used by its various corps. It has not however demonstrated in what respect a change of supplier would have constrained it to acquire material manufactured according to a different technique likely to result in incompatibility or disproportionate technical difficulties in operation and maintenance.

The recent case-law of the Court of Justice makes it clear that reliance upon the notion of necessity may not justify *ipso facto* any deviation from EU rules. It is not only the subject-matter of these cases, that is an area long viewed as within the a twilight zone between EU law and national sovereignty, which makes the above rulings noteworthy. It is also the rigour with which the Court responded to the vague arguments put forward by the national governments. Member States are now required to explain what it is precisely which necessitates a deviation from an EU rule.

However, it would be wrong to assume that the Court has expressed its willingness to meddle with the substantive policy choices made by the Member States in areas which are close to the core of national sovereignty. Indeed, the above

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[67] Ibid., para 47.

[68] In Case C-157/06 *Commission* v. *Italy,* the Court concluded that 'the mere fact of stating that the supplies at issue are declared secret, that they are accompanied by special security measures or that it is necessary to exclude them from the Community rules in order to protect the essential interests of State security cannot suffice to prove that the exceptional circumstances justifying the derogations provided for in Article 2(1)(b) of Directive 93/36 actually exist' (para 32).

[69] Supra n 63, para 59.

rulings should be viewed in their context. In the actions against Italy, for instance, the defences put forward by the Italian government were staggering in their generality and the absence of any specific argument whatever which would substantiate, even remotely, their decision. Furthermore, the remoteness between the subject-matter of the action and the scope of Article 346 TFEU was not contested even by the Italian government. After all, the helicopters were envisaged for the use of forces such as the Corps of Fire Brigades, the Carabinieri, the Coastguard, the Revenue Guard Corps, the State Police and the Department of Civil Protection in the Presidency of the Council of Ministers. Put differently, the cases on which the Court has rendered the above rulings were about egregious violations of both the wording and spirit of Article 346 TFEU which exemplified the presumption, widely held by Member States, that primary law granted them *une carte blanche* in the area. It by no means follows that the Court would adopt an intrusive and activist approach once substantive policy choices are explained properly in relation to the requirements set out in Article 346 TFEU.

8.4.2.2 The Problems Facing the Defence Industries

Following the end of the Cold War, the defence industries in the Member States suffered from considerable financial and structural problems, such as fragmentation and divergence of capabilities, excess production capability in certain areas and shortages in others, duplication, short production runs, reduced budgetary resources, and failure to engage in increasingly costly research.[70] This highly fragmented state has given rise to a number of initiatives, originating in both industry and state bodies, to achieve a degree of convergence which would enhance the competitiveness of the European defence industries.

Furthermore, the European Union has gradually placed greater emphasis on its Security and Defence Policy. Since 1998, considerable time and energy has been spent on establishing institutions, setting out strategies, and consolidating structures in ways which would enhance the Union's international role. In this context, the *European Security Strategy* which defines the strategic priorities for the European Union sets out the latter's ambition for '[a]n active and capable European Union [which] would make an impact on a global scale'[71] in terms of 'shar[ing] in the responsibility for global security'.[72] A number of ESDP missions has been undertaken, some of them well beyond Europe's borders, their range covering military and police operations, rule of law, border monitoring,

[70] See amongst others, Georgopoulos 2007, pp. 203–205.

[71] A secure Europe in a better world—European Security Strategy (Brussels, 12 December 2003), p. 14. See also Report on the implementation of the European Security Strategy (Brussels, 11 December 2008).

[72] Ibid., 2.

and security sector.[73] Finally, the Lisbon Treaty places greater emphasis on security and defence policy.[74]

The development of the European Security and Defence Policy has placed defence capabilities at the core of any debate about the Union's international role. It is noteworthy that first the Treaty Establishing a Constitution for Europe, and now the Lisbon Treaty provide for the establishment of the European Defence Agency (EDA), which[75]

> shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, shall participate in defining a European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities.

It is indicative of the significance attached by the Member States to the issue of military capabilities that the EDA should have been established before the Constitutional Treaty was even signed.[76] In the context of this analysis, a noteworthy achievement is the adoption by EDA in November 2005 of a voluntary code on defence procurement. This entered into force on 1 July 2006 and applies to contracts worth more than €1 m which are covered by Article 346 TFEU.[77] This sets out to establish a single online portal, provided by the EDA, which would publicise procurement opportunities. It is based on objective award criteria based on the most economically advantageous solution for the particular requirement. Furthermore, it provides for debriefing, whereby all unsuccessful bidders who so request will be given feedback after the contract is awarded. The regime provides for exceptions for reasons of pressing operational urgency, follow-on work or supplementary goods and services, and extraordinary and compelling reasons of national security.

All these developments have gradually rendered defence industries at the centre of the attention of both the Union and its Member States. It is in this context that interesting developments have taken place under EU law.

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[73] See the analysis in Grevi et al. 2009. For an analysis from an international law perspective, see Naert 2010.

[74] It also renames it Common Security and Defence Policy.

[75] Article 42(3) subpara 2 TEU.

[76] Joint Action 2004/551/CFSP [2004] OJ L245/17.

[77] Contracts which fall beyond the scope of Art. 346 TFEU are covered by the EC public procurement secondary legislation. According to Art. 10 of Dir 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114, '[t]his Directive shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article [346 TFEU]'.

8.4.2.3 Interpretative and Legislative Initiatives by EU Institutions

In December 2006, the European Commission put forward its view as to the proper interpretation of Article 346 TFEU, and expressed its intention to enforce it rigorously by enforcement proceedings before the Court of Justice.[78] The aim of the document is 'to prevent possible misinterpretation and misuse of Article 296 EC [now 346 TFEU] in the field of defence procurement' and 'give contract awarding authorities some guidance for their assessment whether the use of the exemption is justified'.[79]

The Commission draws upon the wording of Article 346 TFEU[80] and the case-law of the EU Courts and states that 'both the field of and the conditions of application of Article [346 TFEU] must be interpreted in a restrictive way'. It acknowledges the wide discretion granted to a Member State in order to determine whether its essential security interests ought to be protected by deviating from EC law. However, this discretion is not unfettered. To that effect, it is argued that any interests other than security ones, such as industrial or economic, cannot justify recourse to Article 346 TFEU even if they are connected with the production of and trade in arms, munitions and war material.

In relation to the role of the Member States, the Commission acknowledges[81]

> … the Member States' prerogative to define their essential security interests and their duty to protect them. The concept of essential security interests gives them flexibility in the choice of measure to protect those interests, but also a special responsibility to respect their Treaty obligations and not to abuse this flexibility.

What are the implications of this approach in the area which has given rise to most of the cases before the Court, namely public procurement? According to the Commission,[82]

> the only way for Member States to reconcile their prerogatives in the field of security with their Treaty obligations is to assess with great care for each procurement contract whether an exemption from Community rules is justified or not. Such *case-by-case assessment* must be particularly rigorous at the borderline of Article 296 EC where the use of the exemption may be controversial.

In its initiative, the Commission makes a declaration of intent: national measures governing the defence industries would no longer be viewed as inherently above EU law, and any deviations from the Treaties would be pursued before the Court of Justice. In terms of the substance of its construction of Article 346 TFEU,

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[78] COM(2006) 779 fin: Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement (adopted on 7 December 2006).

[79] Ibid., p. 3.

[80] For instance, it points out that the reference to 'essential security interests' 'limits possible exemptions to procurements which are of the highest importance for Member States' military capabilities' (Ibid., p. 7).

[81] Ibid.

[82] Ibid., p. 8 (the emphasis in the original).

there is nothing in the Communication which is revolutionary or which does not originate in the previous, albeit limited, case law or the wording of the above provision. In declaring its intention to no longer tolerate violations of EU law based on an expansive interpretation of Article 346 TFEU, the Commission seeks to strike the balance between the leeway with which national authorities are endowed when dealing with matters close to the core of national sovereignty, and the requirements set out by EU law in order to ensure that no abuse of this leeway occurs. In this context, it is interesting that it should also engage in adjusting the list mentioned in Article 346 (2) TFEU in a rather creative manner.[83] More importantly, one of the main tenets of the Communication is the acknowledgment by the Commission of the prerogative of the Member States to define their essential security interests. It is interesting, however, that it should shy away from developing this point further, and elaborating on its implications for judicial review. Is the control which the Court may exercise on the substance of the national policy choices not inherently limited (provided, that is, that such choices do not constitute an abuse of the rights which are acknowledged in Article 346 TFEU)?[84] In the context of Article 347 TFEU, Advocate General Jacobs stressed the highly subjective nature of the assessment that national authorities are called upon to make and the corresponding paucity of judicially applicable criteria for the exercise of judicial control of high intensity. His argument is worth citing in full:

> … it is not for the Court to adjudicate on the substance of the dispute between Greece and FYROM. It is not for the Court to determine who is entitled to the name Macedonia, the star of Vergina and the heritage of Alexander the Great, or whether FYROM is seeking to misappropriate a part of Greece's national identity or whether FYROM has long-term designs on Greek territory or an immediate intention to go to war with Greece. What the Court must decide is whether in the light of all the circumstances, including the geopolitical and historical background, Greece could have had some basis for considering, from its own subjective point of view, that the strained relations between itself and FYROM could degenerate into armed conflict. I stress that the question must be judged from the point of view of the Member State concerned. Because of differences of geography and history each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Community institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third State. Security is, moreover, a matter of perception rather than hard fact. What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless (para 54, n 46).

The interpretation of Article 346 TFEU is not the only issue relating to the notion of necessity which has attracted considerable attention recently. The other is the legal regulation of defence industries at EU level. The European Commission had advocated the use of EU law, along with other instruments, for the

[83] It is stated in the Communication that the list should be interpreted in a way which recognises developments in technology since the list was drawn up and the different practices now employed to procure such items, such as 'modern, capability-focused acquisition methods' and the inclusion of contracts for related services and works (Ibid., p. 5).

[84] See for instance, the principles set out by the case-law on exports of dual-use goods outlined above.

regulation of the defence industries since the mid-1990s. After a series of initiatives assessing the serious economic problems facing them,[85] and advocating the adoption of a wide range of measures,[86] the Commission put forward its so-called 'defence package' in December 2007, following which two specific measures have been adopted by the Council, namely Directive 2009/43 on intra-EU transfers of defence products,[87] and Directive 2009/81 on public procurement in the fields of defence and security.[88] An analysis of these measures is beyond the scope of this article. Suffice it to point out that they aim to bring the benefits of the internal market to this sensitive area whilst acknowledging that the relevant products have special characteristics which may not be addressed by EU secondary legislation governing the movement and procurement of other, non-strategic goods.

8.5 Conclusion

This article discussed how the EU legal order accommodates the cases where Member States deem that the principle of necessity justifies a deviation from EU law. The analysis of the exceptional clauses in specific policy areas, both in primary and secondary law, as well as the wholly exceptional clauses in the EU Treaties, suggests that the wording and context of the relevant provisions acknowledge, rather than grant, the right of Member States to act in circumstances where they deem it necessary and in contravention of the EU rules. As the Union is based on the principle of limited competence, it would not have the power to grant Member States a right which is inherent in their existence as fully sovereign subjects of international law. Instead, EU law is focused on how to address the tensions which the exercise of this right may raise in the context of the Union's constitutional order.

In seeking to ensure that reliance upon the notion of necessity is not abused, and that it complies with certain substantive and procedural requirements, EU law endows the courts with considerable powers. This becomes even more significant in the context of the decentralised judicial architecture of the Union, as the assessment of the balancing exercise articulated by the case-law of Court of Justice also involves national courts. Another aspect of this balancing exercise is its

[85] COM(96) 10 final: The challenges facing the European defence-related industry. A contribution for action at European level (adopted on 24 January 1996).

[86] COM(97) 583 fin: Implementing European Union strategy on defence related industries (adopted on 12 December 1987). See also COM(2003) 113 final: European defence—industrial and market issues. Towards an EU defence equipment policy (adopted on 11 March 2003).

[87] [2009] OJ L 146/1.

[88] [2009] OJ L 216/76.

dynamic nature. The right of Member States to deviate from EU law in order to protect a certain social interest is examined against the extent to which this interest is already protected under EU law. Therefore, the dividing line between what is necessary for the national authorities to do and what is redundant in the light of an EU intervention in the area is subject to continuous redefinition.

No area exemplifies this evolving process as clearly as the regulation of defence industries. The shift in the prevailing assumptions about the role of EU law in the area, the contribution of the Court of Justice, the gradual acceptance of the proper interpretation of Article 346 TFEU, the adoption of secondary legislation on intra-EU transfers and public procurement, all illustrate an incrementally developing legal and political environment. To strike the balance between what the Member States deem necessary to do and what EU law requires them to do within this environment is not going to get easier.

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Part II
Documentation

Chapter 9
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Part Sixteen	Legal Aspects of International Relations in Various Matters

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16.726 6. Criminal law
16.727 7. Law of criminal procedure
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16.9 IX INTERNATIONAL EVENTS AND DEVELOPMENTS WITH LEGAL IMPLICATIONS
(in alphabetical arragement of key words)

Chapter 10
Netherlands State Practice for the Parliamentary Year 2008–2009

P. van Huizen

Although this sets out to be an annual survey, it may also include material which dates from a different parliamentary year from that given in the heading. This has proved to be inevitable in those cases when texts do not become available to the editor until long after their original date of drafting, written submissions to international organizations made by the Netherlands representatives frequently fall into this category.

Most of the information is derived from the Reports of Parliament which are available in Dutch on www.overheid.nl/op/index.html. The Yearbook surveys are also available in a consolidated way in a database at www.asser.nl/pil/index.html.

1.202 ENFORCEMENT OF INTERNATIONAL LAW IN MUNICIPAL LAW
See: 4.66, 9.633 **B**, 9.65, 11.3

1.203 CONFLICT BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW
See: 6.113, 12.273 SPECIAL TRIBUNAL FOR LIBANON

2.2 CUSTOM
See: 5.274

2.72 ACTS AND DECISIONS OF INTERNATIONAL ORGANIZATIONS
See: 4.7 **B**, 9.633 **A**, **B**, **C**, **D**, **E**, 12.273 SPECIAL TRIBUNAL FOR LIBANON**,** 13.223

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3.11 INTERNATIONAL STATUS; FUNDAMENTAL RIGHTS AND DUTIES
See: 12.211

3.112 NON-INTERVENTION

Alleged Dutch Planning of an Intervention in Suriname

On 2 July 2009 the Ministers of Defence and of Foreign Affairs answered questions on the alleged involvement with the planning intervening in Suriname. Four questions and the given answers read as follows:

1 Are you familiar with the report that carries the headline: 'Bouterse was right about coup'?[1]

2 Can you confirm the general tenor of the report? If not, which parts of the report are not true in your opinion?

3 Did ex-serviceman Peter van Haperen, who worked for the Netherlands Military Intelligence Service (NMID) at the beginning of the 1980s, contact the NMID or any other officials from the Ministry of Defence regarding his intention to contact Bouterse's lawyer or to offer himself as a witness in the trial against Mr Bouterse? If so, what information was exchanged at this time?

4 Could you inform the House of Representatives in a specific and comprehensive manner about the alleged plans of the Netherlands, Belgium and/or the United States to invade Suriname during the first half of the 1980s?

[…]

1 Yes.

2 No. The personnel files of the Ministry of Defence indicate that Peter van Haperen was never employed by the Ministry of Defence. Mr Van Haperen's allegation that the victims of the 'December murders'[2] were involved, together with the Governments of the Netherlands, Belgium and the United States, in preparing an invasion and a coup in Suriname should be attributed to him alone.

3 No. As noted in my response to question 2, according to the personnel files of the Ministry of Defence, Mr Van Haperen never worked for the Ministry. At a self-convened press conference on Friday, 3 July 2009, Mr Van Haperen stated that he had not offered himself as a witness in the trial against Mr Bouterse on his own initiative

[1] De Volkskrant, 1 July 2009.

[2] This refers to the murder on 8 December 1982 of 13 civilians and 2 military officials who were opposed to military rule in Suriname.

but that he had been approached for this purpose by Mr Bouterse's lawyer, Irwin Kanhai.

4 As apparent from the literature concerning this period and from previous responses to Parliamentary questions on this issue (for example in 2007, Tweede Kamer, 2006–2007, 2136), it is common knowledge that the Netherlands and the United States discussed the possibility of intervening in Suriname during this period but that these discussions did not lead to any kind of action. This particular discussion took place in the framework of the wider discussion on potential measures against the military regime in Suriname.[3]

3.1141 IMMUNITY OF FOREIGN STATES AND OF THEIR ORGANS AND PROPERTY

Notification Under Section 3a, Paragraph 2, of the Bailiffs Act

On 4 November 2008 the Minister of Justice announced a notification on the garnishment of the bank account of the US embassy in The Hague. It reads, *in full*, as follows:

On 16 September 2008, M.F.A. Driesenaar, a bailiff based in Amsterdam, at the Admiraal de Ruyterweg 21, informed me by fax of his intention to seize under a warrant of execution the bank account of the US embassy in The Hague.

On 24 September 2008, I notified the aforementioned bailiff that this act would violate the obligations of the Dutch State under international law.

It is a general principle of international law that the bank accounts of embassies are regarded as State property, which enjoys immunity in the receiving State. This principle finds expression, *inter alia*, in Article 21 of the UN Convention on Jurisdictional Immunities of States and Their Property (2004). Although this Convention has not yet entered into force and the Netherlands has yet to ratify it, it may be assumed that the Convention codifies existing customary law in this area.

The proposed official act would violate the principle of immunity. On the basis of Section 3a, paragraph 2, of the Bailiffs Act, I therefore wish to notify the aforementioned bailiff and his colleagues that this act would violate the obligations of the Dutch State under international law.

This notification shall have immediate effect and will be published in the Government Gazette (*Staatscourant*).[4]

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[3] Aanh. Handelingen II, 2008–2009, 3384, p. 7133.

[4] Stc. 14 November 2008, No. 618, p. 1.

3.14 FORMATION, CONTINUITY, AND SUCCESSION OF STATES
See: 6.43, 9.633 **B**, **C**, **D**

3.2113 PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS
See: 12.273 SPECIAL TRIBUNAL FOR LIBANON

3.213 LEGAL EFFECT OF ACTS OF INTERNATIONAL ORGANIZATIONS
See: 4.7 **B**, 9.633 **A**, **B**, **C**, **D**, **E**, 12.273 SPECIAL TRIBUNAL FOR LIBANON, 13.223

3.221 UNITED NATIONS
See: 4.7 **E**, 9.633, 12.273 SPECIAL TRIBUNAL FOR LIBANON, 13.22 **B**, 13.223, 13.23 **C**

3.221 UNITED NATIONS FORUM OF FORESTS
See: 16.55

3.221 WORLD FOOD PROGRAM
See: 9.633 **A**, **B**, **C**, **E**

3.221 INTERNATIONAL MARITIME ORGANIZATION
See: 9.633 **B**, 9.65

3.222 COUNCIL OF EUROPE
See: 4.7 **A**, **B**, 12.273 ECHR

3.222 NORTH ATLANTIC TREATY ORGANIZATION
See: 9.633 **A**, **B**, **D**, **E**

3.222 ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE
See: 13.23 **A**

3.223 EUROPEAN UNION
See: 4.31, 4.7 **B**, **E**, 6.113, 9.633 **A**, **B**, **C**, **E**, **F**, 11.3, 11.31, 12.211, 13.223, 13.23

4.1 NATIONALITY
See also: 6.43

Proposed Amendments to the Netherlands Nationality Act

The Explanatory Memorandum on the abovementioned legislative proposal reads, *inter alia*, as follows:

The legislative proposal contains a number of amendments to the Netherlands Nationality Act. The rules concerning a person's obligation to surrender the nationality of his country of origin will be amended. In principle, an alien who is granted Dutch nationality is obliged to surrender the nationality that no longer has any legal value in his daily life. Under the present legislative proposal, this obligation to surrender the nationality of the country of origin will be extended to certain second-generation immigrants. In addition, the present legislative proposal supplements the rules on loss of nationality. It proposes to enable the Dutch authorities to strip a person of his Dutch nationality following a final and conclusive judgment convicting him of a crime that has harmed the vital interests of the Kingdom of the Netherlands or one of its constituent countries, such as a terrorist act. The rules pertaining to naturalisation in the Netherlands Antilles and Aruba will be tightened up by making knowledge of the Dutch language compulsory.

[…]

The present legislative proposal does not seek to introduce an obligation to surrender the nationality of the country of origin for other groups of persons who are entitled to Dutch nationality. In the case of a minors who are entitled to Dutch nationality, Article 8(1) of the International Convention on the Rights of the Child applies. This provision states that States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations, without unlawful interference. This provision is very broad. The obligation is therefore interpreted on a case-by-case basis. A person's obligation to surrender the nationality of his country of origin cannot be classified as unlawful interference. Nevertheless, the Government regards Article 8 of the Convention as a basis for protecting the identity of a minor as extensively as possible and for not insisting on surrender in cases where a minor exercises the option of applying for Dutch nationality. This approach is compatible with the existing arrangement in the Netherlands Nationality Act, under which minors are not obliged to surrender the nationality of their country of origin in cases where they acquire Dutch nationality together with their parent(s).[5]

4.11 RIGHTS AND DUTIES ATTACHED TO NATIONALITY

See: 4.1

4.13 LOSS OF NATIONALITY

See: 4.1

4.15 MULTIPLE NATIONALITY

See: 4.1

4.31 ADMITTANCE OF ALIENS

[5] Kamerstukken II, 2008–2009, 31 813 (R1873), No. 3, pp. 1, 4.

Dutch View on the Refusal of the British Government to Allow a Dutch Member of Parliament to Enter the United Kingdom

On 12 February 2009 the Ministers of Foreign Affairs and of Justice answered questions on the abovementioned subject. Eight questions and the given answers read as follows:

1 Is it true that the British Government has refused to allow a Dutch Member of Parliament, namely Geert Wilders, the leader of the parliamentary party of the Party for Freedom (PVV), to enter the United Kingdom?[6]

2 What exactly are the grounds on which the British Government has based its refusal? Are they related to security concerns or statements made by the person concerned or has he been declared an undesirable alien for some reason or other?

3 Is it true that the Dutch Minister of Foreign Affairs has informed his British counterpart that this refusal is 'deeply regrettable'?

4 Why was this term used and why did the Minister not state that it is unacceptable that an EU Member State should refuse a Member of Parliament from another EU Member State entry to its territory?

5 Is it true that the Minister of Justice will also discuss this matter with his British counterpart?

6 What are the aims of the Minister of Justice for this meeting, what terms will he use and what demands does he intend to impose?

7 Are you considering the possibility of asking the Prime Minister to inform his British counterpart that the Netherlands considers it unacceptable that a Dutch Member of Parliament has been refused entry to the United Kingdom?

8 Are you willing to answer these questions before Tuesday, 17 February 2009?

[…]

1 Yes.

2 The letter from the British Border Agency to Mr Wilders of 10 February 2009, of which I have received a copy, refers to a 'threat to … community harmony and therefore public security in the United Kingdom.' According to this letter, the presence of Mr Wilders would pose a present and sufficiently serious threat to a fundamental interest of British society. Based on these grounds, Mr Wilders was refused entry to the United Kingdom on the basis of Regulations 19 and 21 of the British Immigration (European Economic Area) Regulation 2006.

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[6] ANP, 10 February 2009: 'Verhagen criticises British ban on Wilders.'

The British immigration regulations were adopted in implementation of the European Directive on Free Movement (2004/38/EC). The United Kingdom can restrict Mr Wilders' right to free movement, among other reasons, on public security grounds (Article 27 of the Directive). Such a decision must comply with the relevant European requirements, including the requirement of sufficient cause.

According to the Directive, this decision should be based exclusively on the conduct of Mr Wilders. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention may not be advanced. The reference to Mr Wilders' conduct in the letter of 10 February 2009 relates to his statements concerning Muslims and Islam.

3 See the reply on question 3 of the members Van Haersma Buma en Haverkamp (Aanh Handelingen II, 2008–2009, No. 1842).

4 It is not unacceptable for an EU Member State to make use of its statutory powers. Nevertheless, I have stated in no uncertain terms that I consider this decision to be highly regrettable and wrong. I have therefore protested this decision.

5 The Minister of Justice already discussed this matter with the British Home Secretary, Jacqui Smith, by telephone on Monday, 9 February 2009 and Wednesday, 11 February 2009.

6 On this occasion, the Minister of Justice expressed himself in terms similar to those used by the Minister of Foreign Affairs. He noted that the Government attaches great importance to the freedom of Members of Parliament to express their opinions, both in the Netherlands and abroad.

7 On 13 February 2009, the Dutch Prime Minister called his British counterpart, Gordon Brown, to discuss the British Government's refusal to allow Mr Wilders to enter the United Kingdom. During the course of this telephone conversation, he explained the position of the Dutch Government. The British Prime Minister took note of this position and responded by stating that he supported the decision of the institution concerned (the Home Office).

8 Yes.[7]

4.32 PASPORTS AND VISAS

See: 13.23 **B**

4.36 RIGHTS AND DUTIES OF ALIENS

See: 13.223

4.63 EXTRADITION

See: 7.213, 9.633 **E**, **F**

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[7] Aanh. Handelingen II, 2008–2009, 1843, pp. 3869–3870.

4.64 OTHER ASSISTANCE IN CRIMINAL MATTERS
See: 4.7 **B**, 11.31, 12.273

4.66 ASYLUM

A. Implications of the Judgment of the European Court of Human Rights in the *Salah Sheekh* Case

The report dated 29 October 2008 of a debate between the Standing Committee on Justice and the State Secretary of Justice reads, *inter alia,* as follows:

> Ms **Albayrak** (Secretary of State for Justice): Madam Chairman! In June 2007, I sent a letter to the House of Representatives explaining the implications of the judgment of the European Court of Human Rights (hereinafter, the Court) in the *Salah Sheekh* case. This is the first time that I am meeting with the Standing Committee for Justice of the House of Representatives to discuss the judgment. This case concerns a number of fundamental issues that could potentially have such significant implications for the Netherlands that we tried to refer it to the Grand Chamber following the Court's judgment. However, the Grand Chamber rejected our request to refer the judgment. The case concerns the implementation of the 'personal risk' requirement under Article 3 of the European Convention on Human Rights (hereinafter, the Convention). When considering the possibility of repatriating a person, one must assess whether he faces a personal risk of torture or death. If such a risk exists, he may not be repatriated. The present judgment has modified the implementation of this requirement, in the sense that the assessment of the risk faced by the individual in question must take account of the overall situation in the country of origin as well as various generic factors, such as whether the individual belongs to a vulnerable minority group. This means that the 'personal risk' requirement has been modified rather than abandoned. The present judgment has precipitated a change in the evaluation of asylum applications in the light of Article 3 of the Convention. For the purpose of such evaluations, we can identify so-called vulnerable minority groups on the basis of the Netherlands' country-specific asylum policies. Taken in isolation, this means that an arbitrary situation of violence or an arbitrary human rights violation in a country does not constitute a sufficient basis for assuming that there is a real risk of a violation of Article 3 of the Convention. This is different in cases where an individual belongs to a vulnerable minority group in the country concerned and is able to demonstrate—or has demonstrated—on the basis of limited personal evidence that there is a risk of a violation of Article 3 of the Convention as a result of the overall situation. If this person can demonstrate that human rights violations have been perpetrated against members of his minority group and that members of this group other than himself have been subjected to such violations, this may be sufficient.
>
> The following factors are relevant in determining whether a population group should be regarded as a vulnerable minority group. For example, it should be determined whether the group has experienced arbitrary violence or arbitrary human rights violations. In addition, it is important to examine the group's status in the country of origin and the extent to which its members can secure effective protection against impending violence or human rights violations. I wish to reiterate that this does not imply that the 'personal risk' requirement is being abandoned and that we do not assume some kind of prima facie victim status in the case of certain population groups when applying Article 3 of the

Convention. In other words, it is not sufficient to be a member of a vulnerable minority group. As already noted, the judgment has led to a modification in the evaluation of asylum applications from members of vulnerable minority groups that are generally unable to secure protection against human rights violations. This modification relates to the existence of a credible personal risk.

Under Article 46 of the Convention, we are obliged to abide by the Court's judgments. I accordingly have no freedom of choice in this matter. As a matter of fact, the consequences of the present judgment are relatively straightforward. In some cases, they concern minority groups that we have already identified and to which we already devote special attention when evaluating individual asylum applications in the light of Article 3 of the Convention. We have amended our policies regarding five countries of origin: Afghanistan, Congo, Iraq, Sudan and Somalia. We have identified several vulnerable minority groups in these countries in connection with the evaluation of asylum applications, and all the groups concerned still have this status. More recently, we have identified single women from Afghanistan as a vulnerable minority group.

Mr **De Wit** (Socialist Party): Could the Secretary of State explain what proof a person who belongs to a vulnerable minority group is still required to provide?

Ms **Azough** (Green Party): Could the Secretary of State also explain why less weight is attached to targeted violence in cases involving violence of this kind? This question concerns the difference between arbitrary and targeted violence.

Ms **Albayrak** (Secretary of State for Justice): There is a reason why I said that the 'personal risk' requirement has not been abandoned. If this was the case, all members of these groups would automatically receive protection in line with the policy on providing protection to certain categories of refugees. Instead, the issue is whether an individual who is slated to return to his country of origin risks being subjected to violations of his human rights and whether he is able to demonstrate on the basis of limited personal evidence that he is personally at risk because he is a member of a vulnerable minority group that has been recognised as such. Such evidence might include the fact that violence has been perpetrated against members of this group. There are certain high-risk groups that we have identified ourselves. People that are members of these groups are entitled to a residence permit on the basis of Section 29a of the Aliens Act. They face less stringent requirements in terms of making a plausible case for receiving refugee status. In order to do so, however, they need to have a credible background story. In addition, the problems they claim to have experienced must relate to one of the grounds for granting refugee status listed in the Refugee Convention. This applies to Afghanistan and Somalia. In the case of Afghanistan, it relates to the ethnic and religious minorities that have their roots in the region. In the case of Somalia, it relates specifically to the Reer Hamar. The judgment in the *Salah Sheekh* case applies to vulnerable minority groups. Such designated population groups face less stringent requirements in terms of making a plausible case that they face a real risk of ill-treatment as described in Article 3 of the Convention. In such cases, a residence permit is issued on the basis of Section 29b rather than Section 29a of the Aliens Act. There needs to be a credible personal risk. The population groups that we have identified as vulnerable minority groups in this context are: ethnic and religious minority groups and single women in Afghanistan; Tutsis in Congo; Christians, Mandians, Yezidis and Palestinians in Iraq; the Reer Hamar in Somalia; and the non-Arab minority of Darfur in Sudan.

Some observers believe that the judgment in the *Salah Sheekh* case should be interpreted as a departure from the practice that domestic remedies must be exhausted before an

appeal can be made to the European Court of Human Rights. In my opinion, however, the exception that was made in this case should be seen exclusively in the context of this particular affair. I therefore believe that this judgment does not have general implications for the exhaustion requirement and that no general conclusions can be drawn from it. In cases before the Strasbourg Court in which domestic remedies have not been exhausted, I will therefore continue to argue that non-exhaustion constitutes an impediment to admissibility. At present, I have no reason to believe, on the basis of the cases that are currently pending before it, that the Court intends to abandon the exhaustion requirement in a general fashion in those cases.

Mr **Van der Staaij** (Politically Reformed Party): This does not alter the fact that the Court has applied a certain reasoning with regard to the exhaustion requirement. This reasoning concerns the question whether an appeal to a higher judicial tribunal will actually change anything in the applicant's situation. It is difficult to know whether this reasoning only applies to cases of this kind or whether it might also apply to other cases.

Mr **De Wit** (Socialist Party): Another relevant factor is the Dutch Council of State's reasonableness test. The Court argues that the Council of State only applies the reasonableness requirement and that it is therefore impossible to make progress in the Netherlands.

Ms **Albayrak** (Secretary of State for Justice): It appears from the judgment that the Court's reasoning relates specifically to Salah Sheekh, that is to say, to people who are members of a vulnerable minority group in Somalia. Taken by itself, the judgment does not imply that the Court is abandoning the exhaustion requirement across the board. The idea that this might have implications for the reasonableness test will be discussed in the context of the Government's letter on asylum policy, which explains how the Immigration and Naturalisation Service (IND) already incorporates new facts and circumstances into its evaluation of asylum applications before asylum cases even reach the courts. This means that the courts have less need to examine these new facts and circumstances.

Mr Van de Staaij asks about the difference between abiding by the Court's judgments and implementing European asylum law. Article 46 of the Convention provides that the Court's judgments are binding and that States must therefore abide by them. The judgment in the *Salah Sheekh* case thus has implications not only for the Netherlands. It provides a more detailed explanation of the manner in which compliance with Article 3 of the Convention should be evaluated. It therefore has significance—by definition—for all States Parties to the Convention, which are expected to act in accordance with this judgment of the Court. If they do not, the Court has the means to intervene.[8]

B. Implications for Dutch Asylum Practice of European Court of Justice Judgment in the Elgafaji Case

On 17 March 2009 the State Secretary of Justice sent a Letter to the House of Representatives on the implications of the ECJ judgement. It reads, *inter alia*, as follows:

[8] Kamerstukken II, 2008–2009, 19 637, No. 1233, pp. 10–12.

The analysis leads me to conclude that the Court's judgment[9] will not have significant implications for Dutch asylum practice. In particular, I anticipate that the 'exceptional situations' described by the Court will arise in a very limited number of cases. At present, no policy changes are required. Even after this detailed analysis, I therefore see no reason to reconsider previous asylum decisions.

[…]

6. Examination for compatibility with Section 29(1)(b) of the Aliens Act 2000

First of all, I would like to point out that the examination for compatibility with Section 29(1)(b) of the Aliens Act 2000 is only relevant if it has been established on the basis of subparagraph (a) that the alien concerned is not a refugee within the meaning of the 1951 Geneva Convention relating to the Status of Refugees.

Next, the authorities will examine whether the alien concerned faces an individual and real risk of ill-treatment within the meaning of Article 3 ECHR. This examination corresponds to the examination whether the alien concerned faces an individual and real risk of serious harm within the meaning of Article 15 of the Qualification Directive.[10] This may involve a situation of armed conflict, although this is not essential from the point of view of this examination.

If there is no individual and real risk, the authorities will examine whether the alien concerned belongs to a vulnerable minority group that is able to make a reasonable case, on the basis of minimal evidence, that the alien concerned would face a real risk of the violation of Article 3 ECHR if forced to return to his or her country of origin. This policy is described above in Section 4 and does not need to be changed in the light of this judgment.

Finally, in exceptional situations, the level of indiscriminate violence within an armed conflict can be so high that there are serious grounds for assuming that any citizen who returns to the country or region concerned faces a real risk of ill-treatment just by virtue of being there. In such cases, the alien concerned will therefore only have to convince the authorities of his identity and the fact that he originates from the country or region concerned in order to qualify for subsidiary protection. In such cases, the alien concerned does not have to be a member of a vulnerable minority group.

The examination for compatibility with Section 29(1)(b) of the Aliens Act 2000 will always take account of the geographical scope of the indiscriminate violence.

7. Application to Dutch policy

7.1 Individual assessment

In my opinion, the substance of the judgment is almost entirely consistent with Dutch asylum policy and the case law of the European Court of Human Rights in Strasbourg.

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[9] Court of Justice of the European Communities, 17 February 2009, case of *Elgafaji* (C-465/07), see also in Judicial Decsicions under 4.66, for implementing decision of the Administrative law Division of the Council of State of 25 May 2009.

[10] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

The starting point for the evaluation of individual asylum applications is and remains the individual assessment. In cases in which the general situation (of violence) in their country of origin is deteriorating, individual aliens will face lower expectations in terms of what they are required to prove as individuals. This has also been laid down in the Aliens Act implementation guidelines.

7.2 Armed conflict

It is significant that, according to its wording, Article 15(c) of the Qualification Directive only applies to situations of international or internal armed conflict. The concept is developed in more detail in the case law of the Administrative Law Division of the Dutch Council of State.

The European Court of Human Rights discusses situations of violence in more general terms, referring to 'the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention.' This does not necessarily have to coincide with the concept of 'armed conflict'.

According to the case law of the Administrative Law Division, an internal armed conflict exists when an organised armed group with a proper command structure is capable of carrying out military operations on all or part of the territory of a country against the armed forces of that country or against another group. In order to constitute an armed conflict, these military operations should also be continuous and interconnected. Disturbances and tension, such as riots, do not imply the existence of an armed conflict.

With a view to realising an asylum strategy that is as meticulous as possible, I have asked the Ministry of Foreign Affairs to examine in its official country reports whether an armed conflict exists in all or part of the country concerned according to the definition of the Administrative Law Division. If the Ministry of Foreign Affairs cannot provide any information on this issue, I will, if necessary, adopt a position on this issue based on the country information that I have at my disposal. Finally, the Administrative Law Division could also develop a standpoint on this issue in its case law.

At the present time, armed conflicts are deemed to be taking place in:

- Colombia, in the department of Valle del Cauca
- Southern and Central Somalia
- Sri Lanka, in the northern province
- Sudan, in the region of Darfur.

Armed conflicts are not deemed to be taking place in:

- Armenia
- Burundi
- Ivory Coast
- Kosovo
- Northern Iraq
- Nepal
- Russia, especially in Chechnya
- Northern Somalia, namely: Somaliland, Puntland, Sool and Sanaag
- Sudan, outside the region of Darfur.

I will shortly receive a number of official country reports containing a position on the existence of armed conflicts in several other countries, including Afghanistan, the Democratic Republic of Congo, Ethiopia, Central and Southern Iraq and Turkey.

7.3 Exceptional situations

General

The Court notes that, in situations of 'armed conflict', there can be an 'exceptional situation' in which the level of indiscriminate violence of the ongoing armed conflict is so high that any citizen who returns to the country or region concerned faces a real risk of ill-treatment just by virtue of being there. However, the Court does not provide clear indicators for such exceptional situations.

In view of this judgment, I will henceforth state more explicitly whether or not an 'exceptional situation' exists in a particular country or region if there is cause for doing so.

More generally, I believe that the wording of the judgment indicates that such situations will occur in an extremely limited number of cases. It alludes to a situation in which every citizen, irrespective of his or her identity, faces a tangible risk of ill-treatment. This might be the case, for example, in situations involving war crimes, such as genocide, or large-scale human rights violations within the population.

This leads me to conclude that the situation referred to here is actually hard to imagine outside situations in which the correct approach, based on national policy, would be to offer automatic protection to certain categories of asylum seekers (categorial protection). This is because the return of an alien to his or her country of origin in the above-mentioned 'exceptional situations' can also be regarded as a serious hardship in view of the overall situation there.

In my view, the three conditions for applying a policy of categorial protection in Section 3.106 of the Aliens Decree 2000 also support this approach.[11] The Court's reference to the level of indiscriminate violence and its geographical scope can be compared to the indicator listed in subparagraph (a). There are also similarities with subparagraph (c), given that 'exceptional situations' are so grave that there would be a Europe-wide consensus that return is inappropriate.

In other words, I believe that 'exceptional situations' will not be applied any more widely than the policy on categorial protection. On the other hand, the use of categorial protection does not automatically imply that an 'exceptional situation' exists. This is because the decision to apply the policy of categorial protection is a national discretionary competence that has been allocated to the State Secretary for Justice and me. This power is not limited to situations of armed conflict.

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[11] Article 3.106 of the Aliens Decree 2000 states: 'The indicators that shall be examined in order to determine whether or not a situation as described in Section 29(1)(d) of the Aliens Act 2000 exists are:

a. the nature of the violence in the country of origin, in particular the gravity of the violations of human rights and humanitarian law and the indiscriminateness, intensity and geographical scope of the violence;

b. the activities of international organisations in respect of the country of origin, if and to the extent that they serve as a barometer for the position of the international community in respect of the situation in the country of origin; and

c. the policies of other countries in the European Union.'

Initial assessment of country information in light of the 'exceptional situations' concept

Based on the above, this section provides a brief, initial assessment as to whether any 'exceptional situations' exist at the present time. In this context, I will focus on those countries to which the categorial protection policy currently applies. Under the Netherlands' country-oriented asylum policy, a categorial protection policy currently applies to three countries:

- Ivory Coast;
- Somalia, unless the alien concerned has spent at least six months in Puntland, Somaliland, Sool or Sanaag; and
- Sudan, for non-Arab population groups from Darfur.

The most recent official country report on Ivory Coast indicates that there is no situation of armed conflict there.[12] Article 15(c) of the Qualification Directive therefore does not apply, which in turn means that it is unnecessary to examine whether an 'exceptional situation' exists.

The recently issued official country report on Somalia indicates that an armed conflict may be assumed to exist in Central and Southern Somalia.[13] It further points out that the security situation in large cities like Mogadishu is poor. In my opinion, however, it does not follow from the report that the geographical scope of the indiscriminate violence is such that every citizen in Central and Southern Somalia faces a real risk of ill-treatment simply by virtue of his or her presence in any part of this region. Such a situation does not appear to exist, especially outside the cities concerned. I have therefore concluded that there is no 'exceptional situation' as described by the Court in Somalia. The Netherlands' current country-oriented asylum policy in respect of Somalia therefore does not require substantial adjustment in this area. I will inform the House of Representatives in the near future as to whether the Netherlands' country-oriented asylum policy in respect of Somalia requires any other adjustments in connection with the recently issued official country report.

The most recent official country report on Sudan indicates that an armed conflict is taking place in Darfur.[14] Citizens, in particular internally displaced persons, are exposed to violence and ill-treatment at the hands of rebel groups and government-sponsored militias. Both rebel factions and government militias have carried out attacks on or committed crimes against the population in the displaced persons camps.

The population in the displaced persons camps is mainly of African origin. According to one source, most members of the Arab population of Darfur are still living in their original places of residence in relative freedom, albeit under difficult conditions. There is no evidence that the parties to the conflict are carrying out targeted attacks on Arab villages or tribes.

It follows from these reports that the situation in Darfur is not such that every citizen faces a real risk of serious harm simply by virtue of his or her presence in the region. It is primarily the non-Arab population groups that are at risk. The Netherlands' current policy in respect of Sudan already recognises this. The non-Arab population groups from Darfur are regarded as a vulnerable minority group (see also Section 4 of this letter). This policy therefore also requires no adjustment.

[…]

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[12] Ministry of Foreign Affairs, Official Country Report on Ivory Coast, January 2009, available at: http://www.minbuza.nl

[13] Ministry of Foreign Affairs, Official Country Report on Somalia, March 2009, available at: http://www.minbuza.nl

[14] Ministry of Foreign Affairs, Official Country Report on Sudan, December 2008, available at: http://www.minbuza.nl

9. Conclusion

The preceding analysis leads me to conclude that the Court's judgement will not have significant implications for Dutch asylum practice. Some points raised by the judgment, which were often already being applied indirectly in practice, will be laid down more explicitly in the policy rules contained in the Aliens Act implementation guidelines 2000. This applies in particular to the assessment, in the framework of the country-oriented asylum policy, as to whether or not an 'armed conflict' or an 'exceptional situation' exists in a particular country or region.

Such situations, in particular, are expected to arise in a very limited number of cases. It speaks for itself that the Government will always present its assessment that an 'exceptional situation' exists—or that such a situation has ended—to the House of Representatives.

It also follows from the above that no major changes are required in Dutch asylum policy. Even after this detailed analysis, I therefore see no reason to reconsider previous asylum decisions.[15]

4.7 PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

See also: 3.112, 4.31, 11.31, 13.223, 13.23 **B**

A. Implementation of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

The Explanatory Memorandum on the abovementioned subject reads, *inter alia*, as follows:

The purpose of this legislative proposal is implementing the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Trb. 2008, 58). A description of the entire contents and background of the Convention appears in the Explanatory Memorandum accompanying the proposal for a Kingdom Act approving the Convention. This Explanatory Memorandum also discusses how the Netherlands will implement obligations arising from the Convention that do not require changes in Dutch law.

[…]

One of the main added values of the Convention is the fact that it takes account of the implications of the ongoing digitalisation of society and advances in the field of technology foe the protection of children against sexual exploitation and sexual abuse under criminal law.

[…]

The challenge facing the legislator is to keep pace with developments in the field of technology as much as possible and amend legislation where necessary. An example of this is the

[15] Kamerstukken II, 2008–2009 19 637, No. 1258, pp. 1, 5, 8–9.

criminalisation of virtual child pornography, which led to the tightening up of Article 240b of the Dutch Criminal Code through the partial amendment of the legislation on sexual offences in 2002. The background to this amendment was the fact that modern technology makes it possible to produce realistic images of child pornography without the direct involvement of actual children. This development required an adequate response from the legislator. The criminalisation of virtual pornography has already led to a conviction in first instance (see District Court of 's-Hertogenbosch, 4 February 2008, LJN: BC3225).

The international dimension and cross-border nature of these types of offences necessitate effective international cooperation. It is therefore advisable to take account of international legal developments when deciding on the tightening up of legislation in this area. This was also true in the case of above-mentioned criminalisation of virtual child pornography. At present, international developments in this area have led to a renewed international consensus on the need for more far-reaching protection of children against sexual exploitation and sexual abuse under criminal law. This international consensus is reflected in the Council of Europe's Convention, which the present legislative proposal seeks to implement.[16]

B. Amendment of the Dutch Personal Data Protection Act

The Explanatory Memorandum on the Amendment of the Dutch Personal Data Protection Act reads, *inter alia*, as follows:

1. Purpose of this legislative proposal

The purpose of this legislative proposal is to amend the Personal Data Protection Act (WBP), first and foremost in connection with the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security (2007 PNR Agreement), with exchange of letters and explanatory statement (Trb. 2007, 129), which was signed in Washington on 26 July 2007.

[…]

2. The 2007 PNR Agreement

In the 2007 PNR Agreement, the European Union and the United States agreed on the conditions under which air carriers operating flights from the European Union to the United States may transfer personal data relating to the passengers on those flights to the authorities in the United States.

[…]

It may therefore be concluded that a separate legal basis for the transfer of specific personal data is required in order to facilitate the full implementation of the 2007 PNR Agreement. The present legislative proposal provides this legal basis. Since the mechanism laid down in this legislative

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[16] Kamerstukken II, 2008–2009, 31 810, No. 3, pp. 1, 2.

proposal requires a separate explanation of its purpose and necessity, as well as its lawfulness, the Government decided to draft a separate legislative proposal.

5. The relationship between the legislative proposal and the right to protection of privacy

How does the breach of the prohibition on processing specific personal data by transferring it to a third country relate to the right to protection of personal data? This right is part of the more comprehensive right to respect for private life, as laid down in Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the right to respect for privacy laid down in Article 10(1) of the Dutch Constitution. The following sections discuss the relationship between the legislative proposal and Article 8 ECHR, Article 10(1) of the Constitution, the Council of Europe's Data Protection Convention and the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (*OJ* L 281; hereinafter, 'the Directive').

5.1 Article 8 ECHR

Article 8(1) ECHR protects the right to respect for private life. However, this right is not absolute. According to the second paragraph of Article 8 ECHR, interference with the exercise of this right is only justified if it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The requirement that the interference be 'in accordance with the law' implies that there must be a legal basis that is sufficiently accessible to and predictable for ordinary citizens. In addition, the statutory provision in question should contain adequate safeguards against arbitrariness and abuse. An interference is necessary in a democratic society if it satisfies a pressing social need. In addition, it must satisfy the conditions of proportionality (i.e., the severity of the infringement should be reasonably proportional to the weight of the interest that it seeks to protect) and subsidiarity (i.e., there is no alternative remedy that is equally effective but less far-reaching).

The transfer of passenger data to the US authorities by an air carrier without the permission of the person concerned can be regarded as an interference with the right to respect for private life.

An examination of the legislative proposal for compatibility with the above-mentioned requirements for justified interference produces the following picture.

The requirement that the interference be 'in accordance with the law' has been satisfied. The legal basis is provided by the present legislative proposal, taken in conjunction with a binding decision of the Council of the European Union, the European Parliament and the Council jointly or the Commission of the European Communities, as well as by the Convention, in conjunction with the decision of the States General approving the Convention.

In accordance with the requirement of accessibility, both the binding EC or EU decisions and the agreements that will provide the basis for the transfer of the data will be published in the appropriate government publications. The present legislative proposal and the related documents will also be published in an appropriate manner. The requirement of accessibility has accordingly been satisfied.

In accordance with the requirement of predictability, proposed Section 23a of the Personal Data Protection Act aims to ensure that those concerned obtain a sufficiently clear picture, by means of

a binding EC or EU decision or an agreement, of the purposes of data processing, the type of data that is transferred, the circumstances under which the data are processed and the relevant privacy safeguards. In concrete terms, the proposed mechanism cannot independently satisfy this requirement.

The relationship between the substance of the 2007 PNR Agreement and the requirement of predictability has already been discussed in the Explanatory Memorandum accompanying the legislative proposal for the approval of the Agreement. The Memorandum states that the 2007 PNR Agreement contains the necessary safeguards. In the present case, the requirement that the interference be in accordance with the law has been satisfied. It is difficult to describe at this time how this requirement will be satisfied in subsequent cases. As regards the purpose of data transfers, such transfers may only take place for reasons of important public interest. A similar wording has been included in Section 23(1)(e) of the Personal Data Protection Act. The wording of proposed Section 23a is as consistent as possible with this. The interests listed in Article 8(2) ECHR—national security, the prevention of crime and the protection of the rights and freedoms of others—can be regarded as reasons of important public interest. The need to act against threats from terrorist or criminal groups can be regarded as a pressing social need not just in the context of the 2007 PNR Agreement but in general. Information exchange is an essential aspect of the fight against terrorism and cross-border crime, and the use of passenger data is a key instrument in this context. The requirement that the interference should be 'necessary in a democratic society' also allows for a certain amount of Member State discretion. According to the established case law of the European Court of Human Rights (e.g., *Murray* v. *the United Kingdom*, 28 October 1994, application no. 14310, NJ 1995, 509), States are entitled to a wider margin of appreciation, in the case of measures relating to national security, when determining whether a reasonable balance has been struck between the severity of the infringement of the right guaranteed in Article 8 and the weight of the interest that it seeks to protect. In this context, it is also important to remember that the ECHR is a living instrument that is interpreted by the Court according to present-day conditions.

Furthermore, it is important to recall that preventive and repressive measures in the fight against terrorism also enjoy a certain status in relation to human rights. In its case law, the European Court of Human Rights has accepted that, on the basis of Article 2 ECHR, States are obliged to take all reasonable preventive and repressive measures in order to protect the lives of their subjects in life-threatening situations (see *Osman* v. *the United Kingdom*, 28 October 1998, Reports 1998, 3124). A similar consideration can also be found in the Guidelines on Human Rights and the Fight against Terrorism, which were adopted by the Committee of Ministers of the Council of Europe on 11 July 2002.

Providing security is one of the main tasks of governments. However, various measures relating to the provision of security infringe the right to protection of privacy. In order to fight various forms of crime that demonstrate total disregard for the integrity of the individual and the human body, such as terrorism, it is essential that the right to privacy cannot be upheld without derogation, precisely in order to protect this right. The Minister of Justice and the Minister of the Interior and Kingdom Relations are therefore of the opinion that the present legislative proposal satisfies the requirements arising from Article 8 ECHR.

[…]

5.3 Data Protection Convention

Article 6 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Trb. 1988, 7; hereinafter, 'the Data Protection Convention'), which was concluded in Strasbourg on 28 January 1981, contains a provision relating to the processing of

personal data revealing religious or other beliefs, as well as personal data concerning health. Pursuant to Article 6 of the Data Protection Convention, such data may not be processed automatically unless domestic law provides appropriate safeguards.

With regard to the question whether the proposed mechanism can be regarded as an appropriate safeguard within the meaning of Article 6 of the Data Protection Convention, the reader is referred to the discussion of this issue in Section 4 of this Memorandum. The Minister of Justice and the Minister of the Interior and Kingdom Relations are of the opinion that the present legislative proposal is consistent with the requirement arising from Article 6 of the Convention.

With regard to Article 2 of the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding Supervisory Authorities and Transborder Data Flows (Trb. 2003, 122), which was concluded in Strasbourg on 8 November 2001, the following observations can be made. The first paragraph of this article provides that each party shall provide for the transfer of personal data to a recipient that is subject to the jurisdiction of a State or organisation that is not party to the Convention only if that State or organisation ensures an adequate level of protection for the intended data transfer. Pursuant to the second paragraph of this article, each Party may allow for the transfer of personal data, by way of derogation from the first paragraph: (a) if domestic law provides for it because of specific interests of the data subject or legitimate prevailing interests, especially important public interests; or (b) if safeguards, which can in particular result from contractual clauses, are provided by the controller responsible for the transfer and are found to be adequate by the competent authorities in accordance with domestic law. This Protocol entered into force for the Netherlands on 1 January 2005. According to the Explanatory Memorandum, which was issued by the Government on the occasion of the approval of the Protocol (Kamerstukken I/II, 2003–2004, 29 580, no. 2), the legislature implemented the Protocol in the Netherlands by adopting Sections 76 and 77 of the Personal Data Protection Act.

These provisions are not affected by the present legislative proposal. The aim of the mechanism in proposed Section 23a is to facilitate the transfer of data to the authorities of third countries in the light of important public interests. The interests that fall under this provision have been identified in the preceding sections of this Memorandum. The Minister of Justice and the Minister of the Interior and Kingdom Relations are therefore of the opinion that the present legislative proposal is consistent with the Data Protection Convention.

5.4 Directive 95/46/EC

Article 8(1) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data prohibits Member States from processing personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership, as well as from processing data concerning health or sex life. The second paragraph of the article lists a number of exceptions to this prohibition. The present legislative proposal does not fall under these exceptions, which can therefore not be invoked to justify its adoption. Article 8(4) of the Directive provides that, subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority. While Recitals 34, 35 and 36 of the Directive refer to the interests of public health and social protection, the membership records of officially recognised religious associations and equivalent organisations and data compiled by political parties as examples of cases in which the Member States might use this power, it is not impossible that Article 8(4) could also be invoked for other reasons of important public interest.

The Minister of Justice and the Minister of the Interior and Kingdom Relations are of the opinion that the fight against terrorism and other forms of serious cross-border crime also constitute a reason of important public interest. Now that proposed Section 23a of the Personal Data Protection Act provides that any transfer of data must be preceded by the adoption of a binding EC or EU decision that lays down rules on purpose limitation and adequate safeguards for the protection of privacy, the conditions imposed by Article 8(4) in this regard have been satisfied.

The fact that the 2007 PNR Agreement and the Directive each have a different legal basis under European law does not detract from the above. For the reasons behind this difference, see Sections 4.2, 7.4 and 7.5 of the Explanatory Memorandum accompanying the legislative proposal approving the 2007 PNR Agreement.

Under Article 8(6) of the Directive, Member States are required to notify the Commission when they invoke Article 8(4). The Government will do so after the present legislative proposal has become law.[17]

C. The Dutch Drinking Water Act and the Human Right to Water

On 26 September 2008 the Minister of Housing, Spatial Planning and the Environment sent a Letter to the House of Representatives on the abovementioned subject. It reads, *inter alia*, as follows:

The right to water and sanitation should be realised in a sustainable manner. Paying for services plays a key role in this context, since it guarantees the financial viability of those services. In addition, it encourages the person paying for the services to consume water in a sustainable manner.

As also noted in the letter, the 'right to water' thus does not imply a 'right to free water'. The letter further states explicitly that the Dutch recognition of the right to water does not have any legal implications, since it is implicit in the above-mentioned rights, which were already codified and recognised by the Netherlands a long time ago. The Netherlands has not assumed any new legal obligations by recognising this right.

[…]

In cases where a consumer does not pay his or her water bill for whatever reason, the policy followed by the water companies is to shut off his or her water supply only as a last resort. On the basis of the new Drinking Water Act, the Government will draft a statutory regulation on the policy for shutting off the supply that is similar to the regulations that apply to electricity and gas. The aim of this regulation will also be to avoid shut-offs as much as possible. A decision to shut off the water supply should therefore not be taken lightly but should always be an option.

[17] Kamerstukken II, 2008–2009 31 734, No. 3, pp. 1, 5, 7, 9, 10.

Against this background, I believe that the deployment of the water companies' power to shut off the water supply as a last resort (for example in the case of arrears) does not constitute a violation of the human right to water.[18]

D. Questions Asked by MPs Regarding the UN Anti-racism Conference

On 19 December 2008 the Minister of Foreign Affairs answered questions on the boycotting of the UN anti racism conference in Geneva. Four questions and the given answers read as follows:

> 4 Is it true that Canada, the United States and Israel have already announced that they will boycott this conference because it threatens to be extremely anti-Semitic in character? What is your opinion on the announced boycott?
>
> 5 To what extent are European countries thinking about the possibility of boycotting the conference? Are you prepared to encourage an exchange of views on this issue at EU level? Have any European countries already announced that they will not attend the conference? If so, which countries?
>
> 6 Do you consider it advisable for the European Union to distance itself from—and thus boycott—this UN conference? Are you prepared to argue at EU level that the European Union should not participate in this controversial conference? How do you intend to do this?
>
> 7 If the European Union refuses to consider a boycott, should the Netherlands still boycott this UN conference on account of its expected character?
>
> […]
>
> 4 Canada and Israel have announced that they will no longer participate in the Durban Review Process or the Durban Review Conference in April 2009. The United States will decide whether or not to participate in the Durban Review Process once the new administration has taken office. I sympathise with the decision of Canada and Israel and have communicated this to the EU partners.
>
> 5, 6 and 7 At the beginning of the preparatory process for the Durban Review Conference, the European Union set out a number of red lines. One of these red lines is that this conference on global racism should not focus on the situation in one particular country, in this case Israel.

The Netherlands is still involved in the preparations for the Durban Review Conference in order to exert a positive influence on developments, together with the EU partners and other like-minded countries. The current state of affairs in the negotiations on the final document does not leave me very hopeful. I will consider it unacceptable if Israel is the only country that is mentioned by name in the final document of this anti-racism conference or if this document

[18] Kamerstukken II, 2008–2009 31 250, No. 33, pp. 1–2.

implicitly conveys a clear anti-Israel or anti-Semitic message. In addition, it would be unacceptable if the document were to establish a consensus in favour of additional norms relating to religious defamation. If and when the process reaches a critical point after which, in my opinion, an acceptable final document is no longer a realistic possibility, I will not hesitate to withdraw the Netherlands from the process.

The Netherlands is seeking to convince its European partners of the need to adopt a critical attitude in the current preparatory process for the Durban Review Conference. As far as I am concerned, boycotting the conference is one of the possibilities. If it becomes clear that there are grounds for withdrawing from the process, I would prefer to take such a step together with all the EU partners, both because EU unity is valuable in itself and because this would have the strongest impact. However, if a joint withdrawal is not feasible and I still consider it necessary to distance the Netherlands from the process, I will not hesitate to withdraw the Netherlands from the process on its own or along with just a few partners.[19]

E. No Participation of the Netherlands in UN Anti-racism Conference

On 20 April 2009 the Minister of Foreign Affairs sent a Letter to the House of Representatives on the abovementioned subject. It reads, *in full*, as follows:

The Netherlands will not participate in the UN anti-racism conference that is being held on 20–24 April 2008 in Geneva. I made this decision on 18 April 2008 after consulting with my European colleagues and other key partners. In addition to the United States, Canada, Australia, New Zealand and Israel, the EU Member States of Germany, Italy and Poland will not participate either.

During the preparatory process, the Netherlands adopted a firm but constructive stance. Its efforts focused on achieving an acceptable final declaration and a depoliticised conference. Thanks to these efforts, the text of the final declaration was improved in many areas, but the current text does not meet the demands imposed by the Netherlands. If the final declaration is improved during the conference, the Netherlands will reconsider its decision not to participate in the conference.

The Netherlands takes the fight against discrimination on the grounds of race, religion, belief, political orientation, gender, sexual orientation or any other basis very seriously. I consider it unacceptable that a number of countries are exploiting this conference to elevate religion above human rights, to place unnecessary restrictions on freedom of expression, to ignore discrimination based on sexual orientation and to implicitly single out Israel and put it in the dock. As long as the current final declaration reaffirms the 2001 Durban Declaration (which refers to Israel), I cannot agree to the text. In light of the above, the reaffirmation of the Durban Declaration and Plan of Action (Article 1 of the Draft Declaration) and certain other draft articles constitute insurmountable obstacles insofar as I am concerned.

In addition, given the nature of the debate on the final declaration in the meeting of the preparatory committee at the end of last week, I expected that the conference would be highly

[19] Aanh. Hand II, 2008–2009, No. 1052, pp. 2209–2210.

politicised and that it would therefore not actually contribute to the fight against racism and discrimination. President Ahmadinejad's speech proves that my fears were not unfounded. He claimed, among other things, that Jewish immigrants had established a cruel, oppressive and racist regime in occupied Palestine. The EU Member States walked out of the chamber at this point, but I had not wanted to provide any kind of platform for this performance. The Iranian President's speech also induced the Czech Republic to follow the Netherlands and other countries in stepping out of the Durban process.

Fighting racism and all other forms of discrimination remains a priority of the Dutch Government, both nationally and internationally. In 2003, for example, the Netherlands drew up a national action plan against racism in consultation with various civil society organisations, in follow-up to the 2001 Durban Conference. The Government is currently working on a new anti-racism plan in implementation of its policy document on integration for 2007–2011. In international organisations, moreover, the Netherlands will continue to promote the worldwide protection of ethnic, religious and other minorities and to oppose all forms of discrimination.

At the end of the conference, I will provide you with further information on its outcome, including the final declaration that is ultimately adopted.[20]

F. Establishment of a National Institute for Human Rights (NIRM) in the Netherlands

On 10 July 2009 the Ministers of the Interior and Kingdom Relations and of Justice sent a Letter to the House of Representatives on the abovementioned subject. It reads, *inter alia*, as follows:

In a letter dated 18 July 2008, the Government informed the House of Representatives of its decision to establish a National Institute for Human Rights (NIRM) in the Netherlands.[21] The establishment of the NIRM will further strengthen human rights protection and prevent overlap between existing institutions. It will also enable the Netherlands to comply with the call of the United Nations and the Council of Europe on their Member States to establish national institutions for the promotion and protection of human rights in accordance with the so-called Paris Principles (1993). In addition, it will enable the Government to honour international commitments and respond to requests from the House of Representatives and non-governmental organisations.

The Government's position paper lists the conditions for establishing the NIRM. One key condition is that the institute must satisfy certain international requirements. Another condition laid down by the Government in July 2008 is that the NIRM must be linked to the Office of the National Ombudsman on the basis of a 'twinning of shared services' model.

[…]

A key conclusion of the NIRM steering committee is that the NIRM can have added value and fill gaps without duplicating the activities of other institutions, provided that it has the minimum responsibilities outlined in the Paris Principles.

[20] Kamerstukken II, 2008–2009 26 150, No. 72, pp. 1–2.

[21] Kamerstukken II, 2007–2008, 31 200 VII, No. 75.

The key tasks of the NIRM are to advise, report and serve as a focal point in the broad field of human rights. A more detailed list of the NIRM's tasks appears in Annexe C.[22] In the Dutch context, these tasks coincide with those of the Broad Human Rights Consultation (BMO) forum of the Netherlands and the Dutch Section of the International Commission of Jurists (NJCM). The letter from the BMO[23] and the letter from the NJCM[24] both highlight the special role of the NIRM.

An analysis of the NIRM's tasks has identified some overlap between the official tasks of the NIRM and the tasks of existing human rights organisations. However, duplication of activities can be avoided by making appropriate policy choices regarding the NIRM and including them in the institute's policy and/or implementation plan.

The tasks of the Dutch Data Protection Authority (CBP), the National Ombudsman, the Netherlands Institute of Human Rights (SIM), the House for Democracy and the Rule of Law and the Office of the National Rapporteur on Trafficking in Human Beings (BNRM) will remain unaffected. The activities of the NIRM will focus on matters in which several human rights are at stake.

Government organisations that grant subsidies to human rights organisations may decide to divert or discontinue those subsidies if the NIRM takes on tasks that are also performed by other institutions at the behest of those granting the subsidies.

It goes without saying that any demarcation between the NIRM and non-subsidised, non-governmental human rights organisations can only take place on a voluntary basis.[25]

4.73 EUROPEAN CONVENTION ON HUMAN RIGHTS 1950
See: 4.31, 4.66, 4.7 **B**, 12.273 ECHR

5.273 INVIOLABILITY OF PERSON, PREMISES AND ARCHIVES, FREEDOM OF MOVEMENT AND COMMUNICATION
See: 3.1141, 5.274 **A**, **B**

5.274 DIPLOMATIC IMMUNITIES

A. Notification under Section 3a, Paragraph 2, of the Bailiffs Act

On 7 January 2009 the Minister of Justice announced a notification on the seizure under a warrant of execution of the official residence of the Ambassador of Saudi Arabia. It reads, *in full*, as follows:

[22] Available for inspection at the Central Information Point of the House of Representatives of the States General.

[23] Letter of 5 March 2009.

[24] Letter of 10 March 2009.

[25] Kamerstukken II, 2008–2009, 31 700 VII, No. 95, pp. 1, 3.

On 3 November 2008 and again on 10 December 2008, H.P.A. van Beest, a bailiff based in Delft, at the Wallerstraat 14c–16c, informed me by fax of his intention to seize under a warrant of execution an immovable property located at Hertelaan 14 in Wassenaar.

On 17 December 2008, I notified the aforementioned bailiff that such this act would violate the obligations of the Dutch State under international law.

It appears from information made available by the Ministry of Foreign Affairs that the immovable property in question serves as the official residence of the Ambassador of Saudi Arabia. The Vienna Convention on Diplomatic Relations (1961) clearly indicates that official residences of ambassadors may not be seized.

The proposed official act would violate the principle of immunity. On the basis of Section 3a, paragraph 2, of the Bailiffs Act, I therefore wish to notify the aforementioned bailiff and his colleagues that this act would violate the obligations of the Dutch State under international law.

This notification shall have immediate effect and will be published in the Government Gazette (Staatscourant).[26]

B. Notification under Section 3a, Paragraph 2, of the Bailiffs Act

On 27 February 2009 the Minister of Justice announced a notification on the instructed garnishment of the residence of the Ambassador of Bolivia. It reads, *in full*, as follows:

On 27 February 2009, A.C. Boiten, a bailiff based in The Hague at the Leyweg 523-D, informed me by fax that he had been instructed to serve a garnishment on Mr Roberto Calzadilla Samiento, the Bolivian Ambassador to the Netherlands, in connection with a right of mortgage established on a residence located at Van Kijfhoeklaan 96 in The Hague, where Mr Roberto Calzadilla Samiento resides. This is a seizure on the basis of the bailiff's authenticated copy of 20 January 2009 of a notarial deed of 17 February 2003, which grants the right of first mortgage on the aforementioned residence to the principal, Quion 9, B.V.

I believe that this official act would violate the immunity to which the Ambassador of Bolivia is entitled under Article 31(1) of the Vienna Convention on Diplomatic Relations (1961) with respect to the criminal, civil and administrative jurisdiction of the receiving State. The act of serving a garnishment on the Ambassador is a coercive measure under civil law, which would therefore violate the obligations of the Dutch State under international law.

On the basis of Section 3a, paragraphs 2 and 5, of the Bailiffs Act, I therefore wish to notify the aforementioned bailiff and his colleagues that this act would violate the obligations of the Dutch State under international law and that they should refrain from carrying it out insofar as they have not already done so.

[26] Stc. 16 January 2009, No. 10, p. 1.

This notification shall have immediate effect and will be published in the Government Gazette (Staatscourant).[27]

C. Dutch Implementation of the Vienna Convention on Diplomatic Relations with Respect to the Enforcement of Fines Imposed on Diplomats

On 2 July 2009 the Minister of Justice answered questions on the poor attitude of diplomats towards paying fines. Eight questions and the given answers read as follows:

1 Are you familiar with the reports that diplomats have a poor attitude towards paying fines?[28] Is it true that three-quarters of the traffic fines imposed on diplomats in 2008 have not been paid? If so, what are your views on this issue?

2 Do you stand by your earlier response that you have seen 'no evidence that diplomats have a poor attitude towards paying fines'?[29] If so, how do you explain the fact that so few diplomats meet the obligation to pay fines?

3 Do you share the view that even diplomats should comply with the laws that apply in the Netherlands and that there is no justification for not holding diplomats responsible for offences? If not, why not?

4 What is the exact scope of the immunities deriving from the Vienna Convention on Diplomatic Relations? To whom do they apply? For which offences can diplomatic immunity be invoked? How far does this go? Is it true that a drunken ambassador cannot be removed from his car and cannot be forced to cooperate in a breathalyser test?

5 Do you share the view that it is unacceptable that it comes down to nothing more than 'common decency' whether or not diplomats pay fines that have been imposed on them and that they cannot be compelled to do anything? If not, why not? If so, what measures do you intend to take to improve the enforcement of fines imposed on diplomats?

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[27] Stc. 12 March 2009, No. 49, p. 1.

[28] AD.nl, 10 April 2009, 'Bekeurde diplomaat notoire wanbetaler' (Fined diplomat is notorious for defaulting on fines), available at: http://www.ad.nl/binnenland/3143473/Bekeurde_diplomaat_notoire_wanbetaler.html;

AD.nl, 10 April 2009, 'Diplomaten negeren massaal boetes' (Diplomats ignore fines on massive scale), available at: http://www.ad.nl/denhaag/stad/3143515/Diplomaten_negeren_massaal_boetes.html;

AD.nl, 10 April 2009, 'Uiteindelijk geen poot om op te staan' (Authorities ultimately have no leg to stand on), available at: http://www.ad.nl/denhaag/stad/3143511/Uiteindelijk_geen_poot_om_op_te_staan.html; and

AD.nl, 10 April 2009, 'Diplomaat kan worden uitgewezen' (Diplomat can be expelled), available at: http://www.ad.nl/denhaag/stad/3143509/Diplomaat_kan_worden_uitgewezen.html

[29] AD.nl, 10 April 2009, 'Uiteindelijk geen poot om op te staan' (Authorities ultimately have no leg to stand on), available at: http://www.ad.nl/denhaag/stad/3143511/Uiteindelijk_geen_poot_om_op_te_staan.html. Aanhangsel Handelingen, 2008–2009, No. 2123.

6 Are you already making use of all the measures you have at your disposal?[30] Are these measures suitable for collecting traffic fines or is there a need for simpler enforcement measures?

7 Are you willing to at least look up the limits of the Vienna Convention on Diplomatic Relations in order to place as few restrictions as possible on the enforcement of the obligation to pay fines?

8 Do you believe that the Vienna Convention on Diplomatic Relations is still up-to-date? Are you willing to push for its amendment or modernisation, if necessary at international level? If not, why not? If so, when and how will you do so?

[…]

1 Yes.

2 The above-mentioned response was linked to the question whether it can be ruled out that the principle of immunity plays a role in the attitude of diplomats to paying fines. This cannot be ruled out. At the same time, I have no concrete evidence that it does play a role. I also have no evidence at my disposal to suggest that there are other reasons why diplomats might have a poor attitude towards paying fines.

3 Diplomats are required to comply with the laws and regulations of the host State (Article 41(1) of the Vienna Convention on Diplomatic Relations). If they fail to do so, however, the authorities of the host State cannot employ coercive legal measures against them, although they can be call them to account in this regard (see my response to questions 5 and 6).

4 The absolute immunities listed in the Vienna Convention apply to groups of persons that are specifically defined in the Convention: diplomats and family members forming part of their household and administrative and technical staff and family members forming part of their household. The immunity that they derive from the Vienna Convention is a general immunity in respect of the host State's jurisdiction in criminal matters. Ambassadors enjoy absolute immunity and are protected against any form of arrest or detention.

5 and 6 What matters is not so much 'common decency' but the implementation of the Vienna Convention, which places restrictions on the enforcement of fines imposed on diplomats as a result of the principle of immunity. In spite of these restrictions, I have several tools at my disposal to call diplomats to account regarding their

[30] Ministry of Foreign Affairs, Diplomatic Terms and Procedures, available at: http://www.minbuza.nl/nl/organisatie/ministerie,geschiedenis/diplomatieke_termen_en_procedures.html#a3 at 9: 'Diplomatic sanctions': 'To begin with, the Ministry of Foreign Affairs of the host State can ask the Chef de Poste of the mission concerned to inform the relevant member of staff that his behaviour is unacceptable. If this proves insufficient, the host State has the following diplomatic sanctions at its disposal:

- expulsion as "persona non grata";
- recalling the relevant ambassador of the host State;
- breaking off diplomatic relations;
- presenting a démarche;
- summoning the ambassador of the sending State.'

outstanding fines and to ask them to pay these fines. Based on information provided by the Central Fine Collection Agency (CJIB), I can confront embassies about these fines. There are several ways in which this can be done. For example, I can send a diplomatic note. Alternatively, I can summon the defaulting diplomat or his ambassador to discuss the matter. In addition, I can seek to lift the relevant form of immunity. As noted by the Minister of Justice in a previous response, such steps have a varying rate of success, since I am obliged to limit myself to making a request for payment and have no coercive legal measures at my disposal.

7 The Netherlands will comply scrupulously with the Vienna Convention's restrictions on enforcing payment obligations. In addition to the general importance of complying with treaty obligations, strict compliance is also important for maintaining healthy diplomatic relations.

Moreover, if the Netherlands does not comply with its obligations, expectations are that it will soon feel the consequences of its actions in other countries. It is very likely that those countries will take reciprocal measures that are just as incompatible with the Vienna Convention,

8 The Vienna Convention is part of international law. Many of its rules are based on centuries of practice. Since 1961, moreover, the Convention has stood its ground in a rapidly changing world. This is because almost all the rules are formulated is a sufficiently general manner. As a result, no serious proposals to amend the Convention have been advanced or accepted.[31]

6.01 RECIPROCITY OF TREATIES
See: 5.274

6.113 RATIFICATION, ACCEPTANCE AND APPROVAL OF TREATIES
See also: 12.273 ECHR

Dutch Approval of Treaties Concerning the European Union

On 19 August 2009 the Minister of the Interior and Kingdom Relations sent a Letter to the House of Representatives on the interpretation of Article 91(3) of the Dutch Constitution. It reads, *in full*, as follows:

'I hereby wish to inform the House of Representatives about the handling of several motions and undertakings concerning the interpretation of Article 91(3) of the Dutch Constitution.

As a result of the debate of 17 June 2009 in the House of Representatives on the proposal for a Kingdom Act submitted by Mr Van der Staaij (MP), which stated that there were grounds for considering a proposal to amend the Constitution in order to introduce the requirement of a

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[31] Aanh. Handelingen II, 2008–2009, 3312, pp. 6989–6990.

two-thirds majority of the votes cast in the States General for the purpose of approving treaties concerning the European Union, two motions were adopted (Kamerstukken II, 30 874, R1818, Nos. 11 and 12).

The motion submitted by Mr Kalma (MP) et al. seeks to introduce the subject of the activation of Article 91(3) of the Constitution, as foreseen in the motion submitted by Mr Schinkelshoek (MP) et al., into the deliberations of the Royal Commission on the Constitution. I have undertaken to convey this wish to the Royal Commission and have interpreted it as relating to the interpretation of Article 91(3) of the Constitution, not least in the light of the transfer of powers to international organisations pursuant to Article 92 of the Constitution. In my speech marking the establishment of the Royal Commission, I referred explicitly to this discussion and to the debate on 17 June 2009. I therefore consider this motion to have been dealt with.

The motion submitted by Mr Schinkelshoek (MP) et al. calls on the Government to include in the Explanatory Memorandum accompanying any legislative proposal approving a treaty amending the founding treaties of the European Union an explicit and well-reasoned examination of the question whether Article 91(3) of the Constitution is applicable. During the debate, I stated that I was willing to implement this motion, in coordination with the Minister of Justice, who is responsible for policy on legislative quality, and the Minister of Foreign Affairs, who is responsible for the approval of treaties. This coordination has not yet taken place. However, it goes without saying that I will inform you if the implementation of this motion runs into difficulties in the future.

The annex to the budgetary statements of the Ministry of the Interior and Kingdom Relations for 2009 also includes an undertaking to treat the 'Oud criterion'[32] as an additional criterion for determining whether or not there is a derogation from the Constitution (Kamerstukken II, 2008–2009, 31 700 VII, No. 2, p. 187). I gave this undertaking during the debate in the Dutch Senate on 3 April 2007 on the Government' position on a report on the constitutional provisions concerning treaties that derogate from the Constitution and the transfer of powers to international organisations (Kamerstukken I, 2003–2004, 27 484, A) and the motion submitted by Prof. Jurgens et al. concerning the Government's report on Article 91(3) of the Constitution (Kamerstukken I, 2000–2001, 27 484, 237c).

Given that the Royal Commission on the Constitution will also consider the interpretation of Article 91(3) of the Constitution in the context of its examination of the impact of the international legal order on the national legal order, I consider this undertaking to have been satisfied.[33]

[32] The 'Oud criterion' was formulated as follows by Prof. Jurgens, a Member of the Dutch Senate for the Labour Party (PvdA) on 3 April 2007: 'If a treaty regulates matters that the Constitution does not regulate or leaves to the discretion of the ordinary legislator, there is no conflict with the Constitution and an ordinary majority is sufficient. The question whether a treaty provision derogates from the Constitution only arises in cases where the Constitution regulates a matter in great detail, as in the case of the bicameral system, or places certain restrictions on the legislator in the field of legislation, as in the case of certain basic rights.' (Handelingen I, 2006–2007, No. 25, p. 815).

[33] Kamerstukken II, 2008–2009, 30 874 (R1818), No. 13, pp. 1–2.

6.21 THE OBSERVANCE OF TREATIES
See: 5.274, 6.43

6.23 THE INTERPRETATION OF TREATIES
See: 6.43

6.43 TERMINATION AND SUSPENSION OF OPERATION OF TREATIES

Continuation of the Application of the Agreement on the Assignment of Nationality between the Netherlands and Suriname

The Report dated 2 February 2009 of the general consultations between the Standing Committee of Foreign Affairs and the Ministers of Foreign Affairs and of Development Cooperation on the abovementioned subject reads, *inter alia*, as follows:

During the past year, the *Agreement on the assignment of nationality*[34] appeared on the bilateral agenda on several occasions, for example in two meetings between the Prime Minister of the Netherlands and President of Suriname, Ronald Venetiaan. The official mission that participated in detailed consultations on this issue in recent days has now returned from Paramaribo. Unfortunately, these consultations did not produce any agreement. I wish to emphasise that, insofar as the Dutch Government is concerned, the *Agreement* continues to apply, since we are of the opinion that Suriname cannot revoke it unilaterally. The *Agreement* thus continues to apply in full, and the Netherlands has made no concessions in this regard.

The Netherlands and Suriname have discussed various ways to overcome the deadlock. Three options arose during these discussions. The first option is to terminate the agreement. This is the option favoured by Suriname, which argues that the main purpose of the *Agreement* is to regulate nationality. In contrast to other countries, the choice is between Surinamese or Dutch nationality. This was the choice that people faced at the time of Suriname's independence. Regulating this choice was the main purpose of the *Agreement*. The Netherlands is opposed to terminating the agreement as long as the rights that Dutch nationals of Surinamese origin can derive from the *Agreement* are not adequately safeguarded. This applies, in particular, to Article 5(2) of the agreement.

The second option is full compliance with the *Agreement*. Suriname rejects this option. It believes that people who do not opt for Surinamese nationality should not enjoy the same rights as Surinamese nationals. An example of this is the active and passive right to vote. I understand this particular argument on a theoretical level. The question is whether Dutch nationals, even those of Surinamese origin, should be able to participate in Surinamese elections. I can imagine what Ms Ferrier had to say about this. Moreover, the rights granted by the *Agreement* were originally

[34] Agreement between the Netherlands and Suriname, signed at Paramaribo on 25 November 1975.

only intended for returning emigrants, i.e. people who returned to Suriname in order to settle there. After two years in Suriname they automatically acquired Surinamese nationality, thus losing their Dutch nationality. As a result of an amendment introduced in 1994, this latter aspect was dropped.

There is also a third option that has been proposed by some Dutch nationals of Surinamese origin. On various occasions in the past, the House of Representatives spoke to the early predecessors of the Minister of Housing, Neighbourhoods and Integration, Eberhard van der Laan, about the identity of official representative bodies for various groups in the Netherlands. Such bodies include a Surinamese forum for public consultation—the *Stichting Surinaams Inspraak Orgaan* (SIO). I am not in charge of this body, which is run by persons of Surinamese origin. It seems to me that, if Dutch nationals of Surinamese origin feel that they are not—or not adequately—represented by the SIO, then it is first and foremost their own responsibility to discuss this. The option favoured by some Dutch nationals of Surinamese origin relates to the preservation of Article 5(2) of the *Agreement*, with the exception of those rights that are exclusively reserved for Surinamese nationals in the Surinamese Constitution, such as the active and passive right to vote, appointment to high office (e.g., judges) and the ban on expulsion. In the context of this debate, I would like to put forward a political rather than an administrative solution. The simple truth is that the *Agreement* is an agreement that was freely concluded between two States. This agreement grants certain rights to Dutch nationals of Surinamese origin. We also know that a majority of Dutch nationals of Surinamese origin do not intend to exchange their Dutch nationality for Surinamese nationality, because they wish to remain Dutch nationals. However, the possibility of switching nationalities was the underlying reason for granting certain rights under Article 5(2) of the *Agreement*. In spite of all this, there is a strong sense of solidarity between the two nations. Examples of this include the fact that Dutch nationals of Surinamese origin frequently travel to Suriname to visit family, transfer large sums of money, invest in the country, want to retire there or seek to use their knowledge to contribute to the development of Suriname. I can understand that, on the basis of this solidarity, this group enjoys more rights than other aliens but not exactly the same rights as Surinamese nationals. Any person who wants those rights should opt for Surinamese nationality, which comes with various rights and duties. However, Dutch nationals of Surinamese origin will not be granted rights relating to the functioning of the independent Republic of Suriname or the rights reserved for Surinamese nationals in the Surinamese Constitution. On the other hand, they might enjoy more flexible rules concerning entry and residence, land acquisition and the establishment of private businesses. This is what was proposed by officials from the Ministry of Foreign Affairs, but the consultations on this issue were inconclusive.

How should we proceed at this time? The official consultations are scheduled to continue in March 2009. In addition, the Prime Minister, the Minister of Justice and I will keep raising this issue in our contacts with Suriname and keep advocating this option as a potential solution, as we have done on several occasions during the past year. Several members of the House of Representatives have argued that Suriname is not complying with the *Agreement*, that the agreement is still in force and that the Netherlands should therefore follow the judicial route. The *Agreement* does not make any provision for the settlement of judicial disputes. Many treaties contain provisions on dispute settlement that are designed to deal with differences of opinion concerning the interpretation of those treaties. That is not the case here. This may be a mistake, but that is how things are. It was not agreed that the parties can refer a matter to the courts in the case of a difference of opinion. In fact, I would like to avoid this, as I intend to make every effort to come to a joint resolution of this issue. I regard Suriname as a partner; not as a country that I want to drag before the courts. I want to treat Suriname as a partner that is capable of concluding serious and sound agreements with the Netherlands. Now that we disagree on something, we should first try to reach some kind of agreement. In order to do so we need to talk to each other. Nevertheless, the *Agreement* is a treaty. Any country can ask the International Court of Justice or the Permanent

Court of Arbitration to rule on the interpretation and application of treaties. This is not my aim. I want to avoid it. However, it remains the ultimate fall-back option if we fail to reach any kind of agreement. My aim is to reach an agreement with our partner Suriname. I regard it as my duty to defend the interests of Dutch nationals abroad, including the interests of Dutch nationals of Surinamese origin who are put at a disadvantage when this part of the *Agreement* is not enforced. I understand that Suriname wants to reserve certain constitutional rights for Surinamese nationals. However, I believe that rights relating to travel and land acquisition—factors that give shape and substance to the above-mentioned solidarity—should be safeguarded for Dutch nationals of Surinamese origin.[35]

6.61 TREATIES CONCLUDED BY INTERNATIONAL ORGANIZATIONS
See: 4.7 **B**

7.213 UNIVERSALITY PRINCIPLE
See also: 9.633 **E**, **F**, 11.3

Expansion of Secondary Universal Jurisdiction

In a Note of 1 December 2008 the Minister of Justice, also on behalf of the Minister of Foreign Affairs, concerning the proposed Kingdom Act on the withdrawal of reservations to several treaties and protocols on the subject of counterterrorism, is stated, *inter alia*, as follows:

The members of the parliamentary party of the CDA (Christian Democratic Alliance) do not yet have a clear understanding of the situation that will apply when the proposed Kingdom Act on the withdrawal of reservations to several treaties and protocols on the subject of counterterrorism enters into force. They have asked for an explanation based on two examples. In connection with their request, I wish to make the following introductory comments.

The examples relate extradition and jurisdiction.

[…]

The present proposal does not introduce any changes in Dutch extradition law.

As regards jurisdiction, there will be a widening of secondary universal jurisdiction over offences falling under one of the aforementioned six conventions and protocols.[36] This type of

[35] Kamerstukken II, 2008–2009, 20 361, No. 141, pp. 19–20.

[36] The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the International Convention against the Taking of Hostages; the Convention on the Physical Protection of Nuclear Material; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; and the Convention on the Safety of United Nations and Associated Personnel.

jurisdiction applies to cases in which an alien who is suspected of committing one of these offences outside the Netherlands is discovered in the Netherlands. At present, the Netherlands has limited secondary universal jurisdiction over these offences. This means that it only has jurisdiction if it has received and rejected an extradition request regarding the person concerned. This jurisdiction is based on Article 4a of the Criminal Code, in conjunction with Article 552hh of the Code of Criminal Procedure. Pursuant to Article 552hh of the Code of Criminal Procedure, an extradition request relating to an offence falling under one of the aforementioned six instruments is regarded as an approved request to prosecute the person concerned if the extradition request originates from a State Party to one of these instruments and if the extradition has been declared inadmissible or the request has been rejected. Pursuant to Article 4a of the Criminal Code, the Netherlands has jurisdiction over persons whose criminal prosecution it has taken over.

The proposal to establish unlimited secondary universal jurisdiction means that the condition relating to the rejection of the extradition request will be dropped. The Netherlands will thus have jurisdiction from the moment that a suspect sets foot on Dutch territory, even in cases in which it has not received an extradition request. This jurisdiction will be based on Article 4 of the Criminal Code.

I will explain the situation that will apply when these changes enter into force using the two examples referred to by the members of the parliamentary party of the CDA.

1. In the first example, a Belgian national who has carried out a terrorist attack in Australia is arrested in the Netherlands. The case assumes that this attack qualifies as an offence under one of the first five instruments, which are currently subject to a reservation, or under the Convention on the Safety of United Nations or Associated Personnel. The Netherlands has an extradition agreement with Australia. If Australia were to submit an extradition request to the Netherlands, the Netherlands would be authorised to extradite the Belgian national to Australia under current conditions as well as in the new situation. As regards the extradition itself, nothing changes. As regards the Netherlands' jurisdiction, however, something will change. In the current situation, if the Netherlands does not extradite the Belgian national to Australia (and is unable to exercise jurisdiction on the basis of Article 4 of the Criminal Code), the Netherlands would only have jurisdiction if it rejected an extradition request submitted by Australia (Article 4a of the Criminal Code, in conjunction with Article 552hh of the Code of Criminal Procedure). In the new situation, the Netherlands will also have jurisdiction in cases in which Australia has not submitted an extradition request to the Netherlands.

2. In the second example, a Belgian national has carried out a terrorist attack in Iran. The Netherlands does not have an extradition agreement with this country. Iran is party to the first, second and fourth instruments that form the subject of this proposed Kingdom Act. Both now and in the future, Section 51a of the Extradition Act can serve as a basis for extradition to Iran for offences falling under these three instruments. Whether or not the Netherlands would agree to a request to extradite the Belgian national would depend on the actual facts and circumstances of the case. As regards the extradition itself, nothing changes. As regards the Netherlands' jurisdiction, however, something will change. At present, the Netherlands would only have jurisdiction if it rejected an Iranian extradition request relating to an offence falling under one of the three aforementioned instruments (Article 4a of the Criminal Code, in conjunction with Article 552hh of the Code of Criminal Procedure). In the future, the Netherlands will have jurisdiction in all

cases in which the foreign suspect is located in the Netherlands, even in cases in which Iran has not submitted an extradition request to the Netherlands.[37]

9.1 THE TERRITORIAL SEA
See: 9.633 **A**, **C**, **D**, **E**, **F**

9.124 WARSHIPS IN THE TERRITORIAL SEA
See: 9.633 **A**, **B**, **C**, **D**, **E**

9.63 JURISDICTION OF A STATE ON THE HIGH SEAS See: 9.633, 12.211

9.632 VISIT AND SEARCH
See: 9.633 **E**, **F**, 13.13

9.633 PIRACY

A. Deployment of a Dutch Frigate in the Waters off the Coast of Somalia upon Request of the UN and the World Food Program

On 10 October 2008 the Ministers of Foreign Affairs, Defence and Development Cooperation sent a Letter to the House of Representatives on the possibilities of the deployment of the Dutch frigate HrMs '*De Ruyter*' in the waters off the coast of Somalia. It reads, *inter alia*, as follows:

On 3 October 2008, we informed the House of Representatives that the Government was investigating the possibility and desirability of deploying a Royal Netherlands Navy frigate in the territorial waters and on the high seas off the coast of Somalia for a limited period.

Having regard to Article 100 of the Constitution, we hereby wish to inform you of the Government's decision to deploy an Air Defence and Command Frigate (ADCF)—HNLMS *De Ruyter*—from the second half of October until mid-December 2008 for the purpose of protecting maritime humanitarian aid convoys to Somalia organised by the World Food Programme (WFP) against piracy.

Grounds for participation

On 25 September 2008, UN Secretary-General Ban Ki-moon sent a letter to the NATO Member States asking them to provide temporary maritime protection against piracy in the waters off Somalia for WFP convoys. On 2 October 2008, the WFP directly approached the Netherlands with a similar request.

[37] Kamerstukken II, 2008–2009 31 539 (R 1865), No. 6, pp. 1, 2.

The humanitarian situation in Somalia has recently deteriorated. The maritime supply of humanitarian aid is threatened by piracy, as noted by the UN Security Council in various resolutions, including UNSCR 1814 (2008), UNSCR 1816 (2008) and, most recently, UNSCR 1838 (2008). Piracy violates international maritime law and threatens the supply of humanitarian aid to Somalia as well as the aid workers themselves. Owing to the large number of hijackings of ships in Somali territorial waters and on the high seas off the coast of Somalia, aid organisations require protection for the maritime transport of humanitarian aid.

The European Union is discussing the possibility of launching a maritime ESDP operation off the coast of Somalia, which would focus in particular on the protection of humanitarian aid convoys. The Canadian operation to protect WFP convoys will end during the second half of October. The present Dutch operation is part of the effort to bridge the gap in the protection of WFP convoys in the run-up to a possible ESDP operation. The European Union is expected to adopt a decision on the launch of such a maritime ESDP operation within the foreseeable future.

The Netherlands has ample experience as regards the maritime protection of WFP convoys. From the end of March until the end of June 2008, via the deployment of HNLMS *Evertsen*, the Netherlands successfully protected 42,000 tons of WFP supplies for Somalia against piracy. Thanks to the efforts of various countries, more than 30 convoys have been organised and protected by frigates since November 2007. As a result, more than 150,000 tons of emergency aid supplies have been transported to Somalia.

The Government is convinced of the need to help alleviate the worst suffering in Somalia. For this reason, as well as in the light of the priorities of Dutch policy on Africa, the Government has one again decided to accede to the requests of the United Nations and the WFP to deploy a Royal Netherlands Navy frigate to protect maritime humanitarian aid convoys to Somalia against piracy.[38]

B. Dutch Participation in the EU Maritime Operation in Somalia

The Report dated 17 November 2008 of a debate between, on the one hand the Standing Committee of Foreign Affairs and Defence, and on the other hand the Ministers of Foreign Affairs, Defence and Development Cooperation, on the abovementioned subject reads, *inter alia*, as follows:

The Netherlands has already concluded the necessary agreements for the initial deployment with the Government of Somalia and the flag States of the ships that will be escorted. It is thus able to deploy more quickly at short notice than other countries. If the mission is approved, other EU countries will also contribute. The Dutch contribution is meant to come to an end in mid-December. No decision has yet been adopted on the ESDP mission.

In accordance with the wishes of the Netherlands, the EU maritime operation will be chiefly humanitarian in nature. It will focus not only on protecting ships against piracy but also, primarily, on humanitarian efforts and escorting the ships of the World Food Programme (WFP).

[38] *Kamerstukken II*, 2008–2009 29 521, No. 84, pp. 1, 2.

The General Affairs and External Relations Council aims to adopt a decision on this issue at its meeting on risk assessment in support of EU policies on 2 December 2008.

[…]

Mr Irrgang has described the situation in Somalia in very negative terms. The situation is lamentable. He was also very dismissive of the country's government. The Transitional Government is the internationally recognised Government of Somalia. We must bear this in mind at all times. The influence of the Transitional Government is limited, because it controls only part of Mogadishu and part of Baidoa. Part of the opposition has concluded a peace agreement with the Transitional Government. This offers some hope of greater stability. We could reject such developments as irrelevant and fictitious, but they are small steps that offer hope that a peace agreement can be worked out. This will help in establishing a fragile process and a greater degree of stability. If we take no notice of such developments, the situation will become even worse than it is today. The process and the agreement provide for the withdrawal of Ethiopian troops and the creation of an international stabilisation force. We are not quite there yet. Obviously, the composition of the Transitional Government may change as a result of the Djibouti process. At present, this is the only thing that offers hope of an improvement of the situation in Somalia. Sticking to certain observations will contribute little to improving the situation in Somalia; on the contrary, it will not improve. Blaming the United States instead of those responsible for committing crimes in Somalia does not do justice to the actual situation.

[…]

I think we need to devote our efforts to the implementation of the Djibouti Agreement and the possibility of achieving an improvement in the current situation together with the present Transitional Government and part of the opposition. If, as advocated by Mr Irrgang, we brush aside these two groups, which have committed themselves to the peace agreement, I am certain that the situation will become even worse. This is about taking small steps in a terrible situation. Investing in the Djibouti Agreement is the only way to improve the situation. This is the aim of our contribution. Mr Irrgang and Mr Van Baalen have asked what will happen to potential detainees. Although we already discussed this in the framework of the previous operation, I would like to emphasise that no prisoners were taken during the previous mission to protect WFP ships. The agreement with Somalia states that the Netherlands may enter and operate in Somalia's territorial waters. The Netherlands may also decide whether or not to prosecute any pirates that it arrests. It is not obliged to hand them over to Somalia. I wish to reassure the House in this regard. The Public Prosecution Service will decide at its own discretion whether or not to prosecute. It is also possible that, if a third State has established jurisdiction over the offences in question and has concluded a transfer agreement with the Netherlands, the Netherlands will hand over the persons in question after receiving a request to this effect. This could apply to the flag State of a rescued ship. In theory, we are under no obligation to transfer such prisoners. The Public Prosecution Service will decide independently whether or not this will occur. If relevant, we can transfer prisoners to another State that has an interest in their transfer.[39]

C. Dutch Participation in the EU's Operation Atalanta

On 19 December 2008 the Ministers of Foreign Affairs, Defence and Development Cooperation sent a Letter to the House of Representatives on the possibilities of

[39] Kamerstukken II, 2008–2009 29 521, No. 88, pp. 11–13.

the deployment of the Dutch frigate 'Hr.Ms. *Evertsen*' in the waters off the coast of Somalia. It reads, *inter alia*, as follows:

On 31 October 2008, we informed the House of Representatives that the Government was investigating the possibility and desirability of contributing to the maritime ESDP operation Atalanta in the territorial waters and on the high seas off the coast of Somalia (Kamerstuk 29 521, No. 86).

Having regard to Article 100 of the Constitution, we hereby wish to inform you of the Government's decision to deploy an Air Defence and Command Frigate (ADCF)—HNLMS *Evertsen*—from mid-August 2009 until mid-December 2009 in support of the EU maritime Operation Atalanta. During this period, the Netherlands will also provide the Force Commander of the operation, who will lead the operation on a day-to-day basis from HNLMS *Evertsen*.

Grounds for participation

The relentlessly poor humanitarian situation in Somalia, which is exacerbated by the constant threat of piracy off the country's coast, is the main reason for the Netherlands's participation in Operation Atalanta. Due to the incessant violence and the unstable political situation in Somalia, the number of internally displaced persons has risen sharply and millions of people now depend on humanitarian aid. Humanitarian aid organisations, in particular the World Food Programme (WFP), are highly dependent on countries that provide escorts for ships transporting emergency aid supplies to Somalia. The maritime protection of humanitarian aid convoys is one of the main tasks of the EU operation.

With the start of Operation Atalanta on 8 December 2008, the EU contribution to the protection of humanitarian aid convoys off the coast has Somalia, as previously advocated by the Netherlands, has become a fact. The EU contribution consists of a one-year, fixed operation to protect humanitarian aid convoys against piracy. This is preferable to successive national operations of the kind that the Netherlands has already carried out on two separate occasions. The EU command and control system provides a clear structure for planning and implementing the operation's protection and patrol duties.

Moreover, it is obvious that keeping global shipping lanes open and safe is of great economic and strategic importance to many countries, including the Netherlands. The increase in piracy off the coast of Somalia represents a significant threat to commercial shipping. Every year, between 20,000 and 30,000 ships pass through the Gulf of Aden, including approximately 450 ships that are registered in the Netherlands. The EU operation therefore also focuses on reducing the risk of confrontations with pirates on the high seas or armed robbery in territorial waters by carrying out patrols in areas with a high risk of piracy.

Through its contribution to Operation Atalanta, the Netherlands is complying with the call of the UN Security Council, in particular in UN Security Council resolutions 1814, 1816 and 1846 (2008), to support a coordinated operation off the coast of Somalia in order to protect humanitarian aid convoys and deter acts of piracy. By deploying a frigate and providing the Force Commander, the Netherlands will be making a substantial contribution to the first maritime ESDP operation during the second half of 2009.

Finally, repressing acts of piracy and armed robbery at sea contributes to the maintenance of international peace and security in a very tangible manner, as piracy is a violation of international law, in particular the UN Convention on the Law of the Sea.

[…]

Mandate and legal basis

The mandate of Operation Atalanta is to protect WFP food convoys and other humanitarian and vulnerable vessels and to repress acts of piracy and armed robbery at sea. The operation thus supports UN Security Council resolutions 1814, 1816 and 1846 (2008). In resolution 1814, the UN Security Council calls on States and regional organisations to take measures, with the consent of the Transitional Federal Government (TFG), to protect WFP food convoys. In resolution 1846, which succeeded resolution 1816 on 2 December 2008, the UN Security Council provides that States cooperating with the TFG, for which advance notification has been provided by the TFG to the UN Secretary-General, may enter into the territorial waters of Somalia and use all means necessary to repress acts of piracy and armed robbery at sea, in accordance with the applicable international law.

International law, in particular the UN Convention on the Law of the Sea, provides the legal basis for taking action against pirates on the high seas. For action within Somalia's territorial waters, within 12 nautical miles of the coast, the operation will rely on UN Security Council resolution 1846, the successor to resolution 1816. On 14 November 2008, in conformity with resolution 1816, the TFG notified the UN Secretary-General that the European Union is cooperating with the TFG in the fight against piracy.

On 17 December 2008, the UN Security Council adopted resolution 1851. This resolution reiterates the call for coordinated action against piracy, including with countries in the Horn of Africa, which could deploy their enforcement agencies against acts of piracy in the region. The resolution also expands on resolution 1846. In addition to the anti-piracy actions that are being carried out in Somalia's territorial waters under resolution 1846 by States cooperating with the TFG, for which advance notification has been provided by the TFG to the UN Secretary-General, resolution 1851 further provides that these States may, at the request of the TFG, use all necessarily means to repress acts of piracy on Somali territory and in Somali airspace. This expansion to action on Somali territory and in Somali airspace is valid for a period of one year and applies exclusively to action against piracy, which should be in conformity with the applicable international humanitarian law and human rights. As stated above, the EU maritime operation Atalanta will operate on the basis of the UN Convention on the Law of the Sea and UN Security Council resolution 1846, which authorise action on the high seas and in the territorial waters of Somalia, respectively.

Examination on suspicion of piracy

Article 110 of the UN Convention on the Law of the Sea explicitly provides that a naval vessel may carry out an examination on board another ship on the high seas. This option may be exercised if there are reasonable grounds for suspecting that the ship in question is engaged in piracy.

Prosecuting persons suspected of piracy

The commanders of Dutch naval vessels are provided with instructions on how to act in situations involving the arrest of persons suspected of piracy. The Dutch Public Prosecution Service is responsible for the prosecution of persons who have been arrested and brought on board of Dutch naval vessels. With the exception of cases involving a clear Dutch interest, prosecution and detention in the Netherlands does not appear to be the most obvious solution.

As regards the Atalanta operation, the European Union has agreed that, if the arresting Member State is unable or unwilling to apply its jurisdiction, it will examine whether one or more other Member States are willing and able to do so. In addition, the European Union will examine to

what extent it is possible, from a legal as well as a practical perspective, to transfer persons who have been arrested on suspicion of piracy to countries in the region on the basis of transfer agreements. Under such circumstances, the arresting Member State will always be entitled to decide independently whether to prosecute or transfer the person or persons concerned. It goes without saying that the applicable human rights obligations may not be infringed at any stage during this process.

UN Security Council resolution 1846 calls on all States Parties to fully implement their obligations under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (also known as the 'SUA Convention'). This implies that the States Parties are obliged to make piracy an offence under their national law. Dutch criminal law already provides for the possibility of prosecuting persons suspected of piracy.

Resolution 1846 also calls on the States parties to the SUA Convention to build judicial capacity for the successful prosecution of persons suspected of piracy. The international community should consider together with the TFG and other countries in the region how enforcement capacity can be improved and strengthened in such a way that it is possible to combat the problem of piracy in Somalia itself.

Participating countries

The United Kingdom has provided the Operation Commander, who operates from the British military headquarters facility at Northwood. The operation was launched on 8 December 2008 with naval vessels from Germany, France, Greece and the United Kingdom and a Spanish patrol aircraft. Greece, Spain and the Netherlands will take turns in providing the Force Commander for a period of approximately four months each. For this purpose, they will each deploy a staff ship and provide a majority of the staff officers during the period of their command. In addition to the above, Belgium, Italy, Portugal and Sweden are contributing frigates, helicopters and patrol aircraft to the operation. A few non-EU States, including Norway and Turkey, are also considering the possibility of contributing to the EU force.

Impact

Operation Atalanta is an operation under EU command. The name of the military force carrying out the operation is EU Naval Force (EU NAVFOR). The EU Council of Ministers (in principle the General Affairs and External Relations Council) exercises political control over EU NAVFOR, while strategic control is in the hands of the Political and Security Committee (PSC). Like all EU Member States, the Netherlands is a member of these EU bodies.

As a result of the deployment of HNLMS *Evertsen* and HNLMS *De Ruyter* earlier this year, the Royal Netherlands Navy already has knowledge and experience of the area operations. Through its representatives in the EU Military Committee, the EU Military Staff and the operational headquarters, the Netherlands played an active role in the planning of Operation Atalanta and ensured that its experience of escorting WFP convoys was also incorporated into the operational plan.

During the period in which the Dutch contribution to Operation Atalanta is limited to a small number of staff officers, one of them will be appointed as a Senior National Representative at the force headquarters in order to look after the Netherlands' interests there. The Dutch staff officers will be responsible for the further transfer of Dutch knowledge and experience. As stated in the Government's letter to the House of Representatives of 21 November 2008 reporting on the meeting of the General Affairs and External Relations Council on 10–11 November 2008 (Kamerstuk 21 501-02, No. 860), these staff officers will be based in the operational headquarters

and the force headquarters for the duration of the operation. This will ultimately benefit those who depend on humanitarian aid in Somalia and commercial shipping along the Somali coast.[40]

D. Dutch Contribution to the NATO Operation Allied Protector

On 13 March 2009 the Ministers of Foreign Affairs, Defence and Development Cooperation sent a Letter to the House of Representatives on the possibilities of the deployment of the Dutch frigate 'Hr.Ms. *De Zeven Proviciën*' in the waters off the coast of Somalia. It reads, *inter alia*, as follows:

On 5 March 2009, we informed the House of Representatives that the Government was investigating the possibility and desirability of contributing to the NATO operation Allied Protector to combat piracy off the coast of Somalia (Kamerstuk 29 521, No. 92).

Having regard to Article 100 of the Constitution, we hereby wish to inform you of the Government's decision to deploy an Air Defence and Command Frigate (ADCF)—HNLMS *De Zeven Provinciën*—for two periods accounting for approximately 40 days between mid-March and mid-July 2009 in the framework of NATO Operation Allied Protector to combat piracy off the coast of Somalia.

As known, the Government already decided on 19 December 2008 to participate in the European Union's Operation Atalanta off the coast of Somalia from mid-August to mid-December 2009 (Kamerstuk 29 521, No. 90). The present letter adheres to, updates and, where necessary, supplements the main points of the Government's letter of 19 December 2008.

Grounds for participation

On 25 February 2009, the North Atlantic Council decided to deploy one of its standing maritime groups—Standing NATO Maritime Group 1 (SNMG1)—for approximately 40 days to combat piracy off the coast of Somalia. This operation, named Allied Protector, will replace some of the planned exercises and port visits that SNMG1 was meant to carry out in Asia between mid-March and mid-July 2009. The Netherlands had planned to contribute a frigate—HNLMS *De Zeven Provinciën*—to SNMG1 for these exercises and port visits in Asia.

The NATO Member States believe that NATO should help to combat piracy off the coast of Somalia. Every year, a large number of ships—between 20,000 and 30,000—pass through the Gulf of Aden. Pirate groups have demonstrated that they are capable of operating at a distance of almost 750 kilometres from the coast of Somalia. In view of the size of the area in which the pirates operate and the large number of ships passing Somalia, the deployment of additional military resources—if supplementary to existing anti-piracy initiatives—is welcome. Moreover, the piracy problem is expected to manifest itself more strongly in the coming months, given the favourable seasonal weather conditions.

The Government has decided to deploy HNLMS *De Zeven Provinciën* in Operation Allied Protector, as this short deployment will enable the Netherlands to make a useful additional

[40] Kamerstukken II, 2008–2009 29 521, No. 90, pp. 1, 2, 6–8.

contribution to the repression of piracy off the coast of Somalia in a relatively swift and simple manner.

The Government believes that it makes sense for the SNMG1 ships to temporarily interrupt their navigation schedule to and from Asia, which passes through the Gulf of Aden twice, in order to carry out an anti-piracy operation in the area that currently faces the highest risk of piracy in the world. The duration of the operation, which will be approximately 40 days (divided into two periods), strikes a good balance between the deployment of SNMG1 ships to combat piracy and the continuation of their regular navigation schedule. This schedule includes port visits in countries that are playing a key role in supporting ISAF operations in Afghanistan, namely Pakistan, Singapore and Australia. These countries are of special importance to the Netherlands due to the logistical support provided by Pakistan and the Netherlands' direct partnership with Singapore and Australia in Uruzgan.

NATO Operation Allied Protector, which is complementary to and will be carried out in close coordination with other operations in the area of deployment, will increase the effectiveness of the joint international efforts to combat piracy off the coast of Somalia. As a result of the deployment of the SNMG1 ships to combat piracy off the coast of Somalia, there will be a short but substantial increase in the number of naval vessels in the area of deployment. This will help to secure a maximum advantage from the deployment of the available military resources to combat piracy.

Keeping global shipping lanes open and safe is of great importance to the Netherlands from an economic, strategic and security perspective. Operation Allied Protector will help to reduce the risk of piracy on the high seas off the coast of Somalia and armed robberies in the country's territorial waters. To this end, Operation Allied Protector will carry out patrols in areas with an increased risk of piracy and support the safe passage of shipping traffic through the International Recommended Transit Corridor (IRTC) in the Gulf of Aden.

Through its contribution to Operation Allied Protector, as in the case of its participation in ESDP operation Atalanta, the Netherlands is complying with the call of the UN Security Council, in particular in UN Security Council resolution 1846 (2008), to support a coordinated operation off the coast of Somalia in order to deter acts of piracy and armed robbery.

Repressing acts of piracy and armed robbery at sea contributes to the maintenance of international peace and security in a very tangible manner, as piracy constitutes a violation of international law, in particular the UN Convention on the Law of the Sea.

[…]

Mandate and legal basis

Operation Allied Protector supports the relevant UN Security Council resolutions concerning the repression of acts of piracy off the coast of Somalia, in particular resolution 1846 of 2 December 2008. In this resolution, the UN Security Council provides that States cooperating with the TFG, for which advance notification has been provided by the TFG to the UN Secretary-General, may enter into the territorial waters of Somalia and use all means necessary to repress acts of piracy and armed robbery at sea, in accordance with the applicable international law.

International law, in particular as reflected in the UN Convention on the Law of the Sea, provides the legal basis for taking action against pirates on the high seas. For action within Somalia's territorial waters, within 12 nautical miles of the coast, the operation will rely on UN Security Council resolution 1846. In preparation for the operation, NATO will ask the TFG to notify the

UN Secretary-General that NATO is cooperating with the TFG and that NATO is authorised to take action in order to repress acts of piracy in Somalia's territorial waters.

On 17 December 2008, the UN Security Council adopted resolution 1851. This resolution reiterates the call for coordinated action against piracy, including with countries in the Horn of Africa, which could deploy their enforcement agencies against acts of piracy in the region. The resolution also expands on resolution 1846. In addition to the anti-piracy actions that are being carried out in Somalia's territorial waters under resolution 1846 by States cooperating with the TFG, for which advance notification has been provided by the TFG to the UN Secretary-General, resolution 1851 further provides that these States may, at the request of the TFG, use all necessarily means to repress acts of piracy on Somali territory and in Somali airspace. This expansion to action on Somali territory and in Somali airspace is valid for a period of one year and applies exclusively to action against piracy, which should be in conformity with the applicable international humanitarian law and human rights. In practice, Operation Allied Protector will not be taking action on Somali territory or in Somali airspace.[41]

E. Legal Implications of Arresting and Detaining Persons during Anti-piracy Operations

On 23 March 2009 the Ministers of Justice and Defence sent a Letter to the House of Representatives on the abovementioned subject. It reads, *in full*, as follows:

This letter fulfils the undertaking, given by the Minister of Defence during his algemeen overleg on 11 March 2009 on the informal meeting of EU ministers in Prague, to provide more detailed information on the legal implications of arresting and detaining persons during anti-piracy operations. The main tasks of Operation Atalanta and Operation Allied Protector are, respectively, to protect food convoys of the World Food Programme (WFP) and carry out patrols (Atalanta) and to deter acts of piracy (Allied Protector). If worst comes to worst, ships participating in Operation Atalanta can arrest suspects. In the case of Operation Allied Protector, arresting suspects is regarded as a national issue. Incidentally, during the two Dutch maritime missions off the coast of Somalia in 2008, no persons suspected of acts of piracy or armed robbery at sea were arrested.

Piracy and armed robbery at sea

Piracy has been recognised as a crime under international law for a long time. It was included in the United Nations Convention on the Law of the Sea (UNCLOS) and is defined as follows:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

[41] Kamerstukken II, 2008–2009, 29 521, No. 93, pp. 1–2, 4–5.

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

This definition implies that the crime of piracy can only be committed on the high seas. If similar acts are carried out in territorial waters, they are described as 'acts of armed robbery at sea'.

Legal basis for action

On the basis of the UN Convention on the Law of the Sea, all States Parties are obliged to cooperate to the fullest possible extent in the repression of piracy. Article 110 of the Convention explicitly provides that a naval vessel may carry out an examination on board another ship on the high seas. This option may be exercised if there are reasonable grounds for suspecting that the ship in question is engaged in piracy. This is one of the few exceptions to the freedom of navigation on the high seas.

The UN Convention on the Law of the Sea does not provide a legal basis for the repression of acts of armed robbery in the territorial waters of a foreign coastal State. There are two possible legal bases for taking action in territorial waters:

1. The prior consent of the coastal State concerned. An example of this is agreement concluded between the Netherlands and Somalia in April 2008, in which Somalia authorised the Netherlands to take action in Somali territorial waters in order to protect convoys of the World Food Programme (WFP).
2. Authorisation by the UN Security Council on the basis of Chapter VII of the UN Charter. An example of this is UN Security Council resolution 1846 (2000), the successor to UN Security Council resolution 1816 (2008). In this resolution, the UN Security Council provides that States cooperating with the TFG, for which advance notification has been provided by the TFG to the UN Secretary-General, may enter into the territorial waters of Somalia and use all means necessary to repress acts of piracy and armed robbery at sea, in accordance with the applicable international law.

On the basis of Article 105 of the UN Convention on the Law of the Sea, any State may seize a pirate ship, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.

Title VI-a of the Dutch Code of Criminal Procedure states that authorised investigating officers and other investigating officers, including in particular commanders of naval vessels, are permitted under international law to take criminal action outside the Netherlands. Thus, for example, commanders of Dutch warships in international waters are allowed to arrest persons suspected of piracy, as defined in the Dutch Criminal Code, whether or not they have been caught *in flagrante delicto*.

Jurisdiction may be exercised insofar as permitted under international law. In general, the principle of sovereignty can stand in the way exercising jurisdiction. However, this does not apply in the case of piracy on the high seas, as the UN Convention on the Law of the Sea provides a legal basis for exercising jurisdiction in such cases. It also does not apply in the case of Somalia's territorial waters, given the fact that the UN Security Council has authorised States to stop and/or pursue ships that are suspected of acts of piracy or armed robbery in those waters. Ships may be pursued from the high seas into the territorial waters of a particular State only after the State concerned has given its consent.

Rules of engagement

For every military operation, including anti-piracy operations, the most senior commander of the operation in question draws up the operation's rules of engagement (ROE). In the case of operations carried out under the flag of an international organisation (e.g. the United Nations, NATO or the European Union), the rules are subsequently approved by a political body within the organisation. For commanders, rules of engagement represent the transition from a mandate to its practical implementation. They encompass the powers that are deemed necessary for implementing the mandate, which, in the case of anti-piracy operations, will be based on various legal instruments, including the UN Convention on the Law of the Sea. These powers can vary from operation to operation.

Possibilities for exercising jurisdiction

Pursuant to Article 4(5) of the Dutch Criminal Code, the Netherlands has universal jurisdiction over acts of piracy as defined in Articles 381–385 of the Criminal Code—including the perpetration of acts of violence against other vessels, persons or property on the high seas—and may exercise this jurisdiction in cases where the Public Prosecution Service believes it is appropriate to carry out a criminal prosecution. This depends in part on whether a Dutch interest is at stake or whether there is some connection to the Netherlands. The latter is determined, in particular, by such factors as the ship's flag, the nationality of the pirates and the victims and the ship's cargo.

The Public Prosecution Service shall examine the appropriateness and viability of any prosecution on a case-by-case basis. With the exception of those cases in which a Dutch interest is clearly at stake, prosecution and detention in the Netherlands does not appear to be the most obvious option.

Arresting suspects

If persons suspected of piracy are arrested on the high seas by a Dutch navy vessel, on the grounds of their suspected involvement in hijacking and/or violence on board a vessel, they will be brought before the commander of the navy vessel on which they are being held. The commander will act in accordance with the provisions of Section 539a et seq. of the Code of Criminal Procedure. On the basis of these provisions, he has certain derived criminal powers in situations where he is unable to wait for instructions from the Public Prosecutor. When a commander makes use of these powers, he must draw up an official report of his actions and findings as soon as possible. In every case, the commander must consult the Public Prosecutor. If immediate action is required, thus preventing the commander from waiting for instructions from the Public Prosecutor, he may also report his actions and findings to the Public Prosecutor afterwards. The report must describe the criminal act and any measures that were taken.

Treatment of suspects on board

If necessary, persons suspected of piracy shall be detained for a short period of time in an area of the ship designated for this purpose by the commander. They shall be treated humanely and be provided with the necessary facilities, including any medical assistance they may require. In consultation with the Public Prosecutor, suspects will, if relevant, receive legal aid. If a video teleconferencing (VTC) connection is available on board the navy vessel, suspects may communicate with counsel in the Netherlands. If necessary, an interpreter will facilitate this communication from the Netherlands. In this way, it is possible to comply with the basic rights of the suspects within the boundaries of the technical and operational possibilities.

Outgoing extradition and surrender requests (requests to other countries)

If the person concerned is located within the jurisdiction of another State and the Netherlands wishes to institute criminal proceedings against this person, he or she will have to be transferred to the Netherlands.

If the other State is an EU Member State, the transfer will be carried out on the basis of a European arrest warrant. In all other cases, it will be carried out on the basis of an extradition request. Dutch law does not require a treaty basis for outgoing extradition requests. The Public Prosecutor shall issue the European arrest warrant or extradition request. European arrest warrants can be sent directly to the judicial authorities of the EU country concerned.

Incoming extradition and surrender requests

If the person concerned is located within the jurisdiction of the Netherlands, for example because he or she was arrested by the Dutch navy, but will be criminally prosecuted by another State, the Netherlands will have to transfer him or her to that State. In principle, this transfer is also carried out on the basis of a European arrest warrant or an extradition request. Dutch law requires a treaty basis for extradition. The extradition procedure is governed by the Extradition Act and the treaty on which the extradition request is based.

Transporting arrested suspects

The method by which the suspects are transferred depends on the position of the country where the ship is located. Depending on the position of the country concerned, it may be easier to transfer the suspects on board the ship rather than on shore. In each case, the method for transporting suspects will be determined by mutual agreement.

National legal provisions on arrest and prosecution in other countries participating in EU NAVFOR

Most of the countries participating in EU NAVFOR, including the Netherlands, have made piracy a criminal offence under national law. The crime itself is not always defined as piracy, but the acts that it encompasses have been criminalised. At any rate, these countries have made the act of carrying out an armed robbery against a ship on the high seas punishable under their national law.

It appears from a recent survey carried out by Denmark and the UN Office on Drugs and Crime (UNODC) that many countries enjoy jurisdiction over acts of piracy perpetrated outside their territorial waters. A limited number of countries have established universal jurisdiction over acts of piracy. Other countries have extraterritorial jurisdiction over criminal acts based on the nationality of the perpetrator or victim or on the flag under which the ship sails. The investigation and prosecution of piracy is controlled by the national laws of the State that carried out the arrest or initiated the prosecution.

International agreements on prosecution and trial

As regards the European Union's anti-piracy operation off the coast of Somalia, which goes by the name of Atalanta, it has been agreed within the European Union that, if the arresting Member State is unable or unwilling to exercise its jurisdiction over persons suspected of piracy or armed robbery at sea, it will be examined whether one or more other Member States are able and willing to do so. If other Member States are also unwilling or unable to exercise their jurisdiction, the arresting Member State can decide to transfer the suspects to a third country that will exercise its jurisdiction over them. Pursuant to the relevant EU decisions, transfers for the purpose of

prosecution in a third country can only take place if the conditions of transfer are in accordance with the applicable international law, in particular international human rights treaties and conventions. The European Union aims to conclude transfer agreements that meet these conditions with relevant countries in the region.

Based on Article 24 of the Treaty on European Union, the European Union concluded a transfer agreement with the Government of Kenya on 6 March 2009. The agreement covers the conditions and arrangements for the transfer of suspects by Operation Atalanta to Kenya as well as their treatment following transfer. It provides that detainees who have been transferred shall be treated in accordance with international law, in particular international human rights treaties and conventions. The Government of Kenya has confirmed that it will not subject suspects transferred to Kenya by Operation Atalanta to the death penalty. The agreement further provides that the arresting Member State and the Red Cross will have access to the suspects arrested by that Member State at all times. The first transfer by Operation Atalanta to Kenya of persons suspected of piracy or armed robbery at sea took place on 10 March 2009. The transfer involved nine suspects who had been arrested by the operation's German frigate, *Rheinland–Pfalz*.

In all cases, the arresting Member State shall decide independently, and on a case-by-case basis, whether or not to transfer the suspect or suspects in question using the appropriate EU or national framework. Unlike the European Union, NATO does not have an arrangement for transferring detainees in the region. In the case of NATO's Operation Allied Protector, all arrests by the participating Member States fall under the jurisdiction of the country concerned. It is subsequently up to the arresting Member State to determine whether or not it is willing and able to exercise its jurisdiction. If this is not the case, the arresting Member State can examine whether one or more other Member States are able and willing to do so. Under all circumstances, the arresting State shall decide independently whether or not to prosecute or transfer the suspects.[42]

F. Dutch Government's Response to the Advisory Memorandum on the Dutch Contribution to the EU Operation Off the Coast of Somalia, Drafted by Professor G.G.J. Knoops

On 17 April 2009 the Ministers of Defence, Foreign Affairs and Justice sent a Letter to the House of Representatives on the abovementioned advise of Professor Knoops. It reads, *in full*, as follows:

This letter satisfies the request of the Standing Committee on Foreign Affairs of the House of Representatives for a response to the memorandum drafted by Professor G.G.J. Knoops in preparation for the roundtable discussion of 8 April 2009 on the Dutch contribution to Operation Atalanta off the coast of Somalia.

International legal framework

The Government sees Mr Knoops' advisory report as an important contribution to its deliberations on judicial action against piracy. It notes, first and foremost, that the report appears to be

[42] *Kamerstukken II*, 2008–2009, 29 521, No. 95, pp. 1–4.

based on the premise that maritime law—and the UN Convention on the Law of the Sea in particular—aims to establish a global system of criminal-law powers on the high seas. In this regard, the Government notes that it was never the intention to establish a supranational system of criminal law at sea.

Maritime law is based on the division of competences at sea, based on such principles as the jurisdiction of coastal States in coastal maritime zones and the jurisdiction of flag States as regards the actions of ships on the high seas. Maritime law indicates which State has jurisdiction is which situations. The structure of maritime law entails that jurisdiction is determined, first and foremost, on a geographical basis. In the various maritime zones, coastal States have either greater (territorial waters) or lesser (Exclusive Economic Zone) jurisdiction over shipping. On the high seas, on the other hand, the flag State has primary jurisdiction to take action in relation to ships sailing under its flag. Situations involving piracy form an exception to the rule. The international community regards piracy as such a serious offence that all States are authorised to take action to repress it. In other words, States have extensive powers in the case of piracy.

It is essential that the international jurisdiction to take action against piracy is properly enshrined in the national law of the State concerned. This means that States must ratify existing agreements, implement the relevant norms in national legislation and enforce this legislation on the basis of those norms. Broadly speaking, the Government regards maritime law—including the manner in which it allocates jurisdiction, including criminal jurisdiction, at sea—as a sensible and effective legal system. It is also a system to which the Kingdom of the Netherlands, which has many different maritime interests, adheres. Key concepts like the freedom of the high seas and the limitation of the powers of coastal States are vital for shipping.

It is important to realise that the situation off the coast of Somalia is both grave and exceptional. The international community is currently responding to this situation in various ways, both legally and operationally. Given the available options within the existing international legal framework, the Government believes that there is no reason to fundamentally reassess modern maritime law in response to the numerous incidents of piracy off the coast of Somalia.

These incidents point to a lack of vital state authority in Somalia, as well as increasing lawlessness. They do not imply that maritime law itself has shortcomings.

As regards the connection between the UN Convention on the Law of the Sea (UNCLOS) and the International Maritime Organisation (IMO) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Shipping (Trb. 1989; hereinafter, the 'SUA Convention'), the Government notes, first and foremost, that both conventions have been implemented in Dutch criminal law insofar as necessary. Offences arising from these conventions have been defined as criminal offences under Dutch law.

UN Convention on the Law of the Sea

The Government does not share Mr Knoops' negative appraisal of the UN Convention on the Law of the Sea. As regards the alleged loopholes identified by Mr Knoops, the Government notes as follows.

First loophole

The UN Convention on the Law of the Sea contains no rules on the repression of piracy in territorial waters. This is understandable in the light of the coastal State's sovereignty over these waters. The coastal State has exclusive jurisdiction in this area and is theoretically the only party that can take criminal action there. This competence is similar to the sovereign autonomy of States on the mainland.

In exceptional situations, as in the case of a fragile State like Somalia, it appears that this division of jurisdiction has undesirable consequences. States that see a need to take action in the territorial waters of Somalia run up against the country's exclusive jurisdiction. This has everything to do with the specific situation in which Somalia finds itself and nothing to do with the concept of territorial waters or the legal rules that apply to it. The Government believes that the impossibility for other States to lawfully take action in Somalia's territorial waters has been suitably addressed by means of agreements with Somalia's Transitional Federal Government (TFG) and UN Security Council resolutions.

In contrast to Mr Knoops, the Government does not consider it necessary to facilitate action in territorial waters in a more general sense, thus encroaching on the coastal State's sovereignty. This may seem like an attractive option in the case of Somalia, but it would undoubtedly have implications for the territorial waters of the Kingdom of the Netherlands in the North Sea and the Caribbean. The Government is convinced that the genuine importance of territorial waters in which the coastal State has exclusive jurisdiction in respect of legislation and compliance with such legislation should not be called into question. The Government accordingly attaches great importance to the announcement in the relevant Security Council resolutions that they do not set a precedent in this area. The Government also has no intention of supporting an 'all-encompassing UN resolution that creates a system for taking action against pirates and maritime terrorism and enforcing international maritime law'. This would affect the division of jurisdiction under maritime law, which could also work against the Netherlands.

Second loophole

In the Government's opinion, the notion of 'private ends' in Article 101(a) of the UN Convention on the Law of the Sea does not exclude the possibility that political motives could also play a role in determining whether or not a particular incident qualifies as an act of piracy. This is because the definition refers to private ends rather than private gain—a distinction that could be relevant in this context. Incidentally, the Government is not currently under the impression that the acts of piracy off the coast of Somalia are driven by political motives.

Third loophole

The reference to the need for 'advance notification' can be traced to the radical step taken in UN Security Council resolutions 1816, 1846 and 1851, namely the granting of access to Somalia's territorial waters. Given the far-reaching nature of this encroachment, the Security Council decided to incorporate a form of consent to this step into the resolutions, in the sense that the TFG must provide advance notification to this effect to the UN Secretary-General. In the case of the European Union's Operation Atalanta and NATO's Operation Allied Protector, the TFG has notified the UN Secretary-General of the fact the organisations in question are cooperating with the TFG and that they are also authorised to combat acts of piracy in Somalia's territorial waters.

Fourth loophole

It is true that there is no uniform model for the adjudication of acts of piracy, but this should be seen against the background of the international judicial system. In general, crimes that are subject to international agreements are rarely adjudicated in a uniform manner. This is not just typical of piracy but also applies to other offences. From the Government's point of view, it is essential that the relevant agreements are ratified, that they are implemented in national legislation and, subsequently, that perpetrators are actually prosecuted.

Fifth loophole

Mr Knoops is absolutely right to classify the various UN Security Council resolutions as ad hoc solutions. In fact, the resolutions do not purport to be anything more than this. The basic premise for the States involved in Operation Atalanta and Operation Allied Protector, as well as for third States involved in combating piracy off the coast of Somalia, remains that the foundations for combating acts of piracy can be found in the UN Convention on the Law of the Sea, supplemented by the IMO Convention for the Suppression of Unlawful Acts against the Safety of Maritime Shipping (SUA Convention). Because these instruments proved to be inadequate in the case of Somalia, an ad hoc solution was adopted in the form of Security Council resolutions.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Shipping (Trb. 1989, 17) (1988 SUA Convention)

First loophole

The Government agrees with Mr Knoops that all States in the Gulf of Aden region should be party to the SUA Convention and its Protocols, but the possibilities for promoting this are limited. In addition, it is not just ratification that is important but rather the implementation and enforcement of the Convention. The Government and it partners are therefore focusing on ratification as well as on the need to actually prosecute persons who have violated the Convention.

Second loophole

Mr Knoops appears to regard the fact that only States Parties can take action on the basis of the SUA Convention as a drawback. However, the Government believes that the fact that action can only be taken by parties that are specifically authorised to do so is actually a sound principle.

As regards the problems identified by Mr Knoops regarding prosecutions on the basis of the Additional Protocol involving foreign nationals or non-flag States, it is not entirely clear what kind of situations this concerns. It is perfectly possible to prosecute foreign nationals under the SUA Convention as well as under the Additional Protocol. Incidentally, the Government notes that the Netherlands is currently drafting the necessary legislation for the approval and implementation of the Additional Protocol and that it is willing to devote attention to this issue in the official approval documents.

Lack of uniformity

The Government endorses Mr Knoops' conclusion that the international community's efforts to combat piracy lack uniformity. This is unfortunate yet understandable: it is a direct consequence of [the fact that the international legal system is based on independent, sovereign States. As a result, each State autonomously develops legislation in line with its national legal tradition. Various agreements in the fields of maritime law and maritime shipping have resulted in a certain amount of streamlining with regard to the criminalisation of piracy and other unlawful acts. The Government believes that greater uniformity cannot be achieved in the short term. Compliance with such international obligations necessarily takes place within the national legal order.

The Government shares Mr Knoops' wish that the States in the Gulf of Aden region will modernise their legislation in respect of piracy. It therefore welcomes the Djibouti Code of Conduct, which was concluded between nine States from the Gulf of Aden region, under the auspices of the IMO, on 29 January 2009. By adopting this Code of Conduct, the countries concerned have indicated that they wish to modernise their national legislation in respect of

piracy and armed robbery at sea and that they wish to improve the possibilities they have at their disposal for investigation and prosecution.
In contrast to Mr Knoops, the Government believes that there has been a certain amount of streamlining with regard to the treatment of suspected pirates within the European Union. For the time being, however, the Government believes that it is unnecessary to adopt a new uniform arrangement for dealing with convicted pirates who are released at the end of criminal proceedings and are unable to return to their countries of origin for fear of human rights violations. Existing Dutch policy on asylum and return provides sufficient possibilities to come to a sensible individual decision in such cases. In theory, the above-mentioned case falls within the boundaries of this policy, which includes public order policy and, in particular, the policy on Article 1F of the Refugee Convention. It is possible to carry out a careful individual evaluation on the basis of the existing policy framework.

Dealing with pirates who have been arrested

Both the UN Convention on the Law of the Sea and the SUA Convention provide a legal basis for establishing jurisdiction over a person who is suspected of piracy. As already noted in this letter, the Netherlands has implemented both these Conventions. Article 4(5) of the Dutch Criminal Code provides that Dutch criminal law is applicable to any person who has committed one of the offences described in Articles 381–385 of the Criminal Code, which concern piracy and related conduct, outside the Netherlands. This broad form of jurisdiction is known as universal jurisdiction. It means that the Netherlands has jurisdiction to prosecute persons for committing the crime of piracy, regardless of whether there is a connection to the Netherlands in the case concerned, for example as the country where the crime was committed or the country of the nationality of the perpetrator(s) and or victims(s). In addition, the Netherlands has jurisdiction over the crimes of 'hijacking' (Article 385a of the Criminal Code) and 'violence on board a seafaring vessel or maritime installation' (Article 385b of the Criminal Code), if the crime was committed against a Dutch seafaring vessel or if the crime was committed on or against any other seafaring vessel and the suspect is located in the Netherlands. This follows from Article 4(8) of the Dutch Criminal Code. The International Convention against the Taking of Hostages contains a definition of the offence of hostage-taking and requires States to make hostage-taking punishable under their national law.

The offences listed in the Convention have been made punishable under Dutch law in Articles 282 and 282a of the Dutch Criminal Code. Finally, the UN Convention on Cross-Border Crime (Trb. 2004, 23) also provides a basis for the obligatory criminalisation of the offences described in the Convention. The above-mentioned agreements provide a basis for exercising jurisdiction over these offences and can also serve as basis for extradition and legal assistance.

If a person has been arrested on suspicion of piracy but prosecution by the Netherlands is not an obvious option, he can be transferred to a country that is willing to prosecute him. If this other country is an EU Member State, the transfer will be carried out on the basis of a European arrest warrant. In all other cases, it will be carried out on the basis of an extradition request. The Dutch extradition procedure is governed by the Extradition Act and the agreement that forms the basis for the extradition request.

The Government notes that the proposal to establish an international tribunal or expand the jurisdiction of the International Criminal Court in order to try persons accused of piracy could be discussed, for example, at the Review Conference of the Assembly of States Parties to the Rome Statute of the International Criminal Court. The issue will also be discussed during the preparation of the Dutch position for the Review Conference. The Government will inform the House of Representatives of this position in the autumn. Incidentally, the International Contact Group on

Piracy off the Coast of Somalia is not in favour of using an international tribunal to try persons accused of piracy.

Deployment of boarding teams

Mr Knoops states that it is very important that the deployment of boarding teams is directly mandated by the UN Security Council and refers to Security Council resolution 1851 in this regard. The authority to deploy such teams in the territorial waters of Somalia arises from Security Council resolution 1846, which provides that States cooperating with the TFG, for which advance notification has been provided by the TFG to the UN Secretary-General, may enter into the territorial waters of Somalia and use all necessary means to repress acts of piracy and armed robbery at sea, in accordance with the applicable international law. The Security Council does not normally prescribe specific means when it issues an authorisation to use 'all necessary means'. It is up to the countries and organisations acting on the basis of the Security Council's authorisation to determine what means are required. This may also include the deployment of boarding teams.

Mr Knoops is of the opinion that there are two legal loopholes with regard to the deployment of boarding teams that need to be dealt with in detail. Both loopholes relate to the rules of engagement. The Government notes that the rules of engagement for Operation Atalanta were adopted by the EU Council of Ministers. They are robust and also allow for action in cases in which an attack is not in progress, in the same way that the UN Convention on the Law of the Sea does not contain a restriction of this kind. The Government is of the opinion that, in practice, the rules of engagement for Operation Atalanta provide sufficient possibilities for taking effective action.

Finally, Mr Knoops advises the Government to develop a (legal) strategy for cases in which the Netherlands arrests persons suspected of piracy but has no clear basis for prosecuting them as well as for cases involving the hijacking of a Dutch vessel. As regards the first type of case, the reader is referred to the previous section on dealing with persons who have been arrested on suspicion of piracy. As regards the second type of case, the Government notes that, in such situations, it will decide how to act in consultation with the Public Prosecution Service. This type of case relates to the enforcement of criminal law. The exact form that such enforcement might take depends on the specific circumstances of the case. Any involvement of members of the Dutch armed forces in such situations would take the form of military assistance on the basis of the Police Act 1993.[43]

G. Dutch Proposal for the Establishment of a Piracy Tribunal

On 11 August 2009 the Ministers of Foreign Affairs and of Justice sent a Letter to the House of Representatives on the abovementioned subject. It reads, *inter alia*, as follows:

Expert Workshop on the Establishment of a Piracy Tribunal

During the workshop, the participants discussed legal arguments for and against the establishment of a piracy tribunal, which touched on various aspects of such a tribunal. In cases where

[43] Kamerstukken II, 2008–2009, 29 521, No. 99, pp. 1–6.

controversial or problematic issues were identified, various possible solutions were reviewed. In a joint document, Germany and the Russian Federation argued for the establishment of an international tribunal along the same lines as those previously put forward by the Netherlands in the Contact Group on Piracy off the Coast of Somalia on 29 May 2009.

The participating experts agreed on several issues. To start with, piracy is a crime under ordinary law that is of a different order than other international crimes like genocide, war crimes, crimes against humanity and torture. Nevertheless, it is patently obvious that piracy is a regional and/or international problem that is not being adequately tackled by national law. Any tribunal that is established should be efficient and cost-effective. In addition, its establishment should take up as little time as possible, given that piracy is an urgent problem. It is important that the rights of defendants and convicted persons are protected at all stages of their trial and detention.

The participating experts also agreed that the crimes to be adjudicated by the tribunal should be based on customary international law, so that the tribunal enjoys sufficient international support and so that its proceedings comply with the principle of legality. This means that only the relevant provisions of the UN Convention on the Law of the Sea should apply. However, these provisions only apply to acts of piracy perpetrated on the high seas and not to acts of piracy perpetrated in territorial waters. An additional legal basis would have to be created for such acts, especially in the case of Somalia.

It was noted that it would be difficult to try those responsible for financing and organising piracy if the jurisdiction of the tribunal were limited to a specific geographical area in the Indian Ocean, since it is likely that these persons are not always located at sea or in Somalia but also in other countries outside the region.

At most, the tribunal should play a complementary role *vis-à-vis* national courts. This means that it could only try cases that are not tried at national level. An example of this is the principle of 'complementarity' that applies to the International Criminal Court. Applying such a principle to the tribunal might reduce the objections of certain countries to its establishment.

The choice of a legal basis for the tribunal has political as well as legal aspects. A UN Security Council resolution, adopted under Chapter VII of the UN Charter, provides the best guarantee of the mandatory cooperation of all Member States. However, several experts regarded a Security Council resolution as an unlikely option, given the objections of the United States and the United Kingdom as well as other countries. A multilateral treaty that would need to be negotiated and which in many countries would be subject to ratification by the national parliament would be too time-consuming. An alternative option would be to establish, pursuant to a bilateral treaty or national legislation, a 'hybrid' tribunal that combines national and international elements. In addition to the Special Court for Sierra Leone, the War Crimes Chamber of the Court of Bosnia and Herzegovina was cited, in particular, as an example of such a tribunal. Under the Bosnian model, international elements, such as international judges, have been added to a national court. The experts agreed that this model was an interesting option for a piracy tribunal that merited further study.

Other—more political—issues include the role of the host State of the piracy tribunal and where to detain persons accused of piracy before, during and after the proceedings. The experts recommended locating the tribunal and the detention facilities in the region. In order to increase enthusiasm for such a step, capacity building activities should be carried out in the countries concerned.

The Netherlands will present the workshop's conclusions, along with proposed solutions to potential problems, to the legal working group of the above-mentioned Contact Group. In the

meantime, it may be concluded that the workshop gave rise to a constructive discussion. Even countries that expressed scepticism regarding the establishment of a piracy tribunal played a constructive role in the discussion. The model on which the War Crimes Chamber of the Court of Bosnia and Herzegovina is based seems particularly promising and will be examined in greater detail.[44]

9.65 POLLUTION OF THE HIGH SEAS

Improvement Measures and Conclusions with Respect to Ship-Generated Waste

On 8 October 2008 the Minister of Housing, Spatial Planning and the Environment, also on behalf of the State Secretary of Transport, Public Works and Water Management and the Minister of Justice, sent a Letter to the House of Representatives on the abovementioned improvement measures. It reads, *inter alia*, as follows:

Many improvements have been undertaken following the events involving the Probo Koala. As a result of these events, the State Secretary for Transport, Public Works and Water Management and I have examined how such incidents could be prevented in the future. The various improvement measures promised to the House of Representatives can be summarised as follows:

1. analysis of international rules and regulations
2. analysis of national legislation
3. improvement of supervision and enforcement.

The concise conclusion that emerges from the analysis of international rules and regulations is that they are adequate and well-coordinated for current purposes, assuming that production processes are not carried out on board, as apparent from the survey carried out by the International Maritime Organisation (IMO). With regard to national legislation, it can also be concluded that the instruments in question are adequate and sufficiently well-coordinated. However, the relationship between the Environmental Management Act and the policy on accepting waste as laid down in licences forms an exception in this regard. In one particular case, moreover, it appears that the same terms and abbreviations are used in different legal regimes to refer to different things. As regards the improvement of supervision and enforcement, we conclude that the improvement measures that were initiated have produced a situation in which the supervision of the ship-generated waste chain is more focused on the risks involved and the cooperation between the various supervisory agencies has improved.

In a nutshell, the improvement actions have produced the following results:

- The Government plans to amend the Prevention of Pollution from Ships Act (WVVS) in order to clarify the definition of hazardous substances. This amendment will follow the definition of hazardous substances employed in the MARPOL Convention.

[44] Kamerstukken II, 2008–2009, 29 521, No. 116, pp. 1–3.

- The Government will adjust its policy on accepting waste, as laid down in the policy document on the safe processing of waste (*De Verwerking Verantwoord*). In this context, the Government will have to take account of the prohibition on transferring waste to individuals who are not authorised to receive waste (Section 10.37 of the Environmental Management Act). This will be taken on board in the second National Waste Management Plan (LAP), which will enter into force in the spring of 2009.
- The second National Waste Management Plan will take better account of the terminology employed in the Environmental Management Act and the Prevention of Pollution from Ships Act.
- The Government will finish its project to formulate a strategy for ship-generated waste. As part of this process, it will formalise the procedures that form part of this strategy. This means, *inter alia*, that the terms and conditions for implementing the strategy in practice will be fleshed out. On the basis of these detailed terms and conditions, the various competent authorities will make choices that may have an impact on the reallocation of capacity, the deployment of additional capacity and resources or the transfer of powers. After the Government has adopted an official decision on the recommendations, and the aforementioned conditions in particular, it will finalise the strategy. The implementation of the strategy will be coordinated by the Seaport Directorate Commission.
- The Government will draw up an informative working document on the applicable legislation for the relevant supervisory agencies at the seaports.[45]

10.2 AIR NAVIGATION
See: 4.7 **B**

11.12 INTERNATIONAL TORT AND DELICT
See: 4.31, 6.43, 11.13, 11.3, 14.125

11.21712 EXHAUSTION OF LOCAL REMEDIES
See: 4.66 **A**

11.3 INTERNATIONAL CRIMES, WAR CRIMES, CRIMES AGAINST PEACE, CRIMES AGAINST HUMANITY
See also: 14.125

Implementation of the Chemical Weapons Convention

On 17 November 2008 the Minister of Justice answered questions on the supply of chemical weapons to Iraq and the Chemical Weapons Convention. Five questions and the given answers read as follows:

[45] Kamerstukken II, 2008–2009 22 343, No. 208, pp. 2–3.

1 Are you familiar with the article 'Voorkomen dat grote vissen door de mazen van de wet zwemmen. De gevolgen van de niet volledige implementatie van het Chemische Wapenverdrag en de Van Anraat-zaak' ('Preventing big fish from slipping through legal loopholes. Consequences of the incomplete implementation of the Chemical Weapons Convention and the Van Anraat case').[46] What is your response to the author's contention that Van Anraat might have received a life sentence if the Netherlands had implemented the Chemical Weapons Convention fully and correctly?

2 In what manner and in which act or acts has Article 1(1) of the Chemical Weapons Convention been implemented in the Netherlands? Have both the use and the supply of chemical weapons been criminalised? What is the maximum sentence for these offences? Can you explain the distinction that is made between the use and supply of chemical weapons in wartime and peacetime?

3 Do you support the author's conclusion that the war crime of 'supplying chemical weapons' is not a stand-alone offence and that the formulation used in the Van Anraat case—'complicity in the use of chemical weapons'—produced a lower minimum sentence? Do you likewise share the author's view that the supply of chemical weapons in wartime should also carry a maximum sentence of life imprisonment?

[…]

5 Is the Netherlands violating its international obligations as a result of not having properly transposed the Chemical Weapons Convention into national law? Could the Netherlands even be held liable as a result? On a separate note, do you share the view that this omission should be rectified as soon as possible? If not, why not? If so, when may the House of Representatives expect to receive a legislative proposal to this effect?

[…]

8 Why has the Dutch Government thus far taken the position that it cannot take action against the supply of raw materials for the production of chemical weapons that took place before the publication of the Royal Decree of 15 November 1984 banning the export of certain strategic goods? Do you share the view that it was sufficiently well known long before this date that Iraq was making use of poison gas in its war with Iran? Do you share the view that deliveries that took place before the entry into force of the Royal Decree could thus indeed lead to a criminal prosecution?

[…]

1 to 3 Yes. I am aware of the article to which you refer.

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC) was signed in Paris on 13 January 1993 and entered into force on 29 April 1997.[47] On that date, the Chemical Weapons

[46] Nederlands Juristenblad 38, 31 October 2008, p. 2426.

[47] Trb. 1993, No. 162.

Convention (Implementation) Act (hereinafter, the 'Implementation Act') entered into force in the Netherlands in implementation of the Chemical Weapons Convention.

Section 2(1) of the Implementation Act covers the key provision that appears in Article I(1)(a) and (b) of the CWC. This article prohibits the States Parties from developing, producing, otherwise acquiring, stockpiling, retaining, transferring or using chemical weapons.

Section 2(2) of the Implementation Act prohibits the same actions in relation to toxic substances, including their precursors, if intended for the development, production, acquisition, stockpiling, retention, transfer or use of chemical weapons. Toxic substances intended for purposes that are permitted under the Convention are subject to a licensing and exemption system.

Infringements of these prohibitions are regarded as economic offences within the meaning of Section 1 of the Economic Offences Act (WED). When committed with intent, these offences are regarded as criminal offences that carry a maximum custodial sentence of six years and a financial penalty of the fifth category (currently €74,000). If the offence was committed with a terrorist objective, the maximum custodial sentence is eight years.

The Chemical Weapons Convention thus obliges the States Parties to criminalise several acts, including the use and supply of chemical weapons. In this context, it does not distinguish between the use and supply of chemical weapons in wartime and peacetime. In its implementation of the Convention, the Netherlands has taken account of the use and supply of chemical weapons in wartime as well as peacetime. Pursuant to Section 2(3) of the Implementation Act, Section 2(1) does not apply in cases where the Criminal Law in Wartime Act (WOS) applies, that is to say, when a crime has been committed within the meaning of the WOS. There are thus no gaps in the implementation of the Chemical Weapons Convention. The purpose of applying the Criminal Law in Wartime Act is to facilitate the imposition of tougher sentences in the case of international crimes.

Since the entry into force of the International Crimes Act (WIM) on 1 October 2003, the penalty clauses of the WOS (Sections 8–10) have lapsed and their substance has been incorporated in the WIM. The WIM makes it possible to take criminal action in respect of the offences described in Section 2 of the Implementation Act, provided that they fall under one of the international crimes defined in the WIM. These international crimes include: genocide (Section 3), crimes against humanity (Section 4), war crimes (Sections 5–7) and torture (Section 8). Most of these international crimes carry the heaviest sentences possible, such as life imprisonment, a maximum custodial sentence of 30 years or a financial penalty of the sixth category (€740,000).

Pursuant to Section 2 of the WIM, international crimes are subject to universal jurisdiction. The rules on participation (perpetration and complicity) in the Criminal Code also apply to such crimes. Pursuant to Article 49 of the Criminal Code, the maximum level of the principal sentence is reduced by a third in the case of complicity. Crimes that carry a life sentence generate a maximum custodial sentence of 20 years in the case of complicity.

Pursuant to Section 14 of the Implementation Act, Dutch criminal law applies to any Dutch national who has committed an offence that has been criminalised by or pursuant to

the Implementation Act outside the Kingdom of the Netherlands.

The States Parties to the Chemical Weapons Convention are free to choose the method by which they implement their treaty obligations. As apparent from the above, the Netherlands has fully complied with all its obligations.

In view of the universally recognised principle of legality, according to which no offence is punishable other than by virtue of an existing statutory criminal provision,[48] the Implementation Act does not have retroactive force. In theory, it therefore does not apply to crimes committed before 29 April 1997.

In its judgment of 9 May 2007, the Court of Appeal of The Hague gave Mr Van Anraat an unsuspended 17-year prison sentence for supplying raw materials for the manufacture of toxic gas to Iraq between 19 April 1984 and 25 August 1998 (complicity in the perpetration of war crimes, as punishable under the WOS). Mr Van Anraat has appealed this judgment to the Supreme Court of the Netherlands.[49]

[…]

5 As apparent from my answers to the previous questions, the Netherlands has transposed the Chemical Weapons Convention into the Dutch legal order fully and correctly. There has been no omission in this regard. The Government accordingly sees no reason to submit a proposal for an amendment. Likewise, the Netherlands does not face any risks in terms of State liability.

[…]

8 Following the beginning of the Iran–Iraq War on 22 September 1980, an increasing number of reports expressed suspicion that Iraq was using chemical weapons. It was immediately clear what precursors had been used for the manufacture of these weapons. Iran submitted its accusations concerning the use of chemical weapons to the UN Security Council on 3 November 1983. On 26 March 1984, the Security Council officially recognised that chemical weapons were being used in the war between Iraq and Iran. Immediately afterwards, on 13 April 1984, the Dutch Government issued an emergency ministerial regulation prohibiting the export of 11 chemicals without a licence from the Ministry of Economic Affairs. The regulation entered into force on 19 April 1984. Together with the United Kingdom, the Netherlands was thus the first (E)EC Member State to institute an export ban. The regulation does not apply to offences that took place before 19 April 1984.

As I pointed out in my answers to questions 1–3, the WOS applies to offences that took place before 1 October 2003. The WOS may therefore provide a basis for taking criminal action against the supply of raw materials before 19 April 1984 if there are indications that such supplies were made for the purpose of producing and using toxic gas in a war situation and if the supply of these materials can therefore be regarded as

[48] The principle of legality is enshrined in Article 1 of the Criminal Code, Article 16 of the Dutch Constitution, Section 4 of the Act of 15 May 1829 containing General Statutory Provisions of the Kingdom, Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 15 of the International Covenant on Civil and Political Rights.

[49] For the judgment of the Supreme Court on 30 June 2009, see in Judicial Decisions under 11.3.

a war crime. A key question in this context is whether or not we are dealing with recklessness.[50]

11.31 TERRORISM
See also: 4.7 **B**, 7.213, 14.125

Closure Guantánamo Bay Prison and Human Rights

On 14 January 2009 the Ministers of Foreign Affairs and of Justice answered questions on the closure of the Guantánamo Bay prison. Three questions and the given answers read as follows:

> 1 Are you familiar with the report that the soon to be sworn in President of the United States of America will decide to close the prison at Guantánamo Bay within the foreseeable future, but that the fate of the current prisoners is complicated by the fact that many of them will be unable to return to their countries of origin because of a real risk of human rights violations?[51]
>
> 2 Given your strong appeal[52] to the future President of the United States to close the prison at Guantánamo Bay and your undertakings during the plenary debate on the budget of the Ministry of Foreign Affairs for 2009,[53] are you prepared to contribute in a significant manner to the closure of the prison at Guantánamo Bay?
>
> 3 Are you willing to take in prisoners and allow them to reside in the Netherlands if the United States is unable to do so and if there are objections from within Dutch society? Hoe exactly do you plan to contribute to the closure of the prison? Can you inform the House of Representatives of your plans as soon as possible?
>
> […]
>
> 1 Yes.
>
> 2 and 3 The Netherlands has argued continuously for the closure of the prison at Guantánamo Bay and therefore welcomes the decision adopted by President Obama immediately after his inauguration. The President has since announced the closure of the detention facility at Guantánamo Bay. Moreover, he has signed an executive order instructing the relevant US authorities to treat all prisoners under US control humanely at all times, to refrain from subjecting them to torture and to comply with Army Field Manual 2-22-3, which explicitly lays down these rules. The new US President also instructed the Central Intelligence Agency (CIA) to close all secret detention facilities as quickly as possible and to refrain from using such facilities in the future. In addition,

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[50] Aanh. Hand. II, 2008–2009, No. 1284, pp. 2697–2699.

[51] 'Obama sluit Guantanamo Bay snel' ['Obama to swiftly close Guantánamo Bay'], NRC Handelsblad, 12 January 2009.

[52] Pauw en Witteman (television programme), 12 January 2009.

[53] Handelingen II 2008–2009, No. 24, p. 1990.

he asked the military prosecutors to freeze all cases against the prisoners in the detention facility for a period of 120 days. The Netherlands will observe with interest how the various agencies carry out these instructions.

The United States is responsible for ensuring that the closure is carried out in an proper manner. This applies to the trial of those prisoners who will be criminally prosecuted as well as to the repatriation and admission of those prisoners who are released, including the protection of their human rights.

The Netherlands does not intend to take in former prisoners from Guantánamo Bay. During the meeting of the General Affairs and External Relations Council (GAERC) on 26 January 2009, it became clear that the Netherlands is far from alone in this regard. It emerged during an informal exchange of views that President Obama's decisions concerning Guantánamo Bay are warmly welcomed throughout the European Union. It was agreed that the United States bears primary responsibility for ensuring that the closure is carried out in a proper manner. The Ministers of Justice and the Interior of the EU Member States were asked to consider the security and legal implications for the free movement of persons of the possible admission of former prisoners from Guantánamo Bay to EU Member States.

The Netherlands is willing to think, together with the United States and countries of origin, such as Yemen, in an EU framework or in some other configuration, about ways of facilitating the absorption of former prisoners by countries of origin or third countries. In addition, the Netherlands continues to play an active role in the international debate on the importance of complying with international law, including human rights, in the fight against terrorism and the resolution of related legal questions.[54]

12.211 NEGOTIATION, DIPLOMACY

Diplomatic and Other Consequences of Possible Dutch Legal Actions against Germany and Denmark

On 16 June 2009 the State Secretary of Foreign Affairs sent a Letter to the House of Representatives on whether The Netherlands should submit a direct complaint against Germany and Denmark to the European Commission or the European Court of Justice. It reads, *in full*, as follows:

During a meeting with the relevant parliamentary committee on 2 June 2009 concerning the certification of traditional sea-going sailing ships, the Secretary of State for Transport, Public Works and Water Management assured the House of Representatives that I would provide more detailed information on the diplomatic and other consequences that would arise if the Netherlands were to take legal action against Germany and Denmark.

I can assure you that the Netherlands is doing its best to protect the interests of Dutch traditional sea-going sailing ships. However, it is doing so in a different manner than the one

[54] Aanh. Hand. II, 2008–2009, No. 1538, pp. 3227–3228.

suggested in options 2 and 3 in the advisory report of the Legal Advisor of the House or Representatives.

Under the first option described by the Legal Advisor to the House of Representatives (option 2), the Netherlands can request the European Commission to initiate infringement proceedings against Germany and Denmark. If the Commission refuses to do so, the Netherlands can bring the European Commission before the European Court of Justice. The second option (option 3) is for the Netherlands to initiate infringement proceedings against Denmark and Germany.

Under these options, the European Commission or the European Court of Justice would pass judgment on the lawfulness of the German and Danish measures and the Netherlands would confront both countries on the ill-advised nature of their policies.

The Professional Charter Sailing Association (BBZ) has already submitted a complaint against Germany and Denmark to the European Commission. In support of this complaint, the Netherlands highlighted the importance of traditional sailing to the Commission. The Secretary of State for Transport, Public Works and Water Management sent the European Commissioner for Industry and Entrepreneurship, Antonio Tajani, a letter to this effect.

In addition, if the Commission initiates proceedings against Germany and Denmark on the basis of this complaint, the Netherlands will intervene as a third party in these proceedings in defence of the interests of the Dutch sailing industry.

In order to convey the Netherlands' concerns about the developments in question, the Dutch embassies in Berlin and Copenhagen will contact the relevant German and Danish ministries. Submitting a Dutch complaint against Germany and Denmark to the European Commission or the European Court of Justice would be a very unusual step—there have only been three such cases since 1958—which might therefore place an unnecessary burden on our relations with those countries. Moreover, it is impossible to predict in advance whether such a complaint would produce a swifter result or one that is more advantageous to the Netherlands. Given that the Netherlands is siding with the sailing industry and that it intends to intervene as a third party in judicial proceedings before the ECJ initiated by the sailing industry or the Commission, a direct complaint against the above-mentioned countries would not have any added value.[55]

12.27 JUDICIAL SETTLEMENT BY INTERNATIONAL COURTS

See: 9.633 **G**

12.2704 EXECUTION AND OTHER CONSEQUENCES OF THE JUDGEMENT

See: 4.66

12.273 EUROPEAN COURT OF HUMAN RIGHTS

See also: 4.66

[55] Kamerstukken II, 2008–2009, 31 409, No. 16, pp. 1–2.

Dutch View on the Report that the European Court of Human Rights Cannot Handle Its Case Load

On 17 July 2008 the Minister of Justice answered questions on the abovementioned subject. Eight questions and the given answers read as follows:

1 Are you familiar with the report that the European Court of Human Rights cannot handle its case load?[56]

2 Is there any truth to the report that the Strasbourg Court has a backlog of 100,000 cases and that this is partly due to the influx of Russian cases?

3 How do you view this backlog? Is the Court facing an emergency? Why not?

4 Do you think that the Court's budget is too low? If not, why not? If so, what steps has the Netherlands taken to increase the Court's budget? How many additional staff would the Court have to employ in order to reduce the backlog to acceptable proportions within the foreseeable future?

5 Is the backlog (also) related to the fact that the Member States do not set aside sufficient funds for the Court and to Russia's role in blocking the simplification of the Court's procedures? If not, why not—and what is causing the backlog? If so, what steps should the Member States take to increase the budget and what role did Russia actually play with regard to the simplification of the Court's procedures?

6 Do you see any cause to challenge Russia on its decision to block the simplification of the Court's procedures? If not, why not? If so, what would be you role in this regard?

7 What steps are the Member States, in particular the Netherlands, taking to clear the backlog?

8 What are the implications of the Court's backlog, its small budget and Russia's resistance to the simplification of its procedures for the general human rights situation?

1 Yes.

2 The European Court of Human Rights in Strasbourg currently has a backlog of more than 100,000 cases, which is increasing by roughly 1,500 cases a month. Incidentally, approximately 95% of cases are declared inadmissible. The number of cases that are submitted to the Court has increased exponentially since the accession of new Member States in the 1990s. More than half the current backlog consists of complaints against four countries: the Russian Federation, Turkey, Romania and Ukraine.

3 The Court faces a serious structural problem. The average time it takes to deal with a case is increasing. The Court therefore prioritises cases concerning serious human rights violations and matters of legal principle. In recent years, the Court has also issued several so-called 'pilot judgments', in which it has attempted to settle a large number of similar cases by means of a single judgment.

[56] Trouw, 20 February 2009.

Dutch policy in respect of the Council of Europe gives high priority to finding a solution for the Court's workload.

4 and 5 There are various reasons why the Court currently has a large backlog. The problem cannot be reduced to a lack of sufficient financial resources, nor can a solution be found by merely raising the budget. Pursuant to Article 50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the expenditure of the Court is borne by the Council of Europe. The Court's budget has been increased substantially in recent years, at the expense of the Council of Europe's general budget, which has remained unchanged. The Netherlands contributed towards additional Registry staff and has urged other Member States to increase their contributions. Unfortunately, there is little support for this at present. Incidentally, the ability of the Court to absorb new Registry staff is relatively limited. This means that extra resources will only have a limited impact. The main problem is that, at present, the Court is not properly equipped to handle the exponential increase in the flow of cases. Protocol No. 14 to the Convention (2004) includes a number of measures to increase the Court's efficiency, which are expected to go a long way towards managing the Court's workload more efficiently. For example, it contains measures aimed at expediting cases that can be immediately recognised as inadmissible or manifestly ill-founded as well as cases in which it is clear that the applicant has suffered only very minor damage. The Protocol was signed by all 47 Member States of the Council of Europe. However, in order to enter into force, it must be ratified by all of them. By refusing to ratify the Protocol, Russia is now the only country that is blocking its entry into force. The Council of Europe is currently examining other ways to restructure the Court, so that it can deal with cases more swiftly and in a less labour-intensive manner. In this context, see also my response to Question 7.

6 The European Union already decided several years ago to keep raising this issue in its bilateral contacts with Russia. In recent years, the Minister of Justice and I have thus repeatedly challenged Russia's position on this issue, most recently during the visit of the Russian Minister of Foreign Affairs, Sergey Lavrov, to the Netherlands in October 2008. The Dutch Human Rights Ambassador also discussed this issue in great detail during his visit to Russia in February 2009. The Russian Government systematically points to the *Duma*, which has the last word on ratification in its capacity as the country's Parliament. In spite of this, we will keep reminding the Russian Government of the need to ratify Protocol No. 14.

7 The Member States of the Council of Europe are taking various initiatives to cope with the Court's workload. The Netherlands is closely involved in efforts to determine how the key provisions of Protocol No. 14 can be implemented despite the fact that it has not entered into force.

Under the chairmanship of the Netherlands, a Reflection Group established by the Council of Europe has issued numerous proposals targeting the Court as well as the Member States. These proposals, whose main purpose is to control the Court's workload, include such measures as more efficient filtering of cases by the Court itself and improving national legal remedies for violations of the European Convention on Human Rights.

An advisory report on this issue by the Advisory Committee on Issues of Public International Law (CAVV), which was commissioned by the Dutch Government, has already been sent to the Council of Europe and its Member States. The report's recommendations

are being used in the discussion on the options for implementing the above-mentioned provisions. It goes without saying that the approach that is eventually adopted must comply with national and international law. The Government believes that there are two options that meet this criterion: (1) provisional application of the relevant provisions of Protocol No. 14; and (2) drafting a new Protocol No. 14 *bis* that includes these provisions but does not require unanimous ratification by all Member States. The Netherlands is pushing for a swift decision on the measures that should be adopted.

As regards the Netherlands, it is worth noting that the above-mentioned backlog of more than 100,000 cases includes well over 500 cases concerning complaints against the Netherlands. In 2008, the Court did not declare a single complaint against the Netherlands admissible. As regards the improvement of national remedies, the Government points out that it is drafting a legislative proposal that aims to provide a legal remedy in civil and administrative proceedings that (allegedly) exceed the reasonable time requirement within the meaning of Article 6, in conjunction with Article 13, of the European Convention on Human Rights.

Incidentally, the Council of Europe has also developed several programmes that aim to reduce the number of complaints submitted to the Court by increasing knowledge about the Court, its procedures and judgments in the Member States and by ensuring that its judgments are—correctly—implemented by the Member States. The Netherlands is supporting this initiative by funding several programmes, including the HELP Programme and the Human Rights Trust Fund—a Norwegian initiative administered by the Council of Europe Development Bank.

8 One consequence of the Court's backlog is that it takes a long time to deal with citizens' complaints. As a result of Russia's failure to ratify the Protocol, the Council of Europe is increasingly considering solutions that do not involve the Protocol's entry into force, as described above.[57]

12.273 EUROPEAN COURT OF JUSTICE

See: 4.66, 6.43, 12.211

12.273 INTERNATIONAL CRIMINAL COURT

Preparations for the Construction of the ICC's Permanent Premises

On 23 October 2008 the Minister of Foreign Affairs sent a Letter to the House of Representatives on the abovementioned issue. It reads, *inter alia*, as follows:

In accordance with Section 5 of the Act sanctioning the Rome Statute of the International Criminal Court,[58] I hereby send you the annotated provisional agenda of the seventh Assembly of

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[57] Aanh. Handelingen II, 2008–2009, 2363, pp. 4959–2960.

[58] Stb. 2001, 343, 17 July 2001.

States Parties (ASP) to the Rome Statute of the International Criminal Court.[59] This year's ASP will take place in The Hague on 14–22 November 2008.

[…]

Premises

The ICC will definitely remain in its current location on the Maanweg ('de Arc') until the end of 2014. From November 2008, additional space will be available in a new building ('de Haagsche Veste') close to the ICC's current premises.

Moreover, the preparations for the construction of the ICC's permanent premises are in full swing. The States Parties and the Court enthusiastically accepted the site of the former Alexanderkazerne as the permanent location of the ICC. An international architectural competition is currently taking place. The three architects chosen by the international jury will be announced at a special gathering organised by the Netherlands on the sidelines of the ASP. The ICC will subsequently enter into negotiations with the winners with a view to awarding the project. In all probability, the project will be awarded to the winner of the first prize. This will be announced at the beginning of 2009.

Construction must start in 2011 if the new building is to be completed in 2014 according to plan. In addition to providing the site and organising the architectural competition, the Netherlands is providing a flexible, low-interest loan of €200 million for the construction. The States Parties will decide whether or not to accept this loan during the upcoming ASP.

[…]

Crime of aggression

A more substantive and profound issue that will be considered during the upcoming ASP is the inclusion in the Statute of the crime of aggression as one of the four crimes over which the ICC has jurisdiction. Last year, the negotiations on this issue once again achieved a small amount of progress. The Netherlands will continue to push for the conclusion of these negotiations during the Review Conference. The crime of aggression definitely belongs in the category of serious international crimes, and the ICC should therefore be able to exercise jurisdiction over it in practice. However, it is uncertain whether the States Parties will be able to reach agreement on this complex issue in the coming months. Key sticking points in this regard include the conditions under which the ICC would be able to exercise jurisdiction over this crime.

[…]

The Netherlands attaches great importance to the election of Ms Thomassen. The election of experienced judges will help to strengthen the ICC institutionally. In addition, the election of Dutch nationals to such positions reinforces the Netherlands' positive image as regards the promotion of international peace and security, the fight against impunity and the promotion of human rights.[60]

[59] Available for inspection at the Central Information Point of the House of Representatives of the States General.

[60] Kamerstukken II, 2008–2009, 28 498, No. 19, pp. 1–4.

12.273 SPECIAL TRIBUNAL FOR LEBANON

Establishment of the Special Tribunal for Lebanon

The Memorandum of Reply on the Establishment of the Special Tribunal for Lebanon reads, *in full*, as follows:

The Government welcomes the provisional report accompanying the two legislative proposals and wishes to thank the relevant parliamentary parties for the dynamic way in which the Senate carried out its preliminary assessment. The Government hopes that the present Memorandum of Reply answers all remaining questions in a clear and satisfactory manner and that the discussion of the legislative proposals will be successfully concluded. The questions will be answered by the Minister of Justice and the Minister of Foreign Affairs, acting on their own behalf as well as on behalf of the Minister of the Interior and Kingdom Relations.

The members of the parliamentary party of the CDA (Christian Democratic Alliance) have asked the Government to explain what constitutional basis it has used to justify its contribution to the establishment of the Special Tribunal for Lebanon (hereinafter, the Special Tribunal), given that it will also be able to convict defendants on the basis of national law. In this context, they point out that, in the case of the Special Court for Sierra Leone, the Security Council actually characterised adjudication in Sierra Leone as a threat to international peace and security. However, they believe that this aspect is missing from Security Council resolution 1757, which provides the legal basis for the establishment of the Special Tribunal. The members of the parliamentary party of the CDA have also asked whether there is a specific legal basis for the Netherlands' obligation to cooperate with the resolution, in view of the question whether Article 91(3) of the Dutch Constitution should be applied.

In the absence of a notification from the Lebanese Government, but at the latter's request, the UN Security Council decided in Security Council resolution 1757 of 30 May 2007 that the provisions of the Agreement between the United Nations and the Government of the Lebanese Republic and the accompanying Statute of the Special Tribunal for Lebanon would enter into force on 10 June 2007. In the course of adopting this resolution, the Security Council stated explicitly that it was acting under Chapter VII of the UN Charter, that is to say, with a view to restoring international peace and security. Prior to making this explicit statement, the Security Council reaffirmed, in the final paragraph of the preamble of resolution 1757 (2007), that the terrorist act in Lebanon and its consequences constituted a threat to international peace and security.

The Dutch Government voluntarily accepted the UN Secretary-General's invitation to act as the host State of the Special Tribunal. To this end, the United Nations and the Kingdom of the Netherlands concluded a Headquarters Agreement in New York on 21 December 2007. Part V of this Agreement contains various provisions on cooperation between the Tribunal and the host State. The Government is of the opinion that the Headquarters Agreement does not contain any provisions that derogate from the Constitution or require such derogations. The official implementing legislation contains additional provisions that enable the Netherlands to cooperate with the Special Tribunal. The Netherlands' cooperation is partly inspired by the constitutional obligation to promote the development of the international legal order (Article 90 of the Constitution). The establishment of the Special Tribunal on Dutch territory is also legitimised by Article 92 of the Constitution, which provides that certain powers, such as judicial powers, may be conferred on international institutions by or pursuant to a treaty—in this case a resolution of the UN Security Council based on the UN Charter.

The members of the parliamentary party of the CDA have noted that, in comparison to the Special Court for Sierra Leone (Implementation) Act, the legislative proposal concerning the establishment of the Special Tribunal for Lebanon does not establish a specific arrangement for the surrender of escaped defendants. They have accordingly asked what the legal situation would be in such situations. The general part of the Explanatory Memorandum accompanying the legislative proposal concerning the establishment of the Special Tribunal for Lebanon states that the proposal is based to a large extent on the International Criminal Tribunal for the former Yugoslavia (Implementation) Act and—in the case of Article 7 (transfer of defendants and other persons)—on the Special Court for Sierra Leone (Implementation) Act. As in the case of the International Criminal Tribunal for the former Yugoslavia (Implementation) Act—and in contrast to the Special Court for Sierra Leone (Implementation) Act (Article 3(1))—the present legislative proposal does not contain a specific provision concerning the surrender of persons who have escaped from custody and limits itself to several generally-worded provisions on the subject of surrender. For example, Article 2 of the legislative proposal provides: 'at the request of the Special Tribunal, persons may be surrendered to the Special Tribunal for the prosecution and adjudication of offences of which the Special Tribunal is authorised to take note pursuant to its Statute'.

In the case of the Special Court for Sierra Leone, there was no need to include a general provision on surrender in the Implementation Act, because Charles Taylor had already been detained by the Court and because there were essentially no plans to arrest or surrender any other suspects. Article 3 of the Special Court for Sierra Leone (Implementation) Act therefore focuses exclusively on the possibility that Taylor or a witness temporarily detained by the Court might escape (see Explanatory Memorandum accompanying the Special Court for Sierra Leone (Implementation) Act, Kamerstukken II, 2005–2006, 30 610, no. 3, p. 9). The situation of the Special Tribunal is different and comparable to that of the Yugoslavia Tribunal. There are likely to be numerous defendants who all still need to be transferred to the Special Tribunal. The Netherlands may also be asked to transfer defendants to the Special Tribunal and the legislative proposal concerning the establishment of the Special Tribunal therefore contains a general provision on transfer. As in the case of the International Criminal Court (Implementation) Act, this renders a specific provision on transfer in the case of escape superfluous.

The members of the parliamentary party of the PvdA (Labour Party) have asked whether they have correctly understood that the Headquarters Agreement requires parliamentary approval because the extension of immunity, for example to the defence lawyers and witnesses, falls outside the mandate of Section 3 of the Kingdom Act of 24 December 1947 approving the Convention on the Privileges and Immunities of the United Nations. The answer to this question is that this is indeed the case.

As regards the funding of the Special Tribunal, the members of the parliamentary party of the PvdA have asked whether it is true that the Special Tribunal has not yet secured financial commitments in support of its second and third year of operation. The Government notes that this observation is correct. However, the funding of the Special Tribunal actually falls outside the responsibilities of the Netherlands. This is because the decision whether there are sufficient financial resources and whether the Special Tribunal can start operating falls under the jurisdiction of the UN Secretary-General.

The members of the parliamentary party of the PvdA have asked whether the Government has anything to report concerning its examination of the advisability of adopting a national framework act for international tribunals. In response to this question, the Government notes that it will soon issue a report on this issue.[61]

[61] Kamerstukken II, 2008–2009, 31 365 B, pp. 1–3.

13.12 UNILATERAL ACTS: REPRISALS
See: 14.125

13.13 UNILATERAL ACTS: PACIFIC BLOCKADE

Israeli Pacific Blockade of the Gaza Strip

On 7 July 2009 the Minister of Foreign Affairs answered questions on the interception by Israeli naval units on the ship Spirit of Humanity. Four questions and the given answers read as follows:

> 1 Are you aware of the attack by Israeli naval units on the ship *Spirit of Humanity* in which 21 human rights activists were arrested?[62]
>
> 2 Are you aware that this operation was condemned by the UN Special Rapporteur on the situation of human rights in the Palestinian territories, Richard Falk, who regards it as proof of the blockade of the Gaza Strip and as a violation of Article 33 of the Fourth Geneva Convention?[63] Do you share his conclusions? If not, why not?
>
> 3 Are you willing to protest to the Israeli authorities and to condemn the seizure of ship and the arrest of those on board? If not, why not?
>
> 4 Are you willing to urge the Israeli authorities to allow the supply of goods to the Gaza Strip? If not, why not?
>
> […]
>
> > 1 I am aware of the fact that the Israeli navy intercepted the ship *Spirit of Humanity* off the Gaza coast. According to the Israeli authorities, the Israeli navy established contact with the *Spirit of Humanity* while the ship was still in international waters. At this time, the crew was informed that ships are not allowed to enter the coastal waters of Gaza for security reasons. When the *Spirit of Humanity* ignored this warning of the Israeli navy and entered the coastal waters of Gaza, the navy intercepted the ship and escorted it to Israel. The ship's crew and passengers were handed over to the Israeli authorities.
> >
> > 2 I am familiar with the declaration made by Mr Falk on 2 July 2009. I do not share his conclusions. On the basis of the agreements concluded between Israel and the Palestine Liberation Organisation (PLO) in the framework of the Oslo Accords, Israel is responsible for security in the coastal waters of Gaza and is authorised to take action against ships in this area. According to Israel, aid supplies destined for Gaza should be transported via the designated land-based border crossings.

[62] See, *inter alia*, BBC News, 3 July 2009: 'Campaigner tells of Israel arrest', available at: http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/8131851.stm

[63] Thoughts by Dee, 2 July 2009: 'UN Expert denounces seizure of aid boat by Israeli forces', available at: http://iadiedee.wordpress.com/2009/07/02/un-expert-denounces-seizure-of-aid-boat-by-israeli-forces

3 In the light of the above, I see no reason to protest to the Israeli authorities.

4 Yes. In fact, I do so on a regular basis. I also made this point emphatically during my recent visit to Israel.[64]

13.14 UNILATERAL ACTS: INTERVENTION
See: 3.112, 13.22 **A**

13.22 REGIME OF THE UNITED NATIONS

A. Investigation of the Government's Preparations and Decisions Relating to the Netherlands' Political Support for the Invasion of Iraq

On 2 February 2009 the Prime Minister sent a Letter to the House of Representatives on the abovementioned subject. It reads, *inter alia*, as follows:

Since the summer of 2002, when the continuous violation of UN resolutions and Saddam Hussein's refusal to cooperate with their implementation became increasingly apparent, since March 2003, when a US-led coalition took action in Iraq with the political—but not military—support of the Dutch Government, and until today, the present Government and its predecessors have accounted for their actions in detail in the House of Representatives and the Senate by means of letters, answers to questions and a series of parliamentary debates. During this six-year period, a majority of the House of Representatives and the Senate consistently supported the Government's policy, including in votes on a dozen motions.

It is now February 2009, and it appears that most of the above-mentioned parliamentary questions once again relate to decisions adopted in 2002 and 2003 and various issues that have already been discussed in many parliamentary debates during those years.

However, it no longer seems sufficient to answer such parliamentary questions in writing in accordance with standard procedure, as this constant cycle questions and answers is beginning to lack transparency. This is not good.

As the same time, the Government must devote attention to the current economic and financial crisis. It goes without saying that the crisis is serious and that it may continue for some time. The Government is optimistic about the country's chances of recovering from the recession, but this will occupy all our time and attention.

Based on all these considerations, the Government proposes to appoint an independent commission of inquiry, chaired by Mr W.J.M. Davids, former President of the Supreme Court of the Netherlands, to investigate the Government's preparations and decisions—between the summer of 2002 and the summer of 2003—relating to the Netherlands' political support for the invasion of Iraq in general and to issues of international law, the provision of intelligence and information and the Netherlands' alleged military involvement in particular. This investigation will be able to incorporate all the questions that have been or are yet to be asked in the House of Representatives

[64] Aanh. Handelingen II, 2008–2009, 3310, p. 6985.

and the Senate.

Mr Davids has informed me that he is favourably disposed towards this request and that he is willing to take responsibility for the composition of such a commission of inquiry, which would preferably include several Ministers of State. This would help to ensure that the commission has ample governmental and political experience at its disposal, as well as ample experience in dealing with questions of international relations and international law.[65]

B. Extension of the Dutch Contribution to UNMIS

On 13 March 2009 the Ministers of Foreign Affairs, Defence and Development Cooperation sent a Letter to the House of Representatives on the abovementioned subject. It reads, *inter alia*, as follows:

Pursuant to Article 100(1) of the Dutch Constitution and in accordance with the decision-making framework for sending troops abroad (*Toetsingskader 2001*), we hereby inform you of the Government's decision to extend the Dutch contribution to the UN peacekeeping mission in Sudan (UNMIS), which consists of thirteen military observers, fifteen police officers and several executive officers, for a period of one year until 13 April 2010.

On 4 April 2008, the Government decided to extend the Dutch contribution to the UN peacekeeping mission in Sudan (UNMIS) for a period of one year until 13 April 2009 (Kamerstuk 29 237, No. 58).

The first members of the Dutch armed forces left for Sudan in April 2006. At the end of June 2006, all members of the Dutch armed forces and the Royal Netherlands Marechaussee (*Koninklijke Marechaussee*) had been deployed. Moreover, since January 2007, the Netherlands has sent four civilian police officers to Sudan instead of members of the Royal Netherlands Marechaussee. These police officers fall under the responsibility of the Minister of the Interior and Kingdom Relations.

[…]

Mandate

The current mandate of UNMIS will be extended for another year on 30 April 2009. This mandate focuses in particular on the security provisions of the Comprehensive Peace Agreement (CPA), which, in addition to the ceasefire, covers the following issues: the withdrawal of the Sudanese Armed Forces (SAF) and the Sudan People's Liberation Army (SPLA); the formation of Joint Integration Units (JIUs) and a Joint Defence Board; the integration of other armed groups (OAGs) in the SAF and the SPLA; and the Disarmament, Demobilisation and Reintegration (DDR) process. The current mandate already devotes special attention to support for elections. Furthermore, UNMIS has the authority to protect the personnel, buildings, installations and equipment of the United Nations as well as of humanitarian relief workers, observers and citizens who are directly threatened by the violence.[66]

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[65] Kamerstukken II, 2008–2009, 31 847, No. 1, pp. 1–2.

[66] Kamerstukken II, 2008–2009, 29 237, No. 86, pp. 1, 6.

C. Extension of the Dutch Contribution to the NATO Training Mission in Iraq

The Report dated 10 August 2009 of the written consultation on the abovementioned subject contained, *inter alia*, the following answers from the Ministers of Foreign Affairs and Defence:

Conclusion of the Status Agreement for NTM-I

The Christian Democratic Alliance (CDA) and the Socialist Party (SP) have asked several questions regarding the negotiations between NATO and Iraq concerning a new agreement on the status of NTM-I personnel. A new status agreement needs to be concluded because the old agreement was linked to the mandate contained in UN Security Council resolution 1790 (2007), which expired at the end of 2008. NATO's basic position in the negotiations is that it wants to conclude an agreement that, in terms of protection, affords NTM-I personnel a status similar to the status afforded to US troops in the Status of Forces Agreement between the United States and Iraq. At the end of 2008, it proved impossible to conclude a new agreement in the relatively short interval between the conclusion of the US agreement and 1 January 2009. At the time, NATO and Iraq therefore agreed on an interim agreement that fixed the status of NTM-I personnel on a temporary basis. The protection afforded to NATO officials under the interim agreement is almost identical to the protection afforded to US troops stationed in Iraq. The two parties eventually signed a new status agreement on 26 July 2009. The agreement will enter into force 30 days after the parties have notified each other that the necessary internal procedures have been completed. Until such time, the interim agreement will continue to apply. The new agreement affords adequate protection to NATO personnel that is similar to the protection afforded to US troops stationed in Iraq.

Procedure for notifying the House of Representatives regarding the extension of the Dutch contribution to NTM-I

The parliamentary parties of the CDA and the SP have asked the Government to explain its conclusion, in the letter regarding the extension of the Dutch contribution to NTM-I, that the Article 100 procedure does not apply to the new contribution to the NATO mission. The Article 100 procedure focuses on the deployment of military units for crisis management operations. As noted in the Government's response to the report of the Working Group on the NATO Response Force, the deployment of individual members of the armed forces, for example in support of Security Sector Reform (SSR), does not take place on the basis of Article 100 of the Dutch Constitution.

The present deployment in support of NTM-I likewise does not involve an entire unit. The Dutch contribution to the training mission consists of just five staff officers, one of whom is responsible for liaison. In addition, we are not dealing with participation in a military operation but participation in a mission with a strong SSR character. It is also worth noting that the deployment is being carried out with a view to completing the current mandate and the possible transformation of the mission after 2009. There has accordingly been no change in the Government's policy concerning the interpretation of Article 100 of the Constitution and the decision-making framework for sending troops abroad (*Toetsingskader*). Nevertheless, in cases such as this, the Government wishes to adhere as much as possible to the requirements of the *Toetsingskader* when notifying the House of Representatives.[67]

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[67] Kamerstukken II, 2008–2009, 29 521, No. 115, pp. 6–7.

13.221 COLLECTIVE MEASURES: PEACEKEEPING OPERATIONS
See: 13.22 **B**

13.222 COLLECTIVE MEASURES: INTERVENTION
See: 13.22 **A**

13.223 COLLECTIVE MEASURES: EMBARGO, BOYCOTT, BLOCKADE

Dutch Interpretation of UN Security Council Resolution 1737 with Respect to the Exclusion of Iranian Students from Education in the Netherlands

On 17 July 2008 the Ministers of Justice, Foreign Affairs and of Education, Culture and Science answered questions on the abovementioned subject. Three questions and the given answers read as follows:

> 1 Are you familiar with the report that Iranian students are being excluded from certain degree courses, such as nuclear physics?
>
> 2 Do you agree that excluding people of a certain nationality from education violates Article 1 of the Dutch Constitution? Do you agree that this is even more unacceptable in the case of persons of dual Iranian–Dutch nationality? If so, what do you intend to do about this? If not, why not?
>
> 3 Are you aware that the Netherlands interprets UN Security Council resolution 1737 much more strictly than other countries? If so, why do you interpret this resolution so much more strictly? If not, do you intend to adopt a more open-minded approach to this resolution like other countries have done?
>
> […]
>
> 1 Yes. For your information, the relevant ministerial regulation has been annexed to this reply. In contrast to what has been suggested in a number of reports, this regulation does not provide for the exclusion of persons from certain degree courses. The regulation concerns a prohibition on the transfer of highly specialised and specifically defined knowledge to Iranian nationals. In practice, this means that all bachelor degrees are and will remain open to everyone, since the knowledge that is passed on in bachelor degree courses is considered—by definition—to be insufficiently specialised to present a threat. Moreover, in the case of master degree courses and more advanced degree courses, the knowledge concerned has been defined so specifically that it does not cover entire degree courses. In fact, it covers nine areas of study that all contribute directly to the acquisition of the knowledge and skills that are necessary for manufacturing nuclear installations and rocket systems. In other words, Iranian students are entirely free to study physics in the Netherlands, as long as the courses they take do not relate directly to the above-mentioned nine areas of study. In addition, educational institutions can apply to the Ministry of Education, Culture and Science for individual exemptions from this prohibition. This is important, because the fear that Iran might benefit from knowledge obtained by Iranian students is not necessarily justified in all cases.

2 No. The ministerial regulation constitutes the implementation by the Netherlands of a binding UN Security Council decision. The binding nature of decisions based on Chapter VII of the UN Charter within the Dutch legal order is based on the ratification of the UN Charter by the Kingdom of the Netherlands.

3 That is incorrect. In response to UN Security Council resolution 1737 and the resulting Common Position of the Council of the European Union (2007/140/CFSP of 27 February 2007), other EU Member States, including the United Kingdom, France, Germany and Belgium, also adopted measures. The 2007 Iran Sanctions Regulation constitutes the implementation by the Netherlands of a binding decision of the UN Security Council. It also implements the provisions of the above-mentioned Common Position of the Council of the European Union.

Article 6 of this Common Position states as follows: 'Member States shall, in accordance with their national legislation, take the necessary measures to prevent specialised teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran's proliferation sensitive nuclear activities and development of nuclear weapon delivery systems.' The binding nature of this article thus goes further than Article 17 of UN Security Council resolution 1737, which 'merely' calls upon all States to exercise vigilance.[68]

13.23 REGIME OF OTHER INTERNATIONAL ORGANIZATIONS

See also: 13.22 **C**, 13.223

A. Dutch Participation in the European Union Monitoring Mission in Georgia

On 19 September 2008 the Minister of Foreign Affairs sent a letter to the House of Parliament on the abovementioned subject. It reads, inter alia, as follows:

By contributing on a proportional basis, the Netherlands is making a useful contribution to the establishment of the European Union Monitoring Mission in Georgia (EUMM Georgia). The Dutch contribution will enable the European Union to play a constructive role in the international handling of this crisis. At the request of the Head of Mission, the size of the mission could be increased.

The Netherlands attaches great importance to Georgia's stability, in part because it is expected to have a positive impact on the entire region. The first risk associated with instability is a deterioration in the human rights situation in Georgia. Such a deterioration already occurred during the events that took place in Georgia after 7 August 2008. In addition, Georgia is a key transit country for gas and oil products.

[…]

[68] Aanh. Handelingen II, 2008–2009, 64, pp. 137–138.

Mandate and objective of the mission

The mission's main task is to monitor and report on all actions and developments in the crisis area in Georgia, especially insofar as these actions have implications for the implementation of the Six-Point Agreement. The UEMM will work in close coordination with the other partners, in particular the OSCE and the United Nations. The mission does not have any executive powers and will thus only be active in the areas of observation, monitoring and reporting. According to the military advice of the European Union Military Committee (EUMC), which is based on the Concept of Operations (CONOPS), this monitoring will have a deterrent effect on violent acts, due to the increased risk that they will become more widely known.

The mission's tasks have been formulated as follows:

- Supporting confidence-building measures and monitoring political developments.
- Monitoring and reporting on developments relating to the free movement of persons, goods and services and supervising the return and resettlement of internally displaced persons.
- Monitoring and reporting on violations of human rights, minority rights and other obligations under international humanitarian law. The mission will also monitor and report on the political and security aspects of the humanitarian situation.
- Monitoring and facilitating the normalisation of relations between the various population groups in Georgia that have been affected by the conflict. The mission's tasks also include supervising the reconstruction of civil governance structures and the return of refugees.

The mission will be carried out at the invitation of the Georgian Government, as extended in the letter from President Saakashvili to SG/HR Solana of 11 September 2008. In addition, the European Union will conclude a Status of Mission Agreement (SOMA) with the Georgian Government as soon as possible. This agreement provides the mission with a mandate to operate in Georgia. It also regulates the necessary privileges and immunities of the EUMM's mission staff.

The mission's mandate also covers monitoring in Abkhazia and South Ossetia. At present, it remains unclear how the European Union will conclude an agreement with the *de facto* local rulers on the implementation of the mission in these areas. None of the EU Member States have recognised the independence of these areas. It is expected that the mission will initially only operate in those parts of Georgia that are not part of Abkhazia or South Ossetia. On 8 September 2008, the Russian Government agreed to the implementation of the mission in this area.

The European Parliament has argued for a mandate based on a UN Security Council resolution. Such a mandate is unlikely to be adopted, however, given that the Security Council has so far been unable to reach agreement on a resolution concerning Georgia. Thus, if the mission spreads to Abkhazia and South Ossetia at a later stage, the European Union will have to conclude new agreements with the *de facto* local leadership in order to safeguard the privileges and immunities of the EUMM.

[…]

Character and scope of the Dutch contribution

The Dutch Government aims to make a proportional contribution to the mission consisting of approximately six to ten officials. These officials can be recruited both from within and from outside government. In principle, the Dutch candidates will be made available for a period of

twelve months. At the European Union's request, the Netherlands will also contribute to the mission's initial capacity in the form of three vehicles, three to five members of the Royal Dutch Military Constabulary (*Koninklijke Marechaussee*) and four to seven civil experts. It is expected that this contribution will be succeeded by the mission's regular capacity, which will be recruited in accordance with the European Union's standard procedures, by the end of January at the latest.

Before staff from the Dutch Ministry of Justice can be deployed on the basis of this steering committee report, the parties concerned need to come to an agreement on liability in the case of occupational disability.

From the point of view of employment law, the ministers concerned will continue to exercise authority over the Dutch officials who are deployed.[69]

B. Relaxation of Visa Sanctions on Belarus

On 3 November 2008 the Minister of Foreign Affairs answered questions on the decision to lift the travel ban for Belarussian officials, including President Lukashenko. The questions and the given answers read as follows:

1 At the meeting of the Council of Ministers in Luxembourg on 13 October 2008, did the Netherlands endorse the decision to lift the travel ban on several individuals, including the so-called 'last dictator of Europe', Belarusian President Alexander Lukashenko?[70]

2 Does this relaxation of the visa sanctions on Belarus not create the impression that we are dealing with a very general easing of the sanctions regime, given that the visa sanctions have been lifted in the case of no less than 36 of the 42 Belarusian officials who were previously affected by such sanctions?

3 Can you explain how this broad relaxation of the sanctions regime tallies with your statement (during your meeting with the parliamentary committee on 9 October 2008 on agenda for the meeting of the General Affairs and External Relations Council) that there should not be a 'substantial relaxation'?

4 Did the Council of Ministers make a connection between the relaxation of the sanctions regime that applies to Belarus and the sanctions that apply to Uzbekistan?

5 Are you aware of the fact that Kristiina Ojuland, who is a member of the Council of Europe, was not granted a visa for her visit to Belarus on 9–10 October 2008? Did this have an impact on the decision of the Council of Ministers? What do you intend to do about it?

6 Are you willing to advocate an approach under which, as long as Belarus continues to flout democratic standards, every visa that is granted to a Belarusian official who was initially subject to the travel ban is 'matched' by a meeting with representatives of the opposition?

[69] Kamerstukken II, 2008–2009, 27476, No. 11, pp. 3, 5–6.

[70] See http://www.charter97.org/en/news/2008/10/13/11078, http://www.eubusiness.com/news-eu/1223893926.2 and http://www.charter97.org/en/news/2008/10/8/10924

7 Does the relaxation of the visa sanctions on Belarusian officials, including President Lukashenko, mean that they are welcome in the Netherlands?

8 Does the relaxation of the visa sanctions also imply that the assets of these officials, which were frozen until now, will be released? Does the General Affairs and External Relations Council have any plans or ideas to this effect? Can you inform us immediately whether or not this is the case?

[…]

1 to 3 At the explicit request of the Netherlands, the meeting of the General Affairs and External Relations Council (GAERC) of 13 October 2008 decided that the existing sanctions against Belarus would be maintained. The enforcement of the visa restrictions in respect of a considerable number of persons on the list, including President Lukashenko, was suspended for a period of six months. The entry ban on the four persons who have been blamed for the disappearances in 1999 and the chairman of the Belarusian electoral council, who was responsible for organising the election, remains in place. On the basis of the Dutch proposals, the suspension of the visa restrictions will end automatically after six months, unless the Council unanimously decides otherwise. In addition, the Council's decision identifies areas in which Belarus is expected to make progress. The freezing of financial assets in the European Union will continue to apply to all the persons on the list. As a gesture to Belarus, in response to some positive developments (e.g. the release of political prisoners and better conditions for the opposition in the run-up to the election), the European Union's sanctions policy has been adjusted in a modest and—for the time being—temporary manner. There is no question of a long-term relaxation of sanctions.

4 No. These are separate issues that are treated as such.

5 I am aware of the refusal to grant a visa to Ms Ojuland. The fact that the European Union has adjusted the enforcement of the sanctions regime does not imply that I am no longer concerned about the human rights situation in Belarus. At my insistence, the sanctions policy therefore remains largely unchanged. The refusal to grant a visa to Ms Ojuland will be raised in our contacts with the Belarusian authorities. The Netherlands has ensured that human rights will remain a key topic of discussion during the expansion of these contacts.

6 I tried to convince the other EU ministers that the European Union should not only meet with the Belarusian authorities, as it did with the Belarusian Minister of Foreign Affairs on the sidelines of the GAERC meeting, but also with members of the opposition. The EU High Representative for the Common Foreign and Security Policy, Javier Solana, subsequently confirmed that he would do so.

7 and 8 The suspension of visa restrictions for six months means that EU countries are now free to grant entry visas to Belarusian officials, including President Lukashenko. However, this does not mean that President Lukashenko, for example, would actually be welcome. As noted, the foreign financial assets will remain frozen. The Council currently has no plans to release these assets.[71]

[71] Aanh. Hand. II, 2008–2009, No. 527, pp. 1109–1110.

C. Expanding the Deployment of Dutch Police Officers in Peacekeeping Missions

On 5 November 2008 the Minister of the Interior and Kingdom Relations sent a Letter to the House of Representatives on the abovementioned subject. It reads, *in full*, as follows:

In accordance with the undertaking I gave during my meeting with the relevant Standing Committees of the House of Representatives on 21 May 2008 concerning the ESDP mission in Kosovo, I hereby wish to provide you with additional information on the deployment of Dutch police officers in peacekeeping missions. At the same time, on my own behalf as well as on behalf of the Minister of Foreign Affairs and the Minister of Defence, I would like to use this letter to respond to a recent request for information on new developments in this area.

Since 2001, Dutch police officers have been participating in peacekeeping missions in a structural manner.[72] The framework for their participation was laid down in a policy document issued by the Ministry of the Interior and Kingdom Relations, the Ministry of Foreign Affairs and the Ministry of Defence (TK 24 476 of 1 October 2000).

The deployment of police officers during peacekeeping missions serves various objectives: promoting the international legal order; maintaining regional stability; contributing to national security; promoting close international police cooperation; and developing an international police network.

International demand for the deployment of police officers in peacekeeping missions has increased in recent years. This is not only due to the growing number of peacekeeping missions but also to the growing recognition that police officers play a key role in such missions.

In order to realise as much of the above-mentioned objectives as possible and use the deployed police officers in the most effective and relevant manner possible, I have developed a new policy approach that is more ambitious.

In this letter, I will explain the most important proposed policy changes and describe the current state of affairs.

Expanding the deployment

At present, Dutch police officers perform non-executive tasks, which are usually of an observational or advisory nature, during peacekeeping missions. In order to contribute in a more flexible and effective manner to the realisation of the aforementioned objectives and in order to ensure that the deployment of police officers matches the operational interests of the police as much as possible, I intend to expand the deployment of Dutch police officers by allowing the deployment of executive officers. In addition, I want to deploy police officers in areas that are more dangerous than those in which they have deployed until now. The planned participation of Dutch police officers in the EUPOL mission in Afghanistan is a good example of this.

[72] See Overview of the participation of police officers in peacekeeping mission since 2000 in the annexe.

It goes without saying that it will only be possible to deploy executive officers if the mandate of the mission in question provides for this. It is not meant to become something that is done automatically. The tasks that need to be carried out are part of the comprehensive assessment of the security situation. I will therefore assess any request for assistance that involves the deployment of executive officers against various criteria, such as whether the principles of proportionality and subsidiarity have been included in the rules of engagement, in addition to the usual criteria of security, a suitable immunity regime and compatibility with existing policy. In order to facilitate the deployment of executive officers, the 'Decision on the deployment of police officers in peacekeeping missions' needs to be amended. I have reached agreement on this matter with the police unions, and the amended Decision is expected to enter into force at the beginning of next year.

Increasing the number of police officers

In addition to expanding the deployment of police officers, I also wish to increase the effectiveness and relevance of the deployment by making more police officers available. At present, a maximum number of 40 police officers can be deployed each year. My aim is to create sufficient scope to deploy a maximum number of 100 police officers each year.

Incidentally, this number is not a goal in itself but very much an upper limit. A number of conditions need to be satisfied before substantially more police officers can be deployed. Thus, for example, the pool of available police officers needs to be enlarged. In addition, I wish to introduce greater diversity (e.g., in terms of specialisation, rank and gender) in the supply. This will help to improve our response to requests for specific skills on the part of Dutch police officers and will also help to increase the chances of appointments to both junior and senior posts. These and other arrangements have been incorporated into a covenant that I hope to sign with the Dutch regional police force managers in the near future.

Intensifying cooperation and strengthening the deployment mechanism

In contrast to the Ministry of Defence, deployments in the framework of peacekeeping missions are not a core task of the Dutch police. In order to improve the effectiveness and efficiency of the Dutch contribution to such missions, the Dutch police will therefore intensify its cooperation with other ministries.

In this context, the Dutch police will seek to cooperate in particular with the Ministry of Defence. This cooperation will focus on the pre- and post-deployment stages. Examples include joint courses and training. Dutch police officers will also make greater use of Ministry of Defence facilities, such as accommodation and medical facilities, during joint missions.

In all cases, the Dutch police will closely examine existing practices of the Ministry of Defence.

The intensification of cooperation between the Dutch police and the Ministry of Defence will be formalised in a covenant.

Annexe

Overview of the participation of Dutch police officers in peacekeeping missions since 2000

Since the introduction of the Dutch policy on the participation of police officers in peacekeeping missions in 2000, the Netherlands has consistently deployed approximately 30 FTEs (full-time equivalents) per year in peacekeeping missions.

Since 2000, Dutch police officers have participated in the following peacekeeping missions:

- Albania (ECPAP)
- Kosovo (KPSS/EULEX)
- Bosnia and Herzegovina (EUPM)
- Serbia and Montenegro (OSCE)
- Macedonia (PROXIMA I and II)
- Sudan UN Beiroet (EU support for AMIS II)
- Afghanistan (EU/ISAF)

At the present time (autumn 2008), Dutch police officers are participating in the following missions:

- Sudan UN Beiroet (EU support for AMIS II) (4 police officers)
- Kosovo (EULEX) (5 police officers)
- Serbia and Montenegro (OSCE) (1 police officer)
- Cyprus (UNFICYP) (7 police officers)
- Bosnia and Herzegovina (EUPM) (6 police officers)

The Dutch police is currently preparing for possible contributions to peacekeeping missions in Afghanistan (EUPOL) and Georgia (EUMM).[73]

14.1 INTERNATIONAL WAR
See: 4.66

14.1122 AGRESSION
See: 12.273, 13.22 **C**, 14.125

14.1123 SELF DEFENCE
See: 14.125

14.1131 LIMITATION AND REDUCTION OF CONVENTIONAL WEAPONS

The Dutch View on the Convention on Cluster Munition

On 3 September 2008 the Minister of Foreign Affairs sent a Letter to the House of Representatives in which he answers questions of the Standing Committee of Foreign Affairs and of Defence on cluster munition. It reads, *inter alia*, as follows:

Is it true that the British Government has decided that it will no longer permit other States to store cluster munitions in the United Kingdom? Are you prepared to adopt a similar position?

[73] Kamerstukken II, 2008–2009, 27 476, No. 14, pp. 1–4.

The British Government is currently in talks with the United States about the storage of US cluster munitions in the United Kingdom. It has not yet adopted an official decision on this matter. Incidentally, the Convention does not prohibit the storage of cluster munitions belonging to third parties. In June 2008, in response to questions from the House of Lords, Lord Malloch Brown stated that the aim of the United Kingdom is to no longer store cluster munitions belonging to third parties following the end of the eight-year transition period, which is the period for the destruction of cluster munitions laid down by the Convention. This would apply to cluster munitions belonging to third parties on military bases in the United Kingdom as well as to cluster munitions belonging to third parties on British military bases outside the United Kingdom.

The Netherlands does not store cluster munitions belonging to third parties on its territory, nor is it considering the possibility of doing so.

[…]

Insofar as the rules of engagement for a specific operation with partners that are not party to this Convention permit the use of cluster munitions, the Netherlands will make national reservations (‘caveats’) to those rules on the basis of the new Convention. These reservations will be drafted separately for each operation.[74]

14.1132 LIMITATION AND REDUCTION OF NUCLEAR WEAPONS
See: 13.223

14.1133 LIMITATION AND REDUCTION OF CHEMICAL AND BIOLOGICAL WEAPONS
See: 11.3

14.1271 CONVENTIONAL WEAPONS
See: 14.1131

14.1274 CHEMICAL WEAPONS
See: 11.3

14.125 HUMANITARIAN LAW
See also: 13.13

Israel’s Reaction in Gaza Consistent with Humanitarian Law?

The report dated 16 February 2009 of a debate between the Standing Parliamentary Committee on Foreign Affairs and the Minister of Foreign affairs reads, *inter alia,* as follows:

In my opinion, a number of you have correctly argued—as also contended by the Dutch Government in its letters of 30 December 2008 and 6 and 7 January 2009—that every Israeli Government is entitled to take action against daily rocket attacks and protect its citizens. In this

[74] Kamerstukken II, 2008–2009, 21 501-02, No. 846, pp. 2, 4.

context, some of you have asked to what extent Israel's legitimate reaction is consistent with the rules relating to humanitarian law and proportionality. It is a fact, as noted in the Government's letters to the House of Representatives, that the Palestinians have suffered many civilian casualties. The Netherlands regrets this, just as it regrets the civilian casualties on the Israeli side. It goes without saying that actions causing civilian casualties should be avoided as much as possible, in accordance with humanitarian law.

The Netherlands expects all parties to act in accordance with humanitarian law during the conflict. Israel is aware of the Netherlands' position in this regard. This position was clearly reiterated in my conversations with Israel's Minister of Foreign Affairs, Tzipi Livni, and in the conversations between the Dutch Prime Minister, Jan Peter Balkenende, and the Israeli Prime Minister, Ehud Olmert. I have been asked for an evaluation of the situation. Such an evaluation was provided in the Government's letter. Regardless of the evaluations, it is clear that the rocket attacks by Hamas are primarily aimed at civilian rather than military targets in Israeli cities. This observation also appears in the Government's letter to the House of Representatives. These attacks do not serve a legitimate military purpose and can be classified without question as war crimes or terrorism.

The Netherlands obviously does not have observations of its own or from other, independently verified sources regarding the exact nature of Israel's military actions and instructions. However, based on the information provided by the Israeli Government to the EU representatives and—via the Dutch ambassador—to us, we are under the impression that the Israeli armed forces are restricting themselves to the achievement of their explicit objective, namely to eliminate the military capability of Hamas, in order to prevent future attacks on Israeli citizens.

I wish to emphasise here that it is terrible that there have been so many civilian casualties, but unfortunately this is partly due to the fact that Hamas deliberately positions and conceals its military installations and weapons in the middle of Gaza's civilian population. According to the humanitarian principle of proportionality, when considering an attack, every country—including Israel—must weigh up the expected tangible and direct military benefits, on the one hand, and the anticipated incidental loss of life, wounding of civilians, damage to civilian structures or combination thereof, on the other. This is the rule that applies on the basis of the humanitarian principle of proportionality.

In its letter to the House of Representatives, the Dutch Government presents its impressions as regards the proportionality debate. One may agree or disagree with these impressions, but our evaluation is based on the information that we currently have at our disposal. I know Israel to be a country that is governed by the rule of law, where the courts closely monitor military action and, in particular, the armed forces' compliance with humanitarian law. For this reason, it is my political view that such fundamental values of humanitarian law play a key role in the assessments carried out by the Israeli armed forces.[75]

14.2 CIVIL WAR

See: 4.66

16.2 INTERNATIONAL LEGAL ASPECTS OF ECONOMIC DEVELOPMENT AND DEVELOPMENT COOPERATION

See: 16.55

[75] Kamerstukken II, 2008–2009, 23432, No. 287, pp. 34.

16.55 ENVIRONMENTAL QUESTIONS

See also: 9.65

The 'Paramaribo Dialogue' in the Framework of the United Nations Forum on Forests (UNFF)

On 8 December 2008 the Minister of Agriculture, Nature and Food Quality sent a Letter to the House of Representatives on the abovementioned subject. It reads, *inter alia*, as follows:

The Netherlands recently organised a meeting with Suriname and the United States to take stock of the options for developing a financing instrument for sustainable forest management in the framework of the UNFF. The results of this meeting will serve as a foundation for the remainder of the negotiations and the further development of a financing instrument for sustainable forest management. A decision on these issues will be adopted at the eighth session of the UNFF in April 2009.

Background

The United Nations Forum of Forests (UNFF) or UN Forests Forum was created in 2000 as an intergovernmental body in the framework of an international agreement on forests. The aim of the UNFF is to promote the management, preservation and sustainable development of all types of forests and to strengthen long-term political commitment to these issues. After fifteen years of negotiations, the seventh session of the UNFF (UNFF-7), which was chaired by the Netherlands, adopted an international instrument for sustainable forest management in April 2007. This so-called Non-Legally Binding Instrument (NLBI) on All Types of Forests is regarded as a milestone. It represents the first time that UN Member States have agreed on an international instrument for sustainable forest management. The instrument is expected to have a significant impact on international cooperation and national action to reduce deforestation, combat forest degradation, promote sustainable living areas and reduce poverty for all forest-dependent population groups. The Member States agreed to mobilise supplementary, new and innovative sources of funding for sustainable forest management, with a particular focus on the private sector and charitable institutions. In order to achieve this, an international funding mechanism needs to be developed. UNFF-8 will adopt a decision on this issue in April 2009. In the build-up to UNFF-8, an international meeting recently took place in Suriname.

Country-led initiative

The 'Paramaribo Dialogue' took place in Suriname on 8–12 September 2008. This so-called country-led initiative (CLI) in the framework of the UNFF was organised by Suriname, with the Netherlands and the United States as co-organisers, and focused on the development of a financing instrument for sustainable forest management.

The CLI brought together approximately 200 participants to explore the options for developing a voluntary global financing instrument/portfolio approach/fund for sustainable forest management. The participants included a variety of representatives from the public and private sectors, international organisations, non-governmental organisations (NGOs) and philanthropic institutions. They exchanged knowledge and experiences and discussed the various existing new and supplementary financing options. The following issues were discussed during the CLI:

- financing sustainable forest management: producer, consumer and community perspectives;
- financing from forest ecosystem services;
- institutional and governance strategies at the national level; and
- institutional and governance strategies at international level.

The participants acknowledged that the circumstances of the countries concerned are different and that they have different interests when it comes to sustainable forest management. They welcomed the portfolio approach as an innovative way of responding to this situation and tapping new and supplementary sources of funding for sustainable forest management. This approach implies the creation of a portfolio of supplementary financial products and services, rather than a single set of funding mechanisms, such as public sector financing, in order to attract the necessary financing from various sources. This approach requires the deployment of innovative instruments, a new *modus operandi* with various interest groups and a flexible contribution from governments.

It was concluded during the CLI that it is very important to improve cooperation, communication and the exchange of information between different interest groups by means of better coordination. Presenting 'best practices' is a useful way of exchanging information. Access to information should also be improved.

It was also emphasised during the meeting that forests serve a multifunctional purpose. They are not only important in terms of storing CO_2 but also in terms of storing water and preserving biodiversity. It is also important to determine the land rights of forest-dependent population groups.

In addition to the aforementioned portfolio approach, the CLI's conclusions and recommendations on the issue of financing focused on the multiplicity of existing financing options. It is not yet clear to all parties how these options can be exploited. Developing countries should be granted better access to sources of funding. The participants felt that the World Bank's Forest Investment Programme has a lot of potential as a funding mechanism.

Way forward in the build-up to UNFF-8 (April 2009)

The conclusion and recommendations adopted during the CLI have been summarised in the Co-Chair Summary Report. On the basis of this report, and with the support of the Netherlands and the United States, Suriname presented the results of the 'Paramaribo Dialogue', which will serve as a foundation for the remainder of the negotiations, during the meeting of the Ad Hoc Expert Group (AHEG) in Vienna on 10–14 November 2008. The Co-Chair Summary Report was welcomed by the UNFF Member States and the key negotiating groups, which referred to the report's conclusions and recommendations throughout the AHEG meeting. The AHEG meeting has provided a valuable insight into the different positions, desires and needs of the Member States. To begin with, Member States will have to establish good forest programmes at national level in order to make it more attractive for investors to contribute financially, especially in developing countries. In addition, financing from development cooperation budgets should start to play a more catalytic role. Finally, there is a need for greater synergy between the various UN organisations united in the Collaborative Partnership on Forests (CPF), including the United Nations Framework Convention on Climate Change (UNFCCC), the International Tropical Timber Organisation (ITTO), the United Nations Food and Agriculture Organisation (FAO) and the World Bank.

In Vienna, the Member States agreed to meet again in a smaller forum to develop two of the proposals for an international financing instrument in greater detail. This meeting will probably take

place in February 2009, immediately after the second meeting on the design of the World Bank's Forest Investment Programme. A final decision on the adoption of a voluntary financing instrument for sustainable forest management will be adopted during the UNFF-8 meeting in April 2009.[76]

16.56 ACCIDENTS AND DISASTERS

See: 9.633 **A**, **C**, **D**

[76] Kamerstukken II, 2008–2009, 26 407, No. 37, pp. 2–4.

Chapter 11
Treaties and Other International Agreements to Which the Kingdom of the Netherlands is a Party

Conclusions and Developments 2009

M. A. van der Harst

This survey covers the treaties, international agreements, and other instruments mentioned in the '*Tractatenblad van het Koninkrijk der Nederlanden*'—Treaty Series of the Kingdom of the Netherlands (abbr. Trb.). Its purpose is to record the legal consequences of such agreements and instruments for the Netherlands, and Netherlands State acts in respect of them, such as signature, parliamentary approval, ratification, entry into force, provisional application, extension or limitation of territorial application, termination and abrogation. Signature by the Netherlands, however, is mentioned separately only if, in the case of multilateral treaties, such signature has taken place on a date different from the official date of conclusion of the treaty.

The issue-number of the *Tractatenblad* mentioned as the source of each entry refers to the issue recording the relevant legal consequence or State act. The text of the treaty or agreement itself may thus be included in a different (earlier) issue of the *Tractatenblad*. By use of the consecutive annual surveys published in the Netherlands Yearbook of International Law a systematically arranged view of the developments with regard to the treaty or agreement in question may be obtained. In relevant cases references will be made to additional sources of the treaty texts, such as the European Treaty Series (*ETS*) and the Official Journal of the European Communities (*OJ*).

Treaties will only be concluded by the Kingdom of the Netherlands as a whole. The Kingdom consists of three countries: the Netherlands (the part in Europe), the Netherlands Antilles and Aruba (both in Latin America). If an instrument or act affects only one or two of the parts of the Kingdom this will be expressly mentioned.

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For an explanation of the formal aspect of Dutch treaty law see H.H.M. Sondaal, 'Some features of Dutch Treaty Practice', 19 NYIL (1988) pp. 179–257. The Act on the Approval and Promulgation of Treaties of 1994 is dealt with in 26 NYIL (1995) pp. 316–320.

The *Tractatenblad* is available on http://www.overheid.nl/op/index.html. The Yearbook surveys are also available in a consolidated way in a database on http://www.asser.nl/pil/index.htm.

3.1141 IMMUNITY OF FOREIGN STATES AND OF THEIR ORGANS AND PROPERTY

See: 9.633 (Trb. 2009 Nos. 80, 89 and 197)

3.211 LEGAL STATUS OF INTERNATIONAL ORGANIZATIONS

—Agreement with the United Nations concerning the headquarters of the Special Tribunal for Lebanon, with Letters and Declaration, New York, 21 December 2007.
Parliamentary approval: by Act of 29 December 2008.
Entry into force: 1 April 2009 (for the Netherlands).
(Trb. 2009 No. 55)

3.2113 PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

—Agreement on the privileges and immunities of the International Tribunal for the Law of the Sea, New York, 23 May 1997.
Ratification: 7 January 2009 (for the Netherlands Antilles).
Entry into force: 7 January 2009 (for the Netherlands Antilles).
(Trb. 2009 No. 32)

—Protocol on the privileges and immunities of the International Seabed Authority, Kingston, 27 March 1998.
Ratification: 7 January 2009 (for the Netherlands Antilles).
Entry into force: 7 January 2009 (for the Netherlands Antilles).
(Trb. 2009 No. 33)

—Exchange of Letters with the International Atomic Energy Agency (IAEA) constituting the Agreement regarding the regional workshop 'Operational Events, Transients and Precursor Analyses', to be held at Petten from 24 to 28 August 2009, with Annexes, Vienna, 18 June 2009.
Parliamentary approval: not required, Article 7(c) Approval Act of 1994.
Entry into force: 18 June 2009 (for the Netherlands).
Promulgation: 29 July 2009.
Duration: a maximum of one year.
(Trb. 2009 No. 115)

—Exchange of Notes constituting an Agreement with Albania concerning privileges and immunities for liaison officers who are employed at Europol, The Hague, 30 July 2009.
Parliamentary approval: pending.
Promulgation: 23 September 2009.
Provisional application: 30 July 2009 (for the Netherlands).
(Trb. 2009 No. 133)

—Agreement with the Slovak Republic on the privileges and immunities of liaison officers seconded by the Slovak Republic to Europol, The Hague, 30 September 2009.
Parliamentary approval: not required, Article 7(b) Approval Act of 1994.
Promulgation: 27 October 2009.
Provisional application: 1 October 2009 (for the Netherlands).
Authentic language: English.
(Trb. 2009 No. 151)

—Agreement with the European Organization for the Safety of Air Navigation 'Eurocontrol' regarding the registration of interns, Brussels, 7 October 2009.
Parliamentary approval: pending.
Promulgation: 17 November 2009.
Provisional application: 7 October 2009 (for the Netherlands).
Authentic languages: French, English (equally authentic).
(Trb. 2009 No. 203)

—Exchange of Letters with the International Atomic Energy Agency (IAEA) constituting the Agreement regarding the technical meeting on 'Incident reporting system for research reactors (IRSRR)', to be held at Petten from 16 to 20 November 2009, with Annexes, Vienna, 8 October 2009.
Parliamentary approval: not required, Article 7(c) Approval Act of 1994.
Entry into force: 8 October 2009 (for the Netherlands).
Promulgation: 21 November 2009.
Duration: a maximum of one year.
(Trb. 2009 No. 208)

—Exchange of Letters with the International Atomic Energy Agency (IAEA) constituting the Agreement regarding the regional training course on the 'physical protection of nuclear material and nuclear facilities', to be held at Delft from 26 October–6 November 2009, with Annexes, Vienna, 9 October 2009.
Parliamentary approval: not required, Article 7(c) Approval Act of 1994.
Entry into force: 9 October 2009 (for the Netherlands).
Promulgation: 21 November 2009.
Duration: a maximum of one year.
(Trb. 2009 No. 209)

—Exchange of Letters with the International Atomic Energy Agency (IAEA) constituting the Agreement regarding the regional workshop 'Event analysis and root causes including human and organizational factors (HOF)', to be held at Petten from 9 to 13 November 2009, with Annexes, Vienna, 9 October 2009.
Parliamentary approval: not required, Article 7(c) Approval Act of 1994.
Entry into force: 9 October 2009 (for the Netherlands).
Promulgation: 21 November 2009.
Duration: a maximum of one year.
(Trb. 2009 No. 210)

—Exchange of Notes constituting the Agreement with ITC-UNESCO regarding the registration of interns, Enschede, 2 November 2009.
Parliamentary approval: pending.
Promulgation: 9 December 2009.
Provisional application: 2 November 2009 (for the Netherlands).
(Trb. 2009 No. 224)

—Exchange of Letters with the United Nations in connection with the Seminar 'Early warning and business cycle indicators', to be held at The Hague, from 14 to 16 December 2009, New York, 23 November 2009.
Parliamentary approval: not required, Article 7(c) Approval Act of 1994.
Entry into force: 23 November 2009 (for the Netherlands).
Duration: a maximum of one year.
(Trb. 2009 No. 230)

—Exchange of Notes constituting the Agreement with Interpol concerning privileges and immunities for liaison officers who are employed at Europol, The Hague, on behalf of Interpol, with Attachment, Lyon, 20 November 2009.
Parliamentary approval: pending.
Promulgation: 30 December 2009.
Provisional application: 25 November 2009 (for the Netherlands).
(Trb. 2009 No. 248)

3.2121 ADMISSION OF STATES

See: 3.222 NATO (Trb. 2009 No. 85); 3.223 EC (Trb. 2009 Nos. 10, 22, 23, 65, 87, 106 and 125); 3.223 EU (Trb. 2009 Nos. 59, 195, 205 and 206); 4.31 (Trb. 2009 No. 199)

3.221 UNIVERSAL ORGANIZATIONS

International Atomic Energy Agency (IAEA)

See: 3.2113 (Trb. 2009 Nos. 115, 208, 209 and 210)

International Bank for Reconstruction and Development (IBRD)

—Amendment, 30 January 2009, of the Articles of Agreement of the International Bank for Reconstruction and Development, Washington, 27 December 1945.
Parliamentary approval: pending.
(Trb. 2009 No. 191)

International Criminal Police Organization (Interpol)
See: 3.2113 (Trb. 2009 No. 248)

International Fund for Agricultural Development (IFAD)

—Amendments, Rome, (1) 26 January 1995 (2) 21 February 1997 (3) 21 February 2001 (4) 16 February 2006, to the Agreement establishing the International Fund for Agricultural Development, with Annexes, Rome, 13 June 1976.
Entry into force: (1) 26 January 1995 (for the Netherlands and Aruba). (2) 21 February 1997 (for the Netherlands and Aruba). (3) 21 February 2001 (for the Netherlands and Aruba). (4) 16 February 2006: Article 7(2)(g), in accordance with Article 12(a)(ii) of the Agreement (for the Netherlands and Aruba). (4) 22 December 2006: Article 7(2)(a–b), in accordance with Article 12(a)(ii) of the Agreement (for the Netherlands and Aruba).
Promulgation: 10 November 2009.
(Trb. 2009 Nos. 139 and 196)

International Maritime Organization (IMO)
See: 16.441 (Trb. 2009 Nos. 84, 147, 148 and 150)

International Maritime Satellite Organization (INMARSAT)

—Amendments, London, 2 October 2008, to the Convention on the International Mobile Satellite Organization (Inmarsat), with Annexes, London, 3 September 1976.
Parliamentary approval: pending.
Promulgation: 24 September 2009.
Provisional application: 6 October 2008.
(Trb. 2009 No. 132)

International Monetary Fund (IMF)

—(1) Resolution, 28 April 2009, on the Fifth Proposed Amendment of the Articles of the Agreement and (2) Resolution, 5 May 2008, on the Sixth Proposed Amendment of the Articles of the Agreement of the International Monetary Fund, Washington, 27 December 1945.
Parliamentary approval: (1) (2) pending.
(Trb. 2009 No. 17)

—Resolution, 23 September 1997, on the Fourth Amendment of the Articles of the Agreement of the International Monetary Fund, Washington, 27 December 1945.
Entry into force: 10 August 2009, in accordance with Article XXVII(c) of the Agreement.
(Trb. 2009 No. 190)

International Renewable Energy Agency (IRENA)

—Statute of the International Renewable Energy Agency (IRENA), Bonn, 26 January 2009.
Parliamentary approval: pending.
Signature: 26 January 2009.
(Trb. 2009 No. 49)

International Seabed Authority (ISA)
See: 3.2113 (Trb. 2009 No. 33)

United Nations Educational, Scientific and Cultural Organization (UNESCO)
See: 3.2113 (Trb. 2009 No. 224)

United Nations Interim Administration Mission in Kosovo (UNMIK)
See: 10.2 (Trb. 2009 No. 92)

United Nations World Food Programme (WFP)
See: 9.633 (Trb. 2009 Nos. 89 and 197)

3.222 REGIONAL ORGANIZATIONS

Caribbean Forum of African, Caribbean and Pacific States (CARIFORUM)
See: 3.223 EC (Trb. 2009 No. 18)

Council of Europe (CoE)
See: 4.64 (Trb. 2009 Nos. 35, 36, and 37); 16.721 (Trb. 2009 No. 141); 16.728 (Trb. 2009 No. 227)

European Organization for the Safety of Air Navigation (EUROCONTROL)
See: 3.2113 (Trb. 2009 No. 203)

North Atlantic Treaty Organization (NATO)

—Protocols to the North Atlantic Treaty on the Accession of (1) Albania and (2) Croatia, Brussels, 9 July 2008.
Parliamentary approval: (1) (2) by Act of 21 February 2009.
Ratification: (1) (2) 13 March 2009 (for the Netherlands).

Entry into force: (1) 27 March 2009 (for the Netherlands). (2) 30 March 2009 (for the Netherlands).
(Trb. 2009 No. 85)

Post Union of the American States, Spain and Portugal (UPAEP)

—(1) Sixth, (2) Seventh and (3) Eighth Additional Protocol, to the Constitution of the Postal Union of American States, Spain and Portugal, with (4) General Rules and (5) Technical Cooperation Rules, Rio de Janeiro, 16 August 2005.
Parliamentary approval: (1) (2) 17 December 2007, tacit. (3) pending. (4) (5) not required, Article 7(b) Approval Act of 1994.

Entry into force: (1) 6 March 2008 (for the Netherlands Antilles and Aruba). (4) 6 March 2008, Admendments, 2000 and 2005, (for the Netherlands Antilles and Aruba). (4) 1 January 2008, Admendments 2007 (for the Netherlands Antilles and Aruba). (5) 14 July 2007, Admendments 2007 (for the Netherlands Antilles and Aruba).
(Trb. 2009 No. 40)

3.223 ORGANIZATIONS CONSTITUTING INTEGRATED COMMUNITIES

Benelux
See: 12.273 Benelux Court (Trb. 2009 No. 4); 16.56 (Trb. 2009 No. 58); 16.723 (Trb. 2009 Nos. 60 and 122)

Benelux Office for Intellectual Property (BOIP)
See: 12.273 Benelux Court (Trb. 2009 No. 4)

European Communities (EC)

See also: 3.223 EU (Trb. 2009 Nos. 195, 205 and 206); 4.64 (Trb. 2009 No. 38); 16.2 (Trb. 2009 Nos. 72 and 73); 16.726 (Trb. 2009 No. 62)

—Protocol to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and Israel, of the other part, to take account of the accession of Bulgaria and Romania to the European Union, Brussels, 31 October 2007.
Ratification: 28 February 2008 (for the Netherlands).
Entry into force: 1 December 2008 (for the Netherlands).
(Trb. 2009 No. 10)

—(1) Protocol to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and Morocco, of the other part, to take account of the accession of Bulgaria and Romania to the European Union, 13 October 2008.

(2) Decision No 2/2005, 18 November 2005, of the EU-Morocco Association Council amending Protocol 4 to the Euro-Mediterranean Agreement, concerning the definition of the concept of 'originating products' and methods of administrative cooperation, 18 November 2005.
Parliamentary approval: (1) not required, Article 7(a) Approval Act of 1994 in conjunction with Article 2 Kingdom Act of 15 June 2006.
Signature: (1) 13 October 2008.
Entry into force: (2) 18 November 2005: for the amended Protocol 4 (for the Netherlands).
Promulgation: 3 March 2009.
Provisional application: (1) 1 January 2007, in accordance with Article 9(2) Protocol (for the Netherlands).
(Trb. 2009 No. 22)

—Protocol to the stabilisation and association agreement between the European Communities and their Member States, of the one part, and Macedonia, of the other part, to take account of the accession of Bulgaria and Romania to the European Union, Brussels, 22 February 2008.
Entry into force: 1 November 2008 (for the Netherlands).
(Trb. 2009 No. 23)

—Protocol, Brussels, (1) 18 May 2004/(2) 1 October 2007/(3) 9 December 2008, amending the Agreement on partnership and cooperation between the European Communities and their Member States, on the one hand, and Azerbaijan, on the other, Luxembourg, 22 April 1996.
Parliamentary approval: (3) not required, Article 7(a) Approval Act of 1994 in conjunction with Article 2 of the Kingdom Act of 15 June 2006.
Ratification: (1) 24 October 2005 (for the Netherlands). (3) 19 October 2009 (for the Netherlands).
Signature: (3) 9 December 2008.
Entry into force: (1) 1 November 2005 (for the Netherlands). (2) 1 November 2007 (for the Netherlands). (3) 1 November 2009 (for the Netherlands).
Provisional application: (3) 1 January 2007 (for the Netherlands).
(Trb. 2009 Nos. 64 and 214)

—Protocol, Zagreb, (1) 28 November 2006/(2) 15 July 2008, amending the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Croatia, of the other part, to take account of the accession of Bulgaria and Romania to the European Union, Brussels, 15 July 2008.
Entry into force: (1) 1 January 2007 (for the Netherlands). (2) 1 March 2009 (for the Netherlands).
Promulgation: 6 May 2009.
(Trb. 2009 No. 65)

—(1) Protocol, Brussels, 19 November 2008, amending the (2) Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Albania, of the other part, to take account of the accession of Bulgaria and Romania to the European Union, Luxembourg, 12 June 2006.
Parliamentary approval: (1) not required, Article 7(a) Approval Act of 1994 in conjunction with Article 2 Kingdom Act of 15 June 2006. (2) by Act of 8 November 2007.
Ratification: (1) 26 February 2009 (for the Netherlands). (2) 10 December 2007 (for the Netherlands).
Signature: (1) 19 November 2008.
Entry into force: (1) (2) 1 April 2009 (for the Netherlands).
Promulgation: 6 June 2009.
(Trb. 2009 No. 87)

—Protocol to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and Egypt, of the other part, to take account of the accession of Bulgaria and Romania to the European Union, 26 November 2007.
Ratification: 29 February 2008 (for the Netherlands).
Entry into force: 1 September 2009 (for the Netherlands).
(Trb. 2009 No. 106)

—Accession Protocol, Luxembourg, 24 April 2007, to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, on the one hand, and Algeria, on the other, with Protocols, Annexes, Final Act and Declarations, Valencia, 22 April 2002.
Ratification: 24 July 2007 (for the Netherlands).
Entry into force: 1 June 2009 (for the Netherlands).
(Trb. 2009 No. 125)

European Community (EC)
See also: 4.31 (Trb. 2009 No. 199); 10.2 (Trb. 2009 No. 92); 16.2 (Trb. 2009 No. 207); 16.42 (Trb. 2009 No. 30); 16.442 (Trb. 2009 Nos. 93 and 236)

—Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, with Annexes and Protocols, Bridgetown, 15 October 2008.
Parliamentary approval: pending.
Signature: 15 October 2008.
Provisional application: 29 December 2008 (for the Netherlands).
(Trb. 2009 No. 18)

European Economic Community (EEC)
See: 4.64 (Trb. 2009 Nos. 95 and 96)

European Police Office (EUROPOL)
See: 3.2113 (Trb. 2009 Nos. 133, 151 and 248)

European Union (EU)
See also: 3.223 EU (Trb. 2009 Nos. 10, 22, 23, 65, 87 and 106); 4.31 (Trb. 2009 No. 199); 4.64 (Trb. 2009 Nos. 35, 36, 37, 38 and 94)

—Council Decision 2007/436/EC, Euratom on the system of the European Communities' own resources, Luxembourg, 7 June 2007.
Parliamentary approval: by Act of 11 September 2008.
Ratification: 21 October 2008 (for the Netherlands).
Entry into force: 1 March 2009 (for the Netherlands).
(Trb. 2009 No. 43)

—Council Decision on the system of the European Communities' own resources (2000/597/EC, Euratom), Luxembourg/Brussels, 29 September 2000.
Termination: 1 January 2007.
(Trb. 2009 No. 44)

—(1) Council Decision 2006/663/EC, Luxembourg, 19 June 2006, adapting the Act of Accession of Bulgaria and Romania as regards to rural development.
(2) Council Decision 2008/493/EC, Luxembourg, 23 June 2008, amending Annex I to the Act of Accession of Bulgaria and Romania.
Entry into force: (1) 1 January 2007. (2) 3 July 2008.
(Trb. 2009 No. 59)

—Convention on centralised customs clearance concerning the allocation of national collection costs retained when traditional own resources are made available to the EU budget, Brussels, 10 March 2009.
Parliamentary approval: pending.
Signature: 10 March 2009.
(Trb. 2009 No. 74)

—Protocol to the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Armenia, of the other part, to take account of the accession of Bulgaria and Romania to the European Union, with Annexes, Protocols and Letters, Brussels, 27 June 2007.
Ratification: 29 May 2008 (for the Netherlands).
Entry into force: 1 April 2009 (for the Netherlands).
(Trb. 2009 No. 195)

—Protocol to the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part, to take account of the accession of Bulgaria and Romania to the European Union, with Annexes, Protocols and Letters, Brussels, 27 June 2007.

Ratification: 29 May 2008 (for the Netherlands).
Entry into force: 1 June 2008 (for the Netherlands).
(Trb. 2009 No. 205)

—Protocol to the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Uzbekistan, of the other part, to take account of the accession of Bulgaria and Romania to the European Union, Brussels, 20 May 2008.
Ratification: 19 December 2008 (for the Netherlands).
Entry into force: 1 February 2009 (for the Netherlands).
(Trb. 2009 No. 206)

4.31 ADMITTANCE OF ALIENS
See also: 10.21 (Trb. 2009 No. 19); 12.273 ICTR (Trb. 2009 No. 68)

—Agreement between the States of the Benelux and Macedonia on the reconduction of persons who are residing without permission, with Executive Protocol and Annexes, Voorburg, 30 May 2006.
Parliamentary approval: 7 May 2007, tacit.
Entry into force: 1 December 2008 (for the Netherlands and the Netherlands Antilles).
(Trb. 2009 No. 54)

—Agreement between the Benelux-states and Armenia on the reconduction of persons who are residing without permission, with Implementation Protocol, Brussels, 3 June 2009.
Parliamentary approval: pending.
Signature: 3 June 2009.
Authentic languages: Dutch, French and Armenian (French prevails).
(Trb. 2009 No. 124)

—Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons regarding the participation, as contracting parties, of Bulgaria and Romania pursuant to their accession to the European Union, with Annexes, Brussels, 27 May 2008.
Ratification: 5 May 2009 (for the Netherlands).
Entry into force: 1 June 2009 (for the Netherlands).
(Trb. 2009 No. 199)

4.32 PASSPORTS AND VISAS
See: 5.275 (Trb. 2009 Nos. 2, 3 and 52)

4.63 EXTRADITION
See also: 9.633 (Trb. 2009 No. 80)

—Agreement with Monaco concerning the mutual extradition of criminals, The Hague, 26 June 1894.
Termination: 1 May 2009.
(Trb. 2009 No. 53)

4.64 OTHER ASSISTANCE IN CRIMINAL MATTERS

See also: 9.633 (Trb. 2009 Nos. 80, 89 and 197); 16.726 (Trb. 2009 No. 62)

—Agreement with Uruguay on mutual administrative assistance for the proper application of customs law and for the prevention, investigation and combating of customs offences, Montevideo, 22 February 2007.
Parliamentary approval: 15 October 2007, tacit.
Entry into force: 1 January 2009 (for the Netherlands).
(Trb. 2009 No. 7)

—Treaty on the transfer of sentenced persons and the execution of sentences imposed by judgments with Brazil, The Hague, 23 January 2009.
Parliamentary approval: pending.
Promulgation: 28 February 2009.
Authentic languages: Dutch, Portuguese, English (English prevails).
(Trb. 2009 No. 25)

—Agreement, Washington D.C., 22 May 2008, amending the Agreement between the Netherlands in respect of Aruba and the United States of America on pre-clearance, with Annex, Washington, 2 December 1994.
Parliamentary approval: 16 November 2008, tacit.
Entry into force: 7 January 2009 (for Aruba).
(Trb. 2009 No. 29)

—European Convention on the international validity of criminal judgments, with Annexes, The Hague, 28 May 1970.
Termination: 5 December 2011: partial between the EU Member States as a consequence of Council Framework Decision 2008/909/JHA.
(Trb. 2009 No. 35)

—European Convention on the transfer of sentenced persons, Strasbourg, 21 March 1983.
Termination: 5 December 2011: partial between the EU Member States as a consequence of Council Framework Decision 2008/909/JHA.
(Trb. 2009 No. 36)

—Additional Protocol to the Convention on the transfer of sentenced persons, Strasbourg, 18 December 1997.

Termination: 5 December 2011: partial between the EU Member States as a consequence of Council Framework Decision 2008/909/JHA.
(Trb. 2009 No. 37)

—European Convention on the enforcement of foreign criminal sentences, Brussels, 13 November 1991.
Termination: 5 December 2011, as a consequence of Council Framework Decision 2008/909/JHA.
(Trb. 2009 No. 38)

—Agreement with South-Korea on mutual administrative assistance in custom matters, with Annex, The Hague, 14 February 2007.
Parliamentary approval: 16 November 2008, tacit.
Entry into force: 1 February 2009 (for the Netherlands).
(Trb. 2009 No. 50)

—Agreement with Japan regarding co-operation and mutual administrative assistance in customs matters, with Annex, Port Louis, 13 March 2008.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 66)

—Exchange of Letters, Ottawa, 30 March/28 April 2009, extending the Agreement with Canada on mutual administrative assistance in customs matters, with Annex, Ottawa, 14 August 2007, to Aruba and the Netherlands Antilles.
Parliamentary approval: pending.
(Trb. 2009 No. 91)

—Convention drawn up on the basis of Article K3 of the Treaty on European Union, on mutual assistance and co-operation between customs administrations, Brussels, 18 December 1997.
Entry into force: 23 June 2009 (for the Netherlands).
(Trb. 2009 No. 94)

—Convention among the Member States of the European Economic Community concerning mutual assistance between the respective customs administrations, with Additional Protocol, Rome, 7 September 1967.
Termination: 23 June 2009.
(Trb. 2009 No. 95)

—Protocol concerning the Accession of Greece to the Convention among the Member States of the European Economic Community concerning mutual assistance between the respective customs administrations, with Additional Protocol, Rome, 7 September 1967.
Termination: 23 June 2009.
(Trb. 2009 No. 96)

—Agreement with Mauritius regarding co-operation and mutual administrative assistance in customs matters, with Annex, Port Louis, 13 March 2008.
Parliamentary approval: 10 April 2009, tacit.
Entry into force: 1 July 2009 (for the Netherlands).
(Trb. 2009 No. 105)

—Agreement with Moldovia on mutual administrative assistance in custom matters, with Annex, Chisinau, 19 June 2006.
Parliamentary approval: 25 December 2006, tacit.
Entry into force: 1 April 2007 (for the Netherlands).
(Trb. 2009 No. 153)

—Agreement with Belgium on the availability of a penitentiary in the Netherlands for the enforcement of custodial sentences convicted by Belgium, Tilburg, 31 October 2009.
Parliamentary approval: pending.
Authentic languages: Dutch, French (equally authentic).
(Trb. 2009 No. 202)

—Agreement with Indonesia on mutual administrative assistance for the proper application of customs law and for the prevention, investigation and combating of customs offences, The Hague, 24 June 2003.
Parliamentary approval: 17 March 2005, tacit.
Entry into force: 1 January 2010 (for the Netherlands).
(Trb. 2009 No. 225)

4.7 PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

See also: 14.125 (Trb. 2009 No. 192); 16.728 (Trb. 2009 No. 227)

—Optional Protocol to the Convention on the rights of persons with disabilities, New York, 13 December 2006.
Parliamentary approval: pending.
(Trb. 2009 No. 194)

4.73 EUROPEAN CONVENTION ON HUMAN RIGHTS, 1950

—Protocol No. 14 to the Convention for the protection of human rights and fundamental freedoms, amending the control system of the Convention, Strasbourg, 13 May 2004.
Parliamentary approval: by Kingdom Act of 1 December 2005.
Ratification: 2 February 2006.
Provisional application: 1 July 2009: Article 4, 6, 7 and 8.
(Trb. 2009 No. 104)

5.275 DIPLOMATIC PRIVILEGES
See also: 7.25 (Trb. 2009 Nos. 11, 81, 114, 118, 120, 134 and 211)

—Exchange of Letters constituting an Agreement between the Benelux States and Macedonia on the abolition of visas for diplomatic passports, The Hague, 30 May 2006.
Entry into force: 1 January 2009 (for the Netherlands).
(Trb. 2009 No. 2)

—Exchange of Letters constituting an Agreement between the Benelux States and Serbia on the abolition of visas for diplomatic and official or service passports, Belgrade, 21 December 2006.
Entry into force: 1 January 2009.
(Trb. 2009 No. 3)

—Exchange of Letters constituting an Agreement between the Benelux States and the Bahamas on the abolition of visas for diplomatic and official or service passports, Washington, 2 February/3 March 2006.
Entry into force: 1 April 2009.
(Trb. 2009 No. 52)

5.6 ARMED FORCES
See: 7.25 (Trb. 2009 Nos. 11, 81, 114, 118, 120, 134 and 211); 9.633 (Trb. 2009 Nos. 80, 89 and 197)

5.8 EXPERTS, TECHNICIANS, ETC.
See: 3.2113 (Trb. 2009 Nos. 115, 208, 209 and 210)

6.242 TREATIES PROVIDING FOR RIGHTS FOR THIRD STATES
See: 9.633 (Trb. 2009 Nos. 89 and 197)

6.4 INVALIDITY, TERMINATION AND SUSPENSION OF OPERATION
See: 3.223 EU (Trb. 2009 No. 44); 4.63 (Trb. 2009 No. 53); 4.64 (Trb. 2009 Nos. 35, 36, 37 and 38); 7.25 (Trb. 2009 Nos. 81, 118 and 134); 9.633 (Trb. 2009 Nos. 89 and 197); 16.114 (Trb. 2009 Nos. 95 and 96); 16.152 (Trb. 2009 Nos. 1 and 34); 16.2 (Trb. 2009 No. 228); 16.5 (Trb. 2009 No. 56); 16.725 (Trb. 2009 No. 223)

7.25 MILITARY JURISDICTION
See also: 9.633 (Trb. 2009 Nos. 80, 80 and 197)

—Agreement with South Africa concerning the status of military and civilian personnel of their department/ministry of defence present in each other's territory for activities related to military cooperation, Pretoria, 8 June 2007.

Parliamentary approval: 27 June 2008, tacit.
Entry into force: 1 February 2009 (for the Netherlands).
(Trb. 2009 No. 11)

—(1) Exchange of Notes, The Hague, 11 March/1 May 2009, prolonging the (2) Exchange of Notes constituting an Agreement with the United States regarding the status of military and civilian personnel of the United States Armed forces who will be present in the Netherlands Antilles and Aruba for military training and exercises, The Hague, 3 May 2005.
Parliamentary approval: not required, Article 7(e) Approval Act of 1994.
Entry into force: (1) 3 May 2009.
Promulgation: 27 May 2009.
Prolongation: 3 May 2010.
Termination: (2) 3 May 2009.
(Trb. 2009 No. 82)

—Agreement with Rwanda concerning the status of military and civilian personnel of their Ministry of Defence present in each other's territory for activities related to bilateral military cooperation, Kigali, 13 May 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 114)

—(1) Exchange of Notes, Paramaribo, 25 August 2009, prolonging the (2) Exchange of Letters constituting an Agreement with Surinam on the status of Dutch military and civilian staff stationed in Surinam in connection with training and education, Paramaribo, 29 June/26 August 2004.
Parliamentary approval: (1) not required, Article 7(e) Approval Act of 1994.
Entry into force: (1) 25 August 2009 (for the Netherlands).
Promulgation: 10 September 2009.
Prolongation: for one year.
Termination: (2) 26 August 2009 (for the Netherlands).
(Trb. 2009 No. 118)

—Exchange of Notes constituting an Agreement with Benin regarding the status of military and civilian Netherlands armed forces personnel in the sovereign territory of Benin who will be present in Benin for the 'Dassa 2009' operation, Cotonou, 7 July 2009.
Parliamentary approval: not required, Article 7(c) Approval Act of 1994.
Entry into force: 7 July 2009 (for the Netherlands).
Promulgation: 15 September 2009.
Duration: a maximum of one year.
(Trb. 2009 No. 120)

—Agreement with Burundi regarding the status of military and civilian Netherlands and Burundian armed forces personnel in their respective sovereign territories within the framework of the partnership for the development of the security sector in Burundi, Bujumbura, 17 August 2009.
Parliamentary approval: not required, Article 7(c) Approval Act of 1994.
Entry into force: 17 August 2009 (for the Netherlands).
Promulgation: 23 September 2009.
Duration: a maximum of one year.
Termination: 17 August 2010.
Authentic language: French.
(Trb. 2009 No. 134)

—Exchange of Notes constituting the Agreement with Rwanda concerning the status of military and civilian personnel of their Ministry of Defence present in each other's territory for activities related to bilateral military cooperation, Yaounde, 16 October 2009.
Parliamentary approval: not required, Article 7(c) Approval Act of 1994.
Entry into force: 16 October 2009 (for the Netherlands).
Promulgation: 21 November 2009.
(Trb. 2009 No. 211)

7.27 JURISDICTION IN POLAR REGIONS

—Measures ATCM XXXI/1–14 and XXXII/1–15 to the Antarctic Treaty, with Annexes and Appendix, Madrid, 4 October 1991.
Parliamentary approval: not required, Article 7(b) Approval Act of 1994: Measures ATCM XXXI/1–14 and XXXII/1–XXXII/14. pending: Measure ATCM XXXII/15.
Entry into force: 11 September 2008: Measures ATCM XXXI/1–14. 15 July 2009: Measures ATCM XXXII/1–14.
(Trb. 2009 Nos. 8 and 218)

—Amendment to Annex II, with Annex, Baltimore, 17 April 2009, of the Protocol on environmental protection to the Antarctic Treaty, with Annexes and Appendix, Madrid, 4 October 1991.
Parliamentary approval: pending.
(Trb. 2009 No. 219)

8.11 FRONTIERS

See also: 16.56 (Trb. 2009 No. 58)

—Agreement between the Dutch Water Board ‘Rijn en IJssel’ (formerly known as the Polder District ‘Oude Rijn’) and the German Water Board ‘Netterdenscher Kanal’ on the water levels of the ‘Oude Rijn’, Doetinchem, 22 May 2008.
Parliamentary approval: not required, Article 7(b) Approval Act of 1994.
Entry into force: 22 May 2008.
(Trb. 2009 No. 76)

8.12 RELATIONS OF ‘VOISINAGE’
See: 8.11 (Trb. 2009 No. 76)

9. SEAS, WATERWAYS

—United Nations Convention on the Law of the Sea, with Annexes, Montego Bay, 10 December 1982.
Ratification: 13 February 2009 (for the Netherlands Antilles).
Entry into force: 13 February 2009 (for the Netherlands Antilles).
(Trb. 2009 No. 77)

—Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, New York, 28 July 1994.
Ratification: 13 February 2009 (for the Netherlands Antilles).
Entry into force: 13 February 2009 (for the Netherlands Antilles).
(Trb. 2009 No. 78)

9.124 WARSHIPS
See: 9.633 (Trb. 2009 Nos. 80, 89 and 197)

9.63 JURISDICTION OF A STATE ON THE HIGH SEAS
See: 9.633 (Trb. 2009 Nos. 80, 89 and 197)

9.633 PIRACY

—Regional Cooperation Agreement on combating piracy and armed robbery against ships in Asia, Tokyo, 11 November 2004.
Parliamentary approval: pending.
(Trb. 2009 No. 80)

—(1) Exchange of Letters, Nairobi, 15/24 April 2009, prolonging the (2) Exchange of Letters constituting the Agreement with Somalia concerning the protection tasks against piracy to be performed by the Netherlands armed forces with regard to humanitarian aid for Somalia, Nairobi, 1 April 2008.
Parliamentary approval: (1) not required, Article 7(e) Approval Act of 1994.
Entry into force: (1) 24 April 2009 (for the Netherlands).

Promulgation: 19 June 2009.
Prolongation: (2) 1 April 2010 (for the Netherlands).
Termination: (2) 1 April 2009 (for the Netherlands).
(Trb. 2009 No. 89)

—(1) Exchange of Letters, San Jose, 26 August/18 September 2009, prolonging the (2) Agreement with Panama concerning the protection tasks to be performed by the Netherlands armed forces of ships under the flag of Panama which provide humanitarian aid for Somalia, 24 April 2008.
Parliamentary approval: (1) not required, Article 7(e) Approval Act of 1994.
Entry into force: (1) 18 September 2009 (for the Netherlands).
Promulgation: 10 November 2009.
Prolongation: 18 September 2010 (for the Netherlands).
Termination: (2) 24 April 2009 (for the Netherlands).
(Trb. 2009 No. 197)

9.65 POLLUTION OF THE HIGH SEAS

—Amendments to Annex IV, 27 April 2001, of the International Convention for the prevention of pollution from ships, London, 17 February 1978.
Ratification: 14 May 2009 (for the Netherlands Antilles).
Entry into force: 14 May 2009 (for the Netherlands Antilles).
(Trb. 2009 No. 103)

9.92 INTERNATIONAL RIVERS

—Protocol on water and health, London, 17 June 1999, to the Convention on the protection and use of transboundary watercourses and international lakes, Helsinki, 17 March 1992.
Parliamentary approval: 6 June 2009, tacit.
Ratification: 25 June 2009 (for the Netherlands).
Entry into force: 23 September 2009 (for the Netherlands).
(Trb. 2009 No. 113)

9.922 SHIPPING ON INTERNATIONAL RIVERS

—Amendments, 30 November 2008, to the European agreement concerning the International carriage of dangerous goods by inland waterways (ADN), with Annexes, Geneva, 25 May 2000.
Entry into force: 28 February 2009 (for the Netherlands).
(Trb. 2009 No. 6)

—Protocol on combined transport on inland waterways to the European Agreement on important international transport lines and related installations (AGTC) of 1991, with Annexes, Geneva, 17 January 1997.
Parliamentary approval: 4 October 1999, tacit.
Ratification: 2 November 1999 (for the Netherlands).
Entry into force: 29 October 2009 (for the Netherlands).
(Trb. 2009 No. 121)

—Amendments, 15 October 2008, to Annex I–II of the European Agreement on main inland waterways of international importance (AGN), with Annexes, Geneva, 19 January 1996.
Parliamentary approval: not required, Article 7(f) Approval Act of 1994.
Entry into force: 15 October 2008 (for the Netherlands).
(Trb. 2009 No. 136)

9.924 POLLUTION OF INTERNATIONAL RIVERS
See: 9.922 (Trb. 2009 No. 6)

10.1 SOVEREIGNTY OVER AIR SPACE
See: 10.2 (Trb. 2009 No. 92)

10.2 AIR NAVIGATION

—(1) Decision 1/2008, Oslo, 10 December 2008, amending Annex I of the (2) Multilateral Agreement between the European Community and its Member States, Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Iceland, Serbia and Montenegro, Norway, Romania, and the United Nations Interim Administration Mission in Kosovo (UNMIK) on the establishment of an European Common Aviation Area (ECAA), with Annexes and Protocols, Luxembourg, 9 June 2006.
Ratification: (2) 26 February 2009 (for the Netherlands).
Entry into force: (1) 10 December 2008 (for the Netherlands).
(Trb. 2009 No. 92)

10.21 CIVIL AVIATION
See also: 4.64 (Trb. 2009 No. 29)

—Exchange of Notes constituting the Agreement with Russia concerning simplified regulations for the entrance and departure of the territory of the Netherlands and the territory of Russia for crew members of airline companies, Moscow, 28 November 2008.
Parliamentary approval: pending.
Provisional application: 28 December 2008 (for the Netherlands).
(Trb. 2009 No. 19)

—Exchange of Notes with South Africa, with Annex, Pretoria, 7 October 2009, amending the Agreement with South Africa for air services between and beyond their respective territories, Capetown, 26 May 1992.
Parliamentary approval: pending.
Promulgation: 1 December 2009.
Provisional application: 7 October 2009 (for the Netherlands).
(Trb. 2009 No. 216)

10.3 OUTER SPACE
See: 3.221 INMARSAT (Trb. 2009 No. 132)

12.273 OTHER JUDICIAL TRIBUNALS

Benelux Court of Justice

—Additional Protocol concerning the judicial protection of persons in the service of the Benelux Office for Intellectual Property (trademarks, drawings and models), Brussels, 24 October 2008.
Parliamentary approval: pending.
(Trb. 2009 No. 4)

International Criminal Tribunal for Rwanda (ICTR)

—Exchange of Letters with the International Criminal Tribunal for Rwanda constituting an Agreement for a witness staying on Netherlands territory for the International Criminal Tribunal for Rwanda, Arusha/The Hague, 3 March/4 April 2009.
Parliamentary approval: not required, Article 7(c) Approval Act of 1994.
Entry into force: 9 April 2009 (for the Netherlands).
Promulgation: 16 April 2009.
Duration: The Agreement shall remain in force for no longer than one year.
(Trb. 2009 No. 68)

International Tribunal for the Law of the Sea (ITLOS)
See: 3.2113 (Trb. 2009 No. 32)

Special Tribunal for Lebanon
See: 3.211 (Trb. 2009 No. 55)

13.14 UNILATERAL INTERVENTION
See: 9.633 (Trb. 2009 Nos. 89 and 197)

14.1122 AGGRESSION
See: 9.633 (Trb. 2009 Nos. 89 and 197)

14.1131 LIMITATION AND REDUCTION OF CONVENTIONAL WEAPONS

—Convention on cluster munitions, Dublin, 30 May 2008.
Parliamentary approval: pending.
Signature: 3 December 2008.
(Trb. 2009 No. 45)

14.125 HUMANITARIAN LAW ('DROIT HUMANITAIRE')
See also: 14.1131 (Trb. 2009 No. 45)

—Optional Protocol to the Convention on the rights of the child on the involvement of children in armed conflict, New York, 25 May 2000.
Parliamentary approval: by Kingdom Act of 18 December 2008.
Ratification: 24 September 2009.
Entry into force: 24 October 2009.
(Trb. 2009 No. 192)

16.1 GENERAL ECONOMIC AND FINANCIAL MATTERS

—Agreement with New Zealand on the holding of stocks of crude oil, major products and unfinished oils, Wellington, 1 April 2008.
Parliamentary approval: 16 November 2008, tacit.
Entry into force: 1 March 2009 (for the Netherlands).
(Trb. 2009 No. 27)

—Agreement with Cyprus on the reciprocal holding of stocks of crude oil and/or petroleum products, The Hague, 14 April 2008.
Parliamentary approval: 17 November 2008, tacit.
Entry into force: 1 July 2009 (for the Netherlands).
(Trb. 2009 No. 99)

16.112 MEASURES RESULTING IN PROMOTION OR RESTRICTION OF TRADE AND OTHER TRAFFIC OF GOODS
See: 4.64 (Trb. 2009 Nos. 7, 29, 50, 66, 94, 95, 96, 105 and 153); 16.55 (Trb. 2009 No. 67)

16.117 COMMODITY AGREEMENTS

—International Tropical Timber Agreement, with Annexes, Geneva, 26 January 1994.
Prolongation: this Agreement will be extended, in accordance with Article 46(3) of the Agreement, until the provisional or definitive entry into force of the new Agreement (for the Netherlands).
(Trb. 2009 No. 9)

—Council Decision, London, 9 June 2009, amending the Food Aid Convention of 1995, London, 1995.
Entry into force: 1 July 2009 (for the Netherlands).
(Trb. 2009 No. 117)

16.141 PROTECTION OF FOREIGN INVESTMENTS

—Agreement with Oman on encouragement and reciprocal protection of investments, Muscat, 17 January 2009.
Parliamentary approval: pending.
Authentic languages: Dutch, Arabic, English (English prevails).
(Trb. 2009 No. 28)

—Agreement with the Macao Special Administrative Region of China on the encouragement and reciprocal protection of investments, Macao, 22 May 2008.
Parliamentary approval: 2 March 2009, tacit.
Entry into force: 1 May 2009.
(Trb. 2009 No. 97)

—Agreement with Burundi on encouragement and reciprocal protection of investments, The Hague, 27 November 2002.
Parliamentary approval: 24 November 2008, tacit.
Entry into force: 1 August 2009.
(Trb. 2009 No. 107)

16.15 TAXES

—Agreement between the Netherlands in respect of the Aruba and Spain on the exchange of information relating to tax matters, Madrid, 24 November 2008.
Parliamentary approval: 23 October 2009, tacit.
Entry into force: 27 January 2010 (for Aruba).
Authentic languages: Dutch, Spanish and English (English prevails).
(Trb. 2009 Nos. 12 and 243)

—Agreement with the States of Guernsey for the exchange of information relating to tax matters, with Memorandum of Understanding, St. Peter Port, 25 April 2008.
Parliamentary approval: 7 March 2009, tacit.
Entry into force: 11 April 2009 (for the Netherlands).
(Trb. 2009 No. 98)

—Agreement with Bermuda (as authorised by the United Kingdom) for the exchange of information with respect to taxes, with Protocol, London, 8 June 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 108)

—Agreement with the Cayman Islands (as authorised by the United Kingdom) for the exchange of information with respect to taxes, with Protocol, London, 8 July 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 119)

—Agreement with Anguilla for the exchange of information relating to taxes, with Protocol, London, 22 July 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 130)

—Agreement with the Turks and Caicos Islands for the exchange of information relating to taxes, with Protocol, London, 22 July 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 131)

—Agreement between the Netherlands in respect of the Netherlands Antilles and Canada on exchange of information on tax matters, Vancouver, 29 August 2009.
Parliamentary approval: pending.
Authentic languages: Dutch, French and English (equally authentic).
(Trb. 2009 No. 154)

—Agreement between the Netherlands in respect of the Netherlands Antilles and Mexico for the exchange of information on tax matters, Mexico City, 1 September 2009.
Parliamentary approval: pending.
Authentic languages: Dutch, Spanish and English (English prevails).
(Trb. 2009 No. 155)

—Agreement with Saint Vincent and the Grenadines on the exchange of information relating to tax matters, Mexico City, 1 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 156)

—Agreement between the Netherlands in respect of Aruba and Saint Vincent and the Grenadines for the exchange of information relating to tax matters, Mexico City, 1 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 157)

—Agreement with Antigua and Barbuda for the exchange of information relating to tax matters, Mexico City, 2 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 158)

—Agreement with Saint Christopher (Saint Kitts) and Nevis on the exchange of information relating to tax matters, Mexico City, 2 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 159)

—Agreement between the Netherlands in respect of Aruba with Norway for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 163)

—Agreement to promote economic relations between the Netherlands in respect of Aruba and Norway, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 164)

—Agreement between the Netherlands in respect of the Netherlands Antilles with Denmark for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 165)

—Agreement to promote economic relations between the Netherlands in respect of the Netherlands Antilles and Denmark, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 166)

—Agreement between the Netherlands in respect of Aruba with Denmark for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 167)

—Agreement to promote economic relations between the Netherlands in respect of Aruba and Denmark, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 168)

—Agreement between the Netherlands in respect of the Netherlands Antilles with Greenland for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 169)

—Agreement between the Netherlands in respect of Aruba with Greenland for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 170)

—Agreement between the Netherlands in respect of the Netherlands Antilles with the Faroes for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 171)

—Agreement between the Netherlands in respect of Aruba with the Faroes for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 172)

—Agreement between the Netherlands in respect of the Netherlands Antilles with Sweden for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 173)

—Agreement to promote economic relations between the Netherlands in respect of the Netherlands Antilles and Sweden, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 174)

—Agreement between the Netherlands in respect of Aruba with Sweden for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 175)

—Agreement to promote economic relations between the Netherlands in respect of Aruba and Sweden, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 176)

—Agreement between the Netherlands in respect of the Netherlands Antilles and Finland for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 177)

—Agreement to promote economic relations between the Netherlands in respect of the Netherlands Antilles and Finland, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 178)

—Agreement between the Netherlands in respect of Aruba and Finland for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 179)

—Agreement to promote economic relations between the Netherlands in respect of Aruba and Finland, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 180)

—Agreement between the Netherlands in respect of the Netherlands Antilles and Iceland for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 181)

—Agreement to promote economic relations between the Netherlands in respect of the Netherlands Antilles and Iceland, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 182)

—Agreement between the Netherlands in respect of Aruba and Iceland for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 183)

—Agreement to promote economic relations between the Netherlands in respect of Aruba and Iceland, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 184)

—Agreement between the Netherlands in respect of the Netherlands Antilles and Saint Christopher (Saint Kitts) and Nevis for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 185)

—Agreement between the Netherlands in respect of Aruba and Saint Christopher (Saint Kitts) and Nevis for the exchange of information with respect to taxes, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 186)

—Agreement with the British Virgin Islands for the exchange of information with respect to taxes, with Protocol, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 187)

—Agreement between the Netherlands in respect of the Netherlands Antilles and the British Virgin Islands for the exchange of information with respect to taxes, with Protocol, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 188)

—Agreement between the Netherlands in respect of Aruba and the British Virgin Islands for the exchange of information with respect to taxes, with Protocol, Paris, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 189)

—Agreement with Samoa for the exchange of information with respect to taxes, with Protocol, Apia, 10 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 193)

—Agreement between the Netherlands in respect of the Netherlands Antilles and Bermuda (as authorised by the United Kingdom) for the exchange of information with respect to taxes, with Protocol, Hamilton, 28 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 200)

—Agreement between the Netherlands in respect of the Netherlands Antilles and Saint Vicent and the Grenadines for the exchange of information with respect to taxes, Willemstad, 28 September 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 201)

—Agreement with the States of Guernsey on the access to mutual Agreements procedures in connection with the adjustment of profits of associates enterprises and the application of the Netherlands participation exemption, with Memorandum of Understanding, St. Peter Port, 25 April 2008.
Parliamentary approval: 19 February 2009, tacit.

Entry into force: 5 November 2009 (for the Netherlands).
(Trb. 2009 No. 212)

—Agreement between the Netherlands in respect of Aruba and Bermuda (as authorised by the United Kingdom) for the exchange of information with respect to taxes, with Protocol, Hamilton, 20 October 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 215)

—Agreement between the Netherlands in respect of the Netherlands Antilles and the Cayman Islands as authorised form the letter of entrustment dated 1 September 2009 from the United Kingdom for the exchange of information with respect to taxes, with Protocol, Willemstad, 29 October 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 217)

—Agreement between the Netherlands in respect of the Netherlands Antilles and Saint Lucia for the exchange of information with respect to taxes, Willemstad, 29 October 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 220)

—Agreement between the Netherlands in respect of the Netherlands Antilles and Antigua and Barbuda for the exchange of information with respect to taxes, Willemstad, 29 October 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 221)

—Agreement with the Cook Islands for the exchange of information relating to tax matters, with Protocol, Rarotonga, 23 October 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 235)

—Agreement between the Netherlands in respect of the Netherlands Antilles and Spain for the exchange of information relating to tax matters, Madrid, 10 June 2008.
Parliamentary approval: 23 October 2009, tacit.
Entry into force: 27 January 2010 (for the Netherlands).
(Trb. 2009 No. 242)

16.152 DOUBLE TAXATION

—Convention with South Africa for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, with Protocol, Cape Town, 15 March 1971.
Termination: 28 December 2005.
(Trb. 2009 No. 1)

—Protocol, 11 December 2008, Mexico City, amending the Agreement with Mexico for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, with Protocol, The Hague, 27 September 1993.
Parliamentary approval: pending.
Authentic languages: Dutch, Spanish (equally authentic).
(Trb. 2009 No. 16)

—Agreement with the Socialist Federal Republic of Yugoslavia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, with Protocol, Belgrade, 22 February 1982.
Termination: 31 December 2009 (for Slovenia).
(Trb. 2009 No. 34)

—Council Decision 2008/492/EC, Luxembourg, 23 June 2008, concerning the accession of Bulgaria and Romania to the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, Brussels, 23 July 1990.
Entry into force: 1 July 2008.
(Trb. 2009 No. 39)

—Protocol, Vienna, 8 October 2008, amending the Agreement with Austria for the avoidance of double taxation with respect to taxes on income and capital, with Final Protocol, Vienna on 1 September 1970, as amended by the Protocol, The Hague, 18 December 1989, and the Protocol, The Hague, 26 November 2001.
Parliamentary approval: 10 April 2009, tacit.
Entry into force: 22 May 2009 (for the Netherlands).
(Trb. 2009 No. 81)

—Protocol, Tallinn, 26 June 2008, amending the Convention with Estonia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, with Protocol, Talinn, 14 March 1997.
Parliamentary approval: 6 December 2008, tacit.
Entry into force: 22 May 2009 (for the Netherlands).
(Trb. 2009 No. 83)

—Protocol, The Hague, 29 May 2009, amending the Convention with Luxembourg for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, with Protocol, The Hague, 8 May 1968, as amended, Luxembourg, 16 October 1990.
Parliamentary approval: pending.
(Trb. 2009 No. 100)

—Agreement with Bermuda (as authorised by the United Kingdom) for the avoidance of double taxation on individuals, London, 8 June 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 109)

—Agreement with Bermuda (as authorised by the United Kingdom) on the access to mutual agreements procedures in connection with the adjustment of profits of associated enterprises, London, 8 June 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 110)

—Agreement with Bermuda (as authorised by the United Kingdom) on the avoidance of double taxation with respect to enterprises operating ships or aircraft in international traffic, London, 8 June 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 111)

—Protocol, Berlin, 23 June 2009, amending the Convention with Belgium for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, with Protocols, Luxembourg, 5 June 2001.
Parliamentary approval: pending.
Authentic languages: Dutch, French (equally authentic).
(Trb. 2009 No. 116)

—Mutual Agreement on the Implementation of Article 25(2), The Hague, 2 October 2008, of the Convention with the United Kingdom for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains, with Protocol, London, 26 September 2008.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 123)

—Protocol, The Hague, 25 August 2009, amending the Convention with Singapore for the avoidance of double taxation and the prevention of fiscal evasion

with respect to taxes on income and on capital, with Protocol, Singapore, 19 February 1971.
Parliamentary approval: pending.
Authentic languages: Dutch, English (equally authentic).
(Trb. 2009 No. 145)

—Protocol, with Additional Protocol, The Hague, 8 September 2009, amending the Agreement with Austria for the avoidance of double taxation with respect to taxes on income and capital, with Final Protocol, Vienna on 1 September 1970, as amended by the Protocol, The Hague, 18 December 1989, the Protocol, The Hague, 26 November 2001, and the Protocol, Vienna, 8 October 2008.
Parliamentary approval: pending.
Authentic languages: Dutch, German (equally authentic).
(Trb. 2009 No. 160)

—Protocol between the Netherlands in respect of the Netherlands Antilles and Norway, Paris, 10 September 2009, amending the Convention between the Netherlands in respect of the Netherlands Antilles and Norway for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, Willemstad, 13 November 1989.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 162)

—Protocol, The Hague, 27 November 2009, amending the Convention with Barbados for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, with Protocol, Bridgetown, 28 November 2006.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 229)

16.163 MINERAL RESOURCES
See: 16.1 (Trb. 2009 Nos. 27 and 99)

16.181 PEACEFUL USE OF NUCLEAR ENERGY

—Agreement, Paris, 9 February 2009, amending the Exchange of Letters with France concerning the possible return of radioactive waste remaining after the reprocessing of irradiated nuclear fuel, Paris, 29 May 1979.
Parliamentary approval: pending.
Authentic languages: Dutch, French (equally authentic).
(Trb. 2009 No. 41)

16.2 INTERNATIONAL LEGAL ASPECTS OF ECONOMIC DEVELOPMENT AND DEVELOPMENT CO-OPERATION

—Stepping Stone Partnership Agreement between the European Communities and their Member States, of the one part, and Ivory Coast, of the other part, with Annexes and Protocols, Brussels, 22 January 2009.
Parliamentary approval: pending.
Signature: 26 November 2008.
(Trb. 2009 No. 72)

—Stepping Stone Partnership Agreement between the European Communities and their Member States, of the one part, and Cameroon, of the other part, with Annexes and Protocols, Brussels, 22 January 2009.
Parliamentary approval: pending.
Signature: 15 January 2009.
(Trb. 2009 No. 73)

—(1) Decision No 1/2008 of the ACP-EC Council of Ministers of 13 June 2008 regarding the revision of the terms and conditions of financing for short-term fluctuations in export earnings, Addis Abeba, 13 June 2008.

(2) Agreement, Luxembourg, 25 June 2005, amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, Cotonou, 23 June 2000.
Ratification: (2) 16 November 2007 (for the Netherlands).
Entry into force: (1) 13 June 2008 (for the Netherlands). (2) 1 July 2008 (for the Netherlands).
(Trb. 2009 No. 207)

—Agreement with Dahomey on the employment of Netherlands Volunteers in Dahomey, 2 August 1972.
Parliamentary approval: 2 June 2009, tacit.
Termination: 18 May 2010 (for the Netherlands).
(Trb. 2009 No. 228)

16.42 ROAD TRAFFIC AND TRANSPORT

See also: 16.51 (Trb. 2009 No. 161)

—Amendments, 11 July/15 October 2008, to the Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted and/or used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions as signed in Geneva, 20 March 1958.

Parliamentary approval: not required, Article 7(b) Approval Act of 1994.
(Trb. 2009 No. 5)

—Amendments, 2 February 2008, to the Customs Convention on the international transport of goods under cover of TIR Carnets (TIR Convention), with Annexes, Geneva, 14 November 1975.
Parliamentary approval: 28 December 2008, tacit.
Entry into force: 1 January 2009.
(Trb. 2009 No. 30)

—Amendments to Annex 1–2, 6 March 2008, of the Agreement on international carriage of perishable food and on the special equipment to be used for such carriage (ATP), Geneva, 1 September 1990.
Parliamentary approval: not required, Article 7(f) Approval Act of 1994.
Entry into force: 6 December 2009 (for the Netherlands).
(Trb. 2009 No. 112)

—Modifications to Annex I, 30 March 2009, to the European Agreement on main international traffic arteries (AGR), with Annexes, Geneva, 15 November 1975.
Parliamentary approval: not required, Article 7(f) Approval Act of 1994.
Entry into force: 14 January 2010 (for the Netherlands).
(Trb. 2009 No. 204)

16.43 RAIL TRAFFIC AND TRANSPORT

—Amendments, 18 March 2008, to the European Agreement on important international combined transport lines and related installations (AGTC), with Annexes, Geneva, 1 February 1991.
Parliamentary approval: not required, Article 7(b) Approval Act of 1994.
Entry into force: 23 May 2006 (for the Netherlands).
Promulgation: 13 May 2006.
(Trb. 2009 No. 61)

—Amendments, 18 March 2008, to Articles 14, 15 and 16 of the European Agreement on important international combined transport lines and related installations (AGTC), with Annexes, Geneva, 1 February 1991.
Entry into force: 10 December 2009 (for the Netherlands).
(Trb. 2009 No. 152)

16.441 SEA TRAFFIC (INCLUDING COLLISIONS, ASSISTANCE, SALVAGE)

—International Convention for the safety of life at sea, with Annex, London, 1 November 1974, amended by:

(1) Resolution MSC.194(80), with Annex, 20 May 2005,
(2) Resolution MSC.216(82), with Annex, 8 December 2006,
(3) Resolution MSC.239(83), with Annex, 12 October 2007,
(4) Resolution MSC.256(84), with Annex, 16 May 2008,
(5) Resolution MSC.257(84), with Annex, 16 May 2008,
(6) Resolution MSC.269(85), with Annex, 4 December 2008.
(7) Resolution MSC.282(86), with Annex, 5 June 2009.

Parliamentary approval: (4) (5), (6), (7) not required, Article 7(f) Approval Act of 1994.
Entry into force: (1) (2) 1 January 2009. (3) 1 July 2009. (4) (5) 1 January 2010. (6) 1 July 2010: Annex I. (6) 1 January 2011: Annex II.
(Trb. 2009 Nos. 84 and 147)

—(1) Resolution MSC.240(83), with Annex, 12 October 2007,
(2) Resolution MSC.258(84), with Annex, 16 May 2008,
(3) Resolution MSC.283(86), with Annex, 5 June 2009,
amending the Protocol relating to the International Convention for the safety of life at sea, 1974, with Annexes, London, 11 November 1988.
Parliamentary approval: (2) (3) not required, Article 7(f) Approval Act of 1994.
Entry into force: (1) 1 July 2009. (2) 1 January 2010.
(Trb. 2009 No. 148)

—Amendments, 1 December 2005, to Annex III of the international Convention on load lines, with Annexes, London, 5 April 1966.
Entry into force: 3 February 2010.
(Trb. 2009 No. 149)

—Amendments, with Annex, 4 December 2008, to the Protocol relating to the International Convention on load liners, 1966, with Annexes, London, 11 November 1988.
Parliamentary approval: not_required, Article 7(f) Approval Act of 1994.
(Trb. 2009 No. 150)

16.442 MARITIME TRANSPORT

—(1) Protocol, 31 March 2009, amending the (2)Agreement on maritime transport between the European Community and its Member States, of the one part, and the People's Republic of China, of the other part, with (3)Protocol of 5 September 2005, Brussels, 6 December 2002.
Parliamentary approval: (1) not required, Article 7(a) Approval Act of 1994 in conjunction with Article 2 Kingdom Act of 15 June 2006.

Ratification: (1) 27 October 2009 (for the Netherlands). (2) 11 July 2003 (for the Netherlands). 3) 31 January 2008 (for the Netherlands).
Signature: (1) 31 March 2009.
Entry into force: (1) 27 October 2009 (for the Netherlands). (2) (3) 1 March 2008 (for the Netherlands).
(Trb. 2009 Nos. 93 and 236)

16.45 AIR TRAFFIC AND TRANSPORT
See: 10.21 (Trb. 2009 No. 19)

16.47 TELECOMMUNICATIONS

—(1) Radio Regulations WRC-07, Geneva, 22 October–16 November 2007.
(2) Radio Regulations WRC-97, Geneva, 21 November 1997.
(2) Radio Regulations WRC-2000, Istanbul, 2 July 2000.
(3) Radio Regulations WRC-03, Geneva, 9 June–14 July 2003.
(4) Regional Agreement for the European Broadcasting Area (EBU), Stockholm, 23 June 1961.
(4) Protocol, Geneva, 16 June 2006, revising certain parts of the Regional Agreement for the European Broadcasting Area (EBU), Stockholm, 23 June 1961.
(4) Regional Agreement relating to the planning of the digital territorial broadcast service, Geneva, 16 June 2006.
Parliamentary approval: (1) not required, Article 7(b) Approval Act of 1994.
Ratification: (1) 8 July 2009. (2) (3) 19 December 2007.
Entry into force: (1) 8 July 2009. (2) (3) 19 December 2007. (4) 15 February 2008 (for the Netherlands).
Promulgation: 4 March 2009.
Provisional application: (1) 1 January 2009, in accordance with Article 54 of the Statute of the International Telecommunication Union.
(Trb. 2009 Nos. 20 and 142)

16.5 SOCIAL AND HEALTH MATTERS
See also: 4.7 (Trb. 2009 No. 194)

—Additional Agreement, Ankara, 16 April 2009, to the Agreement with Turkey, Ankara, 6 January 2000, in accordance with articles 7 and 26 of the European Convention on social security 1972, and amending the Agreement on social security with Turkey, 5 April 1966, with Final Protocol and Additional Agreement.
Parliamentary approval: pending.
Authentic languages: Dutch, Turkish and French (French prevails).
(Trb. 2009 No. 79)

—Agreement with India on social security, with Administrative Arrangement, New Delhi, 22 October 2009.
Parliamentary approval: pending.
Authentic language: English.
(Trb. 2009 No. 213)

16.51 LABOUR AND RELATED MATTERS

See also: 14.125 (Trb. 2009 No. 192)

—Maternity Protection Convention (Revised), Geneva, 28 June 1952.
Termination: 15 January 2010 (for the Netherlands).
(Trb. 2009 No. 56)

—Convention concerning the revision of the Maternity Protection Convention (Revised) 1952, with Recommendation, Geneva, 15 June 2000.
Parliamentary approval: 31 October 2008, tacit.
Ratification: 15 January 2009 (for the Netherlands).
Entry into force: 15 January 2010 (for the Netherlands).
(Trb. 2009 No. 57)

—(1) Amendments, with (2) Annexes and Appendices, 20 March 2009, to the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR), Geneva, 1 July 1970.
Parliamentary approval: (1) pending. (2) not required, Article 7(f) Approval Act of 1994.
Entry into force: (1) (2) 20 June 2010, in accordance with Article 21(5)(b) of the Agreement (between the Netherlands and Finland).
(Trb. 2009 No. 161)

16.54 HEALTH MATTERS

See also: 9.92 (Trb. 2009 No. 113)

—Exchange of Letters, Canberra, 2 July 2009, amending the Agreement with Australia concerning the provision of medical treatment, Canberra, 5 April 1991.
Parliamentary approval: pending.
(Trb. 2009 No. 135)

16.55 ENVIRONMENTAL QUESTIONS

See also: 7.27 (Trb. 2009 Nos. 8, 218 and 219)

—Amendments to Annex III, 31 October 2008, of the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade, with Annexes, Rotterdam, 10 September 1998.
Parliamentary approval: not required, Article 7(f) Approval Act of 1994.
Entry into force: 1 February 2009 (for the Netherlands).
Promulgation: 7 May 2009.
(Trb. 2009 No. 67)

—Protocol on pollutant release and transfer registers, with Annexes, Kiev, 21 May 2003.
Parliamentary approval: by Act of 20 December 2007.
Ratification: 11 February 2008 (for the Netherlands).
Entry into force: 8 October 2009 (for the Netherlands).
(Trb. 2009 No. 129)

16.56 ACCIDENTS AND DISASTERS
See also: 9.633 (Trb. 2009 Nos. 89 and 197)

—Memorandum of Understanding with Belgium and Luxembourg on cooperation concerning the control over crises with possible cross-border consequences, Luxembourg, 1 June 2006.
Parliamentary approval: pending.
Signature: 1 June 2006.
(Trb. 2009 No. 58)

16.6 CULTURAL MATTERS
See: 16.61 (Trb. 2009 No. 137)

16.61 CULTURAL AGREEMENTS

—Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, Paris, 14 November 1970.
Parliamentary approval: by Kingdom Act of 12 June 2009.
Ratification: 17 July 2009.
Entry into force: 17 October 2009 (for the Netherlands).
(Trb. 2009 No. 137)

—Convention on the protection and promotion of the diversity of cultural expressions, with Annex, Paris, 20 October 2005.
Parliamentary approval: 1 July 2009, tacit.
Ratification: 9 October 2009 (for the Netherlands).
Entry into force: 9 January 2010 (for the Netherlands).
(Trb. 2009 No. 222)

16.66 SPORTS

—Anti-doping Convention, with Annex, Strasbourg, 16 November 1989.
Ratification: 6 November 2008 (for the Netherlands Antilles).
Entry into force: 1 January 2009 (for the Netherlands Antilles).
Promulgation: 28 February 2009.
(Trb. 2009 No. 24)

—International Convention against doping in sport, with Annexes and Attachments, Paris, 19 October 2005.
Ratification: 12 May 2009 (for the Netherlands Antilles).
Entry into force: 1 July 2009 (for the Netherlands Antilles).
(Trb. 2009 No. 102)

16.721 PRIVATE LAW

See also: 16.61 (Trb. 2009 No. 137)

—Convention on international interests in mobile equipment, with Protocol and Annex, Cape Town, 16 November 2001.
Parliamentary approval: pending.
(Trb. 2009 No. 86)

—European Convention on the adoption of children (revised), Strasbourg, 27 November 2008.
Parliamentary approval: pending.
(Trb. 2009 No. 141)

16.723 INTELLECTUAL PROPERTY

—Amendments, (1) (2) 29 September 2008, to the Regulations of the Patent Cooperation Treaty (PTC), with Regulation, Washington, 19 June 1970.
Entry into force: (1) 1 January 2009. (2) 1 July 2009.
Promulgation: 12 February 2009.
(Trb. 2009 No. 13)

—Protocol, (1) 25 May 2007/(2) 4 August 2009, amending the Regulations of Implementation to the Benelux Treaty concerning intellectual property (trademarks, drawings and models), with Protocol, The Hague, 25 February 2005.
Entry into force: (1) 17 May 2009 (for the Netherlands). (2) 1 October 2009 (for the Netherlands).
Promulgation: (1) 17 April 2009.
(Trb. 2009 Nos. 60 and 122)

—Amendments, 1 October 2003, to the Regulations of the Patent Cooperation Treaty (PTC), with Regulation, Washington, 19 June 1970.
Parliamentary approval: 16 May 2008, tacit.
Ratification: 16 October 2008.
(Trb. 2009 No. 128)

16.725 PRIVATE INTERNATIONAL LAW

—Convention on choice of court agreements, The Hague, 30 June 2005.
Parliamentary approval: pending.
Authentic languages: French, English (equally authentic).
(Trb. 2009 No. 31)

—Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, with Protocols and Declarations, Lugano, 16 September 1988.
Termination: 1 January 2010.
(Trb. 2009 No. 223)

16.726 CRIMINAL LAW
See also: 4.64 (Trb. 2009 No. 202); 16.66 (Trb. 2009 No. 102)

—Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities' financial interests, with Joint Declaration, Brussels, 19 June 1997.
Parliamentary approval: by Act of 22 June 2001.
Ratification: 28 March 2002 (for the Netherlands).
Entry into force: 19 May 2009 (for the Netherlands).
(Trb. 2009 No. 62)

16.728 ADMINISTRATIVE LAW
See also: 4.64 (Trb. 2009 Nos. 7, 50, 66, 91, 105 153 and 225)

—Treaty concerning a European vehicle and driving licence information system (EUCARIS), Luxembourg, 29 June 2000
Parliamentary approval: 8 April 2001, tacit.
Entry into force: 1 May 2009 (for the Netherlands).
(Trb. 2009 No. 69)

—Additional Protocol, Utrecht, 16 November 2009, to the European Charter on local self-government, Strasbourg, 15 October 1985
Parliamentary approval: pending.
Signature: 16 November 2009.
(Trb. 2009 No. 227)

Chapter 12
Netherlands Municipal Legislation Involving Questions of Public International Law, 2009

M. A. van der Harst

This survey covers municipal regulations relevant to international law that could not be dealt with adequately in the State Practice section. Translations of all or part of the text are usually given, together with descriptive or analytical notes where appropriate.

The information is derived from the Staatsblad and Staatscourant which are available in Dutch at www.overheid.nl/op/index.html. The Yearbook surveys are also available in a consolidated way in a database at www.asser.nl/pil/index.html.

3.2113 PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

Order of the State Secretary for Justice of 10 July 2009, No. WBV 2009/14, Amending the Aliens Circular 2000 (Stc. 2009 No. 11452)

Under the terms of the Headquarters Agreement between the International Criminal Court and the host State (the Netherlands[1]), the stay of journalists, staff of non-governmental organisations and staff of legal associations who perform activities for the benefit of the International Criminal Court, should be facilitated. In accordance with a letter of 21 December 2007 from the Permanent Mission of

[1] Trb. 2007 No. 125.

Translated by P. Kell.

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the Kingdom of the Netherlands to the United Nations, belonging with the Agreement concluded in New York on 21 December 2007 between the Kingdom of the Netherlands and the United Nations concerning the Seat of the Special Tribunal for Lebanon,[2] this arrangement also applies to the above-mentioned categories of alien who are involved in the work of the Special Tribunal for Lebanon in Leidschendam. As a result of this amendment to the Aliens Circular, journalists, staff of non-governmental organisations and staff of legal associations who are connected with the International Criminal Court or the Special Tribunal for Lebanon are issued with a temporary residence permit pursuant to Article 3.4, paragraph 3, of the Aliens Decree.

In anticipation of the implementation of the 'modern migration policy' which recently became law, the stay of family members of military personnel employed at the Joint Force Command headquarters in Brunssum is brought into line with the existing family reunification policy. Use is made for this purpose of the possibility provided by Article 3.13, paragraph 2, of the Aliens Decree. Under this article, a residence permit may also be granted in cases other than those referred to in Article 3.13, paragraph 1, of the Aliens Decree, subject to a limitation connected with family reunification or family formation.

The Order entered into force on 29 July 2009.[3]

3.221 UNIVERSAL ORGANIZATIONS

United Nations

See: 3.2113, 12.273

3.222 REGIONAL ORGANIZATIONS

North Atlantic Treaty Organization

See: 3.2113

3.223 ORGANIZATIONS CONSTITUTING INTEGRATED COMMUNITIES

European Community (EC)

See: 16.112

4.31 ADMITTANCE OF ALIENS

See: 3.2113

4.63 EXTRADITION

See: 12.273

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[2] Trb. 2007 No. 228.

[3] Stc. 2009 No. 11452.

4.64 OTHER ASSISTANCE IN CRIMINAL MATTERS
See: 12.273

6. THE LAW OF TREATIES

Kingdom Act of 27 November 2008 Amending the Kingdom Act on the Approval and Publication of Treaties in Connection with the Electronic Publication of Treaties and of Decisions of International Organisations and Their Availability in Consolidated Form (*Stb.* 2008 No. 552)

Article 16 of the Kingdom Act on the Approval and Publication of Treaties[4] is to read as follows:

'1. Treaties and decisions of international organisations shall be published in the Tractatenblad van het Koninkrijk der Nederlanden [Treaty Series of the Kingdom of the Netherlands].

2. Our Minister of Foreign Affairs shall publish the Tractatenblad.

3. The Tractatenblad shall be published electronically in a generally accessible manner.

4. After its publication the Tractatenblad shall remain available electronically in a generally accessible manner.

5. No costs shall be charged for consulting the Tractatenblad.

6. Rules shall be laid down by ministerial order concerning the publication and continued availability of the Tractatenblad.'

The following articles are inserted after Article 16:

Article 16a

'If electronic publication of the Tractatenblad in the manner referred to in Article 16 is wholly or partly impossible, Our Minister of Foreign Affairs shall arrange for a replacement publication in accordance with rules to be laid down by ministerial order.'

Article 16b

'1. A paper copy of the Tractatenblad shall be supplied on request to any person at no more than cost price.

2. Our Minister of Foreign Affairs shall designate a publication office where a copy can be obtained.'

[4] See also 26 NYIL (1995), pp. 316–320.

Article 16c

'1. The texts of any translations into Dutch of the treaties and decisions of international organisations published pursuant to this Act shall be available in consolidated form for every person by means of a generally accessible electronic medium designated by ministerial order.

2. Categories of treaties and of decisions of international organisations to which paragraph 1 does not apply may be designated by ministerial order.

3. A consolidated text of a treaty or of a decision of an international organisation which has been made available pursuant to paragraph 1 shall remain available if the treaty or decision has been changed, suspended or revoked since it became available.'

The Act entered into force on 1 July 2009.[5]

Order of the Minister of Foreign Affairs of 5 December 2008, No. DJZ/BR/1140-08, Containing Further Rules on the Electronic Publication of Treaties and of Decisions of International Organisations (Tractatenblad (Electronic Publication) Order) (Stc. 2008 No. 247)

This Order serves to implement Articles 16, 16a and 16b of the Kingdom Act of 27 November 2008 referred to above. The main provisions of the Order are as follows:

Article 1

'1. The Tractatenblad shall be published at the internet address www.officielebekendmakingen.nl.

2. The date of publication shall be stated in the Tractatenblad.

3. The Minister of Foreign Affairs shall arrange for the Tractatenblad to remain available at the internet address referred to in paragraph 1 after publication.'

…

Article 3

'Replacement publication of the Staatsblad [Bulletin of Acts and Decrees] or the Staatscourant [Government Gazette], as the case may be, as referred to in Article 9 of the Publication Act shall occur:

(a) by means of publication at a replacement internet address to be designated by the Minister of Justice or the Minister of the Interior and Kingdom Relations, as the case may be;

[5] Stb. 2009 No. 275.

(b) by means of a paper publication to be issued by an emergency distribution centre organised by the publication office referred to in Article 4; or
(c) in such other way as the Minister of Justice or the Minister of the Interior and Kingdom Relations, as the case may be, may determine.'

The Order entered into force on 1 July 2009.[6]

9.1 THE TERRITORIAL SEA

Kingdom Act of 25 February 2008 Regulating the Duties and Powers and the Administration and Policy of the Coastguard for the Netherlands Antilles and Aruba (Coastguard for the Netherlands Antilles and Aruba Kingdom Act) (Stb. 2008 No. 98)

The aim of the Kingdom Act is to provide a permanent statutory framework for the coastguard for the Netherlands Antilles and Aruba. The following provisions are of importance:

Article 2

'… 3. The supervisory and investigative duties are:

(a) general police duties, including operations to combat the trafficking and smuggling of drugs,
(b) counterterrorism,
(c) border control,
(d) customs control,
(e) environmental and fishing control, and
(f) control of shipping, including shipping movements and ship equipment.

4. The service-oriented duties are:

(a) handling shipping traffic in emergency or urgent situations and safety traffic,
(b) providing assistance and emergency rescue.

5. Further rules relating to the duties of the Coastguard as referred to in this article may be laid down by or pursuant to order in council.'

Article 3

'The Coastguard shall exercise its duties in the following waters and the airspace above them:

(a) the inland waters of the Netherlands Antilles and of Aruba;

6 *Stc*. 2008 No. 2202.

(b) the territorial waters of the Netherlands Antilles and of Aruba;
(c) the contiguous zone and the other marine areas in the Caribbean Sea, subject to the provisions of Article 11.'

Article 4

'1. To implement the supervisory and investigative duties the commanding officer designated by Our Minister is authorised to require the master of a vessel:

(a) upon being called or hailed, to heave to and stop the vessel or to manoeuvre it in such a way as to provide access to the vessel;
(b) to take the necessary measures to grant the commanding officer or crew designated by him with access to the vessel, or
(c) to sail the vessel that has been called or hailed in a direction indicated or yet to be indicated by the commanding officer and to moor, anchor or beach the vessel at a designated place.

2. Rules about the manner in which the instructions referred to in paragraph 1 are given may be laid down by order of Our Minister.'

…

Article 9

'Coastguard vessels are authorised to exercise the right of hot pursuit referred to in Article 111 of the Convention on the Law of the Sea. The orders and signals referred to in that article shall be given only by or on the instructions of the commanding officer.'

Article 10

'1. The commanding officer and persons on board designated by him are competent to use force in the lawful exercise of their powers in performing the duties of the Coastguard if this is justified by the intended objective, taking account among other things of the dangers associated with the use of force, and if this objective cannot be achieved in any other way. If possible, the use of force shall be preceded by a warning.

2. The exercise of the power referred to in paragraph 1 should be reasonable and moderate in relation to the proposed objective.

3. Rules about the use of force as referred to in paragraphs 1 and 2 may be laid down by Kingdom order in council on the recommendation of Our Minister.'

Article 11

'The powers granted by this Act for the exercise of the duties referred to in Article 2, paragraph 3, may be exercised outside the territorial waters of the Netherlands Antilles and of Aruba insofar as this is permitted by international law and interregional law.'

The Kingdom Act entered into force on 1 May 2009.[7]

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[7] Stb. 2009 No. 114; see also 39 NYIL (2008), p. 271.

Decree of 7 January 2009 Containing Provisions Implementing the Coastguard for the Netherlands Antilles and Aruba Kingdom Act (Coastguard for the Netherlands Antilles and Aruba Implementing Decree) (Stb. 2009 No. 114)

This decree implements the Coastguard for the Netherlands Antilles and Aruba Kingdom Act.[8] It contains provisions concerning the external characteristics of coastguard vessels and aircraft and concerning the instructions for the use of force by Coastguard personnel.

The decree entered into force on 1 May 2009.[9]

9.2 THE CONTIGUOUS ZONE
See: 9.1

9.63 JURISDICTION OF A STATE ON THE HIGH SEAS
See: 9.1

9.631 HOT PURSUIT
See: 9.1

9.8 INLAND AND LAND-LOCKED SEAS
See: 9.1

11.31 TERRORISM

Act of 12 June 2009 Amending the Criminal Code, the Code of Criminal Procedure and Certain Related Acts to Provide That Participating and Cooperating in Training for Terrorism Constitute Criminal Offences and to Expand the Scope for Disqualification from a Profession as an Additional Sentence and Certain Other Amendments (Stb. 2009 No. 245)

The aim of the Act is to amend the Criminal Code and other statutes to take account of recent legal developments, for example in the international field. These include making it a criminal offence to participate or cooperate in training for terrorism.

A new Article 83b is inserted and reads as follows:

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[8] Supra.

[9] Stb. 2009 No. 114.

'The indictable offence of preparing or facilitating a terrorist offence is deemed to mean each of the indictable offences defined in Article 131, paragraph 2, Article 132, paragraph 3, Article 205, paragraph 3, Article 225, paragraph 3, Article 285, paragraph 4, Article 311, paragraph 1 (6°), Article 312, paragraph 2 (5°), Article 317, paragraph 3, in conjunction with Article 312, paragraph 2 (5°), Article 318, paragraph 2, Article 322a, Article 326, paragraph 2, and Article 354a.'

Article 132, paragraph 3, will read as follows:

'3. If the criminal offence the commission of which is provoked in writing or by image is a terrorist offence or an offence which intended to prepare or facilitate a terrorist offence, the term of imprisonment for the offence described in paragraph 1 shall be increased by a third.'

The changes to the law entered into force on 1 April 2010.[10]

12.273 SPECIAL TRIBUNAL FOR LEBANON
See also: 3.2113

Act of 29 December 2008 Containing Provisions Connected with the Establishment of the Special Tribunal for Lebanon, Partly for the Purpose of Implementing Resolution 1757 of the Security Council of the United Nations of 30 May 2007 (Special Tribunal for Lebanon Implementing Act) (Stb. 2009 No. 40)

The aim of the Act is to introduce statutory provisions governing the prosecution by the Special Tribunal for Lebanon of the persons responsible for the attack of 14 February 2005, which resulted in the death of the former Lebanese prime minister Rafiq Hariri and others. This is pursuant, inter alia, to Resolution 1757 of the Security Council of the United Nations of 30 May 2007 (which acted pursuant to Chapter VII of the Charter of the United Nations) and the entry into force, as indicated in Resolution 1757, of the provisions of the Annex to the Resolution, including the Statute of the Special Tribunal for Lebanon on 10 June 2007.

Article 2

'At the request of the Special Tribunal people may be handed over to the Special Tribunal for the prosecution and trial of criminal offences in respect of which the Special Tribunal has jurisdiction under its Statute …'

…

[10] Stb. 2010 No. 139.

Article 4

'1. The District Court of The Hague has exclusive jurisdiction to hear these requests of the Special Tribunal…'

…

Article 6

'People who are present in the Netherlands and have been summoned by the Special Tribunal to appear as a witness or expert may be apprehended on the orders of the public prosecutor in The Hague and brought before the Special Tribunal.'

Article 7

'1. The transit of suspects and other persons who are handed over by the authorities of a foreign State to the Special Tribunal or who have been handed over or have come to the Netherlands at the request of the Special Tribunal shall take place on behalf of the Special Tribunal by and under the guard of Dutch officials designated by Our Minister …'

…

Article 9

'1. Requests of the Special Tribunal for any form of assistance in criminal matters which are addressed to a judicial or police authority in the Netherlands, whether named or otherwise, shall be granted wherever possible …'

Article 10

'1. Witnesses or experts, of any nationality whatever, who comply with a writ or summons issued by the Special Tribunal or who come to the Netherlands as a consequence of a warrant ordering that they be brought before the Special Tribunal may not be prosecuted, apprehended or subjected to any other custodial measures in the Netherlands for offences or convictions that preceded their arrival in the Netherlands…'

The Act entered into force on 6 February 2009.[11]

16.112 MEASURES RESULTING IN PROMOTION OR RESTRICTION OF TRADE AND OTHER TRAFFIC OF GOODS

Decree of 20 August 2009 Amending the Strategic Goods Decree in Connection with Council Regulation (EC) No. 428/2009 Setting Up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-Use Items (Stb. 2009 No. 359)

[11] Stb. 2009 No. 40.

The Decree implements the transit regime provided for in the Regulation. The two most important changes from Council Regulation (EC) No. 1334/2000 are the addition of controls on brokering services (Article 5) and on transit (Article 6). As the Strategic Goods Decree relates only to the cross-border movement of physical goods, it is not possible to include provisions on brokering in this Decree. This has therefore been regulated separately in the Brokering Services Sanctions Order 2009.[12]

In principle, transit control for dual-use goods applies to the goods listed in Annex I to the Regulation. The Member States have been left the option of extending the transit control to cover goods not included in Annex I or goods which are included in it and may possibly be intended for a military end use in a country subject to an internationally agreed arms embargo. Use has been made of this possibility in Article 4a of the Decree.

The Decree entered into force on 27 August 2009.[13]

16.6 CULTURAL MATTERS

Act of 12 June 2009 Implementing the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property Concluded in Paris on 14 November 1970 (Act Implementing the 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property) (Stb. 2009 No. 255)

The Act implements the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property concluded in Paris on 14 November 1970. The Act emphasises the protection of cultural property illicitly exported from other State Parties and subsequently imported into the Netherlands.

Dutch law too now regulates the situations in which the protection for buyers in good faith is set aside for certain precisely defined categories of cultural property. This adjustment has made it possible for the Netherlands to become a party to the 1970 UNESCO Convention.

The main provisions of the Act are as follows:

Article 3

'It is prohibited to bring cultural property into the Netherlands which:

[12] Stc. 2009 No. 15368. The order entered into force on 15 October 2009.

[13] Stb. 2009 No. 359.

(a) has been removed from the territory of a State Party in contravention of the provisions laid down by that State Party in accordance with the objectives of the Convention in respect of the export of cultural property from that State Party or in respect of the transfer of ownership of cultural property; or
(b) have been stolen in a State Party.'

Article 4

'Possession of cultural property brought into the Netherlands in contravention of the prohibition referred to in Article 3 may be reclaimed in accordance with Articles 1011a to 1011d of the Code of Civil Procedure by the State Party from which the property comes or by the person legally entitled to such property.'

In addition, the Code of Civil Procedure is extended to include Article 1011a, paragraph 1 of which reads as follows:

'1. A legal action to recover possession of a movable, based on Article 4 of the Act implementing the 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property, is instituted against the possessor or, in the absence of a possessor, against the holder of the cultural property before the court competent according to the rules of this Code.'

The following provisions are among those added to Book 3 of the Civil Code:

Article 87a

'1. To determine whether the possessor has exercised due care in obtaining cultural property as referred to in Article 1 (d) of the Act implementing the 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property, account is taken of all circumstances of the acquisition, in particular:

(a) the capacity of the parties;
(b) the price paid;
(c) whether the possessor consulted every reasonably accessible register of stolen cultural property and all other relevant information and documentation which he could reasonably have obtained, and whether the possessor consulted accessible authorities;
(d) whether the possessor took all other steps which a person acting reasonably would have taken in such circumstances…'

'2. A dealer as referred to in Article 437 of the Criminal Code is deemed not to have exercised the due care referred to in Article 86b, paragraph 2, in acquiring cultural property if he has failed to:

(a) ascertain the identity of the seller;
(b) obtain a written statement from the seller that he is competent to dispose of the property;
(c) include in the record to be kept by him the provenance of the cultural property, the name and address of the seller, the purchase price paid to the seller and a description of the cultural property;

(d) to consult the registers relating to stolen cultural property which it would be appropriate to consult in the circumstances given the nature of the cultural property.

3. An auctioneer who does not meet the requirements of due care referred to in paragraphs 1 and 2 when accepting cultural property for public auction or who returns this cultural property to the person offering it for public auction without having complied with the requirements of due care acts unlawfully in relation to the persons who may institute a claim for return as referred to in Article 86b.'

Article 310c

'1. A legal action for return of a movable pursuant to Article 4 of the Act implementing the 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property becomes barred upon the expiry of five years from the start of the day following that on which the place where the property is located and the identity of the possessor or the holder thereof become known and in any event upon the expiry of thirty years from the start of the day following that on which the property has been removed from the territory of the State Party from which the property originates…'

The changes to the law entered into force on 1 July 2009.[14]

16.83 MILITARY ASSISTANCE AND ARMS TRADE

See: 16.112

[14] Stb. 2009 No. 256. The Kingdom Act of 12 June 2009 entered into force on 27 June 2009 (Stb. 2009 No. 254).

Chapter 13
Netherlands Judicial Decisions Involving Questions of Public International Law, 2008–2009

L. A. N. M. Barnhoorn

The decisions in this survey are taken from the documentation system of the Public International Law Department of the T.M.C. Asser Instituut, which now contains abstracts from approximately 8,650 decisions dating from 1839 to the present day.[1] Most of the texts are taken from various Reports and Journals, but the Institute also receives the texts of decisions involving questions of public international law directly from the Courts concerned by special agreement between the Institute, the Ministry of Justice, and the Courts. If the decision has not (yet) been published elsewhere, the source of the text is given as 'Institute's Collection' followed by the administrative sequence number.

Not all the decisions in the documentation system of the Institute are included in this survey. Some are left out because they contain very minor points of (international) law. Those decisions which are included are given either in an extensive form, with verbatim extracts from the judgment, or in a summarized form, depending on their relevance to international law.

A two-year period is covered by the survey, one year of which overlaps the period covered by the survey in last year's volume of the NYIL. This is made necessary by the fact that the text of the decisions is sometimes available only after a considerable time. This is also why, by way of exception, decisions are occasionally included although given at a time prior to the period covered by the survey.

[1] For the period covered updated by Research Associate P. van Huizen.

This section has been translated by P. Kell.

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The Yearbook surveys are also available in a consolidated way in a separate database on http://www.asser.nl

1.202 ENFORCEMENT OF INTERNATIONAL LAW IN MUNICIPAL LAW
See: 1.203, 7.213

1.203 CONFLICT BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW
See also: 3.2113 **B**, 4.66, 4.73 **B** n 65), 6,23, 6.43, 7.213

X v. The Management Board of the Social Insurance Bank, Central Appeals Court for the Public Service and for Social Security Matters, 5 March 2009, LJN No. BI0952, JB (2009) No. 134, USZ (2009) No. 154[2]

- *Under Article 5 (1) of the 1962 Convention* concerning *Equality of Treatment of Nationals and Non-Nationals in Social Security (ILO Convention No. 118)*[3] *the Netherlands had an obligation to guarantee to its own nationals, when they were resident abroad, provision of various benefits, including old-age benefits. The Netherlands denounced ILO Convention No. 118 on 24 December 2004 and this denouncement took effect on 20 December 2005.*
- *In its judgment of 14 March 2003*[4] *the Central Appeals Court held that Article 5 (1) of ILO Convention No. 118 should be classified as a provision of a treaty binding on all persons within the meaning of Article 94 of the Constitution*[5] *and that Article 9a, para 1, of the General Old Age Pension Act* [*introduced in the*

[2] With note by M. Driessen.

[3] 494 UNTS p. 271, Trb. 1962 No. 122. Article 5 reads: '(1). In addition to the provisions of Article 4, each Member which has accepted the obligations of this Convention in respect of the branch or branches of social security concerned shall guarantee both to its own nationals and to the nationals of any other Member which has accepted the obligations of the Convention in respect of the branch or branches in question, when they are resident abroad, provision of invalidity benefits, old-age benefits, survivors' benefits and death grants, and employment injury pensions, subject to measures for this purpose being taken, where necessary, in accordance with Article 8(2). In case of residence abroad, the provision of invalidity, old-age and survivors' benefits of the type referred to in paragraph 6(a) of Article 2 may be made subject to the participation of the Members concerned in schemes for the maintenance of rights as provided for in Article 7'.

[4] 36 NYIL (2005) pp. 466–474.

[5] Article 94 reads: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with the provisions of treaties or of decisions by international institutions that are binding on all persons'.

Benefit Restrictions (Foreign Residence) Act][6] *could therefore not be applied to a case such as the present one until 1 January 2006.*

- *As the Central Appeals Court set out in its reference for a preliminary ruling of 1 November 2007*[7] *this also means that the obligation resulting from Article 5 (1) of ILO Convention No. 118 was wrongly not contained in national legislation. If the national legislator had fulfilled its treaty obligations, the person concerned would have been entitled under the national legislation to an unchanged state old age pension.*
- *If the position under international law had then changed in such a way that the person concerned could no longer derive protection under a treaty provision, he could still have derived such entitlement under national legislation.*
- *Only after national legislation had been modified could the benefit be cancelled, with appropriate compensation under Article 1 of Protocol I.*[8] *As the Dutch legislator failed to bring national legislation into line with ILO Convention No. 118, this cannot, in the opinion of the Central Appeals Court, result in a situation in which a reduction of the state old age pension is possible without compensation. As no compensation whatever has been offered to the appellant in respect of the reduction, the requirement of proportionality has not, in the opinion of the Central Appeals Court, been met and this cancellation is contrary to Article 1 of Protocol I of the European Convention on Human Rights.*

The Facts: X was born in 1939 and had not lived in the Netherlands since 1963. He had lived in Madagascar since 1974. Since leaving the Netherlands he had been voluntarily insured under the Dutch General Old Age Pension Act (AOW). His wife died in 2000. By decision of 14 April 2004 the Management Board of the Social Insurance Bank granted him the maximum state old age pension for a single person, namely € 921.28 gross per month. In its decision the Social Insurance Bank stated that X lived in a country to which the Benefit Restrictions (Foreign Residence) Act applied. This Act had entered into force on 1 January 2000, but its operation had been temporarily suspended by the government until 1 May 2005.[9] By decision of 29 April 2005 the Social Insurance Bank reduced the old age pension payable to X with effect from 1 January 2006 to the standard rate for a married pensioner, namely € 637.03 gross per month. It stated in this connection that under the Benefit Restrictions (Foreign Residence) Act single persons were

[6] For a description of the content of and background to Article 9 and the Benefit Restrictions (Foreign Residence) Act, see n 10.

[7] LJN No. BB7475, RSV (2007) No. 352, RV (2007) No. 86 with note by M. Ydema.

[8] 213 UNTS p. 262; ETS No. 9; Trb. 1952 No. 80. Article 1 reads: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

[9] As a consequence of the judgment of the Central Appeals Court of 14 March 2003.

eligible for the higher rate of old age pension only if they lived in the Netherlands or in a country with which the Netherlands had concluded an enforcement treaty. No enforcement treaty had been concluded with Madagascar. X's objection to this decision was held to be unfounded by the Social Insurance Bank on 29 April 2005. X applied for review of this decision to the District Court of Amsterdam on 20 April 2007, but his application was held to be unfounded.[10] X then appealed against this judgment to the Central Appeals Court for the Public Service and for Social Security Matters (referred to below as the Central Appeals Court).

Held: '…4.3. It is not in dispute between the parties that the appellant's state old age pension should be treated as a possession within the meaning of Article 1 of Protocol I to the European Convention on Human Rights and that the appellant has partly been deprived of this possession by the operation of the Benefit Restrictions (Foreign Residence) Act, i.e., by the lowering of the appellant's old age pension to the standard rate for a married pensioner. The Central Appeals Court will therefore assess whether the conditions for an infringement of the right to peaceful enjoyment of possessions have been fulfilled.

4.4. As the Central Appeals Court held in its judgment of 22 December 1999 (LJN AA4300),[11] the second sentence of Article 1 of Protocol I provides that the infringement of the peaceful enjoyment an existing rights to benefits is conditional not only on the requirement that it is provided for by law but also that the general interest should be balanced against the requirements resulting from the fundamental right invoked in the case and that the chosen means should be reasonably proportionate to the intended ends. The State has a large measure of discretion in applying these criteria.

4.5. The Central Appeals Court notes first of all that the infringement of the peaceful enjoyment of possessions was in accordance with the conditions provided for by law. It shares the view of the District Court that the infringement was in the general interest. To this extent the Central Appeals Court can endorse the opinion of the District Court and its references to the legislative history of the Benefit Restrictions (Foreign Residence) Act.[12] The Central Appeals Court also considers

[10] LJN No. BA4292, RSV (2007) No. 255.

[11] JB (2000) No. 31 with note by A.W. Heringa, RSV (2000) No. 78, NJCM-Bull (2001) p. 37 with note by A. Woltjer.

[12] The District Court described the content of and background of Art. 9a as follows: '…Article 9a of the General Old Age Pension Act applies a scheme that is different from Article 9 as regards the amount of the old age pension for persons not resident in the Netherlands. Under paragraph 1 of this article, a pensioner who is single and resides outside the Netherlands is entitled to the basic rate of 50% and not 70% of the net minimum wage unless, in brief, the person concerned resides in a country where he is entitled, under a treaty or a decision of an international organisation, to (full) benefit (…).

Art. 9a was introduced by the Benefit Restrictions (Foreign Residence) Act (Stb. 1999, 250). The aim of this Act is to introduce legislation providing for the possibility of checking the lawfulness of benefits paid to people abroad (or for people abroad in the case of the General Childcare Benefit Act). The Benefit Restrictions (Foreign Residence) Act entered into force on 1

that achieving effective checks on the lawfulness of old age pension paid abroad is a legitimate aim. The legislator has decided in this connection to provide a legal basis for these checks through the conclusion of treaties, as a result of which benefits under those parts of the General Old Age Pensions Act that are sensitive to fraud (i.e., the allowance for a married person with a spouse under the age of 65 years and the supplement of 20% on the standard married rate for persons who are single) are withheld or terminated, as the case may be, as long as no enforcement treaty has entered into force with the country of residence. The Central Appeals Court has already held this instrument to be appropriate in the context of the operation of the Benefit Restrictions (Foreign Residence) Act in relation to the General Child Benefit Act [judgment of 17 September 2004 (LJN AR2746)[13] and the Supplementary Benefits Act (reference for a preliminary ruling of 1 November 2007 (LJN BB7475))].[14] The Central Appeals Court sees no

(Footnote 12 continued)
January 2000. As regards (inter alia) the General Old Age Pension Act, a transitional period of three years applies to people who, at the time the Act came into force, were not resident in the Netherlands and were in receipt of Dutch benefits. This period was subsequently extended for one year (Stb. 2003, 524). After the expiry of this period the payment of the benefits to people in a non-treaty country is discontinued …'

[13] RSV (2005) No. 104, RV (2004) No. 78 with note by P.E. Minderhoud.

[14] In this case the Central Appeals Court held that Art. 4a of the Supplementary Benefits Act and the cancellation as of 1 July 2003 of the supplements paid to a number of Turkish employees in respect of benefits under the Old Age Pension Act were not contrary, inter alia, to ILO Convention No. 118. The Central Appeals Court noted, among other things, that, following a complaint by the Confederation of Turkish Trade Unions that the Netherlands was not applying the Convention correctly, an opinion had been submitted by an ad hoc advisory committee to the Governing Body of the ILO in March 2007. However, the Central Appeals Court considered that this opinion could not be accorded the same weight as that accorded by the Court in its previous judgment of 21 July 2006 to the rulings of the UN Committee on Human Rights. According to the Central Appeals Court, the allowance under Art. 4a should now be determined by reference to Art. 5(2) and no longer by reference to Art. 5(1). However, Art. 5(2) could not result in a prohibition on the application of Art. 4a or the cancellation. However, the cancellation was contrary to Art. 1 of Protocol I to the European Convention on Human Rights since it conflicted with the requirement of proportionality developed by the European Court of Human Rights: there was no compensation in the form of a phasing-out scheme. The Central Appeals Court then formulated preliminary questions for a referral to the European Court of Justice on the possible phasing-out scheme under Art. 6(1) of Order 3/80 of the Council of Association. This article had direct effect. The question was whether application of this article was not contrary to Art. 59 of the Additional Protocol to the Association Agreement, which provides that Turkey should not receive more favourable treatment than that granted to other Member States. Art. 4a applied to the other Member States from 1 January 2007. The question was also whether this did not constitute discrimination under Art. 9 of the Association Agreement since the export prohibition had been introduced for the other Member States over a period until 1 January 2010; the Court of Justice was asked to assess in relation to the interpretation of Art. 9 whether it was compatible with the requirements of Art. 14 of the European Convention on Human Rights in conjunction with Art. 1 of Protocol I and could therefore provide interpretation data which were important for assessing whether the national scheme was compatible with the specified fundamental rights, respect for which was guaranteed by the Court of Justice (cf. Yousfi judgment). At the time of writing (23 April 2010) the Court of Justice had not yet given a ruling.

occasion to come to a different view about the operation of the Benefit Restrictions (Foreign Residence) Act in relation to the General Old Age Pension Act, particularly since this concerns a reduction and not a termination of the old age pension.

4.6. It is evident, however, from the case law of the European Court of Human Rights that the proportionality referred to above in legal consideration 4.4 is absent if a disproportionate burden is put on individual interested parties. Where the right to peaceful enjoyment of possessions is infringed in the general interest without any form of compensation, for example in the form of a transitional arrangement, Article 1 of Protocol I can be deemed to be complied with only in exceptional cases.

4.7. The Social Insurance Bank reduced the appellant's state old age pension as of 1 January 2006, without any transitional arrangement, from € 921.28 gross per month to € 637.03 gross per month. The District Court held that the absence of a phasing-out scheme or other transitional arrangement did not warrant the conclusion that the required degree of proportionality was absent. This was because the Social Insurance Bank had already informed the appellant in its decision of 14 April 2004 on the supplement that his state old-age pension might possibly be reduced in the future. The appellant had therefore been able to take account of this possibility.

4.8. The Central Appeals Court cannot follow the decision of the District Court in this respect. Under Article 5 (1) of ILO Convention No. 118 of 1962 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, the Netherlands had an obligation to guarantee to its own nationals, when they were resident abroad, provision of various benefits, including old-age benefits. The Netherlands denounced ILO Convention No. 118 on 24 December 2004 and this denouncement took effect on 20 December 2005.[15] In its judgment of 14 March 2003 (LJN AF5937) the Central Appeals Court held that Article 5 (1) of ILO Convention No. 118 should be classified as a provision of a treaty binding on all persons within the meaning of Article 94 of the Constitution and that Article 9a, para 1, of the General Old Age Pension Act could therefore not be applied to a case such as the present one until 1 January 2006. As the Central Appeals Court set out in its above-mentioned reference for a preliminary ruling of 1 November 2007 this also means that the obligation resulting from Article 5 (1) of ILO Convention No. 118 was wrongly not contained in national legislation. If the national legislator had fulfilled its treaty obligations, the person concerned would have been entitled under the national legislation to an unchanged state old age pension. If the position under international law had then changed in such a way that the person concerned could no longer derive protection under a treaty provision, he could still have derived such entitlement under national legislation. Only after national legislation had been modified could the benefit be cancelled, with appropriate compensation

[15] The District Court stated that in this connection the Social Insurance Bank had lowered X's pension with effect from 1 January 2006. It also stated that the Convention had been denounced by Act of Approval of 9 December 2004 (Stb. 2004, 715), which had entered into force on 30 December 2004.

under Article 1 of Protocol I. As the Dutch legislator failed to bring national legislation into line with ILO Convention No. 118, this cannot, in the opinion of the Central Appeals Court, result in a situation in which the state old age pension could be reduced without the provision of compensation. As no compensation whatever has been offered to the appellant in respect of the reduction, the requirement of proportionality has not, in the opinion of the Central Appeals Court, been met and this cancellation is contrary to Article 1 of Protocol I of the European Convention on Human Rights.

4.9. The Central Appeals Court can agree with the findings of the District Court regarding Article 14 of the European Convention on of Human Rights, in keeping with the above-mentioned judgment of the Central Appeals Court of 17 September 2004. As regards the exemption scheme[16] the Central Appeals Court sees sufficient difference between the appellant's situation and the situation of those who enjoy protection under the exemption scheme to warrant the identified difference in treatment.[17]

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[16] Translation of the Dutch term 'pardonregeling'.

[17] The District Court held as follows: '… The District Court does not consider that the application for review instituted by the plaintiff provide any basis for assessing whether or not the reduction of the plaintiff's benefit is contrary to Art. 14 of the European Convention on Human Rights. The District Court holds that this question should be answered in the negative for the following reasons. (…) In the General Old Age Pension Act a distinction is made as regards the entitlement to the settlement of 20% for single persons between, on the one hand, people resident in the Netherlands or in a country with which an enforcement treaty has been concluded and, on the other, persons resident in a country with which no enforcement treaty has been concluded. This is a direct distinction based on residence and, in so far as people of non-Dutch nationality are statistically more likely to no longer receive the supplement on account of residence abroad, also a direct distinction based on nationality (…). As already held above, the object of the Benefit Restrictions (Foreign Residence) Act is to make it easier to check and enforce the lawfulness of benefits paid outside the Netherlands, which is an object that can be achieved by the conclusion of treaties. In the opinion of the District Court, this object can be said, within the context of Article 14 of the European Convention as well, to be legitimate and a suitable means of achieving the specified object and hence an objective justification of the indirect distinction according to nationality and the distinction based on residence. The District Court would refer in this connection to the judgment of the Central Appeals Court of 17 September 2004, LJN: AR2764. (…) The plaintiff has referred to the fact that a specific transitional scheme exists in relation to the application of Art. 9a of the General Old Age Pension Act. In brief, this scheme means that the benefits of persons who were resident abroad before the entry into force of the Benefit Restrictions (Foreign Residence) Act on 1 January 2002 were already in receipt of benefits on that date will not be lowered. The plaintiff considers that he too should be eligible for such a scheme as equal cases should be treated equally. The District Court noted that in the case of the plaintiff the principle of legal certainty plays a less pronounced role. At the time when the plaintiff was granted the benefits, the Benefit Restrictions (Foreign Residence) Act was already in force and had been temporarily suspended until the date on which the renunciation of ILO Convention No. 118 would take effect. Express reference was made to this point in the decision granting benefits. Unlike the group of people to whom the exemption scheme applies the plaintiff was aware at the time when the benefit was granted that it would be reduced in the future. It follows that the plaintiff is not in the same position either formally or substantively as people to whom the exemption scheme applies. There is therefore no breach of Art. 14 of the European Convention.'

4.10. It follows from the above that the appeal succeeds and that the appeals judgment should therefore be quashed. The reduction of the appellant's state old-age pension on 1 January 2006 cannot be maintained. The Social Insurance Bank should make a fresh decision on the appellant's objection and should logically grant the appellant reasonable compensation in the form of phasing-out scheme for having been deprived of enjoyment of this possessions …'

1.204 SELF-EXECUTING PROVISIONS OF TREATIES OR DECISIONS OF INTERNATIONAL ORGANISATIONS
See: 1.203, 4.73 **B** n 64), 4.742

2.01 CONFLICT BETWEEN SOURCES
See: 4.66, 6.43

2.2 CUSTOM
See: 3.1141, 6.23 (n 68), 6.43, 7.213, 11.3

2.3 GENERAL PRINCIPLES OF LAW
See: 3.2113 **B**, 4.66, 4.73 **B**, 6.06 (n 78), 7.213

2.4 JUDICIAL DECISIONS
See: 3.2113 **B**

2.5 OPINION OF WRITERS
See: 3.1141, 7.213

2.71 UNILATERAL ACTS OF STATES
See: 3.2113 (16jan2009), 4.724, 6.06 (n 4), 6.43

2.72 ACTS AND DECISIONS OF INTERNATIONAL ORGANISATIONS
See: 3.2113 (16jan2009), 4.66, 6.43, 14.1132

3.1141 IMMUNITY OF FOREIGN STATES

United States of America v. X, Y and Z, Court of Appeal of Den Bosch, 18 November 2008, LJN No. BG5015, NIPR (2009) No. 36

– *As the primary purpose of the proceedings is to obtain payment (or continued payment) of the instalments of rent, the US is not entitled—in accordance with*

the basic rule formulated in the judgment of the Supreme Court of 22 December 1989[18]*—to invoke immunity in respect of a payment dispute of this kind.*
– *There is no need to determine whether the view defended by the US, namely that a sovereign State can invoke the privilege of immunity under rules of unwritten international law as soon as a claim for performance of an agreement is instituted against it, can be accepted as correct in the event of claims for performance other than those instituted in the present case, since this is not a question that has to be addressed by the Court of Appeal in this case.*

The Facts: X, Y and Z applied to the District Court of Maastricht (limited jurisdiction sector, Maastricht location) to contest the early termination of tenancy agreements concluded with the United States for the provision of homes for US army personnel. By interim judgment of 7 February 2007 the District Court ruled that it had jurisdiction to take cognizance of the claim.[19] The United States lodged an interim appeal against this judgment before the Court of Appeal of Den Bosch.

Held: '…4.1. This appeal concerns the following matters.

4.1.1. [X.] et al. let a number of existing and yet-to-be-built dwellings/residential apartments to the US as homes for US army personnel stationed in the province of Zuid-Limburg. The dispute between the parties concerns the following three tenancy agreements with accompanying supplements (referred to below as the tenancy agreements): (a) the tenancy agreement concluded between [X.] and the US on 17 November/4 December 2003 in respect of (six) dwellings in [place name B.]; (b) the tenancy agreement concluded between [Y.] and the US on 18/25 October 2002 in respect of (two) dwellings situated in [place name B.]; (c) the tenancy agreement concluded between [Z.] and the US on 23/30 August 2004 in respect of (nine) dwellings situated in [place name A.].

4.1.2. In so far as relevant, each of the tenancy agreements includes a clause [paragraph (a) of "ARTICLE 3—TERMINATION OF AGREEMENT"] to the effect that the US is entitled wholly or partly to terminate the tenancy agreement during the agreed tenancy period "… should the housing units become excess to US requirements due to military draw down, relocation of troops, or termination of agreements between the Government(s) of the United States and the Netherlands, …".

4.1.3. The US terminated the tenancy agreements early by invoking the contractual provision referred to above with effect from the date stated in the letters of termination.

4.1.4. [X.] et al. did not accept this early termination. They served a writ of summons of 12 October 2005 on the US to appear before the limited jurisdiction court in Maastricht and sought principally:

(a) a declaratory ruling that the tenancy agreements had been terminated on incorrect grounds, that these terminations did not have the effect desired by the US

[18] 22 NYIL (1991) p. 379; 94 ILR p. 373.

[19] LJN No. AZ9224; NIPR (2007) No. 229.

and that the relevant tenancy agreements concerning the dwellings in question had not been lawfully terminated on the dates from which the US had purported to terminate them; (b) an order that the US pay the rents to the plaintiffs for the dwellings concerned for the period from the dates of the purported termination of the tenancy agreements until the dates on which the tenancy agreements are validly terminated, together with statutory interest from the due date of each instalment of rent until the date of full and final settlement; and, alternatively (in summary) (c) a declaratory ruling that the defendant had acted unlawfully vis-à-vis the respective plaintiffs; (d) an order that the US pay damages and bear the costs of the action.

4.1.5. Even before entering a defence to these claims, the US lodged an interim motion for the court to decline jurisdiction together with a statement of defence, with exhibits. In brief, the US argued (1) that on account of the privilege of State immunity to which the US was entitled the Dutch courts had no jurisdiction to take cognizance of the principal claims referred to above at 4.1.4 (a) and (b), and (2) that relative jurisdiction was vested not in the limited jurisdiction court in Maastricht but in its counterpart in Heerlen in so far as the case related to the tenancy agreement between [Z.] and the US concerning the dwellings in [place name A.], with the result that the case should to this extent be transferred to the limited jurisdiction court in Heerlen.

4.1.6. After a defence had been entered by [X.] et al. to the motion concerning the lack of jurisdiction, the limited jurisdiction court ruled—in brief—by (interim) judgment that it had jurisdiction to assess the principal claims of [X.] et al. including those concerning the dwellings in [place name A], and, in the principal action, put the case down for hearing. The limited jurisdiction court also explicitly allowed an appeal against this interim judgment.

4.1.7. The US lodged an appeal in good time against the judgment of the limited jurisdiction court in the interim action.

4.2. The objections of the US as set out in the statement of grounds of appeal are as follows: (1) the jurisdiction assumed by the limited jurisdiction court in assessing the principal claims of [X.] et al. is contrary to unwritten international law; (2) the District Court of Maastricht, limited jurisdiction sector, Maastricht location, does not have relative jurisdiction to take cognizance of the dispute between [Z.] and the US concerning the dwellings in [place name A.].

4.3. Lack of jurisdiction of the Dutch courts; immunity from jurisdiction?

4.3.1. By way of explanation of the first ground of appeal the US submits, in brief, that although the Dutch courts do, in principle, have jurisdiction to take cognizance of a dispute concerning a tenancy of immovable property, this basic rule is subject to an exception in this case on the basis of unwritten international law since [X.] et al. are seeking to enforce performance of the tenancy agreements terminated by the US. The US argues that, as a sovereign State, it can never be compelled by the courts to perform a (tenancy) agreement that has been terminated, whether rightly or wrongly, but may instead, in principle, be obliged to pay compensation (for irregular termination). Unlike a claim for compensation, this

claim for performance is, according to the US, covered by privilege of jurisdictional immunity which the US has invoked.

4.3.2. By contrast, [X.] et al. argue, in brief, that the only point of relevance is that the dispute concerns tenancy agreements of a private law nature and that, in keeping with the ruling of the limited jurisdiction court, it must be held that there is no good ground for the distinction made by the US between performance and compensation, particularly since the claim by [X.] et al. is for payment of rental instalments (i.e. payment of a pecuniary claim).

4.3.3. The ground of appeal must fail. The Court of Appeal holds as follows in this connection:

4.3.4. The dispute between the parties in the principal action basically concerns the question whether or not the US rightly terminated the tenancy agreements early pursuant to the contract clause referred to in finding 4.1.2. There is no dispute between the parties that the conclusion and termination of tenancy agreements constitute '*acta iure gestionis*' (acts performed under private law).

While acknowledging that the courts do, in principle, have jurisdiction to assess this dispute and the matter at issue, the US argues that this power is limited to a claim for compensation based on an irregularity in the manner of termination. According to the US, the power of the court does not, by definition, include taking cognizance of a claim for performance of tenancy agreements once they have been terminated. With reference to the legal opinion referred to in finding 2.3, the US bases these submissions on the existence of a distinction of principle said to be recognised in unwritten international law between these two categories of claims.[20]

4.3.5. As, according to the US, the purpose of the principal claims of [X.] et al. is to obtain an order against the US to perform the terminated tenancy agreements, it is entitled to claim immunity from jurisdiction in respect of these claims. The US submits (see its pleadings, no. 3.7) that, if it were compelled to perform the agreements, it would be obliged not only to pay the rent but also to perform all other obligations to which it is subject as tenant by law and under the tenancy agreements. It argues that as a sovereign State it cannot be compelled to do so.

4.3.6. In the opinion of the Court of Appeal, the US has in this way interpreted the scope of the principal claims instituted by [X.] et al. more broadly than intended by [X] et al. according to the originating writ of summons (see finding of law 4.1.4) and according to their own submissions in the proceedings. [X.] et al. are, after all, seeking a declaratory ruling and, in conjunction with this, an order that US should pay (or continue to pay) the instalments of rent agreed until the expiry dates of the agreements. In other words, the purpose of these proceedings for [X] et al. is simply to enforce pecuniary claims and not to secure continuing performance by the US of all its other obligations resulting from the tenancy

[20] This is a reference to the legal opinion dated 6 August 2008 and submitted by Professor A.H.A. Soons and P. Jeminez Kwast on 5 September 2008.

agreements, assuming that it is established that the tenancy agreements were wrongly terminated.

4.3.7. The Court of Appeal therefore notes that the primary purpose of the proceedings instituted by [X.] et al. is to obtain payment (or continued payment) of the instalments of rent. The Court of Appeal agrees with the limited jurisdiction court that—in accordance with the basic rule formulated in the judgment of the Supreme Court of 22 December 1989, NJ 1991, 70—the US is not entitled to invoke immunity in respect of a payment dispute of this kind.

4.3.8. There is no need to determine whether the view defended by the US, namely that a sovereign State can invoke the privilege of immunity under rules of unwritten international law as soon as a claim for performance of an agreement is instituted against it, can be accepted as correct in the event of claims for performance other than those instituted in the present case, since this is not a question that has to be addressed by the Court of Appeal in this case…'[21]

3.2113 IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

A. X v. the Mayor and Aldermen of the Municipality of Onderbanken, Supreme Court, 6 June 2008, LJN No. BD3187, BNB (2008) No. 212[22]

– *A German member of the civilian personnel of NAPMA, part of the NATO armed forces, is entitled to exemption from municipal property tax on account of his use of his house in the Municipality of Onderbanken.*
– *It is not in dispute that he is in the employ of a NATO component as referred to in Article 5, para 1, of the 1997 Municipal Taxes* (*Diplomatic and International Exemptions*) *Order and does not have Dutch nationality. The exemption is then not applicable if he is permanently resident in the Netherlands as referred to in Article 5* (2) *of the Order.*[23]
– *The decision on the question of whether there is permanent residence is left to the Minister of Foreign Affairs, who is involved on behalf of the State of the Netherlands in the conclusion and observance of the treaties and* (*headquarters*) *agreements with international organisations as referred to in the Order and has been designated as the person having primary responsibility for the contacts with such organisations and acting as intermediary in cases where the organisations encounter problems with government authorities in the Netherland.*
– *In the present case there is no permanent residence as referred to in Article 5* (2).

[21] The Court of Appeal did not rule on the second ground of appeal of the United States as the parties stated at the hearing that they had reached an amicable settlement on the dispute about the dwellings concerned.

[22] With note by Van Leyenhorst at BNB (2008) No. 211.

[23] Stc. 1996 No. 249, p. 14. For the text of Article 5, see under Held.

The Facts: X, a German national, had worked as a member of the civilian personnel of NAPMA, part of the NATO armed forces in the province of Zuid Limburg, since arriving in the Netherlands. He owned a house in the Municipality of Onderbanken. He was assessed for municipal property tax by the municipality for his use of the house in 2003. X lodged an objection, but the assessment was upheld. X then applied to the Court of Appeal of 's-Hertogenbosch for a review of the decision. The Court of Appeal dismissed the application on 23 November 2006. Finally, X appealed in cassation to the Supreme Court against this judgment.

Held: '…3.3. The Court of Appeal held that the interested party was not eligible for exemption from property tax on account of his use of the property. In point 4.2 of its judgment the Court of Appeal had previously given as its reason for this finding that the present tax could not be regarded as a tax on salary and emoluments (as referred to in Article 19 of the Agreement on the status of the North Atlantic Treaty Organisation, national representatives and international staff (Treaty of Ottawa of 20 September 1951, Trb. 1953 No. 9).[24] Continuing with this reasoning the Court of Appeal held in point 4.5 of its judgment that the interested party was not eligible for an exemption under Article 5, para 2, of the 1997 Municipal Taxes (Diplomatic and International Exemptions) Order of 20 December 1996, Stc. 1996, 249 (referred to below as the Order) as he was permanently resident in the Netherlands since he had lived in the Netherlands since 1992 without interruption and there was no evidence that he had any actual intention on the reference date of leaving the Netherlands. The interested party challenged these findings.

3.4. Article 1, para 1, opening words and (a), of the Order grants an exemption from municipal taxes as regards: "property tax on the use of immovable property".

Article 3, para 2, of the Order reads (insofar as relevant here) as follows:

> The members of the diplomatic and consular missions of other powers (…) are exempted from the taxes referred to in Article 1, para 1, points (a), (…) provided that they do not have Dutch nationality and are not permanently resident in the Netherlands.

Article 5 of the Order reads:

> 1. Exempted from the taxes referred to in Article 1, para 1, points (a), (…) are:
> (… Supreme Court: this is followed by a list of persons in the employ of or working for NATO or NATO-related organisations…)
> 2. Persons who have Dutch nationality and persons who are permanently resident in the Netherlands are excepted from the exemption referred to in para 1.

3.5 The Explanatory Notes to the Order in the Stc. 1996, No. 249, state (insofar as relevant here) as follows:

> 1. General
> The 1997 Municipal Taxes (Diplomatic and International Exemptions) Order is based on Article 243 of the Municipalities Act. This article empowers the Minister of the Interior and the Minister of Finance to lay down further rules on exemption from municipal taxes

[24] 1999 UNTS p. 67.

if they consider such an exemption to be necessary by virtue of international law or international usage.

The Vienna Convention on Diplomatic Relations is of particular importance to diplomatic exemptions. The exemptions that apply to consular missions and their members are based on the Vienna Convention on Consular Relations. Both Vienna Conventions make provision for a minimum level of tax privileges. The terms used in the Order correspond to the terminology of the Vienna Conventions. (…)

The explanatory note to Article 5 states inter alia:

(…) In accordance with Article 3, para 2, paragraph 2 [of Article 5] indicates that the exemption does not apply to persons of Dutch nationality or persons permanently resident in the Netherlands.

3.6.1. On 25 March 1997 the State Secretary for the Interior sent a "Circular on the 1997 Municipal Taxes (Diplomatic and International Exemptions) Order" (referred to below as the Circular) to all Dutch municipalities. The Circular includes the following passage:

(…) The members of a mission are eligible for a number of exemptions provided that they are not Dutch nationals and are not permanently resident in the Netherlands ('DV'[25] status). This condition also applies to persons who are eligible for a special international exemption (Article 5). When a person takes up employment with a mission or international organisation, the municipality where he resides is notified. The notification also specifies the status of the person concerned. If the letters 'DV' appear in the status code, this means that the person is designated as permanently resident in the Netherlands. In such a case, no exemption is granted from municipal taxes.

Whether or not a person is treated in this connection as permanently resident in the Netherlands is determined by the Protocol Department of the Ministry of Foreign Affairs. What is of crucial importance in this connection is whether the person concerned was already in possession of a residence permit at the time of entry into the employment of the diplomatic or consular mission or international organisation. If doubts exist about the status of a person or if it is not entirely clear whether or not a person is permanently resident in the Netherlands, the matter can always be checked with the Protocol Department of the Ministry of Foreign Affairs. (…)

Article 5 provides for an exemption from the occupier's share of the property tax and from the occupier's share of the taxes on movable residential and commercial premises for military and civilian personnel who are attached to the armed forces of NATO countries. I wish to observe in this connection that where an exemption is granted in such a case to one family member, it is not appropriate to impose the assessment on non-exempted members of the family who reside with the exempted person (…)

3.6.2. In the Municipalities Fund Circular of 30 May 2001 the Minister of the Interior and Kingdom Relations, speaking partly on behalf of the State Secretary for Finance, informed the municipal administrations as follows under "8.3 1997 Municipal Taxes (Diplomatic and International Exemptions) Order":

(…) the Ministry of the Interior and Kingdom Relations provides further information on the Order on the Internet, including the complete text of the Order as this read on 1 January 2000 and updated explanatory notes (…). These explanatory notes contain the

[25] Dutch abbreviation of the term 'duurzaam verblijf' (permanent residence).

> following passage on the term 'permanent residence': When a person enters the employment of a mission or international organisation, the municipality where he is resident is notified of this by the Ministry of Foreign Affairs. The person's status is also indicated in the notification. If the letters 'DV' (i.e., permanently resident) appear in the status code, this means that the person is treated as permanently resident in the Netherlands. In that case no exemption from municipal taxes is granted. Whether or not a person is treated as permanently resident in the Netherlands is determined by the Protocol Department of the Ministry of Foreign Affairs. From 1 January 2000 onwards, the crucial factor in determining status in the case of new notifications of administrative, technical and service personnel and private domestic staff is no longer the period of residence in the Netherlands prior to the entry into employment but whether the member of staff concerned was posted by the sending State or recruited locally. Staff posted by a sending State who work at a mission as administrative, technical and service personnel, are treated by the Ministry of Foreign Affairs as permanently resident in the Netherlands after they have worked in the Netherlands for 10 years. If doubts exist about the status of a person or if it is not entirely clear whether or not a person is permanently resident in the Netherlands, a check can always be made with the Protocol Department of the Ministry of Affairs.

3.7.1. It is not in dispute that the interested party is in the employ of a NATO component as referred to in Article 5, para 1, of the Order and does not have Dutch nationality. The exemption is then not applicable if he is permanently resident in the Netherlands as referred to in Article 5, para 2, of the Order.

3.7.2. According to its contents and the explanatory notes, the Order is intended to give effect to international usage as evidenced by treaties and from (headquarters) agreements concluded by the Netherlands with international organisations that have established themselves in the Netherlands. This means that the terms used in the Order should be interpreted in accordance with the meaning given to them in such treaties and agreements, as also stated in the explanatory notes to the Order. The government ministers referred to in Article 243 of the Municipalities Act have implemented this provision by leaving decisions on this matter to the Minister of Foreign Affairs, who is involved on behalf of the State of the Netherlands in the conclusion and observance of the treaties and (headquarters) agreements with international organisations as referred to in the Order and has been designated as the person having primary responsibility for the contacts with such organisations and acting as intermediary in cases where the organisations encounter problems with government authorities in the Netherlands.

3.7.3. It follows from the above that the interested party is entitled to rely on the fact that in the official levying tax will grant him exemption from property tax on account of the use of the immovable property in cases where the Minister of Foreign Affairs decides in accordance with the above that he is not permanently resident in the Netherlands. The Court of Appeal failed to recognise this. The ground of appeal therefore succeeds.

3.8. The judgment of the Court of Appeal cannot be allowed to stand. The matter will be referred back for further examination of the question of whether the interested party was permanently resident in the Netherlands on 1 January 2003. If necessary, the interested party should submit a decision of the Minister of Affairs

as referred to in 3.7.2. The other grounds of appeal in cassation need not be considered …'[26]

B. X v. State Secretary for Finance, Supreme Court, 16 January 2009, LJN No. BF7264, BNB (2009) No. 113[27]

– *The retirement pension paid by the United Nations Joint Staff Pension Fund to the former registrar of the International Court of Justice is not exempt from the levy of Dutch tax.*
– *His argument based on Article 32*(*8*) *of the Statute of the International Court of Justice fails.*[28] *This is evident from the text and structure of the article, the ordinary meaning of the word 'salaries', the purpose of the article and the history of the conclusion of the Convention on the Privileges and Immunities of the United Nations of 1946; nor is there any different generally accepted practice of the Contracting States to the Statute within the meaning of Article 31* (*3*) (*b*) *of the Vienna Convention on the Law of Treaties.*[29]

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[26] By judgment of 1 April 2009 the Court of Appeal of Arnhem held that on account of his residence status X was entitled to the exemption under the Order, LJN No. BI1455. The Court of Appeal gave a similar ruling on the same day in the case of Y against the Mayor and Aldermen of Onderbanken. Y's American wife had been appointed as a teacher at the AFNORTH International School, LJN No. BI1557, referral by Supreme Court of 6 June 2008, LJN No. BD3159, BNB (2008) No. 211 with note by Van Leyenhorst. The Court of Appeal of's Hertogenbosch once again came to a similar ruling on 12 February 2008 with regard to an assessment for property tax for 2005 on a woman teacher at this school, LJN No. BC9201 (appeal in cassation was lodged but subsequently retracted by the Municipality of Onderbanken on 21 September 2009). Previously the Court of Appeal of The Hague had held that an employee of the European Patent Office in The Hague was not entitled to an exemption under the Order for property tax levied by the Municipality of the Hague in respect of a dwelling situated in The Hague LJN Nos. AR2996 and AS4683. This decision was upheld by the Supreme Court on 25 April 2008 (cause list no. 41.691).

[27] With note by A.L. Mertens.

[28] Art. 32 reads: '1. Each member of the Court shall receive an annual salary. 2. The President shall receive a special annual allowance. 3. The Vice-President shall receive a special allowance for every day on which he acts as President. 4. The judges chosen under Article 31, other than members of the Court, shall receive compensation for each day on which they exercise their functions. 5. These salaries, allowances, and compensation shall be fixed by the General Assembly. They may not be decreased during the term of office. 6. The salary of the Registrar shall be fixed by the General Assembly on the proposal of the Court. 7. Regulations made by the General Assembly shall fix the conditions under which retirement pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their travelling expenses refunded. 8. The above salaries, allowances, and compensation shall be free of all taxation'.

[29] 1155 UNTS p. 331, Trb. 1972 No. 51. Art. 31 reads: '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. … 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 …'

– *In the proceedings on the application for review, the argument that he had been entitled to assume from a letter from the Ministry of Foreign Affairs that his pension would not be taxed was rejected by the Court of Appeal of The Hague in view of its interpretation of the content of that letter; that interpretation is of a factual nature and is adequately reasoned.*

The Facts: X, a Colombian national, had been in the employ of the United Nations as registrar at the International Court of Justice in The Hague until his retirement on 5 February 2000. After his retirement he continued living in the Netherlands. In connection with X's income tax return for 2001, his authorised representative had written to the Inspector of Taxes by letter of 14 May 2003 inquiring whether the retirement pension paid to X by the United Nations Joint Staff Pension Fund was exempted from the levy of Dutch tax. After replying by letter of 28 June 2004 that this was not the case, the Inspector took the pension into account when determining the income tax assessment for 2002. An objection lodged by X against the assessment was rejected by the Inspector. X then applied to the Court of Appeal of The Hague for review of this decision. The Court of Appeal dismissed his application on 28 August 2007.[30] X then appealed in cassation to the Supreme Court.

Held: '…3.1. The following can be assumed in the cassation proceedings.

3.1.1. The interested party, who resides in the Netherlands, was in the employ of the United Nations until his retirement on 5 February 2000. He was last employed as registrar of the International Court of Justice (referred to below as the ICJ).

3.1.2. An internal staff assessment was deducted by the United Nations from his salary.

3.1.3. The interested party accumulated pension rights with the United Nations Joint Staff Pension Fund in Geneva (referred to below as the Pension Fund) from 15 September 1964 to 5 February 2000. The employer's contribution towards this pension scheme was not taken into account in the basis for the staff assessment deduction. The employee's contribution towards the pension, which was deducted from the interested party's salary, did not result in any deduction in the calculation of the staff assessment.

3.1.4. The applicable pension scheme provides for the possibility of a lump payment instead of periodic pension payments in the event of early termination of the employment or the death of the employee.

3.1.5. The interested party has received a retirement pension from the pension fund since 1 April 2001.

3.1.6. After the interested party's authorised representative had asked the Inspector in writing whether his pension was exempt from the levy of Dutch tax, correspondence took place between the representative and the Inspector. The Inspector then took the position that the pension payments were not exempt, and, when determining the assessment for income tax and social security contributions

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[30] *LJN* No. BH5891.

for 2002, treated the full amount of the pension payments received by the interested party in that year as belonging to his taxable income from employment and home ownership.

3.1.7. Successive presidents of the ICJ have stated or confirmed the following concerning the taxability of pensions of former members of the ICJ:

> The question is governed by Article 32, para 8, of the Statute of the Court which provides; 'Les traitements, allocations et indemnités sont exempts de tout impôt' 'The above salaries, allowances and compensation shall be free of all taxation.' The word 'traitements refers to paras 1 and 6 of Article 32. The word 'indemnités' refers to para 4. The word 'allocations' refers to paras 2, 3 and 7. That the pensions provided for in para 7 are included in the word 'allocations' is clear from the French text of para 7, which states that pensions are 'allouées'. The English text of para 8 is even more clear. It states: 'the above salaries, allowances and compensation shall be free of all taxation. There can be no doubt that this wording refers to all payments mentioned in paras 1–7, including pensions.[31]

3.1.8. On 14 December 1992 the Ministry of Foreign Affairs sent a letter to the ICJ (to the registrar) dealing with the levy of Dutch tax on a pension awarded to the widow of a former judge of the ICJ. This letter read as follows:

> Le Ministère des Affaires étrangères, Direction du Protocole, présente ses compliments au Greffe de la Cour internationale de Justice et, en se référant à Sa Note no 87501 du 18 septembre 1992 relative à des feuilles d'impôts adressées à B, a l'honneur de Lui communiquer ce qui suit.

[31] The Supreme Court does not give any further consideration to the statements. The Court of Appeal held as follows:

'… The status of the statements

6.21. The statements made by successive presidents of the International Court of Justice do not prompt the Court of Appeal to take a different view, in so far as it concerns the taxation of pension payments. The statements contain an interpretation of Article 32 of the Statute. They do not contain a judicial opinion binding on the Court of Appeal, but instead amount to an interpretation which these presidents consider should be placed on Article 32 of the Statute.

6.22. As already held above, there does not appear to be any reason why pension payments should not be taxable in this context. However, Article 32 of the Statute does prohibit the levying of tax in connection with the granting of entitlement to pension and their further accrual during the period that the position is held. The Court of Appeal takes into account in this connection that the granting of pension entitlement during the employment results from the employment/relationship between the International Court of Justice as an institution of the United Nations and the official concerned.

Principle of legitimate expectations

6.23. The case documents do not show that an exchange of notes as referred to above occurred in respects of the statements of the presidents.

6.24. Nor is it apparent from the case documents that the statements were submitted to the persons competent (at that time) in the Netherlands to form policy on tax cases, or that any such person expressed the view, in a way that could be interpreted as a commitment, that the interpretation of the presidents for the future will be followed in levying Dutch tax. Nor is there any evidence that as a result of these statements policy favourable to this interpretation has been drafted and implemented by the Inspector of Taxes or coordinated at a higher level.

6.25. It must therefore be concluded that a legitimate expectation, requiring protection in law, that the presidents' interpretation of pension payments after the retirement date would be followed for the purposes of the levy of Dutch tax cannot be derived from these statements …'

En vertu de la Loi relative à l'impôt sur le revenu (Loi du 16 décembre 1964, publiée au Bulletin des Lois et des Décrets royaux no. 519), les personnes physiques qui ne résident pas aux Pays-Bas mais qui ont des revenus dont la source est aux Pays-Bas (contribuables étrangers) sont redevables aux Pays-Bas de l'impôt sur le revenu, pour les revenus de certaines sources néerlandaises, en particulier de biens immobiliers situés aux Pays-Bas (article 48, paragraphe 1, et article 49, paragraphe 1, sous b, deuxièmement).

Les feuilles d'impôts pour la déclaration de l'impôt sur le revenu pour les années 1989, 1990 et 1991 ont été envoyées par le Service des impôts des Pays-Bas à B, au titre des biens immobiliers qu'elle possède aux Pays-Bas et pour lesquels elle est donc soumise à l'impôt sur le revenu aux Pays-Bas. La pension allouée à B en sa qualité de veuve de Son Excellence C, ancien juge et Vice-président de la Cour internationale de Justice, n'est pas soumise à l'impôt aux Pays-Bas.

B est donc priée de bien vouloir retourner au Service des impôts à Q, après les avoir dûment remplies et signées, les feuilles d'impôts ci-jointes qui lui sont destinées.

(…)

3.1.9. In 2006, when the application for review of the present case was already pending before the Court of Appeal, A, the head of the International Law Department of the Ministry of Foreign Affairs, wrote the following to the interested party's authorised representative:

You gave the Ministry a copy of a letter of 14 December 1992 from the Ministry to the International Court of Justice (ICJ) relating to the taxability of the pension of the widow of C, a former judge at the ICJ, and of the ICJ's reply of 7 January 1993 to that letter. I understand that in the context of tax proceedings before the Court of Appeal of The Hague concerning X, former registrar of the ICJ, clarification of the following may be of importance to the Court of Appeal.

On behalf of the Netherlands the Ministry informed the ICJ in the above-mentioned letter, after consultation with the Ministry of Finance, that: 'La pension allouée à B en sa qualité de veuve de Son Excellence Monsieur C, ancien juge et Vice-président de la Cour Internationale de Justice, n'est pas soumise à l'impôt aux Pays-Bas.'

This position was based on Article 32 of the Statute of the ICJ. In our view, X was entitled to assume, for example on the basis of the above-mentioned letter, that his pension was exempt from tax. (…)

3.1.10. On 28 April 2006 the Secretary-General of the Ministry of Foreign Affairs wrote the following letter to the Director-General for Tax and Customs Policy of the Ministry of Finance:

I am writing in response to your letter of 21 April 2006. In it you express your surprise about a letter sent on 13 April last by A of this Ministry to the lawyer representing X, former registrar of the International Court of Justice (ICJ).

I endorse your comments about the need to achieve unity in interministerial policy. Indeed, I therefore consider it a matter of great regret that an opinion must now be given by the national courts on one aspect of the relationship between the Netherlands as host country and the highest international legal body established in the Netherlands. I very much hope that I may assume that in the future our two Ministries and the relevant implementing agencies will arrange for policy changes that affect the position of international organisations to be introduced only after proper mutual consultation. This will help to foster the attractive conditions laid down as an objective in the government's paper

on the Interministerial Policy Review (IBO) of the Policy Framework for Attracting and Hosting International Organisations.[32]

It has become apparent in various contacts between our two Ministries that they are not presenting a united front in this matter. The Ministry of Foreign Affairs has always advocated that it should be asked to give an opinion on the international law aspects when the Tax Administration considers a policy change in relation to the taxability of pensions of former judges and registrars of the ICJ. In my view, it is therefore debatable whether, as you state, all facts and circumstances which both parties consider relevant have been submitted to the Court of Appeal.

I do not share your opinion that A, by writing his letter of 13 April last, has usurped the role of the tax court. At the request of X's lawyer, he provided a very brief clarification from the international law perspective of a passage from a letter written in 1992 by my Ministry to the ICJ. This in no way prejudices the ruling which the courts must give in this case.

A's letter to the lawyer clarifies two aspects of a passage from the 1992 letter from the international law perspective. First, it indicates that the passage quoted from this letter was based on Article 32 of the Statute of the International Court of Justice. There can be no doubt whatever about this since only this provision of the ICJ Statute relates to this issue and no other provision whatever could form a basis for the finding in the letter that no tax can be levied on the relevant pension. Second, it is indicated that X was entitled to assume, for example from the 1992 letter, that his pension was exempted from tax. This view is based on the general nature of the quoted passage. It is immaterial for this purpose that the widow is, as far as we know, not resident in the Netherlands, since it has not been alleged that tax was not levied because the widow was not resident in the Netherlands. The letter indicates that tax is levied by the Netherlands on the immovable property of the widow in the Netherlands, but not on her pension because this is not subject to Dutch tax since the person concerned is a widow of a former judge of the ICJ. This is one of the few matters in which Article 32 of the Statute has played a concrete role, and is therefore of importance in relation to the interpretation of this article. I therefore consider that A was entitled to give this clarification of the international law position at the request of the lawyer.

I have learned, by the way, that at the hearing the Tax Administration presented before the court not only your letter to me of 21 April 2006 but also a letter which was sent by A to the Tax Administration in 2004 following a question from the Tax Administration about the application of immunity and that it has placed its own interpretation on this.

As the hearing has now taken place, I should like to conclude by expressing the hope and sincere intention that such incidents can be avoided as far as possible in the future. I therefore wish to repeat my earlier proposal to arrange consultations as quickly as possible between the lawyers of our two ministries in order to arrive at a common interpretation and thus prevent comparable problems in future cases, in keeping with the matters discussed by the State Secretary for Economic Affairs with the Director of the Queen's Secretariat.

3.2. The Court of Appeal held that it does not follow from Article 32 (8) of the Statute of the ICJ that the pension of the interested party has been exempted from taxation in the Netherlands. It went on to reject the interested party's claim based on the principle of legitimate expectations. In the view of the Court of Appeal, the full amount of the pension received by the interested party in 2002 is liable to tax as income from employment and home ownership.

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[32] See 37 NYIL (2006) pp. 240–248.

3.3.1. The first ground of appeal takes issue with the above-mentioned finding of the Court of Appeal and maintains that the pension of the interested party is exempted under Article 32 (8) of the Statute.

3.3.2. This provision from the Statute grants an exemption from taxation which, in so far as it concerns the registrar, relates only to “the above salaries”. In view of the text and structure of Article 32 of the Statute it is logical that this wording in respect of the registrar should relate only to his salary, which is regulated as such in paragraph 6, and does not relate to his pensions, which are separately regulated in paragraph 7 and are not mentioned in the exemption provision of paragraph 8.

3.3.3. This interpretation is based on the ordinary meaning of the word “salaries” (French text: “traitements”). In common parlance, these terms do not relate to pensions paid after termination of employment. A similar decision was made by the French Conseil d’État in its judgment of 6 June 1997, no. 148683, Recueil Lebon, 1997, p. 206 ff., part of which was also published in Ars Aequi 1998, p. 44 ff. This judgment concerned a predecessor of the interested party as the registrar of the ICJ. The Conseil d’État reasoned that it follows from the wording (“les termes memes”) of Article 32 (8) of the Statute that pensions are not covered by the exemption regulated therein. A similar decision was taken on 14 January 2002 by the arbitral tribunal established to settle a dispute between France and UNESCO, Reports of International Arbitral Awards Volume XXV, p. 231 ff. This tribunal considered that the tax exemption for “traitements et emoluments” in the headquarters agreement between France and UNESCO did not relate to the pensions of former UNESCO staff. The tribunal cited, among other things, the normal linguistic meaning of these terms.

3.3.4. The fact that the exemption from taxation under Article 32 (8) of the Statute does not extend to pensions is also in keeping with the purpose of this provision. Privileges and immunities, including tax privileges, have been granted to the registrar in the interests of the ICJ with a view to ensuring that this court can carry out its duties independently. The independence of the ICJ is not affected if the retirement pension of an interested party who no longer holds his position as registrar of this court is liable to tax in his country of residence. The judicial character of the former activities is not an obstacle to this, as is evident from the Agreement of 29 July 1994 Trb. 1994, 189 on the seat of—in brief—the Yugoslavia Tribunal of the United Nations. Article XIV (2) of that Agreement provides that the pensions of (inter alia) registrars of the Tribunal are not exempted from income tax in the host country.[33] The same provision has since been made for the pensions of (inter alia) registrars of the International Tribunal for the Law of the Sea and the International Criminal Court.

[33] 1792 UNTS p. 351. Art. XIV(2) reads: ‘…2. In the event the Tribunal operates a system for the payments of pensions and annuities to former Judges, Prosecutors and Registrars and their dependants, exemptions from income tax in the host country shall not apply to such pensions and annuities.’

3.3.5. This interpretation of the Statute is supported by the history of the conclusion of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 (Stb. 1947, H 452). Article V, para 18, opening words and letter (b), of this Convention provides that "salaries and emoluments" of officials of the United Nations are exempt from taxation.[34] The drafters of this Convention also expressly considered the possibility of exempting pensions as well. Ultimately, however, they decided that it was not expedient for the time being to include such an exemption in the Convention (Report of the Sixth Committee to the General Assembly, Document A/43/Rev. 1, 1946 Plenary Meetings of the General Assembly, pp. 643–644). Clearly, it was considered that pensions were not covered by the words "salaries and emoluments". It is therefore unlikely that the members of the United Nations would have assumed, when drafting the Statute a short time earlier, that the term 'salaries' includes pensions.

3.3.6. In interpreting the Statute the interested party invokes the practice of a number of Contracting States which do treat pensions as coming within the exemption of the Statute. However, there is still no generally accepted practice of the States concerned within the meaning of Article 31 (3) (b) of the Convention of Vienna of 23 May 1969, Trb. 1977, 169 on the law of treaties (referred to below as the Vienna Convention on the Law of Treaties). This is evident from the case which led to the judgment of the French Conseil d'État involving a predecessor of the interested party as registrar at the ICJ. His UN pension was taxed by his country of residence—France. The person concerned challenged this decision up to the highest judicial authority, invoking Article 32 (8) of the Statute, but this appeal was dismissed by the Conseil d'État.

3.3.7. The above leads to the conclusion that if Article 32 of the Statute is interpreted in accordance with the rules laid down in the Vienna Convention on the Law of Treaties the pension of the interested party does not come under the exemption of para 8 of that article.

3.3.8. The fact that the Dutch Ministry of Foreign Affairs and successive presidents of the ICJ take the position that the Statute should be interpreted differently cannot alter this.

3.3.9. The first ground of appeal therefore fails.

3.4.1. In the second ground of appeal in cassation the interested party complains about the rejection by the Court of Appeal of his argument that he was entitled to assume from the letter of the Ministry of Foreign Affairs cited above in 3.1.8 that his pension would not be taxed.

3.4.2. The Court of Appeal's rejection of this argument was based on, among other things, his interpretation of the content of the letter, in particular the sentence in which it is stated that the pension of the widow of the former member of the ICJ in the Netherlands was not liable to tax. After examining the structure of the letter the Court of Appeal held that that sentence could reasonably only be construed as

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[34] 1 UNTS p. 16. Art. V(18) reads: '…officials of the United Nations shall (a)…(b) be exempt from taxation on the salaries and emoluments paid to them by the United Nations.'

building on what had gone before, which was—in brief—that the widow concerned was a foreign taxpayer, and that that sentence was not based on an interpretation of the Statute.

3.4.3. This finding, on which the rejection of the argument based on legitimate expectations was solely based, is disputed in vain in the cassation proceedings as the finding is of a factual nature and has been adequately motivated. It is not incomprehensible, even in the light of the letters cited above in 3.1.9 and 3.1.10, in which a different interpretation of the letter invoked by the interested party is defended. This is why the second ground of appeal in cassation also fails …'[35]

The Supreme Court then ruled on how the tax on the pension payments should be determined under the Dutch tax legislation in force at the time when the various pension entitlements arose. Finally, the Supreme Court referred the case back to the Court of Appeal of Amsterdam for further hearing and decision. However, the appeal was withdrawn on 27 February 2009.

3.213 LEGAL EFFECT OF ACTS OF INTERNATIONAL ORGANISATIONS

See: 3.2113 **B**, 4.66, 6.43, 14.1132

3.214 INTERNATIONAL OFFICIALS

See: 3.2113

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[35] The Court of Appeal held as follows in this connection: '…Expectations and policy; 6.26. The letter of 14 December 1992 from the Ministry of Foreign Affairs, as referred to in 3.13, starts with a brief explanation of the tax system in the Netherlands and expressly states that someone who is not resident in the Netherlands is liable to tax—as a non-resident taxpayer—only in so far as he has income from sources in the Netherlands, including in particular immovable property, with reference to the relevant provisions of the Income Tax Act 1964 in force at that time. As regards the case of the widow concerned the letter goes on to say that the tax return forms for the years 1989 to 1991 inclusive which were sent to her relate to taxation that will be levied on her on account of her ownership of immovable property in the Netherlands, for which she is liable to tax in the Netherlands. Subsequently the letter states that the pension awarded to her in the capacity of widow of a former judge and Vice-President of the International Court of Justice is not liable to tax in the Netherlands. In the context of the above, this last sentence cannot reasonably be construed as having the meaning put on it by the interested party, namely that the receipt of the pension by the widow was exempted from tax purely and simply because her deceased husband had been a judge and Vice-President of the International Court of Justice. The only reasonable interpretation of this sentence is that it builds on what goes before, namely that she is not resident in the Netherlands and can therefore be liable only to a limited extent to tax for certain sources of income situated in or emanating from the Netherlands, which does not include the pension payments. At the end of the letter it is stated that the widow is requested to complete and sign the tax returns and return them to the Tax Administration in Brunssum. Contrary to what the interested party has asserted, it cannot be inferred from this letter that it is based on an interpretation of the Statute by the Ministry of Foreign Affairs. …'

3.221 INTERNATIONAL CIVIL AVIATION ORGANISATION
See: 6.23

3.221 INTERNATIONAL LABOUR ORGANISATION
See: 1.203

3.221 UNITED NATIONS
See: 3.2113 **B**

3.221 UNITED NATIONS COMMISSION ON HUMAN RIGHTS
See: 11.3

3.221 UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANISATION
See: 3.2113 **B**

3.221 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
See: 6.06

3.221 UNITED NATIONS HUMAN RIGHTS COUNCIL
See: 4.742

3.221 UNITED NATIONS MONITORING, VERIFICATION AND INSPECTION COMMISSION (UNMOVIC)
See: 11.3

3.221 UNITED NATIONS SPECIAL COMMISSION (UNSCOM)
See: 11.3

3.222 EUROPEAN PATENT OFFICE
See: 3.2113 **B** (n 30)

3.222 NORTH ATLANTIC TREATY ORGANISATION (NATO)
See: 3.2113 **A**

3.223 EUROPEAN UNION
See: 4.66, 6.06, 6.23 (n 79), 6.43, 14.1132

4.31 ADMITTANCE OF ALIENS
See: 4.66, 4.73 **B**, 6.43, 11.2171

4.32 PASSPORTS AND VISAS
See: 4.73 **B**, 6.06, 6.43

4.41 GENOCIDE
See: 7.213, 11.3

4.64 OTHER ASSISTANCE IN CRIMINAL MATTERS
See: 7.213

4.65 EXPULSION
See: 6.06, 11.2171

4.66 ASYLUM
See also: 7.213

M. Elgafaji and N. Elgafaji v. State Secretary for Justice, Administrative Law Division of the Council of State, 25 May 2009, LJN No. BI4791, JV (2009) No. 291,[36] NAV (2009) No. 24,[37] RV (2009) No. 9[38]

– *The Division infers from paragraph 43 of the judgment of the Court of Justice of the European Communities of 17 February 2009 in the Elgafaji case*[39] *that Article 15(c), in conjunction with Article 2(1)(e), of Council Directive 2004/83/ EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted,*[40] *is intended to offer protection in the exceptional situation that*

[36] Note by P. Boeles.

[37] Note by M. den Heijer.

[38] Note by K.M. Zwaan.

[39] Case of Elgafaji (C-465/07); JV (2009) No. 111 with note by T. Spijkerboer, NAV (2009) No. 11 with note by H. Battjes. *RV* (2009) No. 6 with note by H. Battjes. For the text of finding 43, see under Held.

[40] OJ 2004 L 304, p. 12. Art. 15 reads: '… Serious harm consists of: (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict…'

Art. 2(1)(2) reads: '…"person eligible for subsidiary protection" means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial

indiscriminate violence characterising the armed conflict taking place is of such a high level that substantial grounds exist for believing that a civilian who returns to the relevant country or, as the case may be, to the relevant region would, solely on account of his presence there, face a real risk of being subject to the serious threat referred to in Article 15(*c*) *of the Directive.*

- *Although, according to the Court of Justice, Article 15*(*c*) *of the Directive must be interpreted independently, this does not alter the fact that it can be concluded from the judgment of the Court of Justice that Article 15*(*c*) *has a bearing on a situation to which Article 29*(*1*)(*b*)*, of the Aliens Act*[41] *also relates, having regard to the interpretation of Article 3 of the European Convention on Human Rights by the European Court of Human Rights.*[42]
- *It follows from the judgment of the Court of Justice that Article 15*(*c*) *of the Directive is not applicable if the level of the indiscriminate violence characterising the armed conflict taking place is less high than in the exceptional situation referred to above. In that case the alien can, in view of paragraphs 39 and 40 of the judgment,*[43]*derive entitlement to protection from Article 15*(*a*) *and* (*b*) *if he succeeds in showing that he is specifically threatened for reasons connected with his personal circumstances. In that case too Article 29*(*1*)(*b*) *of the Aliens Act offers the requisite protection since Article 3 of the European Convention also requires the provision of protection in such circumstances, in view of the interpretation by the European Court of Human Rights in the abovementioned judgments of 30 October 1991, 11 January 2007 and 17 July 2008.*[44]
- *The situation in Baghdad as referred to in Article 15*(*c*) *does not occur in relation to the appellants.*

The Facts: On 20 December 2006 the Minister for Immigration and Integration rejected the requests for asylum of M. and N. Elgafaji, who were from Iraq. Their application for review of this decision was granted by the District Court of The Hague (sitting in Almelo) on 21 March 2007. Both the State Secretary for Justice and M. and N. Elgafaji appealed against this judgment to the Administrative Law Division of the Council of State. In its decision of 12 October 2007 the Division

(Footnote 40 continued)
grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 … and [who] is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country…'

[41] Art. 29(1)(b) reads: '… A temporary residence permit, as referred to in Article 28, may be issued to an alien:…(b) who has proved that he has good grounds for believing that if he is expelled he will run a real risk of being subjected to torture or to inhuman or degrading treatment or punishment; …

[42] 213 UNTS p. 221, ILM (1984) p. 1027, ETS No. 5, Trb. 1951 No. 154. Art. 3 reads: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

[43] For the text of findings 39 and 40 see under Held.

[44] For further information about these judgments see under Held.

requested the Court of Justice of the European Communities for a preliminary ruling on two questions relating to the interpretation of Article 15(c) of Directive 2004/83/EC of 29 April 2004 and stayed consideration of the appeals until the Court of Justice had given its ruling.[45] The Court of Justice answered the questions in its judgment of 17 February 2009. In the meantime the State Secretary had, after all, granted M. and N. Elgafaji a temporary asylum residence permit pursuant to Article 29(1)(d) of the Aliens Act with effect from 2 April 2007.[46]

Held: '…In the appeal of the State Secretary

2.3. In his grounds of appeal, in so far as relevant here, the State Secretary argues, in brief, that the District Court failed to recognise that no relationship exists between Article 15, opening words and (c), of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (referred to below as the Directive) and Article 29, para 1, opening words and (d), of the Aliens Act 2000. According to the State Secretary, Article 15, opening words and (c), when read in conjunction with section 2, opening words and (e), of the Directive, comes within the scope of Article 29, para 1, opening words and (b), of the Aliens Act 2000. He submits in this connection that the prohibition of refoulement, as contained in Article 3 of the European Convention on Human Rights (referred to below as the ECHR) is contained in Article 15, opening words and (c), of the Directive, as well as in Article 29, para 1 (b), of the Aliens Act 2000. The State Secretary explained at the hearing on 17 March 2009 that the Court of Justice had concluded, in its judgment of 17 February 2009, that the protection afforded by Article 15, opening words and (c), of the Directive does not extend further, in substantive terms, than the protection afforded by Article 3 of the ECHR, as interpreted in the case law of the European Court of Human Rights (referred to below as the ECtHR) …

2.3.4. In its decision of 12 October 2007 referring the case for a preliminary ruling, the Division described the case law of the ECtHR concerning Article 3 of the ECHR in the following terms: 'In accordance with, among other things, the judgment of 30 October 1991 in the case of Vilvarajah, no. 13163/87 (http://www.echr.coe.int and RV 1991, 19) in order to make a plausible case that an alien would run a real risk of being subjected to treatment inconsistent with Article 3 of the Convention, it is necessary to show that there are special distinguishing features from which an increased risk of treatment inconsistent with Article 3 of the ECHR can be inferred. The mere possibility of an infringement is insufficient.

[45] LJN No. BB5841, RV (2007) No. 17 with note by S.G. Kok, NAV (2007) No. 46 with note by M. den Heijer, AB (2008) No. 105 with note by H. Battjes.

[46] Art. 29(1)(d) reads: 'A temporary residence permit, as referred to in Article 28, may be issued to an alien: … (d) for whom return to his country of origin would, in the opinion of the Minister, constitute an exceptional hardship in the context of the overall situation there.'

It is also evident, for example from the judgments of the ECtHR of 6 March 2001 in the case of Hilal, No. 45276/99 (http://www.echr.coe.int and JV 2001/104) and 17 February 2004 in the case of Venkadajalasarma, No. 58510/00 (http://www.echr.coe.int and NJB 2004/17, No. 20) that besides the requirement of individualisation, importance is also attached to the general human rights situation in the country of origin which forms the background to the applicant's individual account.

It cannot be inferred from the judgment of the ECtHR of 11 January 2007 in the case of Salah Sheekh, No. 1948/04 (http://www.echr.coe.int and AB 2007, 76) that the above-mentioned requirement of individualisation has been abandoned. However, it can be inferred, as held by the Division in today's judgment in case no. 200701023/1 (http://www.raadvanstate.nl),[47] that if an alien is a member of a specific minority group which is the target of serious human rights violations and there are special circumstances of the kind that applied in the Salah Sheekh case, information about the situation of the group and the extent to which it can provide or obtain protection from such human rights violations must be expressly taken into account in answering the question whether an alien can succeed in showing that, upon return, he would run a real risk of being subjected to treatment within the meaning of Article 3 of the ECHR, and the more serious the situation the greater the weight that should be attached to this information.'

2.3.5. In its referral to the Court of Justice, the Division found that, in view of the grounds of appeal of the State Secretary, it was necessary to determine whether, in particular, Article 29, para 1, opening words and (b), of the Aliens Act 2000 already provides the protection offered by Article 15, opening words and (c), read in conjunction with Article 2, opening words and (e) of the Directive. On the assumption that Article 15, opening words and (c), together with Article 15, opening words and (b), of the Directive are exclusively intended to provide protection in situations also covered by Article 3 of the ECHR, as interpreted in the case law of the ECHR described above, the protection offered by Article 15, opening words and (c), of the Directive is already derived by the aliens under national law from Article 29, para 1, opening words and (b), of the Aliens Act 2000, since the latter provision is in any event intended to provide the same protection as Article 3 of the ECHR. Taking account of the fact that the serious harm against which Article 15, opening words and (c), of the Directive is intended to provide protection cannot be directly traced back to the text of Article 3 of the ECHR and that—at the time of the referral—there was no known case law of the ECtHR concerning Article 3 of the ECHR in which the harm described in Article 15, opening words and (c), of the Directive was involved as such in the assessment, the Division considers that it is possible to interpret Article 15, opening words and (c), of the Directive in such a way as being intended, in comparison with Article 3 of the ECHR, to provide supplementary or other protection. Since the meaning of Article 15, opening words and (c), of the Directive is decisive in

[47] See 40 NYIL (2009) p. 428.

assessing the grounds of appeal and this meaning is not clear, the Division decided to refer the following questions to the Court of Justice for a preliminary ruling:

> (1) Is Article 15, opening words and (c), of the Directive to be interpreted as offering protection only in a situation in which Article 3 of the ECHR, as interpreted in the case law of the ECtHR, also has a bearing, or does the former provision, in comparison with Article 3 of the ECHR, offer supplementary or other protection? (2) If Article 15, opening words and (c), of the Directive, in comparison with Article 3 of the ECHR, offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15, opening words and (c), of the Directive, read in conjunction with Article 2, opening words and (e), thereof?

2.3.6. Pending the preliminary ruling procedure, the ECtHR gave judgment in the case of 17 July 2008, No. 25904/07, NA. v. the United Kingdom, in which it held, insofar as relevant here, as follows:

> 115. From the foregoing survey of its case-law, it follows that the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

2.3.7. In its judgment of 17 February 2009, the Court of Justice held as follows in relation to the questions referred to it for preliminary ruling:

> 28. In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.
>
> (…)
>
> 35. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the level of indiscriminate violence characterising the armed conflict taking place—assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred—reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.
>
> 36. That interpretation, which is likely to ensure that Article 15(c) of the Directive has its own field of application, is not invalidated by the wording of recital 26 in the preamble to the Directive, according to which '[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.
>
> 37. While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set

out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows—by the use of the word 'normally'—for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.

38. The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paras (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.

39. In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.

40. Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account:

- the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive, and
- the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower.

(…)

43. Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, must be interpreted as meaning that:

- the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;
- the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place—assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred—reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

44. It should also, lastly, be added that the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, arising from the foregoing paragraphs is fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR (see, inter alia, N.A. v. the United Kingdom, Section 115 to 117 and the case-law cited).

2.3.8. The Division infers from paragraph 43 of the above judgment, when read in conjunction with paragraphs 35 to 40, that Article 15, opening words and

(c), when read in conjunction with Article 2 (1), opening words and (e), of the Directive, is intended to offer protection in the exceptional situation that indiscriminate violence characterising the armed conflict taking place is of such a high level that substantial grounds exist for believing that a civilian who returns to the relevant country or, as the case may be, to the relevant region would, solely on account of his presence there, face a real risk of being subject to the serious threat referred to in Article 15, opening words and (c) of the Directive. Article 29, para 1, opening words and (b), of the Aliens Act 2000 provides for the protection required in this way, since this provision forms the basis for granting a residence permit in situations covered by Article 3 of the ECHR, and the latter provision also covers—in view of the way in which it was interpreted by the ECtHR in the judgment of 17 July 2008 in the above-mentioned preliminary referral proceedings, which judgement is explicitly cited by the Court of Justice in paragraph 44 referred to above—the exceptional situation described in Article 15, opening words and (c) of the Directive. Although Article 15, opening words and (c), of the Directive must be interpreted independently, as held by the Court of Justice in paragraph 28 of the judgment of 17 February 2009, and, as a consequence of the interpretation in paragraph 35, could have its own scope, as held by the Court of Justice in paragraph 36, this does not alter the fact that it can be concluded from the interpretation of Article 15, opening words and (c), of the Directive given in this judgment by the Court of Justice that this provision has a bearing on a situation to which Article 29, para 1, opening words and (b) of the Aliens Act 2000 also relates, having regard to the interpretation of Article 3 of the ECHR by the ECtHR.[48]

2.3.9. It follows from the findings of the Court of Justice in the above-mentioned judgment that Article 15, opening words and (c), of the Directive are not applicable if the level of the indiscriminate violence characterising the armed conflict taking place is less high than in the exceptional situation referred to above. In that case the relevant alien can, in view of paragraphs 39 and 40, derive entitlement to protection from Article 15, opening words and (a) and (b) of the Directive if he succeeds in showing that he is specifically threatened for reasons connected with his personal circumstances. In that case too Article 29, para 1, opening words and (b), of the Aliens Act 2000 offers the requisite protection since Article 3 of the ECHR also requires the provision of protection in such a case, in view of the interpretation by the ECtHR in the above-mentioned judgments of 30 October 1991, 11 January 2007 and 17 July 2008.

2.3.10. By holding that there is no basis for assuming that Article 29, para 1, opening words and (d), of the Aliens Act 2000 could not provide a basis for subsidiary protection as referred to in Article 15, opening words and (c), as read

[48] In its judgment of 25 June 2009 the Division also concluded that Article 15 (c) did not involve a change in the law, LJN No. BJ1596, JV (2009) No. 330, with note by T. Spijkerboer. Idem in its judgment of 13 July 2009, JV (2009) No. 352, with note by M. den Heijer, RV (2009) No. 10 with note by Sadhia Rafi.

in conjunction with Article 2, para 1, opening words and (e), of the Directive, the District Court failed to recognise that the State Secretary had rightly taken the position, in the light of the above findings, that pursuant to Article 29, para 1, opening words and (b), of the Aliens Act 2000 there was already entitlement to protection against facing a real risk of serious harm as referred to in Article 15, opening words and (c), of the Directive. As follows from the case law of the Division (including the judgment of 3 December 2001 in case No. 200105129/1, JV 2002/13), the District Court should have assessed first of all the position taken in the decisions of 20 December 2006 to the effect that the aliens cannot derive protection from Article 29, para 1, opening words and (b) of the Aliens Act 2000 as they had not succeeded in showing that they faced a real risk of serious harm.

Only afterwards could it assess the position taken in the decisions that the aliens were not eligible for an asylum residence permit pursuant to Article 29 (1), opening words and (d), of the Aliens Act 2000, in which context Article 15, opening words and (c), of the Directive as interpreted by the Court of Justice plays no role having regard to recital 26 in the preamble to the Directive. The grounds of appeal succeed.

2.4. The appeal is well-founded. The appealed judgment should be reversed. Giving judgment, as the District Court should have done, the Division holds as follows.

2.5. The aliens have submitted—in summary—that the Minister wrongly took the position that they were not able to derive entitlement to protection from Article 29, para 1, opening words and (b), of the Aliens Act 2000. They submit, first of all, that they fear that they will be personally threatened on return to Iraq, as they were previously subjected to threats. In addition, the aliens argue that before leaving Iraq they had their habitual place of residence in Baghdad and that if they were to have to return to Baghdad they would, solely on account of their presence there, face a real risk of being individually subject to the serious threat to their life or person by reason of indiscriminate violence in the context of an armed conflict. In this connection the aliens have invoked—with reference to the general official reports on Iraq of the Minister of Foreign Affairs of December 2005, April 2006 and December 2006—the bad security situation in Iraq in general and in Baghdad in particular.

2.5.1. In her decisions of 20 December 2006, insofar as relevant here, the Minister took the position that the aliens could not derive protection from Article 29, para 1, opening words and (b), of the Aliens Act 2000 as they had not succeeded in showing that there was a real risk of serious harm in their case. The Minister based her position on the fact that the aliens with fear of being personally subject to personal threats in the event of their return to Iraq as they had, according to their submission, previously been subject to threats was not credible. At the hearing of 17 March 2009 the State Secretary stated in further explanation of the decisions that they were also based on the position that there was no armed conflict in Iraq in general or in Baghdad in particular in which the level of indiscriminate violence was of such a high level that there were substantial grounds for believing

that a citizen who returned would run a real risk of serious harm solely by his presence there.

2.5.2. In the appealed judgment the District Court held that it was reasonable for the Minister to have taken the position that the aliens' fear of being subject to personal threats on their return to Iraq, because they had, they alleged, been previously subject to threats, was not credible. As held above at 2.1, the arguments that have been submitted as grounds of appeal cannot result in the setting aside of the appealed judgment. It follows that it must now be assumed that the aliens' fear of being subject to personal threats on their return to Iraq for reasons connected with their personal circumstances is not credible. This is why what the aliens have submitted in respect of this fear is not a ground for the opinion that the Minister wrongly refused to grant them a residence permit pursuant to Article 29, para 1, opening words and (b), of the Aliens Act 2000.

2.5.3. Although it is apparent from the above-mentioned official report of December 2006, which relates in part to the situation in Iraq at the time when the decisions of 20 December 2006 were taken, that the security situation in Iraq had deteriorated and continued to be of great concern and that the violence concentrated in, among other places, Baghdad and its environs, it cannot be inferred from this that the indiscriminate violence characterising the armed conflict taking place at that time in Iraq in general and in Baghdad in particular was of such a high level that the Minister wrongly took the position that the aliens had not succeeded in showing that substantial grounds existed for believing that the aliens would, solely on account of their presence there, face a real risk of being subject to a serious and individual threat to their life or person.[49] The official reports of December 2005 and April 2006 invoked by the aliens do not result in a different finding if only because these reports do not contain information on the extent of the indiscriminate violence in Iraq in general and in Baghdad in particular at the time when the above-mentioned decisions were taken. As the aliens have thus not succeeded in showing case that, in the event of their return to Iraq, they would run a real risk of a serious and individual threat as referred to above, there is no ground for finding that the Minister wrongly refused to grant a residence permit pursuant to Article 29, para 1, opening words and (b), of the Aliens Act 2000 …'[50]

[49] In its judgment of 14 August 2009 the Division did assume on the basis of the UNHCR report of April 2009 that an Article 15 (c) situation existed in Ninewa (Iraq), LJN No. BJ5727, JV (2009) No. 384; the same was true of Kirkuk in the judgment of 21 August 2009, LJN No. BJ6304, JV (2009) No. 387. However, this was not the case in Kabul (Afghanistan), cf. judgment of 29 September 2009, LJN No. BJ9164, JV (2009) No. 463 with note by H. Battjes.

[50] The Division referred the case back to the District Court to examine whether the State Secretary had entirely met their request by granting them an asylum permit under Article 29 (d) of the Aliens Act. The District Court had not yet given judgment when the present case was written up (16 April 2010).

4.7 PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS
See: 4.73 **B**

4.73 EUROPEAN CONVENTION ON HUMAN RIGHTS
See: 1.203, 4.66, 6.06, 7.213, 11.3, 14.1132

A. X v. P. Hemelrijk, Supreme Court, 18 January 2008, LJN No. BB3210, RvdW (2008) No. 104, NJ (2008) No. 274.[51]

- *Is an open letter published by journalist Hemelrijk on her website containing critical comments about X's story that his killing of a person in hiding during the Second World War was an act of resistance unlawful?*
- *This case involves a clash of two fundamental rights, namely on the side of Hemelrijk the right to freedom of expression and on the side of X his right to honour and reputation and to respect for privacy. The answer concerning which of these two rights is more important in the present case must be sought by weighing all the relevant circumstances.*
- *In principle, no priority is according in weighing these circumstances to the right to freedom of expression as safeguarded in Article 7 of the Constitution*[52] *and Article 10 of the European Convention on Human Rights.*[53] *The same is true of the rights protected by Article 8 of the Convention.*[54]

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[51] With note by E.J. Dommering.

[52] Art. 7(1) reads: '1. No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law. … 3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law …'

[53] 213 UNTS p. 221, ETS No. 5, Trb. 1964 No. 69, Art. 10 reads: '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

[54] Art. 8 reads: '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

– *It follows that this is not a two-stage test (i.e., a test in which it is first decided by reference to the circumstances which of the two rights deserves priority and then whether the result of this assessment is negated by the necessity test as laid down in Article 8 (2) of the Convention and Article 10 (2) of the Convention, respectively). Instead, this test should be carried out all at once in such a way that the finding that one of the two rights takes priority over the other in view of the circumstances of the case also means that the infringement of the other right complies with the necessity test of the relevant paragraph 2.*

The Facts: X served a writ on the Algemeen Dagblad journalist P. Hemelrijk on 11 May 2001 requiring her to appear before the District Court of Amsterdam and sought (i) a declaratory ruling that by writing her 'Open letter to the Supreme Court' of 2 November 1998 and sending it to the national media and by placing it and keeping it placed on the internet, Hemelrijk had acted unlawfully against him, (ii) an injunction requiring Hemelrijk to remove the open letter from the internet and to cease and desist from replacing it on the internet on pain of an incremental penalty, and (iii) an order directing Hemelrijk to pay damages. The District Court dismissed the claims by judgment of 16 June 2003.[55] The Court of Appeal of Amsterdam upheld this judgment on 9 March 2006.[56] X appealed in cassation to the Supreme Court against this judgment.

Held: '…3.2 It was against this background that X instituted the present proceedings against Hemelrijk. Very briefly, he alleges that Hemelrijk acted unlawfully against him by publishing the open letter since it repeated allegations that had previously been held by the Supreme Court to be unlawful and/or unfounded in the Het Parool judgment.[57] Hemelrijk's main defence is that if X is free to seek publicity for his coloured version of what happened at the time in question, she should be free to contest this version, in particular X's assertion that he had killed Y in the interests of the resistance movement.

The District Court dismissed the application. The Court of Appeal upheld this judgment. In brief and in so far as relevant to the cassation proceedings, it held as follows. The case involves the clash of two fundamental rights, freedom of expression on the one hand and the right to honour and reputation, respect for privacy and the right to be left in peace on the other. To determine which of these rights prevails in this case, all relevant circumstances should be taken into account. One factor of importance in this connection is that the open letter should be

[55] LJN No. AI0400.

[56] LJN No. AV4203.

[57] Finding 3.1 (v) of the Supreme Court's judgment states as follows: 'Following this article two articles by Bart Middelburg were published in January and February 1990. The Court of Appeal of Amsterdam gave a declaratory judgment to the effect that these articles, which were mostly given over to the accusation that X had been guilty of '(common) murder in the course of a robbery', were offensive to X and ordered Het Parool and Middelburg to pay compensation. The appeal in cassation against this judgment was dismissed by the Supreme Court by judgment of 6 January 1995, No. 15549, NJ 1995, 422 (referred to below as the Het Parool judgment).'

regarded as a press publication. The basis for the assessment is the right to freedom of expression. In view of the tone and tenor of the open letter, the District Court also rightly held that it was in the nature of a column, which may not be judged by the same high standards as investigative journalism of the kind practised by Middelburg. Account should also be taken of the fact that the assertion that killing Y was an act of resistance necessary to protect the life of X and/or others is at least questionable, whereas X clearly gave the impression in the programme cited above at 3.1, at (vii),[58] that this was an act of resistance that had been objectively established, given the rehabilitation of his reputation by the Advisory Committee on the Resistance Movement (although in fact no such rehabilitation ever occurred). Although this concerns an act committed 55 years ago, given the above-mentioned circumstances and taking into account the opinion of the Central Appeals Court for the Public Service and for Social Security Matters[59] as referred to at 3.1 (vi), which was given less than a month earlier, X has brought it is on his own head that a critical onlooker such as Hemelrijk would feel obliged to dispute the version of this story recounted by X in the 'Het Uur van de Wolf' programme. And she was entitled to do so. After all, the public interest at stake here concerns not only the memory of Y but also the feelings of other victims of the persecution of the Jews in the Second World War (and their next of kin). Contrary to what X alleges, Hemelrijk has not suggested that X killed Y for pecuniary gain. She has merely submitted in a cynical and provocative fashion that she does not believe X, which she is entitled to do, given the manner in which X has himself sought publicity.

The criteria to be applied in assessing the dispute

3.3. Parts 2-2.2 and 7-7.2 of the ground of appeal in cassation, when read together, set out the criteria which X submits should be applied in answering the question whether the open letter is unlawful in relation to him. According to parts 2-2.2, the Court of Appeal wrongly took the freedom of expression as the basic principle and thus failed to recognise that there is no ground for accepting an order of priority between that right and the right to honour and reputation, respect for privacy and the right to be left in peace on the other. In addition, liability in tort exists in principle if the open letter contains untrue (or partially untrue) statements about X, in any event if Hemelrijk knew or should have known this. According to parts 7-7.2, the Court of Appeal wrongly applied only the necessity test of Article

[58] Finding 3.1(vii) states as follows: 'X was the subject of a broadcast in the NPS television programme 'Het Uur van de Wolf' on 1 December 1997.

[59] Finding 3.1(vi) states: 'By judgment of 6 November 1997 the Central Appeals Court for the Public Service and for Social Security Matters held that Y's killing by X did not constitute an act of resistance within the meaning of Article 1, para 1, of the Special Pensions (1940–1945) Act and that the pension applied for by X partly on this ground had therefore rightly been refused. The Central Appeals Court held in this connection that no information objectively proving the existence of an emergency situation connected with resistance activities was available other than statements made by X himself. The Central Appeals Court added that this was not altered by the fact that the Advisory Committee on the Resistance Movement had pronounced the rehabilitation of X's reputation in January 1946 since there is no evidence that this rehabilitation was based on an actual verification of the facts, which is also true of the pardon granted to X in 1946.'

10 (2) European Convention on Human Rights (referred below as ECHR) and not the necessity test of Article 8 (2) ECHR as well. X argues that if the Court of Appeal did apply this test, it is impossible to see how it arrived at the reasoning given by it for its findings.

3.4.1. As the Court of Appeal rightly held (findings 3.2 and 3.3), this case involves a clash of two fundamental rights, namely on the side of Hemelrijk the right to freedom of expression and on the side of X his right to honour and reputation and to respect for privacy. The answer concerning which of these two rights is more important in the present case must be sought by weighing all the relevant circumstances. As the Supreme Court held in legal finding 5.11 of the Het Parool judgment, it is not the case that priority is, in principle, accorded to the right to freedom of expression as safeguarded in Article 7 of the Constitution and Article 10 ECHR. The same is true of the rights protected by Article 8 ECHR. It follows that this is not a two-stage test (i.e. a test in which it is first decided by reference to the circumstances which of the two rights deserves priority and then whether the result of this assessment is negated by the necessity test as laid down in Article 8 (2) ECHR and Article 10 (2) ECHR respectively). Instead, this test should be carried out all at once in such a way that the finding that one of the two rights takes priority over the other in view of the circumstances of the case also means that the infringement of the other right complies with the necessity test of the relevant paragraph 2.

3.4.2. The following should also be observed with a view to the further assessment of the ground of appeal in cassation. This case concerns the assessment of an opinion questioning the version given by X in the 'Het Uur van de Wolf' television programme about his motives for killing Y in 1943 (see above at 3.1(vii) and 3.1(i) respectively).[60] As the European Court of Human Rights has held, even when the opinion amounts to a (purely) value judgement, the proportionality of the infringement of rights protected by Article 8 ECHR may depend on whether there is a sufficient factual basis for the relevant opinion, because even a value judgement may be excessive and hence unlawful if it lacks any factual basis (cf. inter alia European Court of Human Rights 19 December 2006, No. 18235/02).

3.5. The Court of Appeal held in finding 3.4 of its judgment that "the right of freedom of expression serves as the basic criterion in assessing a press publication". However, it is apparent from findings 3.2 and 3.3, and also from the rest of its judgment, that the Court of Appeal took account—as it was required to do—of all relevant circumstances of the case in deciding which of the fundamental rights concerned should be given priority. This is why it is clear that in uttering the sentence that has been challenged the Court of Appeal simply meant that the freedom of expression should be taken into account in all cases when assessing a

[60] Finding 3.1 (i) states as follows: 'On 24 May 1943 X killed Y, a Jew who had been placed in hiding with him since 19 May 1943. On 29 May 1943 the body was left in a boat hired by X in his own name in a branch of the Boerenwetering canal. X was arrested and sentenced to 4 years' imprisonment on 15 June 1944 for manslaughter (and hiding the corpse to evade investigation).' Finding 3.1 (ii) states: 'On 17 January 1946 X was granted a pardon in the sense that the remainder of his sentence was remitted.'

(press) publication. The legal complaint that the Court of Appeal based its decision on an order of priority between the rights at issue in this case therefore lacks any basis in fact. It follows from the treatment of the other parts of the ground of appeal in cassation below that the complaint about the reasoning given for the judgment also fails.

Was the Court of Appeal's designation of the open letter as a press publication correct and made on good grounds?

3.6. Parts 1-1.3 of the ground of appeal in cassation contain legal arguments and other arguments about the reasoning of the Court of Appeal which challenge finding 3.4 of its judgment, namely that the open letter should be treated as a press publication. The Court of Appeal based this opinion on the fact that by writing the open letter Hemelrijk had sought publicity, that she had sent the letter to all national media and published it on her website, and that she had discussed its content in various interviews.

3.7 As the parties recognise that Hemelrijk wrote and published the letter in her private capacity (something which is also manifestly apparent from the conclusion of the open letter), the Court of Appeal clearly intended in the disputed parts of its opinion to say that the open letter should be equated with a press publication for the purpose of the test to be applied in this case. As regards the assessment of the parts of the ground of appeal in cassation, it is important to note that the case law of the European Court of Human Rights shows that the freedom of the press occupies a special place in the assessment to be made under Article 10 ECHR since the press have a vital role to play as public watchdog. However, due to the advent of the internet and other factors, it is no longer possible to define accurately what is meant by the press in the above-mentioned sense, partly because it has thus become possible for private individuals to address themselves to a wider public outside the hitherto existing media. Against this background the Court of Appeal evidently intended to take account of this development. It did so by attributing special significance in the assessment to be made in this case (see 3.4.1 above) to the fact that Hemelrijk had addressed herself by means of the open letter—a publication on her personal website—to a broad public in order to question the explanation given in public by X in the 'Het Uur van de Wolf' television programme of his motive for killing Y and of his release from custody in 1946. It was the clear opinion of the Court of Appeal that she was acting partly in the public interest, with the result that an open letter may be justifiably equated with a press publication. There is no evidence that this opinion misrepresents the law. Nor is this reasoning incomprehensible.

Was the Court of Appeal right to equate the open letter with a column?

3.8. Parts 3-3.8 of the ground of appeal in cassation take issue with the opinion of the Court of Appeal in legal finding 3.5 that the open letter was rightly equated by the District Court with a newspaper column. This opinion is challenged by a series of submissions in these parts of the appeal.

In so far as the essence of the submissions is that this opinion is incomprehensible because the open letter does not fulfil the characteristics of a column, they cannot result in cassation because they lack a factual basis. By using the phrase

'equated with', the Court of Appeal expressed the fact that it was aware that the open letter was not a column in the journalistic and usual sense of the word.

In so far as the essence of the submissions is that the comparison made by the Court of Appeal with a newspaper column is incomprehensible, they fail because, according to the clear and not incomprehensible opinion of the Court of Appeal, what the open letter has in common with a column is that it does not primarily give a factual account but presents a view or opinion in a thought-provoking manner.

In so far as it is argued in the submissions that only a newspaper column is (in the words of these parts of the appeal) a "place of privilege", and even then only to a limited extent, they fail because this submission is not correct. If it is clear to the target group that the message is intended to express an opinion, its lawfulness must be assessed by reference to different criteria than those applied to a factual account. In other words, it is the content and not the label ("newspaper column") that is important in this connection. It should be noted, incidentally, that even in a publication devoted purely to expressing an opinion the bounds of propriety (which are influenced by the nature of the publication) may not be exceeded; see above at 3.4.2.

In so far as it is argued in the submissions that a newspaper column, or a comparable piece of writing such as an open letter, is not a suitable medium in which to discuss a serious and sensitive topic such as the killing of a Jew who was in hiding during the Second World War, they must fail if only because they do not recognise that the purpose of the open letter was, according to the facts as found by the Court of Appeal, not so much to raise the subject of Y's killing as to question the version of events put about by X, the perpetrator of the killing, in the media.

Did Hemelrijk have compelling reasons of public interest for publishing the open letter?

3.9. Parts 4-4.4 of the ground of appeal in cassation take issue with the opinion of the Court of Appeal (legal finding 3.7) that, despite X's substantial interest in the form of respect for his right to privacy, there were still sufficiently compelling reasons for publication of the open letter since (i) by the statements he had made in the "Het Uur van de Wolf" programme X had brought it is on his own head that a critical onlooker such as Hemelrijk would feel obliged to dispute this "abuse", and (ii) the public interest at stake here is not only Y's memory but also but also the feelings of other victims of the persecution of the Jews in the Second World War (and their next of kin).

3.10. These parts of the ground of appeal in cassation fail. In view of the circumstances mentioned by the Court of Appeal, namely that X had once again sought publicity in the "Het Uur van de Wolf" television programme and that in that programme he had wrongly created the impression that his reputation had been fully rehabilitated since his conviction, the Court of Appeal's finding that there were compelling reasons of public interest justifying the publication of the open letter and bringing it to the attention of the public is neither evidence of a misinterpretation of the law nor incomprehensible. It is not necessary to consider here whether the open letter can be justified only if there are compelling reasons of public interest for it since this does not concern a "both hurtful and degrading accusation of robbery and

murder" (legal finding 5.10 of the *Het Parool* judgment) but merely amounts—according to the finding of the Court of Appeal (which is, as will be seen below, challenged in vain in the cassation proceedings)—to an "exposure in a cynical, provocative manner" of X's story that Y's killing was an act of resistance. Nor was it incorrect for the Court of Appeal to take into account in reaching its opinion not only Y's memory but also the feelings of other victims of the persecution of the Jews in the Second World War and their next of kin. Similarly, it is perfectly understandable that the Court of Appeal found—as this finding must be understood—that the public interest is served by satisfying the sense of justice and the emotions of the victims of the persecution of the Jews in the Second World War and their next of kin. And it is equally understandable that the Court of Appeal attached particular importance in this connection to the memory of Y, a Jew who was in hiding and was killed by X at the address where he was hiding.

Did Hemelrijk suggest that, in killing Y, X was motivated by a desire for pecuniary gain?

3.11. Parts 5-5.4 of the ground of appeal in cassation contest the reasons given by the Court of Appeal for its opinion in legal finding 3.9 (a) that Hemelrijk did not suggest that X had killed Y for pecuniary gain and that this case therefore differs to this extent from the case of the Het Parool judgment which concerned the accusation of murder and robbery. The essence of the submissions is that this opinion was incomprehensible since Hemelrijk basically repeats Het Parool's suggestion that X killed Y for pecuniary gain, as is evident in particular from the following passage of the open letter: "I'm not going to speculate about X's real motives for killing this person in hiding. I know better than to do that! However, it's an established fact that the victim had a small fortune in cash, which he carried with him day and night. The Supreme Court knows that as well as I do. And it also knows that shortly after the murder witnesses saw X with a large amount of money, which looked like it had been in the water. If I remember correctly, he was busy hanging the banknotes up to dry. But I am not going to speculate about X's real motives. I know better than that. Let the readers draw their own conclusions."

3.12. These parts of the ground of appeal in cassation can be dealt with collectively. They do not challenge the opinion of the Court of Appeal "that the assumption that killing Y was an act of resistance necessary to protect the life of X and/or others is at least questionable" (legal finding 3.6).

The Court of Appeal based this finding on the following:

- X created the impression in the above-mentioned television programme that Y's killing was an act of resistance and that this had been objectively established, given the "rehabilitation" of his reputation by the Advisory Committee on the Resistance Movement;
- however, X's reputation has never been rehabilitated;
- Hemelrijk rightly assumed—inter alia, on the basis of the criminal judgment of the District Court of 15 June 1944, the pardon recommendation of Minister of

Justice Kolfschoten of 14 January 1946, his letter to the Advisory Committee on the Resistance Movement[61] and the judgment of the Central Appeals Court for the Public Service and for Social Security of 6 November 1997, later followed by the ruling of the Special Pensions Board of the Pensions and Benefits Council of 10 June 2005[62]—that the assertion that this was an act of resistance could be openly questioned.

3.13. Partly against this background the Court of Appeal gave a not incomprehensible opinion by reading the quoted passage as meaning that Hemelrijk alleged, albeit in provocative words, that she did not believe that Y's killing by X was an act of resistance. Unlike Middelburg, in the publications which led to the Het Parool judgment, she did not make the accusation that X had been guilty of murder and robbery, but confined herself to questioning the motives given by X for his deed in the "Het Uur van de Wolf "television programme. In addition, the open letter is not investigative journalism and does not pretend to be so, but is instead a publication expressing an opinion. Even the fact that the passage, when read in itself, can be interpreted differently—i.e. as meaning that Hemelrijk has basically repeated the accusation expressed by Middelburg in Het Parool to the effect that, in killing Y, X did not commit an act of resistance but was motivated by a desire for pecuniary gain—does not make the opinion of the Court of Appeal incomprehensible. X also—rightly—maintains in these parts of the appeal that there was no factual basis for the present publication. In arriving at its opinion that questions can be raised about the correctness of the assertion that this was an act of resistance, the Court of Appeal evidently referred to legal consideration 9 of the judgment of the District Court, which cites in particular: (i) that another hiding place for Y was not first sought; (ii) that X hired in his own name the boat that was used to remove the body; (iii) that after his arrest he mentioned the name of the person who had assisted him; (iv) that almost immediately after his arrest X stated that the victim was a Jew who had gone into hiding, and (v) that he gave inconsistent accounts of what happened to Y's money (as Hemelrijk has alleged, without being contradicted, X acknowledged in the context of the pension application procedure that he had found NLG 250 in Y's possessions and that he had appropriated this money).

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[61] Finding 3.1(iii) states: 'A letter from the then Minister of Justice Kolfschoten of 6 February 1946 to "the Advisory Committee on the Resistance Movement" contains the following passage: "In connection with the publication in various newspapers of the pardon granted to X I would draw your attention to the fact that the suggestion in these reports that this concerned a rehabilitation of his reputation is not correct. A remission of sentence granted by way of pardon does not affect the judgment, as is also evident from the content of the pardon decision. In the present case, as in all pardon decisions, the statement of the granting of the pardon is followed by the phrase: 'the judgment otherwise remaining fully intact'. Pardons cannot be used as a last form of legal redress."

[62] Finding 3.1 (xii) states as follows : 'On 10 June 2005 the Special Pensions Board of the Pensions and Benefits Council gave a ruling on a notice of objection lodged by X in the proceedings for review of the decision refusing his application for a pension under the Special Pensions Act 1940-1945)….'

Doubt cast on X's resistance past; ground of appeal wrongly not discussed?

3.14. Part 6 of the ground of appeal in cassation concerns the suggestion which, according to X, is implicit at various places in the open letter that whether he was engaged in any resistance activities is doubtful. X maintains that this has harmed his name and reputation. The District Court rejected this submission. On appeal X challenged this opinion in a ground of appeal. According to this part of the ground of appeal in cassation the Court of Appeal wrongly failed to discuss this ground of appeal.

This part of the ground of appeal in cassation cannot lead to cassation since it lacks any factual basis. After all, in legal finding 3.8 the Court of Appeal cited, inter alia, X's submission that Hemelrijk had repeated that he (X) was "boasting" about his resistance past, and held in legal finding 3.9 that since X had created impression in the "Het Uur van de Wolf" programme that killing Y was an act of resistance Hemelrijk was entitled to refer to this. The Court of Appeal went on as follows: "This was all she did." In this way the Court of Appeal held that Hemelrijk did not express a view on the question whether X's history as a member of the resistance could be criticised, but confined himself to expressing doubts about the resistance character of Y's killing. In other words, far from leaving X's submission undiscussed, the Court of Appeal actually rejected it.

4. Decision

The Supreme Court dismisses the appeal; …'

B. X v. the Minister of Foreign Affairs, Administrative Law Division of the Council of State, 3 December 2008, LJN No. BG5910, JB (2009) No. 13, AB (2009) No. 70,[63] JV (2009) No. 114[64]

– *According to the settled case law of the European Court of Human Rights proceedings relating to the entry, stay and deportation of aliens fall outside the scope of Article 6 of the European Convention on Human Rights.*[65]

[63] Note by T. Barkhuysen and M.L. van Emmerik.

[64] Ibid.

[65] 213 UNTS p. 221, ETS No. 5, Trb. 1964 No. 69, Art. 6 reads: '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice…'

As the dispute about the reimbursement of the costs of proceedings can be traced back to the refusal to grant a temporary residence permit, the request for reimbursement of non-pecuniary damage cannot be based on this treaty provision.

- *However, legal certainty, as a generally accepted principle of law upon which Article 6 is partly based, also applies within the national legal order and independently of that treaty provision and means that such a request and the resulting dispute should result in a final determination within a reasonable time, in an appropriate case after hearing by an independent and impartial tribunal.*
- *As this requirement as laid down in Article 6 is based on that legal principle, reference will be made to the case law of the European Court of Human Rights for the interpretation of this treaty provision. It follows from the case law that, save in special circumstances, stress and frustration as a ground for reimbursement of non-pecuniary damage will be assumed to exist where a reasonable time is exceeded. This is not the case here.*

The Facts: On 5 July 2001 the Minister of Foreign Affairs rejected a request by X to grant her a temporary residence permit. X lodged an objection to this decision by letter of 21 July. On 14 August the Minister replied that he had decided he would no longer oppose the issuing of a temporary residence permit. X then applied by letter of 2 September for reimbursement of the costs of the legal assistance for the submission of the notice of objection. The Minister rejected this application on 30 October. X lodged an objection to this decision by letter of 27 November 2001. X subsequently applied for review by letter of 4 October 2006 on the ground that a decision on this notice of objection had not been taken in time. In a decision of 13 October 2006 the Minister held the objection to be unfounded after all. X applied to the District Court of The Hague (sitting in Amsterdam) for review of this decision, but the District Court held on 11 June 2007 that the application was unfounded. X then appealed to the Administrative Law Division of the Council of State.

Held: '…2.5. [Appellant] also rightly argues that by not giving a decision on the application for review, in so far as directed against the failure to decide on the objection in good time, and by not expressing a view on the ground of administrative appeal that the reasonable time referred to in Article 6 (1) of the European Convention on Human Rights (referred to below as the ECHR) had been exceeded, had not given a ruling on the basis of the application.

2.6. The appeal is manifestly well-founded. The appealed ruling should be quashed.

Doing what the District Court should have done, the Administrative Law Division holds as follows:

[…]

2.7.1. There is no evidence that a committee as referred to in Article 7:13 of the General Administrative Law Act has been established or that the provisions of Article 7:10, paras 2, 3 or 4, have been applied. This means that the

Minister was obliged, under Article 7:10, para 1, of the General Administrative Law Act to make a decision within six weeks of receipt of the notice of objection of 27 November 2001 and that upon the expiry of this period X was entitled to lodge an administrative appeal against the failure to make such a decision in time.

By letter of 21 June 2006 the Minister stated that no decision had yet been taken on the objection and that this would occur once the notice of objection had been amplified by the grounds on which it was based. There is no evidence that in the preceding period X had pressed the Minister for a decision on the objection. In these circumstances the notice of administrative appeal of 4 October 2006 was lodged unreasonably late, as referred to in Article 6:12, para 3, of the General Administrative Law Act.

2.7.2. The administrative appeal is therefore inadmissible in so far as it is directed against the failure to decide on the objection in time.

[…]

2.9. X also maintains that the Minister wrongly took the position that there was no ground for reimbursing the non-pecuniary damage suffered by her in connection with the time taken by the objection procedure. She argues in this connection—in brief—that the Minister failed to recognise that proceedings relating to the entry, stay and deportation of aliens come within the scope of Article 6 of the ECHR and that as a result of the long duration of the objection stage she had suffered stress and frustration.

2.9.1. According to the settled case law of the European Court of Human Rights (inter alia the judgment of 5 October 2000, Maaouia v. France no. 39652/98, AB 2001, 80) proceedings relating to the entry, stay and deportation of aliens fall outside the scope of Article 6 of the ECHR. As the dispute about the reimbursement of the costs incurred by X in the proceedings can be traced back to the refusal to grant her a temporary residence permit, the request for reimbursement of non-pecuniary damage cannot be based on this treaty provision. However, legal certainty, as a generally accepted principle of law upon which Article 6 of the ECHR is partly based, also applies within the national legal order and also independently of that treaty provision and means that such a request and the resulting dispute should result in a final determination within a reasonable time, in an appropriate case after hearing by an independent and impartial tribunal. As this requirement as laid down in Article 6 of the ECHR is based on the principle of legal certainty, reference will be made to the case law of the European Court of Human Rights (including the judgment of 29 March 2006, Pizzati v. Italy no. 62361/00, JB 2006/134) concerning the interpretation of this treaty provision. It follows from the case law that stress and frustration as a ground for reimbursement of non-pecuniary damage will be assumed to exist where the reasonable time is exceeded, save in special circumstances.

2.9.2. X lodged an objection to the decision of 30 October 2001 by letter of 27 November 2001, which was received by the Minister on the same day. Although the proceedings have now lasted for almost seven years, the submission

that X suffered such stress and frustration as a result of the delay as to constitute a ground for financial compensation is not plausible in this case, contrary to what has been alleged. The reason for this is that the dispute relates solely to the reimbursement of the costs of the proceedings and X clearly had no interest in their speedy payment since, as stated at the hearing, she did not—on the advice of her counsel—send a reminder throughout the entire period before the submission of the notice of administrative appeal of 4 November 2006 in order to be able to generate the largest possible amount of default interest. As X has not alleged any other facts or circumstances on which the request for reimbursement of non-pecuniary damage could be based, there is no ground for awarding such compensation. The argument fails …'[66]

[66] In keeping with this judgment, the Administrative Law Division of the Council of State (ABRS) held in its judgment of 20 May 2009 that the requirement of a 'reasonable time' under Article 6 was also applicable to proceedings under the Government Information (Public Access) Act; referring to its judgment of 24 December 2008 (LJN No. BG8294, JB (2009) No. 42 with note by C.L.G.F.H. Albers) it held that a period of 5 years was reasonable in the event of an objection procedure and proceedings before two courts: the objection procedure may not exceed 1 year and application for review and appeal may each not exceed 2 years. In the case of ABRS 24 December 2008 compensation of 500 euros was awarded for a half year's delay. In this case the delay in the appeal stage was seven months, for which compensation of 1,000 euros was awarded, LJN No. BI4558, JB (2009) No. 167 with note. As regards the delays/compensation, it should also be noted that the Central Appeals Court for the Public Service and for Social Security Matters awarded the same compensation (500 euros per half year) in its judgment of 26 January 2009, but that it considered that a reasonable time would already have been exceeded in benefits proceedings before authorities of first, second and third instance (objection, review and appeal) once 4 years had elapsed: 6 months for the objection stage, 18 months for the review stage and 2 years for the appeal, LJN No. BH1009, AB (2009) No. 41, RSV (2009) No. 86 with note by R. Stijnen, JB (2009) No. 66 with note by T. Barkhuysen and M.L. van Emmerik, idem in its judgment of 12 March 2009, LJN No. BH7955, JB (2009) No. 135 with note by T. Barkhuysen and M.L. van Emmerik. The Trade and Industry Appeal Tribunal too has applied a maximum of 4 years, see judgment of 3 March 2009, LJN No. BH6281, JB (2009) No. 139, AB (2009) No. 304 with note by I. Sewandono; idem in its judgment of 25 June 2009, LJN No. BJ2560, JB (2009) No. 210, AB(2009) No. 323 with note by I. Sewandono. Finally, the Supreme Court held on 19 December 2008, in keeping with its previous judgment of 17 June 2008 concerning criminal cases (LJN No. BD2578, RvdW (2008) No. 662, NJ (2008) No. 358 with note by P.A. Mevis), that in tax cases relating to the imposition of a tax penalty, where the delay in cassation proceedings is less than 12 months the penalty should be reduced by 5% if the delay was not more than 6 months and by 10% if the delay was between 6 and 12 months; where the delay exceeded 12 months the Supreme Court would act as it sees fit. Finally, in the case of a penalty of less than 1,000 euros, the Supreme Court considered that the statement that Article 6 had been infringed was sufficient compensation, LJN No. BD0191, BNB (2009) No. 201 with note by G.J.M.W. de Bont under Supreme Court 15 May 2009, BNB (2009) No. 205. In the previous judgment of the Administrative Law Division of 20 May 2009, in which Article 6 was applied by analogy, the compensation was awarded under Articles 8.73 of the General Administrative Law Act, Article 39 of the Council of State Act and Article 29 of the General Administrative Law Act. In the administrative law cases in which Article 6 could be applied without the specified circuitous route, the Administrative Law Division stated that relevant provisions of the Act had been applied in conformity with the Convention, cf. the judgment of 4 June 2008,

4.741 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
See: 11.3

4.742 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

NV Waterleiding Maatschappij Limburg v. X, District Court of Maastricht, Limited Jurisdiction Sector, sitting in Heerlen, 25 June 2008, LJN No. BD5759, NJCM-Bulletin (2009) p 249[67]

– *The right to water is contained in long codified rights recognised by the Netherlands, namely the right to an adequate standard of living and the right to the enjoyment of health (Articles 11 and 12 respectively of the International Covenant on Economic, Social and Cultural Rights).*[68] *Recognition of the right to water and sanitation is therefore an elaboration of this element of existing rights. In addition, the Netherlands recognised the right to water and sanitation as a human right at the seventh session of the Human Rights Council in Geneva (3 to 28 March 2008).*[69]
– *As cutting off the water supply would also not be proportionate to the amount of the arrears, the interests of X in the continued supply of water take precedence over the interests of the water company (Waterleiding Maatschappij Limburg).*

The Facts: X was in arrears with his payments for water supplied by NV Waterleiding Maatschappij Limburg. After attempts to collect the money proved

(Footnote 66 continued)
LJN No. BD3121, AB (2008) No. 229 with note by R.J.G.M. Widdershoven, JB (2008) No. 146 with note by A.M.L. Jansen. The Central Appeals Court for the Public Service and for Social Security Matters adopted this in its judgment of 11 July 2008, LJN No. BD7033, AB (2008) No. 241 with note by R.J.G.M. Widdershoven, JB (2008) No. 172 with note by A.M.L. Jansen; idem in the above-mentioned judgments of the Central Appeals Court for the Public Service and for Social Security Matters of 26 January and 12 March 2009.

[67] Note by F. Coomans.

[68] 993 UNTS p 3, ILM (1967) p 360, Trb 1969 No. 100. Art. 11(1) reads: '1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent…' Art. 12(1) reads: '1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health…'

[69] See 40 NYIL (2009) p. 292.

abortive, the water company sued X before the District Court of Maastricht, limited jurisdiction sector, sitting in Heerlen, claiming payment of the arrears and leave to cut off the supply while the arrears were outstanding.

Held: '…as regards the relief sought in B of the claim, in relation to the arrears of principal, the limited jurisdiction judge notes that this part of the claim will be refused since the defendant's right to water would be frustrated by such a measure. To exercise his right to water the defendant has in this case no alternative but to deal with WML, the regional monopolist. This right is contained in long codified rights recognised by the Netherlands, namely the right to an adequate standard of living and the right to the enjoyment of health (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights respectively). Recognition of the right to water and sanitation is therefore an elaboration of this element of existing rights. In addition, the Netherlands recognised the right to water and sanitation as a human right at the seventh session of the Human Rights Council in Geneva (3 to 28 March 2008).

Furthermore, as the relief sought is not proportionate to the amount of the arrears, the interests of the defendant in the continued supply of water take precedence over the interests of the plaintiff.

As the other claim does not appear unlawful or unfounded, it should be awarded and the defendant should be ordered to bear the costs of the proceedings …'

5.13 THE MINISTERS
See: 3.2113, 5.273 (n 73)

5.21 DIPLOMATIC RELATIONS
See: 5.273 (n 73)

5.273 INVIOLABILITY OF DIPLOMATIC PREMISES

'Van Stolkpark' Community Association v. the Mayor and Aldermen of the Municipality of The Hague, Administrative Law Division of the Council of State, 4 March 2009, LJN No. BH4654, JB (2009) No. 100[70]

– *As the Embassy of Iran acted in breach of Article 40, para 1, of the Housing Act by building a parking garage on the property of the Embassy in The Hague, the*

[70] With note by H. Peters.

Mayor and Aldermen of the Municipality of The Hague were entitled to take enforcement action in this matter.[71]

- *It has been stated on the part of the Embassy has stated that it will not remove the parking garage built without planning permission. Furthermore, the parking garage is exempt from execution measures under Article 22 (3) of the Vienna Convention on Diplomatic Relations.*[72] *As, in view of these circumstances, the Municipal Executive cannot take remedial action at the expense of the party in breach or collect an incremental penalty imposed for non-compliance, the Municipal Executive rightly treated this situation as a special circumstance on the basis of which it could decide against taking enforcement action.*
- *At the court hearing, the Municipal Executive indicated that the decision of 19 February 2007 would be entered in a public register so that it would be apparent to third parties that the Municipal Executive would take enforcement action in respect of the parking garage on the property once the premises on the property are no longer used by the Embassy.*

The Facts: On 19 February 2007 the Mayor and Aldermen of the Municipality of The Hague (referred to below as 'the Municipal Executive') rejected the application of the 'Van Stolkpark' Community Association (referred to below as 'the Association') to take enforcement action in respect of a parking garage at the rear of the premises of the Embassy of the Islamic Republic of Iran at Duinweg 20-22 in The Hague. An objection lodged by the Association against the rejection was held to be unfounded by the Municipal Executive on 19 June 2007. The District Court of The Hague subsequently dismissed an application by the Association for review of the decision (judgment of 14 May 2008).[73] Finally, the Association appealed against this judgment to the Administrative Law Division of the Council of State.

Held: '…2.1. The Division interprets the decision of 19 February 2007 as meaning that the Municipal Executive has refused to take enforcement action in respect of the garage on the property as long as the premises are used by the Embassy and provided that the garage is hidden from view as much as possible by shrubs and plants in keeping with the planting plan of Jan van den Berg Garden Contractors of 26 September 2005.

2.2. Pursuant to its objects and as evidenced by its actual activities, the Association represents above all the common interests of the residents of the Van Stolkpark neighbourhood, mainly by promoting good residential and living conditions. Contrary to what the Embassy maintains, this also includes activities unrelated to legal proceedings. The District Court therefore rightly treated the

[71] Art. 40(1) reads: '… 1. It is prohibited: (a) to build without or contrary to a planning permission granted by the municipal executive, (b) to maintain a structure, operational base or part thereof that has been built without or contrary to a planning permission granted by the Municipal Executive, …'

[72] 500 UNTS p 95, Trb. 1962 No. 101. For the text of Article 22 (3) see under Held.

[73] LJN No. BD8962.

Association as an interested party within the meaning of Article 1:2, para 1, of the General Administrative Law Act by decision of 19 February 2007.

2.3. As the decision of 19 February 2007 does not relate to the paving over of the plot, the Association's submissions on this point will be disregarded.

2.4. The Association submits that the District Court failed to recognise that the Municipal Executive was not entitled to decide not to take enforcement action. It argues for this purpose that there is no real prospect of legalisation because the building of the parking garage on the property is contrary to the local plan and to the reasonable requirements governing the external appearance of buildings. The Association also argues that insufficient arguments have been put forward for the assertion that the garage is needed for security reasons. Furthermore, the Association takes the position that enforcement action would send a signal that the Embassy is required to obey the law and that it could be ordered to remove the garage from the property following an enforcement decision.

2.4.1. Pursuant to Article 1, opening words and (i), of the Vienna Convention on Diplomatic Relations, the "premises of the mission" are deemed to be the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

Pursuant to Article 22 (3) of the Vienna Convention on Diplomatic Relations, the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

2.4.2. As the Embassy had acted in breach of Article 40, para 1, of the Housing Act by building the parking garage on the property, the Municipal Executive was entitled to take enforcement action in this matter.

In view of the public interest that is served by enforcement, the administrative authority having the power to take remedial action at the expense of a party in breach or to impose an order subject to penalty for non-compliance must in general exercise this power in the event of a breach. The administrative authority may refuse to do so only in special circumstances. Such a situation may occur if there is a real prospect of legalisation. In addition, enforcement action may be so disproportionate to the interests served in this connection that it should not be applied in the particular situation.

2.4.3. It is not in dispute that there is no real prospect of legalisation. Nonetheless, special circumstances may occur in which the Municipal Executive may refuse to exercise its power to take remedial action at the expense of a party in breach or to impose an order subject to penalty for non-compliance. Such circumstances occur in this case.

In this case the Embassy has stated that it will not remove the parking garage built without planning permission. Furthermore, the parking garage is exempt from execution measures under Article 22 (3) of the Vienna Convention on Diplomatic Relations. As, in view of these circumstances, the Municipal Executive cannot take remedial action at the expense of the party in breach or collect an incremental penalty imposed for non-compliance, the Municipal Executive rightly treated this

situation as a special circumstance on the basis of which it could decide against taking enforcement action.[74] At the court hearing, the Municipal Executive indicated that the decision of 19 February 2007 would be entered in a public register so that it would be apparent to third parties that the Municipal Executive would take enforcement action in respect of the parking garage on the property once the premises on the property are no longer used by the Embassy.

2.5. The appeal is unfounded. The appealed judgment should be upheld …'

5.274 DIPLOMATIC IMMUNITIES
See: 3.2113 **A**, 5.273

5.36 CONSULAR FUNCTIONS
See: 6.06, 11.2171

5.372 CONSULAR IMMUNITIES
See: 3.2113 **A**

6.06 MEMORANDUM OF UNDERSTANDING

X v. the State Secretary for Justice, Administrative Law Division of the Council of State, 27 January 2009, LJN No. BH2031, JV (2009) No. 126[75]

– *There is no ground for the view that the Memorandum of Understanding of 18 March 2003, which applies between the Dutch authorities, the Afghan authorities and the United Nations High Commissioner for Refugees (referred to below as UNHCR), prevents forcible repatriation of aliens of Afghan nationality to their country of origin. Reference is made in this connection to section 3 of the Memorandum of Understanding and, in particular, the seventh paragraph, from which it is evident that forcible repatriation is an option.*[76]

[74] The District Court held as follows in this connection: '… According to the case documents, the defendant consulted with all concerned and tried to reach a solution satisfactory to all parties. At the request of the defendant, the Ministry of Foreign Affairs acted as an intermediary. During the consultations it became apparent that termination of the illegal situation was not an option in practice. This being so, the defendant weighed the interests of the local residents against those of good diplomatic relations with the Islamic Republic of Iran. In the light of the circumstances outlined here, the District Court considers that the defendant exercised due care and that its decision not to take enforcement action was reasonable…'.

[75] Note by G.E.W. Westendorp.

[76] Paragraph 7 reads as follows: 'The Parties accept that alternatives to voluntary repatriation will in all cases be an option of last resort. Prior to considering such alternatives for the persons concerned, all humanitarian aspects of their situation will be given fair consideration, adequate notification will be provided, and every effort will be made to encourage them to opt for voluntary repatriation.'

– *As the alien has also not denied that the authorities in Afghanistan do not refuse entry to aliens who are repatriated with the help of an EU standard travel document, it was correct the alien's submissions do not constitute a ground for holding that there is no prospect of repatriation to Afghanistan. In view of the above, the declarations of the Consulate General of Afghanistan in The Hague do not have the meaning attributed to them by the alien.*

The Facts: X, an Afghan national, was declared to be an undesirable alien on 13 November 2008 and held in detention pending his expulsion. His application for review of this decision was declared unfounded by the District Court of The Hague (sitting in Assen) on 4 December 2008. His application for compensation was refused. X appealed against this judgment to the Administrative Law Division of the Council of State.[77]

Held: '…2.1. In ground of appeal 1 the alien argues, in summary, that the District Court wrongly held that it was incorrect that there was no prospect of expulsion to Afghanistan because under the Memorandum of Understanding (referred to below as the MoU) of 18 March 2003, which applies between the Dutch authorities, the Afghan authorities and the United Nations High Commissioner for Refugees (referred to below as UNHCR), forcible repatriation is possible using an EU standard travel document. He submits in this connection that in view of the position taken by the Consulate General of Afghanistan, as recorded in the note of the telephone conversation of 26 November 2008 and in the letters of 5 November 2008, 9 September 2008 and 13 August 2008, forcible repatriation with the help of an EU standard travel document is contrary to the MoU.[78] As he is not prepared

[77] At the hearing before the Administrative Law Division, X's lawyer arranged to be accompanied by J.C. Moerman of the Consulate General of Afghanistan in The Hague.

[78] According to Westendorp (supra n 74) it is evident from the statement of appeal 'that the representative of the Afghan Consulate General has stated that the success of a few repatriations to Afghanistan is attributable solely to the fact that the Dutch authorities 'conceal' that the repatriations are forcible and are carried out with the help of an EU standard travel document.

In the letter of 13 August 2008 the Consulate General states that no cooperation whatever is provided by Afghanistan for forcible repatriation. Nor may a tacit 'no objection' be deemed to have been given by the Afghan authorities in such cases. The method of expulsion with the help of an EU standard travel document is not mentioned in the MoU and cannot be applied without prior discussion between the partners to the MoU. The Consulate General does not have any information about people who are forcibly repatriated to Afghanistan or about other countries which do this. According to the letter of 13 August 2008 the Consulate General is unilaterally faced with faits accomplis as a result of the procedure. After an announcement of a proposed expulsion, a tacit 'no objection' is assumed, without verification of the receipt of the annoucement by the Afghan authorities and also without any express mention in the annoucement that it involves a forcible repatriation, even though it may be assumed that Afghanistan is opposed to this.

In the letter of 9 September 2008 reference is made to the seventh paragraph of Paragraph 3 of the MoU, which states that forcible repatriation will in all cases be an option of 'last resort'. It is provided in this connection that 'all humanitarian aspects of their situation will be given fair consideration'. This consideration is not something that may be given unilaterally by

to contemplate voluntary repatriation and forcible repatriation with the help of an EU standard travel document is unlawful, X argues that the District Court wrongly held that it was incorrect that there was no prospect of expulsion to Afghanistan.

2.1.1. The State Secretary submits in response to this ground of appeal that, although voluntary repatriation is always the aim, the MoU also provides other options. At the hearing before the Administrative Law Division, the State Secretary explained that this is also evident from how the policy is implemented in practice. The Afghan authorities issue a laissez passer for aliens who have Afghan nationality and are prepared to return to Afghanistan voluntarily. If an alien who has Afghan nationality indicates to the Afghan authorities during his repatriation procedure that he does not wish to return, he is not issued with a laissez passer. In such a situation the alien may be forcibly repatriated to Afghanistan by the Repatriation and Departure Service [of the Ministry of Justice] with the help of an EU standard travel document through the intermediary of the Minister of Foreign Affairs, after notification to the Afghan Ministry of Refugees and Repatriation and the UNHCR in Kabul. In his statement of defence of 16 December 2008 the State Secretary stated that at least seven Afghan aliens had been expelled to Kabul and granted entry there with the help of an EU standard travel document since 1 January 2007. At the hearing before the Division, the State Secretary also mentioned a successful expulsion to Afghanistan on 5 January of this year. He also pointed out that neighbouring countries employ the same method. For example, according to the State Secretary, the United Kingdom repatriated five hundred Afghan aliens in 2007 with the help of an EU standard travel document. As the forcible repatriation procedure is labour-intensive, it is applied mainly in the case of people who have been declared to be undesirable aliens and/or whose applications for asylum have been rejected on the grounds of Article 1(F) of the Refugee Convention.

2.1.2. The District Court rightly held that there is no ground for the view that the MoU prevents the forcible repatriation of aliens of Afghan nationality to their country of origin. The Division would refer in this connection to section 3 of the MoU and, in particular, the seventh paragraph, from which it is evident that forcible repatriation is an option.[79]

(Footnote 78 continued)
the Netherlands. Further consultation with the Afghan authorities is therefore desirable, according to the Consulate General. As regards the EU standard travel document, the Consulate General declares that this is not mentioned in the MoU. If voluntary repatriation is preferable, voluntary and express acceptance of the use of the EU standard travel document is logical. In the letter of 5 November 2008, the Consulate General states that the Repatriation and Departure Service has been informed that there are insufficient reception facilities and no guarantee of an acceptable existence for repatriated Afghan refugees. It is also stated that repatriated refugees are nonetheless welcome, provided that their repatriation is voluntary.'

[79] In proceedings between the Crown and a number of Dutch provinces and municipalities the Memorandum of Understanding concluded between the Icelandic and Dutch governments on

As the alien has also not denied that the authorities in Afghanistan do not refuse entry to aliens who are repatriated with the help of an EU standard travel document, the District Court also rightly did not consider that the alien's submissions constituted a ground for holding that there is no prospect of repatriation to Afghanistan. In view of the above, the declarations of the Consulate General do not have the meaning attributed to them by the alien.

Ground of appeal 1 fails. […]

2.3. The appeal is unfounded. The appealed judgment should be upheld.

2.4. The application for compensation should be refused if only for this reason …'

6.1 CONCLUSION AND ENTRY INTO FORCE OF TREATIES

See: 7.213

6.221 [NON-]RETROACTIVITY OF TREATIES

See: 6.23 (n 86), 6.43

6.223 APPLICATION OF SUCCESSIVE TREATIES

See: 6.43

6.23 INTERPRETATION OF TREATIES

See also: 1.203, 3.2113, 4.66, 4.73, 6.43

(Footnote 79 continued)
11 October 2008 was disclosed for inspection only to the Administrative Law Division and not to the defendant. The Division did not, incidentally, consider that there was a plausible risk that as a consequence of the proceedings brought by the Dutch provinces and municipalities against Landsbanki the Icelandic government would not perform the MOU and that good international relations would be harmed by the proceedings. The Division therefore quashed the Royal Decree of 10 November 2008, which had set aside the decision of the provinces and municipalities concerned of 4 November 2008 to institute proceedings against Landbanski in order to obtain a ground for enforcing pre-judgment attachments in Norway. The Administrative Law Division held that the setting aside by the Royal Decree was also contrary to the principle of legal certainty to which lower-tier authorities were also entitled and more specifically, to the right of appeal to the courts (by analogy with Article 6 of the European Convention on Human Rights, which was not, in principle, applicable in this case), judgment of 22 April 2009, LJN No. BI1842, AA (2009) p. 660 with note by L.J.A. Damen.

Board of Airline Representatives in the Netherlands v. the State of the Netherlands and the Minister of Finance, Supreme Court, 10 July 2009, LJN No. BI3450, RvdW (2009) No. 848, NJ (2009) No. 563[80]

– *The levy of the air passenger tax introduced by Act of 20 December 2007*[81] *is not manifestly incompatible with Article 15 of the Chicago Convention on International Civil Aviation of 1944.*[82]
– *On appeal, the Court of Appeal of The Hague, after recapitulating the purpose and system of the Convention and the place in it of the final sentence referred to above, examined the significance of the term 'charges' and rightly concluded that this term should be understood both in the second part and in the third part of Article 15 as a levy imposed in exchange for a certain consideration, and that the final sentence of Article 15 does not prohibit levies not imposed in exchange for a certain consideration, such as the air passenger tax.*
– *The Court of Appeal clearly followed the rules referred to in the opinion of the Advocate-General relating to the interpretation of international treaties, as set out—since the conclusion of the Chicago Convention—in the Vienna Convention on the Law of Treaties of 1969.*[83]

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[80] With note by M.R. Mok at NJ (2009) No. 564. This mentions the judgment of the Supreme Court of 4 September 2009, in which the air passenger tax and, more specifically, the decision not to tax transfer passengers, was held not to be in contravention of Article 87(1) of the EC Treaty. Other sources for this judgment are LJN No. BI3451, RvdW (2009) No. 899 and JB (2009) No. 229, with note by R.J.B. Schutgens.

[81] Stb. 2007 No. 562, pp. 18-19. The Act provides that air passenger tax will be levied from 1 July 2008.

[82] 15 UNTS p 295, Stb. 1947 No. H 165. Art. 15 reads: '… Airport and similar charges

Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.

Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher, (a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and (b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

All such charges shall be published and communicated to the International Civil Aviation Organization: provided that, upon representation by an interested contracting State the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned. No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon…'

[83] See under Held.

- *The Court of Appeal did not hold that the version of the Chicago Convention in English prevailed over the text in the other languages of equal authenticity, but instead based its interpretation on the English version and then evidently concluded, in accordance with the rule of Article 33 (3) of the Vienna Convention (which presumes that the terms of the treaty have the same meaning in each authentic text*[84]*), that its interpretation was in keeping with the versions in the other languages.*
- *The text of the Chicago Convention and the purpose of the terms used in it, when seen in their context and in the light of the object and purpose of the arrangements made in Article 15, confirm the correctness of the interpretation accepted by the Court of Appeal.*
- *The minor linguistic differences between the authentic language versions do not detract from the conclusion that the final sentence of Article 15 is intended to prevent a situation in which the use of the air space above a Contracting State solely for the purpose of transit over or entry into or exit from its territory is subjected to a levy which would undermine the requirement in the previous text of Article 15 that its own aircraft and those of other contracting States should be treated equally. The levy of the present air passenger tax is not (manifestly) in breach of a prohibition of this nature.*

The Facts: On 24 January the Board of Airline Representatives in the Netherlands (referred to below as BARIN) applied to the District Court of The Hague for an interim injunction ordering the State of the Netherlands and the Minister of Finance to suspend implementation of the air passenger tax until it had been decided by judgment having the force of res judicata in proceedings on the merits that the air passenger tax was not in breach of Article 15 of the Chicago Convention. The District Court dismissed the application on 19 March 2008.[85] BARIN appealed against this judgment to the Court of Appeal of The Hague. The Court of Appeal upheld the judgment of the District Court on 17 June 2008.[86] BARIN then appealed in cassation to the Supreme Court.

Held: '…3. Assessment of the ground of appeal.

3.1. This case concerns the question whether the air passenger tax to be levied from 1 July 2008 was compatible with the Convention on International Civil Aviation signed at Chicago on 7 December 1944, Trb. 1954, 18 (referred to below as the Chicago Convention). The air passenger tax was introduced by Act of 20 December 2007 as part of the Environmental Taxes Act. According to a statement of the State Secretary for Finance to the House of Representatives of

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[84] 1151 UNTS p. 331, 8 ILM (1969) p. 679, Trb. 1972 No. 51. Art. 33(3) reads: '… 3. The terms of a treaty are presumed to have the same meaning in each authentic text …'

[85] LJN No. BC7128, NJ (2008) No. 304, NJF (2008) No. 282, M&R (2008) No. 45 with note by J.M. Meijer.

[86] LJN No. BD7068.

3 June 2009, Kamerstukken II 2008-2009, 31 492, No. 11, the rates will be set at nil with effect from 1 July 2009 and the tax will be abolished with effect from 2010.

3.2. The air passenger tax is levied on the departure of a passenger in an aircraft from an airport situated in the Netherlands (Article 36ra, para 1, now Article 73, para 1 Environmental Taxes Act). The tax is owed at the moment when the passenger departs (Article 36rd, now Article 76 Environmental Taxes Act and is levied on the operator of the airport (Article 36rb, now Article 74 Environmental Taxes Act). The tax is calculated by reference to the number of passengers (Article 36rc, now Article 75 Environmental Taxes Act). The tax amounts to € 11.25 per passenger if the destination is within the European Union or is less than 2,500 km away, and € 45 in other cases (Article 36re, now Article 77 Environmental Taxes Act). The airlines that carry the relevant passengers are obliged to pay the tax charged to them by the airport operator (Article 36rg, para 3, now Article 79, para 3 Environmental Taxes Act). If, nonetheless, the airport operator does not receive these payments, it is to this extent entitled to a refund of the tax (Article 36rf, now Article 78 Environmental Taxes Act).

3.3. In these interim injunction proceedings, BARIN applied, as noted above at 1, for an interim injunction which, in brief, restrains the State from levying the air passenger tax until it has been decided by judgment having the force of res judicata in proceedings on the merits that the air passenger tax is not in breach of Article 15 of the Chicago Convention. The interim relief judge dismissed BARIN's application, and his judgment was upheld on appeal. The criterion rightly applied by the Court of Appeal in deciding whether the application could be granted was whether the air passenger tax was manifestly in breach of the Chicago Convention.

3.4. In legal findings 2.1 to 2.14 of the appealed judgment the Court of Appeal gave its reasons for holding that the air passenger tax was not (manifestly) incompatible with Article 15, final sentence, of the Chicago Convention. This is challenged in various parts of the ground of appeal, which puts a different interpretation on Article 15 of the Chicago Convention than that which has been accepted by the Court of Appeal as correct. The ground of appeal points out (at 1) that, besides English, other languages are equally authentic and concludes (at 2) from a comparison of the text of Article 15, final sentence, of the Chicago Convention in some of these languages that the air passenger tax is in breach of the provisions of the final sentence. It is also submitted (at 3 and 4) by reference to a textual analysis in certain languages of the provisions of the second and third parts of Article 15 that (the Court of Appeal failed to recognise that) different terms are used in these parts and that the purpose of the final sentence of Article 15 is that the prohibition on imposing 'other charges' should be applied as broadly as possible: i.e. the departure (or right of departure) of a passenger on board a civil aircraft from the territory of a contracting State should simply not be taxed. Parts 5 to 7 of the ground of appeal take issue with certain aspects of the reasoning given by the Court of Appeal for its judgment. Part 8 is of no significance on its own.

3.5. The disputed passage at the end of Article 15 of the Chicago Convention reads as follows in the texts in English, French and Spanish, which are of equal authenticity:

> No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon."
>
> "Aucun État contractant ne doit imposer de droits, taxes ou autres redevances uniquement pour le droit de transit, d'entrée ou de sortie de son territoire de tout aéronef d'un État contractant, ou de personnes ou biens se trouvant à bord."
>
> "Ningún Estado contratante impondra derechos, impuestos o otros gravámenes por el mero derecho de transito, entrada o salida de su territorio de cualquier aeronave de un Estado contratante o de las personas o bienes que se encuentren abordo."

3.6. In points 5.2 to 5.8 of the opinion of the Advocate-General an overview is given of the passage through parliament of the bill introducing the air passenger tax, during which the question of whether the tax was in breach of the passage of the Chicago Convention quoted above was raised and answered in the negative. It must be inferred from what was stated during the passage of the bill through parliament that the intention in imposing the air passenger tax as referred to above in 3.2 in respect of passengers departing from the Netherlands was not to levy a tax in exchange for a certain consideration, but to make the costs (or part of the costs) to society entailed by air travel visible in the price of flight tickets and thus make members of the public aware that activities that pollute the environment entail costs which are insufficiently reflected in the ticket price, and that the price of the tickets is too low in relation to other forms of transport owing to the absence of any form of consumption tax (excise duties and VAT) in international civil aviation. In summary, this is a "regulatory" consumption tax levied in respect of each departing passenger for which there is no consideration and which is intended to make visible to the public the social costs (or part of the costs) of air travel that are not included in the ticket price.

3.7. The Court of Appeal rightly held that the air passenger tax was not manifestly incompatible with the Chicago Convention. After recapitulating the purpose and system of the Convention and the place in it of the final sentence referred to above, the Court of Appeal examined the significance of the term "charges" and rightly concluded that this term should be understood both in the second part and in the third part of Article 15 as a levy imposed in exchange for a certain consideration, and that the final sentence of Article 15 does not prohibit levies not imposed in exchange for a certain consideration, such as the air passenger tax. All arguments in the cassation appeal therefore fail for this reason. As the Court of Appeal continued its judgment by setting out further reasons for rejecting the different position taken by BARIN, the parts of the ground of appeal challenging these reasons do not have any significance on their own. Nonetheless, the following points should be made about certain arguments raised by the appellant.

3.8. The Court of Appeal clearly followed the rules referred to in the opinion of the Advocate-General at points 7.3 to 7.8 relating to the interpretation of

international treaties, as set out—since the conclusion of the Chicago Convention—in the Vienna Convention on the Law of Treaties of 23 May 1969, Trb. 79 (referred to below as the Vienna Convention).[87] The Court of Appeal did not hold that the text of the [Chicago] Convention in English prevailed over the text in the other languages of equal authenticity, but instead based its interpretation on the English version and then evidently concluded, in accordance with the rule of Article 33 (3) of the Vienna Convention (which presumes that the terms of the treaty have the same meaning in each authentic text), that its interpretation was in keeping with the versions in the other languages. The text of the Chicago Convention and the purpose of the terms used in it, when seen in their context and in the light of the object and purpose of the arrangements made in Article 15, confirm the correctness of the interpretation accepted by the Court of Appeal. The minor linguistic differences between the authentic language versions do not detract from the conclusion that the final sentence of Article 15 is intended to prevent a situation in which the use of the air space above a Contracting State solely for the purpose of transit over or entry into or exit from its territory is subjected to a levy which would undermine the requirement in the previous text of Article 15 that its own aircraft and those of other contracting States should be treated equally. The levy of the air passenger tax is not (manifestly) in breach of a prohibition of this nature.

3.9 The Court of Appeal therefore rightly concluded that Article 15 of the Chicago Convention did not (manifestly) prevent the levy of air passenger tax. All arguments advanced in the cassation appeal therefore fail for this reason.

4. Decision

The Supreme Court dismisses the appeal …'

[87] The Advocate-General cites Articles 31(1), (2) and (3) (in paragraph 7.3) and Article 4 (in paragraph 7.4: no retroactivity of the Vienna Convention, but these interpretation rules are rules of international customary law). In paragraph 7.5 he states: 'As became apparent above, according to Art. 31 (1) VCLT the grammatical and teleological interpretation methods take precedence. Engelen […] paraphrases this general rule of interpretation as follows: 'The ordinary meaning to be given to the terms of a treaty in accordance with the basic rule of Article 31(1) VCLT is the meaning that naturally flows from an unbiased reading of the text of the treaty in the light of its object and purpose, together with a fair, honest and reasonable appreciation of the other authentic evidence of the common intention of the parties mentioned in paragraphs 2 and 3 of the said Article. In other words, the presumption is that the terms of a treaty have been used in the sense in which they would normally be understood in the particular context.' He goes on to refer to Articles 32 and 33 in paragraph 7.6. In paragraph 7.7 he summarises this as follows: 'To confirm the meaning which results from the application of Article 31 or to determine this meaning if its remains unclear, recourse may be had, according to Article 32, to supplementary means of interpretation, in particular the preparatory work of the treaty and the circumstances of its conclusion. However, recourse is generally had to the preparatory work and the circumstances of the conclusion only if the rules of Article 31 VCLT do not produce elegant results. […]. Finally, Article 33 VCLT provides that in principle each authenticated text has the force of law and that the terms of a treaty are presumed to have the same meaning in the different authentic texts. Unless a given language prevails, when comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, will be adopted'. Finally, in paragraph 7.8 he applies the rules to Article 15 of the Chicago Convention.

6.43 TERMINATION AND SUSPENSION OF OPERATION OF TREATIES
See also: 1.203

State Secretary for Justice v. X, Administrative Law Division of the Council of State, 8 August 2008, LJN No. BE0215, JV (2008) No. 366, RV (2008) No. 44[88]

- *There is no ground for the view that it can be inferred from the conduct of the parties to the Treaty that they are in fact ignoring the Treaty or that it can be inferred from the conduct of either of these parties that it is in fact ignoring the Treaty and that the other party is acquiescing in this conduct. The District Court therefore rightly dismissed the submission of the State Secretary that the Netherlands and Japan are not applying Article 1, opening words and (1), of the Treaty.*[89]
- *The State Secretary has not plausibly shown in the documents invoked by her that a fundamental change of circumstances has occurred, let alone the nature of such a change.*
- *The phrase 'if they act in accordance with the laws of the country' in the second sentence of Article 1, opening words and (1), of the Treaty cannot therefore be treated as a general qualification limiting the application of the most-favoured-nation clause in that article. The provisions of national law relating to the entry and residence of aliens should therefore be applied in the light of the object and purpose of the Treaty, subject to the most-favoured-nation clause.*
- *This means that an application submitted by a Japanese national for a fixed-term ordinary residence permit for work in a self-employed capacity should be assessed in accordance with Article II (1), opening words and (a) and (b), of the Dutch-American Treaty of Friendship of 1956.*[90]

The Facts: An application by X, a Japanese national, for a change in the limitation of the fixed-term ordinary residence permit granted to him was rejected by decision of 31 July 2006. An objection to this decision lodged by X was

[88] With note by TH.L. Badoux.

[89] Stb. 1913 No. 389. Art. 1(1) reads: 'The citizens of both High Contracting Parties shall have full freedom with their families to enter and settle in the entire area of each other's territory or possessions and, if they act in accordance with the laws of the country: 1°. shall in all respects be accorded the same treatment as nationals or citizens of the most favoured nation in everything as regards travel and residence, study and research, the conduct of their enterprises and professions and the carrying on of their commerce and trading activities…'

[90] 285 UNTS p 189, Trb. 1956 No. 40. Art. II (1) reads: '1. Nationals of either Party shall be permitted to enter the territories of the other Party or to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or which they are actively in the process of investing, a substantial amount of capital; and (c) for other purposes subject to the laws relating to the entry and sojourn of aliens…'

declared unfounded by the State Secretary for Justice on 23 March 2007. X applied to the District Court of The Hague (sitting in Amsterdam) for review of this decision. The District Court granted his application on 6 December 2007.[91] The State Secretary then appealed against this judgment to the Administrative Law Division of the Council of State.

Held: '…2.2. In the second ground of appeal the State Secretary submits, in essence, that the District Court failed to recognise that as the parties to the Trade Treaty no longer apply Article 1, opening words and (1), the provision has fallen into disuse (sometimes referred to as desuetude). The State Secretary argues in this connection that since the exchange of notes between the Dutch and Japanese governments concerning the abolition of visas (Tokyo, 15 and 16 May 1956 (Trb. 1956, 58)) makes no reference to this article of the Treaty, neither country considered it to have a bearing on the subject-matter of the notes. Nor is this altered, according to the State Secretary, by the fact that, as held by the District Court, the Treaty is listed in the Annex to the Decision of the Council of the European Union of 15 November 2001 (2001/855/EC) authorising the automatic renewal or continuation in force of provisions governing matters covered by the common commercial policy contained in the friendship, trade and navigation treaties and trade agreements concluded between Member States and third countries (referred to below as Council Decision 2001/855/EC) and also appears on the website of the Japanese Foreign Ministry as this says nothing about the significance attached by the two countries to the above-mentioned article of the Treaty. The State Secretary also argues that there is no evidence that Japan has invoked the above-mentioned article against the Netherlands and there is no reference to the Treaty in national legislation or in policy.

2.2.1. It is apparent from what was stated in Trb. 1956, 168 that the Treaty was concluded in The Hague on 6 July 1912 and entered into force on 9 October 1913. As a consequence of the Dutch declaration of war on Japan the operation of the Treaty was suspended on that date. In a note from the Dutch Embassy of 29 May 1953 the Dutch government informed the Japanese government of its desire to revive the operation of the Treaty. The operation of the Treaty revived on 29 August 1953.

In so far as relevant here, the exchange of notes of 15 and 16 May 1956 stated as follows:

> 1. Japanese and Netherlands nationals shall be free to travel from any place whatever to the Netherlands (territory in Europe,) and Japan respectively without the necessity of obtaining a visa in advance, provided that they are furnished with valid passports issued by the country of which they are nationals and provided that the duration of their stay shall not exceed a period of three consecutive months.
>
> 2. It is understood that the waiver of the visa requirement does not exempt Japanese and Netherlands nationals from the necessity of complying with the Netherlands and Japanese

[91] LJN No. BB9899, JV (2008) No. 67, RV (2008) No. 48 with note by Th. L. Badoux, mentioned in 39 NYIL (2008) p. 438, n. 113.

> laws and regulations on aliens. Either Government reserves the right to refuse entry into and residence in its territory to nationals considered undesirable.
>
> 3. Japanese and Netherlands nationals travelling to the Netherlands and Japan respectively with the intention of staying there for a period exceeding three months, or seeking employment or occupation shall not benefit by the provision sub 1 of this Arrangement. However, the visa for them shall be obtained free of charge.

2.2.2. Although Article 4 of the Vienna Convention provides that the Convention applies only to treaties which are concluded by States after the entry into force of the Convention on 27 January 1980, the majority of provisions of the Convention can be treated as rules of customary law.[92] As such, these provisions too can be deemed applicable to the Trade Treaty.

2.2.3. It has been established that the Treaty has not been terminated in the manner provided for in Article 20.[93] Nonetheless, under Article 54, opening words and (b), of the Vienna Convention the termination of a treaty may always take place by consent of all the parties.[94] Such consent may be apparent from the conduct of the parties to a bilateral treaty, from which it can be inferred that the party actually ignores the treaty and the other party to the treaty acquiesces in this conduct.

2.2.4. Although the exchange of notes between the Dutch and Japanese governments of 15 and 16 May 1956 does not refer to Article 1, opening words and (1), of the Treaty, this does not provide a sufficient basis for the conclusion drawn by the State Secretary that the two governments no longer attach any importance to the above-mentioned article. As the operation of the Treaty revived on 29 August 1953 and as the above-mentioned article also relates, in view of its wording, to the entry and settlement of citizens of both parties in the territory of the other party, the exchange of notes can also be interpreted—pursuant to Article 31 (3), opening words and (a), of the Vienna Convention[95]—as meaning that both governments had intended for the purposes of this article to state beyond doubt that citizens of the other party do not require a visa for a stay of less than three months and are subject to the national laws of the other party governing entry and residence for a stay longer than three months, which may include (in view of point 3 of the exchange of notes) residence for the purposes of working in a self-employed capacity.

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[92] 1151 UNTS p. 331, 8 ILM (1969) p. 679, Trb. 1972 No. 51. Art. 4 reads: '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.'

[93] Under Article 20, in so far as relevant here, the Treaty will remain in force until twelve months have elapsed from the day on which either of the High Contracting Parties has notified the other of its intention to terminate the Treaty.

[94] Art. 54 reads: 'The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; (b) at any time by consent of all the parties after consultation with the other contracting States…'

[95] Art. 31(3)(a) reads: '… 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; …'

Although nothing can be inferred from the reference in the Annex to Council Decision 2001/855/EC about the significance which the Netherlands attaches to the above-mentioned article, this does not warrant the finding that the Netherlands attaches no significance to it. As is apparent from Decision 70/470/EC of the Council of the European Communities of 13 October 1970 authorising the automatic renewal or continuation in force of certain friendship, trade and navigation treaties and similar agreements concluded between Member States and third countries (OJ.EC no. L 231 of 20 October 1970), and subsequently, as is evident from Decision 2001/855/EC, the Netherlands has always requested that the provisions of the Treaty be automatically renewed or continued in force, without excepting Article 1, opening words and (1). It can therefore be inferred that the Netherlands has not distanced itself from the provisions of the Treaty. Similarly, it can be inferred from the fact that the Treaty is mentioned on the website of the Japanese Foreign Ministry (a translation of which was lodged by the alien in the objection proceedings) that Japan too has not distanced itself from the provisions of the Treaty, including Article 1, opening words and (1). As no evidence has been produced for the submission that it has not been shown that Japan has invoked the above-mentioned article against the Netherlands, the State Secretary's argument fails for this reason alone.

In view of this position, the fact that there is no reference to the Treaty in either Article 8.26 of the Aliens Decree 2000 or in the Aliens Circular does not in itself warrant the finding that it can be inferred that the Netherlands is ignoring the Treaty and has withdrawn itself from it.

2.2.5. In the light of the above findings, there is no ground for the view that it can be inferred from the conduct of the parties to the Treaty that they are in fact ignoring the Treaty or that it can be inferred from the conduct of either of these parties that it is in fact ignoring the Treaty and that the other party is acquiescing in this conduct. The District Court therefore rightly dismissed the submission of the State Secretary that the Netherlands and Japan are not applying Article 1, opening words and (1), of the Treaty. The ground of appeal fails to this extent.

2.3. In addition, the State Secretary argues in the second ground of appeal, with reference to the note of the Dutch Embassy of 29 May 1953 and the Explanatory Memorandum to the Rules on Integration in Dutch Society (Civic Integration Act) (Kamerstukken II, 30 308, No. 3, p. 53) that the District Court also failed to recognise that Article 1, opening words and (1), of the Treaty has ceased to operate as there has been a substantial change of circumstances.

2.3.1. In so far as relevant here, the note of the Dutch Embassy of 29 May 1953 states as follows: 'In spite of the fact that, due to altered conditions, the Treaty of 1912 shows certain deficiencies which tend to make it inadequate to meet modern requirements and international practice in trade policy, the Netherlands Government deem it desirable, that a revival of the Treaty be effected pending negotiations for and the conclusion of a new Treaty of Commerce and Navigation. In the opinion of the Netherlands Government the Treaty of 1912 is particularly out of date, since it contains no provisions regarding questions which might arise in respect of multilateral treaties or conventions in the field of international economic

cooperation, or the institution of functional integrations of a regional character, to which either the Kingdom of the Netherlands or Japan is, or may become, a party.'

In so far as relevant here, the Explanatory Memorandum states as follows: "In addition, the government does not consider that the Trade Treaty concluded between the Netherlands and Japan in The Hague on 6 July 1912 (Stb. 1913, 293) (or, rather, Article 1 of the Treaty) has any relevant consequences for the present Bill in view of the fundamental change of circumstances since the conclusion of the Treaty and Article 62 of the Vienna Convention on the Law of Treaties."[96]

2.3.2. The State Secretary has not plausibly shown in the documents invoked by her that a fundamental change of circumstances has occurred, let alone the nature of such a change. Although the note of the Dutch Embassy states that circumstances have changed, it is apparent from the rest of the note that this is mainly a reference to new developments in the field of regional or international economic cooperation. Nor does the explanatory memorandum explain what circumstances have changed. To this extent the ground of appeal fails.

2.4. In the third ground of appeal the State Secretary argues, in essence, that the District Court failed to recognise that Article 1, opening words and (1), of the Treaty have no bearing on legal residence status. The State Secretary submits in this connection that it can be inferred from the wording that the most-favoured-nation clause becomes applicable only if an alien complies with the national legislation on the entry and residence of aliens, and that it was not the intention of the drafters of the Treaty to set aside this legislation by the inclusion of a most-favoured nation clause. This interpretation of the above-mentioned article is supported by Article II (1) of the Dutch-American Treaty of Friendship, in which two objects on the basis of which residence is permitted, in derogation from national immigration legislation relating to these objects, take precedence over a reference to national legislation relating to the entry and residence of aliens.

2.4.1. It is not in dispute between the parties that the first sentence of Article 1, opening words and (1), of the Treaty does not extend so far that the national legislation on the entry and residence of aliens no longer applies at all. Nor is it in dispute between the parties that the phrase "if they act in accordance with the laws of the country" in the second sentence of that article also relates to this national legislation.

The dispute focuses on the question of whether this phrase amounts to a general qualification limiting the application of the most-favoured-nation clause in that article. As the parties do not disagree about the interpretation of the meaning of this phrase, it follows that pursuant to the Article 31 (1) of the Vienna Convention the relationship between this phrase and the most-favoured-nation

[96] Art. 62 reads: '… 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty…'

clause should be interpreted in good faith in the light of the object and purpose of the Treaty.[97]

It follows from the preamble and in particular Articles 1 and 7 of the Treaty that, in so far as relevant, its object is to promote trade between the Netherlands and Japan and the conduct of business by their nationals in each other's territory in order to strengthen the ties of friendship and good understanding between the two nations. Various provisions of the Treaty, particularly Article 17,[98] include most-favoured-nation clauses, from which it can be inferred that they are intended to support the object of the Treaty. It follows that the interpretation proposed by the State Secretary would not only detract from the supporting role of the most-favoured-nation clause in Article 1, opening words and (1), of the Treaty as desired by the parties but would also deprive the clause of all purpose, as argued by the alien in the statement of defence. After all, the consequence of the State Secretary's interpretation is that the most-favoured-nation clause is applicable and can thus be invoked only if the substantive requirement is met, whereas the purpose of this clause lies precisely in the fact that the substantive requirement does not apply in full. The alien therefore rightly submits in the statement of defence that Article 27 of the Vienna Convention is also incompatible with the interpretation proposed by the State Secretary,[99] since the State Secretary maintains that the provisions of national law are applicable in full in relation to the entry and residence of aliens.

2.4.2. On the basis of the above, the phrase "if they act in accordance with the laws of the country" in the second sentence of Article 1, opening words and (1), of the Treaty cannot therefore be treated as a general qualification limiting the application of the most-favoured-nation clause in that article. The provisions of national law relating to the entry and residence of aliens should therefore be applied in the light of the object and purpose of the Treaty, subject to the most-favoured-nation clause. This means that an application submitted by a Japanese national for a fixed-term ordinary residence permit for work in a self-employed capacity should be assessed in accordance with Article II (1), opening words and (a) and (b), of the Dutch-American Treaty of Friendship and section B11/8.1 of the Aliens Circular 2000.

2.4.3. It seems reasonable to assume, as the State Secretary has submitted, that it was not the intention of the drafters of the Treaty in including the most-

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[97] Art. 31(1) reads: '…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…'

[98] Pursuant to Article 17, the High Contracting Parties agree that in all matters concerning commerce, navigation and industry, every privilege, favour or immunity that either of the High Contracting Parties has already granted or may hereafter grant to the ships, nationals or citizens of any other foreign State shall be immediately and unconditionally granted to the ships and nationals of the other High Contracting Party since it is the intention of the High Contracting Parties that the commerce, navigation and industry of both countries should be accorded most favoured nation treatment in every respect.

[99] Art. 27 reads: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.'

favoured-nation clause to completely set aside the provisions of national law in relation to the entry and residence of aliens. However, this submission does not affect the interpretation of Article 1, opening words and (1), of the Treaty, as set out above at 2.4.2, because this interpretation does not cause the meaning of this article to be ambiguous or obscure or produce a result that is manifestly absurd or unreasonable. The invocation of Article II (1) of the Dutch-American Treaty of Friendship does not necessitate a different interpretation of Article 1, opening words and (1), of the Treaty.

2.4.4. The District Court therefore rightly held, in essence, that Article 1, opening words and (1) of the Treaty has a bearing on legal residence status. The ground of appeal fails.

2.5. As the second and third grounds of appeal do not succeed and are intended to challenge the findings of the District Court which contain independent grounds for annulment, the first ground of appeal need not be considered.

2.6. The appeal is unfounded. The appealed judgment should be upheld, subject to improvement of the grounds for the judgment …'

6.434 UNILATERAL DENUNCIATION OF TREATIES
See: 6.43

6.4341 FUNDAMENTAL CHANGE OF CIRCUMSTANCES
See: 6.43

6.61 TREATIES CONCLUDED BY INTERNATIONAL ORGANISATIONS
See: 7.213

7.21 EXTRATERRITORIAL SCOPE OF LEGISLATIVE ACTS
See: 1.203, 7.213

7.213 UNIVERSAL JURISDICTION
See also: 11.3

Public Prosecution Service v. J. Mumbara, Supreme Court, 21 October 2008, LJN No. BD6568, RvdW (2008) No. 751, NJ (2009) No. 108[100]

– *The Netherlands has no original jurisdiction in relation to a Rwandan national accused of having committed crimes within the meaning of Article 1 of the*

[100] With note by N.J. Keijzer. Discussed by L. van Herik in 'A quest for jurisdiction and an appropriate definition of crime", 7 Journal of International Criminal Justice (2009) pp 1117-1131.

Genocide Convention (Implementation) Act against non-Dutch nationals in Rwanda.[101]

- *The suspect's presence in the Netherlands is not a sufficient ground for assuming jurisdiction. Although Article 2, para 1, opening words and (a) of the International Crimes Act*[102] *admittedly declares that Dutch criminal law is applicable in such a case with respect to crimes of this kind, the Act did not take effect until 1 October 2003. No provision granting retroactive effect to this jurisdictional arrangement was made either by statute or elsewhere, although—having regard, inter alia, to Article 7(2) of the European Convention on Human Rights*[103] *—there was no legal rule barring this.*
- *The suspect can be prosecuted and tried in the Netherlands in respect of the crimes concerned only if the conditions of Article 4a of the Criminal Code with regard to the establishment of derivative jurisdiction are fulfilled, namely that the prosecution is taken over by the Netherlands from a foreign State on the basis of a treaty from which the jurisdiction to prosecute follows for the Netherlands.*[104]
- *When Article 4a of the Criminal Code was introduced, the legislator could not have envisaged that this provision would cover the transfer of a prosecution by a UN Tribunal such as the present one to the Netherlands, but instead used the term 'State' in the specific meaning attributed to it in (national and international) legal parlance. The terminological distinction between 'State' and 'tribunal' has always been observed hitherto. This is why, in the absence of indications to the contrary, it should be assumed that even now the term 'foreign State' in Article 4a of the Criminal Code does not include tribunals.*
- *The view that a 'treaty' as referred to in Article 4a of the Criminal Code also exists in a case where, as here, the Prosecutor of the Rwanda Tribunal has requested that the Netherlands take over the prosecution of the suspect and the Minister of Justice has agreed to this orally is incorrect. The Court of Appeal held rightly and on correct grounds that jurisdiction had not been established in a treaty as referred to in Article 4a of the Criminal Code since such a treaty*

[101] Art. 1 reads: 'Any person who, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such: 1. kills members of the group; 2. causes serious bodily or mental harm to members of the group; 3. deliberately inflicts on the group conditions of life calculated to bring about its physical destruction in whole or in part; 4. imposes measures intended to prevent births within the group; 5. forcibly transfers children of the group to another group will be guilty of genocide and sentenced to life imprisonment or imprisonment for a term not exceeding twenty years or a fine of the fifth category.'

[102] See 35 NYIL (2004) p. 426. Art. 2(1)(a) reads: '1. Without prejudice to the relevant provisions of the Criminal Code and the Code of Military Law, Dutch criminal law shall apply to: (a) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands: …'

[103] Art. 7(2) reads: '… 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations …'

[104] For the text of Art. 4a see under Held.

basis cannot be found in the provisions referred to above (including the Charter of the United Nations, the Statute of the Rwanda Tribunal and the so-called Completion Strategy based on Resolution 1503 (2003) of the Security Council of the United Nations of 28 August 2003, in combination with Article 11bis of the Rules of Procedure and Evidence of the Rwanda Tribunal)[105] *or in any other treaty, nor can it be found in this case in the arrangement to which the Court of Appeal has referred under the heading 'mini treaty'.*

The Facts: Joseph Mumbara, a Rwandan, was refused asylum by the State Secretary for Justice on 12 August 1999. Mumbara lodged an objection against this refusal. However, no decision was taken on the objection. On 8 February 2005 he was informed that his file had been transferred to 'Unit 1F' of the Immigration and Naturalisation Service (IND) as there were indications that Article 1F of the Refugee Convention applied to his request for asylum. On 18 May 2006 the IND transferred the file to the Public Prosecution Service. Mumbara was arrested in Amsterdam on 7 August 2006 on suspicion of having committed war crimes. By letter of 11 August 2006 the Public Prosecution Service gave notice of the arrest to the Prosecutor of the Rwanda Tribunal. On 29 September 2006 the Prosecutor of the Rwanda Tribunal submitted a written application for referral of the prosecution for genocide, committed in two incidents described in the application, and for 'similar facts on other dates between 6 April 1994 and 17 July 1994 in the territory of Rwanda'. This application was made, through the intermediary of the Dutch ambassador in Tanzania, to the Minister of Justice, who then authorised the Public Prosecution Service to take over the criminal proceedings by letter of 27 November 2006. On 5 January 2007 the Public Prosecution Service made a (second) application for the institution of a preliminary judicial investigation relating in part to the suspicion of genocide. In a reaction to a written request of the Advocate General of 23 November 2007 the Prosecutor of the Rwanda Tribunal stated by e-mail on 30 November 2007, inter alia, that an agreement had been concluded by him with the Dutch authorities for the referral of the criminal proceedings for genocide. By interim judgment of 24 July 2007, however, the District Court of The Hague held that the Dutch courts had no jurisdiction in respect of the genocide.[106] The Public Prosecution Service appealed against this decision to the Court of Appeal of The Hague. The Court of Appeal dismissed the appeal on 17 December 2007.[107] The Public Prosecution Service then appealed in cassation to the Supreme Court.

Held: '…5.2. The Court of Appeal based its finding that the case brought by the Public Prosecution Service against the accused in respect of the charges in count 1 was inadmissible on, inter alia, the following grounds:

[105] For the text of Art. 11bis see under Held.

[106] LJN No. BB0494, English translation in LJN No. BB8462.

[107] LJN No. BC0287, English translation in LJN No. BC1757. Discussed by E. Van Sliedrecht in DD (2008) pp. 653–669 and by C. Ryngaert in 2 Hague Justice Journal (2007) and by N. Keijzer and E. van Sliedrecht in 10 YIHL (2007) pp. 384–385.

"…9. As already indicated above (Section 2), in the originating summonses, the accused has been charged with five indictable offences allegedly committed by him as a Rwandan national in Rwanda in 1994. Each of these charges has been worded both as a war crime (or torture) and as genocide. The District Court came to the conclusion that there was no jurisdiction for the offences formulated as genocide and consequently declared that the case brought by the Public Prosecution Service for these offences was inadmissible."

[…]

Original jurisdiction?

11. Original jurisdiction can, according to the District Court (legal findings 15–27), be derived from the provisions of Articles 2–4 and 5–7 of the Criminal Code,[108] or from Article 5 of the Genocide Convention Implementation Act[109] or Article 3 of the Wartime Offences Act.[110] The Court of Appeal—like the District Court, the public prosecutor and the defence—finds that the rules relating to the charge of genocide lack applicability and that no jurisdiction can thus be derived from them. In that respect the Court of Appeal refers to the above-mentioned findings of the District Court.

[…]

12. The Court of Appeal agrees with the District Court (legal findings 29–32) that jurisdiction can also not be derived from the International Crimes Act (Article 3 of which creates a secondary universal jurisdiction with respect to genocide), which came into force after the commission of the offences concerned. For reasons of legal certainty, the legislator—expressly—decided against providing for the Act to have retroactive effect.

13. The Court of Appeal agrees with the District Court (legal findings 33–44) that no basis for jurisdiction exists in international law either.

Derivative jurisdiction on the basis of Article 4 of the Criminal Code?

14. Finally jurisdiction could be derived—in derivative or subsidiary form—from the provisions of Article 4a of the Criminal Code. The District Court came to the conclusion that this article is not applicable in the present case.

[108] 'In short, these provisions imply that Dutch criminal law applies to: any person who commits any offence in the Netherlands (territoriality principle); a Dutch national who commits certain criminal offences while abroad (active personality principle); anyone on foreign soil who commits certain criminal offences against a victim having Dutch nationality (passive personality principle); anyone on foreign soil who commits criminal offences against vital national interests, such as the sovereignty or the security of the Dutch State (protective principle); anyone on foreign soil who commits certain criminal offences (universality principle)' (District Court's summary).

[109] For the text of Art. 5 see infra.

[110] Art. 3 reads: 'Without prejudice to the regulations of the Criminal Code and the Military Criminal Code, Dutch criminal legislation is applicable: (…) 2. to any person who, outside the Kingdom of the Netherlands in Europe, is guilty of a criminal offence (…) as described in the Articles 1 and 2 of the Act implementing the Genocide Convention if this offence is committed with respect to a Dutch national or a Dutch legal person or is an offence by which any Dutch interest is or could be impaired; (…) 4. to a Dutch national, who outside the Kingdom of the Netherlands in Europe, is guilty of a criminal offence as referred to in Article 1…'

15. Article 4a, para 1, of the Criminal Code (in force since 19 July 1985) reads:

> Dutch criminal law is applicable to any person whose prosecution has been transferred to the Netherlands by a foreign state pursuant to a treaty from which the jurisdiction to prosecute follows for the Netherlands.

If derivative jurisdiction is to exist under this provision, it is therefore necessary: (a) for there to be a 'State' (b) which has original jurisdiction and (c) for the prosecution to have been transferred by an organ of that State to the Netherlands and (d) for there to be a treaty 'from which the Netherlands derives jurisdiction to prosecute'.

16. With respect to the condition mentioned under (a), the Court of Appeal agrees with the District Court that—in view of the status of the Rwanda Tribunal—there is in itself much to be said for a sympathetic, 'functional' interpretation of this condition, in such a way that the Tribunal is treated as a 'State' within the meaning of Article 4a of the Criminal Code. On the other hand, there are some considerations which oblige the Court of Appeal to conclude, unlike the District Court, that such a functional interpretation cannot be accepted and that for this reason alone this article is not applicable. First of all, the Court of Appeal has taken into consideration the nature of the provision at issue in this case. In the view of the Court of Appeal, a provision on jurisdiction can be compared (up to a point) to a provision establishing a criminal offence and a provision on penal sanctions. That is why such a provision must meet the requirement of 'cognizability'. Equating an organ of the United Nations with a 'State' within the meaning of Article 4a of the Criminal Code does not fulfil that requirement of cognizability. Like the District Court (legal finding 39) the Court of Appeal would refer to the grounds for cassation prepared by the then Advocate General N. Keijzer for the Supreme Court's judgment of 18 September 2001 in respect of the 'December Murders' case [LJN: AB1471, NJ 2002,559, with note by J.M. Reijntjes].[111] Moreover, legal assistance between States is based on reciprocity, which is precisely the element that is largely absent in the relationship between the Tribunal and the Netherlands given the 'vertical' character of the relationship.

The Court of Appeal would go on to point out that the legislation establishing the tribunals [see below Section 25 at (c), the provision in the Act establishing the Yugoslavia Tribunal* (note in original text: Act of 21/4/1994, Stb. 308, establishing the 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) has also been declared to be applicable to the Rwanda Tribunal] provides that the different jurisdictional provisions in the context of international legal assistance are applicable by analogy since, in the opinion of the Court of Appeal, they are not directly applicable to the Tribunal.

The following passages of the Explanatory Memorandum to the Bill leading to this Act* [note in text: *Kamerstukken II* 1993–1994, 23 542, no. 3, p. 2.] are

[111] See also 32 NYIL (2001) p. 282 and ILDC No. 80.

relevant to this point: 'In addition, the Statute of the Tribunal obliges States to cooperate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law, for example in (…) the production of evidence (…) and the surrender of the accused to the Tribunal (Article 29 Statute). (…) Special legislation is required in order to fully comply with these obligations. For example, the existing statutory provisions with respect to international cooperation in criminal matters are geared to inter-state cooperation and not to cooperation with an international tribunal. This concerns extradition and mutual assistance in criminal matters as well as the implementation of sentences pronounced by non-Dutch courts. The present bill is intended to augment the existing legislation in these respects.'

The Explanatory Memorandum to the Bill that led to the Act establishing the Rwanda Tribunal [Kamerstukken II, 1995–1996, 24 818, no. 3, p. 2] also mentions in respect to the surrender to the Rwanda Tribunal that separate legislation should be introduced to allow this variant of international legal assistance: 'In this respect it almost goes without saying that pursuant to Article 2, para 1, of this Bill, the variant of international legal assistance introduced in the present Bill, unlike classic extradition, provides for the surrender of a person claimed to an international body pursuant to a resolution of the United Nations Security Council and not, as usual, to another sovereign State. This warrants a separate statutory arrangement, which is provided for by this Bill.'

Finally, the Court of Appeal notes that in addition to the Vienna Convention on the Law of Treaties (of 23 May 1969, Trb. 1977, 169),[112] which concerns international agreements concluded between States in written form, a second Vienna Convention has been introduced on the Law of Treaties between States and International Organisations or between International Organisations (Convention of 21 March 1986, Trb. 1987, 136).[113] This too indicates that a distinction should be made between States and international organisations.

Although the Court of Appeal agrees with the District Court (legal finding 55) that at the time there was no thought of referring prosecution to the Netherlands, this does not constitute a sufficiently cogent argument for now applying a teleological interpretation without an adequate basis. Nor does the Court of Appeal consider that a different assessment is warranted simply because it is apparent from the decision of the Rwanda Tribunal in the (comparable) Bagaragaza* case [note in original text: Decision on prosecution's request for referral of the indictment to the Kingdom of the Netherlands; case no. ICTR-2005-86-llbis; Trial Chamber III, decision of 13 April 2007, Section 18 et seq.] that the Dutch government took the view that the Rwanda Tribunal did come within the definition of 'State' in Article 4a of the Criminal Code.[114]

112 1155 UNTS p. 331, 8 ILM (1969) p. 679.

113 A/CONF.129/15, 25 ILM (1986) p. 1543.

114 Bagaragaza was transferred by the Tribunal to the Dutch authorities on 13 April 2007. He was suspected of having committed a number of crimes as defined in the Statute of the Rwanda

Although, as mentioned above, the Court of Appeal considers that for this reason alone Article 4a of the Criminal Code is not applicable, it also considers it advisable to discuss the criteria for application of this article as described in Section 15 under (b), (c) and (d).

17. Like the District Court, the Court of Appeal considers that the jurisdiction and hence the power of the Rwanda Tribunal or its Prosecutor, as the case may be, to bring prosecutions is beyond doubt in the present case on the basis of (in particular) Articles 1 and 2 of the Statute of the Tribunal adopted by the Security Council of the United Nations by resolution 955 (1994) on 8 November 1994 (referred to below as the Statute). It follows that the condition referred to above at (b) (see Section 15) for application of Article 4a of the Criminal Code has thus been fulfilled.

18. The condition of Article 4a of the Criminal Code, as referred to above (see Section 15) at (c), has also been fulfilled since the Court of Appeal—like the District Court—does not have any doubts either about the power of the Prosecutor of the Tribunal to refer the prosecution in the present case, in view of his complete and exclusive power of prosecution as an organ of the Tribunal [based on Articles 10 and 15 (2) of the Statute]. The Court of Appeal took into account in this connection that the Tribunal's procedure for referral of prosecution as set out in Article 11*bis* of the Rules of Procedure and Evidence (RPE) is worded in such a way as to refer only to cases already brought before the Tribunal.

In his request of 29 September 2006 for referral of the prosecution in the present case, the Prosecutor also stated that the referral of such 'un-indicted cases' is within his competence under the Statute. The Court of Appeal finds no reason to query this statement, particularly in view of paragraph 39 of the letter of 29 May 2006 from the President of the Tribunal to the Security Council of the United Nations about the Completion Strategy of the Tribunal.

(Footnote 114 continued)
Tribunal in Rwanda in 1994. These crimes included genocide and violations of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977. However, the judgment of the District Court of The Hague in the Mumbara case prompted the ICTY to request the Netherlands on 17 August 2007 to return Bagaragaza to it. The District Court of The Hague granted the request (through the intermediary of the Public Prosecution Service). The District Court stated that the Bagaragaza's counsel (Mr Knoops) had requested that the Minister be advised to surrender him only after the President of the Tribunal had decided on the application for reconsideration of the President's decision of 6 March 2008 on his prosecution and detention or on the application for review of the decision. Counsel's request was made because it was assumed that Bagaragaza's safety would be at risk in the United Nations Detention Facility in Arusha. Defence counsel also asked the Minister to urge the Tribunal to expedite the proceedings since a third country had come forward where Bagaragaza could serve his sentence. Then he would not have to be surrendered and could remain in the United Nations Detention Unit in Scheveningen. Finally, defence counsel requested the Minister to stipulate as a condition for surrender that the Registrar would, as promised, carry out an up-to-date security check. It is not evident from the judgment whether the District Court actually acceded to these requests in its recommendations to the Minister. Judgment of 21 March 2008, LJN No. BC7362. Bagaragaza was transferred to Arusha on 20 May 2008.

Transfer based on treaty?

19. The conclusion can be drawn that transfer of prosecution is one of the forms of international assistance in criminal matters that does not in itself need a basis in a treaty. However, it is apparent from Article 4a of the Criminal Code that this requirement does apply if the Netherlands has no original jurisdiction and the transfer of prosecution must create (derivative) jurisdiction; the District Court (legal findings 61-65) held—partly based on its account of the legal history of this subject—that a treaty that entails this legal consequence must fulfil certain requirements of specificity: 'the competence to prosecute and try the suspect must follow from a treaty that contains explicit agreements about transfer of the right to prosecute and in any event makes an arrangement for the cases in which referral is possible' (legal finding 65).

20. The Court of Appeal shares the view of the District Court that some specificity is required. In any case general agreements or declarations of intent about (mutual) cooperation in criminal matters cannot be deemed sufficient to create jurisdiction, particularly in view of the great importance of preventing conflicts of jurisdiction. As stated above, the requirements to be fulfilled by a transfer of prosecution that creates jurisdiction must be stricter than those which apply to transfer of prosecution alone (and to which the treaty requirement does not apply).

In this respect, the Court of Appeal also refers to the statement made in the Explanatory Memorandum to the Bill that led to the introduction of Article 4a of the Criminal Code* [note in original text: Kamerstukken II, 1979–1980, 15 972, nos. 1–3, p. 8]: 'Additions to the rules of Dutch criminal law on criminality and prosecutability cannot be found in the proposed provisions. A treaty is the appropriate vehicle for arranging these subjects with a view to the international transfer of prosecutions. This also applies to the expansion of the competence of the Dutch criminal courts, for which the basis is not the new Article 4a of the Criminal Code but the applicable treaty.'

It is in itself correct, as the Public Prosecution Service points out, that the conventions mentioned in Article 552hh of the Code of Criminal Procedure (which, in cases where extradition is refused, require the initiation of prosecution by referral of the case to the prosecuting authority, in keeping with the principle of *aut dedere aut judicare*) do not contain a detailed system of rules. However, the States involved are obliged, with a view to the possible trial, to ensure that the competence to prosecute for the offences referred to in those conventions is guaranteed. This is why the article concerned was included in the Code of Criminal Procedure. As the conventions relate only to (a limited group) of specific offences, this in itself involves a certain limitation (namely with respect to 'the cases in which' the arrangement applies). The Court of Appeal refers in this connection to the provision in Article 4 of the United Nations Convention of 20 December 1988, Trb. 1990, 94, against the illicit traffic in narcotic drugs and psychotropic substances. This article provides that jurisdiction is established in certain situations (e.g. where the offence has been committed in the territory of the State Party or where the suspect is not extradited because he is a national of the

State Party). In other cases, for example when the suspect is in the territory of a State who does not wish to extradite him, that State is competent—but certainly not obliged in all cases—to establish jurisdiction. This convention has not been included in Article 552hh of the Code of Criminal Procedure because, as the Court of Appeal infers from the parliamentary history of the Act approving the Convention*, [note in original text: Kingdom Act of 2 July 1993, Stb. 387. See Explanatory Memorandum, *Kamerstukken II* 1990–1991, 22080 (R 1406), no. 3, pp. 11–12] the Netherlands does not accept derivative jurisdiction in this connection (the establishment of jurisdiction prescribed by the convention is already covered by the provisions on jurisdiction in the Criminal Code).

In other words: not only must derivative jurisdiction have a basis in a treaty, but the Dutch legislator must also decide whether or not to exercise this optional competence. This obliges the court to exercise even more restraint in interpreting the rules of law.

21. The Public Prosecution Service has also drawn attention to the wording of Article 4a: the competence of prosecution must 'follow' from the treaty, which has been paraphrased by the Public Prosecution Service, in keeping with the Explanatory Memorandum to the Bill, as 'resulting from'.

Whatever may said about this linguistic paraphrasing, the Court of Appeal infers in part from the passage quoted in Section 20 from the Explanatory Memorandum that a treaty in the sense of Article 4a of the Criminal Code should not only contain a provision for referral of prosecution but also explicitly provide for (derivative) jurisdiction.

22. The Public Prosecution Service has also invoked (a) the Charter of the United Nations in connection with the Statute of the Rwanda Tribunal (and the relevant resolutions and the Completion Strategy) and (b) the Genocide Convention, as being a treaty within the meaning of Article 4a of the Criminal Code, 'from which the jurisdiction to prosecute… follows'.

The Charter of the United Nations, with annexes

23. The following can be said about the Charter of the United Nations, the Statute of the Rwanda Tribunal and the applicable Rules of Procedure and Evidence. Chapter VII of the Charter of the United Nations also forms, according to Resolution 955 (1994), a basis for the establishment of the Rwanda Tribunal, which underlines the importance of that body and the paramount obligations of States to comply with the Charter. The Public Prosecution Service was right to point this out, referring in this connection to Articles 25 and 103 of the Charter, which read as follows:

Article 25: The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 103: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

However, these obligations should then be sufficiently articulated, as held above. The Charter does not contain a blank authorisation to just randomly make a

demand on a State. This is also evident from the wording of the above-mentioned resolution, which refers at 2 to the obligations which result from the resolution and the Statute of the Rwanda Tribunal:

> Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute …'

24. In this respect the Court of Appeal points to a number of more specific provisions:

(a) The Statute of the Rwanda Tribunal stipulates among other things:

Article 8: Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.
2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 28: Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal for Rwanda.

(b) The Rules of Procedure and Evidence stipulate in Rule 11*bis* among other things:

Rule 11*bis*: Referral of the Indictment to another Court

(A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State: (i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State. (B) The Trial Chamber may order such referral *proprio motu* or at the request of

the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.

(c) As regards the Dutch legislation, the Act establishing the Yugoslavia Tribunal is especially important (see note 2). This Act includes the following provisions, which also apply to the Rwanda Tribunal:

Article 2

At the request of the Tribunal persons may be transferred to the Tribunal for prosecution and trial for criminal offences of which the Tribunal is competent to take cognizance by virtue of its Statute.

Article 9

1. Requests of the Tribunal for any form of legal assistance, whether or not addressed to a specified judicial or police body in the Netherlands, will be acceded to wherever possible.

2. Articles 552i, 552j, 552n and 552o-552q—with the exception of the reference in Article 552p, para 4, to Article 552d, para 2, of the Code of Criminal Procedure and Article 51, paras 1 and 4, of the Extradition Act are applicable *mutatis mutandis*.

3. Representatives of the Tribunal will be permitted upon request to be present at the execution of the requests and to have questions presented to the persons involved in the execution of the requests.

4. The Dutch authorities in charge of the execution of requests for legal assistance are responsible for the safety of the persons concerned and are accordingly authorised to set conditions concerning the manner in which requests for legal assistance are executed.

Article 11

1. At the request of the Tribunal custodial sentences imposed by the Tribunal by way of final judgment may be enforced in the Netherlands.
2. At the request of the Tribunal the convicted person may be provisionally arrested for that purpose.
3. The public prosecutor or deputy public prosecutor in The Hague is authorised to order the provisional arrest.
4. Articles 9 (paras 2–5), 10, 11 [paras 1 and 2 (a)] and 12 of the Enforcement of Criminal Judgments (Transfer) Act are applicable *mutatis mutandis*.
5. At the request of the Tribunal, orders made by the Tribunal for the return of property and proceeds as referred to in Article 24 (3) of the Charter may be enforced in the Netherlands. Articles 13, 13a, 13b and 13d-13f—with the exception of the reference in Article 13d, para 2, to Article 552d, para 2, of the Code of Criminal Procedure—of the Enforcement of Criminal Judgments (Transfer) Act are applicable *mutatis mutandis*.

25. According to the Court of Appeal, the following conclusions may be drawn from these provisions:

(a) a request for referral of prosecution to the Rwanda Tribunal must be granted without any reservation, and referral by the Tribunal under Rule 11*bis* RPE in the situation referred to at (iii) is dependent not only on the willingness of the

requested State, but also on the existence of jurisdiction. This jurisdiction issue is extensively assessed (with other issues) by the Rwanda Tribunal before a request for referral is made to a State. In this respect, the Court of Appeal refers to the decision of the Trial Chamber III of 19 May 2006, in which the Tribunal refused to refer prosecution of Bagaragaza to Norway because Norway did not have 'jurisdiction' *ratione materiae* (as genocide was not specifically prohibited under Norwegian law) and could 'only' prosecute on the basis of general offences. Although (according to note 11 of this decision) Norway had ratified the Genocide Convention, it had not implemented it in its national legislation.[115]

The Court of Appeal infers from this that referral of prosecution by the Tribunal under Rule 11*bis* RPE can take place only if the requested State has independent (original) jurisdiction. There is no reason to assume that the Prosecutor would not be bound by this condition for (a request for) referral in the event of a case not brought before the Tribunal.

(b) Article 28 of the Statute obliges States to cooperate with the Tribunal and gives a non-exhaustive list in paragraph 2 of various requests for legal assistance which must be granted without undue delay. Like the District Court (legal finding 75) the Court of Appeal considers that these obligations are, according to the wording of the article, the key to investigation and prosecution by the Tribunal itself.

The provision contained in Rule 11*bis* RPE relates to the referral of prosecution to a State and is therefore not based on Article 28 of the Statute. The Court of Appeals infers from the evident connection with the Completion Strategy referred to below (Section 26), pursuant to the instruction of the Security Council, that Rule 11*bis* RPE has a direct basis in the Charter. But it does not follow from this that the Prosecutor has more competences as a result of that Rule or that connected obligations for States should be deduced from it than those which already follow from the wording of that Rule. And Rule 11*bis* A, at (iii), is expressly based—as already noted above—on referral to a State that already has (original) jurisdiction.

This is why, according to the Court of Appeal, it cannot be said that under the Charter of the United Nations, provisions of the Statute of the Rwanda Tribunal and/or the Rules of Procedure and Evidence the request made by the Prosecutor in the present case for referral of prosecution creates a treaty based legal obligation for the Netherlands which is such that the request must be treated as a request as referred to in Article 4a of the Criminal Code.

The Court of Appeal would like to refer in this connection to the 'short paper' submitted by the Advocate General during the appeal hearing, which was attached as an annex to the above-mentioned e-mail message from the Prosecutor of 30 November 2007 (see Section 8), with respect to the relationship between Article 28 of the Statute of the Rwanda Tribunal and Article 11*bis* of the Rules of Procedure and Evidence. This paper deals, among other things, with the case law of the Appeals Chamber (of the Yugoslavia Tribunal) with respect to these articles. It can be inferred from this case law that the Appeals Chamber believes that States

[115] See n 113 above.

are under no obligation, either under Article 28 of the Statute of the Tribunal or under Article 11*bis* of the Rules of Procedure and Evidence, to agree to a prosecution referral by the Tribunal.

(c) In the Act establishing the Rwanda Tribunal as referred to above, an attempt was made to 'translate' the obligations resulting from the Statute of the Rwanda Tribunal to the Dutch situation, taking the other Dutch legislation into account. For example, the Act created a bridge to the extradition laws, the legislation on the transfer of enforcement of criminal judgments and the regulations on (general) international mutual assistance in criminal matters. Like the District Court (legal finding 77) the Court of Appeal can only conclude that the Dutch legislator omitted (whether intentionally or erroneously) to regulate the referral of prosecution to the Netherlands. This could take place even without a treaty (unlike the transfer of enforcement of Tribunal judgments), albeit without the expansion of jurisdiction provided for in Article 4a of the Criminal Code. Like the District Court, the Court of Appeal is of the opinion that the courts are not competent to fill what is evidently currently viewed by the Public Prosecution Service as a gap by means of what is in this respect too purely a teleological interpretation.

26. According to the explanation given by the so-called Completion Strategy of the Rwanda Tribunal, the purpose of which—in accordance with instruction of the Security Council [Resolution 1503 (2003) of 28 August 2003]—is to concentrate on the 'most senior leaders suspected of being most responsible' for the crimes in regards of which the Tribunal is competent, the Prosecutor's request is to complete the proceedings in 2010 at the latest and for that reason to transfer the 'intermediate and lower-rank accused' to 'competent national jurisdictions'. It follows that the text of this Resolution can also not create any relevant obligation, as the Netherlands does not have the requisite (original) jurisdiction (competence).

The Genocide Convention

27. As regards the jurisdiction that can be based on the Genocide Convention, Articles V and VI of that Convention and their transposition to Article 5 of the Genocide Convention (Implementation) Act are of particular importance.

Convention on the Prevention and Punishment of the Crime of Genocide[116]

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 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.

[116] 78 UNTS p. 277, Trb. 1960 No. 32.

Genocide Convention (Implementation) Act

Article 5

1. Dutch criminal law is applicable to a Dutch national who, outside the Netherlands, is guilty of:

1° a crime described in Articles 1 and 2 of this Act;

2° the crime described in Article 131 of the Criminal Code, if the offence or crime to which that provision refers is a crime as referred to in Articles 1 and 2 of this Act.

2. Prosecution may also take place if the suspect becomes a Dutch national only after commission of the offence.

The Court of Appeal notes that in itself the Genocide Convention (given the provisions of Article V) provides every scope for the broad, even (secondary) universal establishment of jurisdiction, as held by the International Court of Justice decided in its judgment of 11 July 1996, Section 31:[*] [note in text: Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide—Bosnia and Herzegovina v. Yugoslavia] 'The Court sees nothing in this provision which would make the applicability of the Convention subject to the condition that the acts contemplated by it should have been committed within the framework of a particular type of conflict. The contracting parties expressly state therein their willingness to consider genocide as "a crime under international law", which they must prevent and punish independently of the context "of peace" or "of war" in which it takes place. In the view of the Court, this means that the Convention is applicable, without reference to the circumstances linked to the domestic or international nature of the conflict, provided the acts to which it refers in Articles II and III have been perpetrated. In other words, irrespective of the nature of the conflict forming the background to such acts, the obligations of prevention and punishment which are incumbent upon the States parties to the Convention remain identical.

As regards the question whether Yugoslavia took part—directly or indirectly—in the conflict at issue, the Court would merely note that the Parties have radically differing viewpoints in this respect and that it cannot, at this stage in the proceedings, settle this question, which clearly belongs to the merits. Lastly, as to the territorial problems linked to the application of the Convention, the Court would point out that the only provision relevant to this, Article VI, merely provides for persons accused of one of the acts prohibited by the Convention to "be tried by a competent tribunal of the State in the territory of which the act was committed ...". It would also recall its understanding of the object and purpose of the Convention, as set out in its Opinion of 28 May 1951, cited above: 'The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations' [Resolution 96 (1) of the General Assembly, December 11th 1946].

The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations

as binding on States, even without any conventional obligation. A second consequence 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). (ICJ Rep 1951, p. 23.) It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.'

At the time, the legislator, however, chose 'only' to apply an active personality principle to the Implementation Act. It is important to note that by so doing, the Netherlands did not underestimate its treaty obligations, as can be deduced from the recent decision of the International Court of Justice of 26 February 2007*.[note in original text: Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide—Bosnia and Herzegovina v. Serbia and Montenegro] Paragraph 442 of this decision reads:

> 'The Court would first recall that the genocide in Srebrenica, the commission of which it has established above, was not carried out in the Respondent's territory. It concludes from this that the Respondent cannot be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices, or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide. Even if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia's other international obligations, inter alia its obligation to co-operate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia's domestic courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.'

Provision for (secondary) universal jurisdiction referred to above, for example for genocide has now been made in Article 3 of the International Crimes Act, which has been in force since 1 October 2003, as indicated above (Section 12). It was noted in that section that the legislator intentionally chose at that juncture not to give retroactive force to this provision. The Court of Appeal would refer in this connection to the answer of the Minister of Justice to parliamentary questions asked as a result of the judgment of the District Court in the present case* [note in original text: Aanh. Hand. II 2006–2007 no. 2466] 'The court's finding consideration that it is faced with a gap in the existing legislation which it cannot solve by means of a reasonable interpretation of the law is based on the wording of the multilateral conventions to which reference has been made. To the extent that the court considers that at the time of the indicted offences there was no applicable national legal provision conferring jurisdiction for genocide, it should be noted that this was due to the choice of the Dutch legislator not to create broad extra-territorial jurisdiction and to the position of international law at that time. Under the International Crimes Act which came into force on 1 October 2003, the Netherlands now has broader jurisdiction, for example for the crime of genocide.

When this Act was introduced the legislator explicitly chose not to give retroactive force to this broader jurisdiction provision.'

28. In view of the manner in which the Genocide Convention has been implemented in the Netherlands, the Court of Appeal fails to see how this convention could now create jurisdiction through Article 4a of the Criminal Code. The Court of Appeal would point out again—perhaps unnecessarily—that when implementing conventions the legislator can choose to what extent it wishes to implement optional obligations in Dutch legislation.

'Mini-treaty'?

29. Ultimately, the question is whether in the current case another agreement could perhaps result in a treaty within the meaning of Article 4a of the Criminal Code. As the correspondence of the Prosecutor of the Rwanda Tribunal with organs of the State of the Netherlands, as described in Section 8 above, contains certain pointers supporting the notion that the two sides made agreements about the transfer of the present case, the question could arise of whether it was the intention to conclude a 'treaty' (in substantive terms).

The Public Prosecution Service is of the opinion that this question can be answered affirmatively since there is a *consensus ad idem* and there is sufficient certainty about the subject of the agreement. In the view of the Public Prosecution Service there are grounds for considering that a treaty within the meaning of Article 4a of the Criminal Code exists. To support this point of view, the Public Prosecution Service has referred, inter alia, to the opinion of 30 November 2007, produced at its request by K. Brölmann, senior lecturer in international law at the University of Amsterdam. One of the conclusions in this opinion is that—based on the freedom of form of treaties—there is nothing in international law to prevent the correspondence between the Prosecutor of the Rwanda Tribunal and the Minister of Justice from being construed as an international legal agreement or 'treaty' within the meaning of international law. Brölmann reaches this conclusion in the following way: the agreement between the Dutch Minister and the Prosecutor of the Tribunal is based on (i) bilateral communication; (ii) having a normative content; (iii) between international legal entities; (iv) represented by 'organs' which (according to relevant internal law) can be deemed, from the perspective of international law, to be competent to conclude treaties. According to Brölmann, the agreement thus conforms to the definition of 'treaty'.

Furthermore, the Public Prosecution Service refers to the reply of the Prosecutor of the Rwanda Tribunal as shown in Section 8. In answer to the written request of the Advocate General, the Prosecutor stated that an agreement had been reached with the Dutch authorities concerning the transfer of prosecution of the suspect.

The Prosecutor states inter alia in the message: '… there was an agreement between the Prosecutor of the ICTR and authorities in the Netherlands concerning the transfer of the case against [suspect] as far as proceedings for the crimes of genocide are concerned.' And also: 'In the opinion of the ICTR Prosecutor the agreement was binding upon delivery of the assent to the request by the Minister of Justice of the Kingdom of the Netherlands.'

The Ministry of Foreign Affairs argues, by contrast, that the request of the Prosecutor and the letter of the Minister of Justice to the public prosecutor cannot be construed as a treaty within the meaning of international law. This position, as set out in a letter of 22 November 2007 from the Legal Advisor, Head of the International Law Department of the Ministry of Foreign Affairs, to the Advocate General, is based inter alia on the consideration that written *consensus ad idem* forms the basis of a treaty within the meaning of international law. As in the present case the written request of the Prosecutor of the Rwanda Tribunal to refer prosecution did not result in a written reply from the Dutch authorities, this requirement was not met.

The Court of Appeal finds that the correspondence between the Prosecutor of the Rwanda Tribunal and organs of the State of the Netherlands as referred to above does in itself contain certain pointers supporting the notion that the two sides made arrangements about the transfer of the present case. As the Court of Appeal sees no reason to cast doubt on the authority of the Prosecutor to make such arrangements, it will assume that in this manner a treaty—with extreme freedom of form—was concluded between the Prosecutor and the Dutch Minister of Justice.

Subsequently the question arises whether such a treaty—with freedom of form—can be regarded as a treaty within the meaning of Article 4a of the Criminal Code. The Court of Appeal answers this question in the negative. It finds, inter alia, that Article 4a of the Criminal Code relates, in its opinion, to a general arrangement which meets, inter alia, the requirements of cognizability. As held above, these have not been met.

Article 91 of the Constitution too prevents a situation in which the Kingdom can be bound by such a treaty since a treaty with freedom of form cannot be treated as one of the cases for which no approval is required.[117]

The Court of Appeal also holds that the provisions regulating jurisdiction form an explicit and closed system with a high level of public policy content. In view of Article 94 of the Constitution it is not possible to derogate from this on the basis of customary law, but only on the basis of provisions of treaties or decisions of international institutions that are binding on all persons.

Things might have been different if the United Nations had concluded a treaty with the Dutch authorities in which it was laid down that in the framework of the Completion Strategy the prosecution of suspects whose cases had not (yet) been brought before the Tribunal could, in consultation with the Netherlands, be transferred to the Netherlands, even in cases in which the Netherlands has no original jurisdiction.

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[117] Art. 91 reads: '1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament. 2. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval. 3. Any provisions of a treaty that conflict with the Constitution or whichlead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour.'

Conclusion

30. In view of the above, the Court of Appeal draws the following conclusion.

National and international opinion on the regulation of jurisdiction in relation to genocide has clearly evolved in recent decades in such a way that a broad jurisdiction has been created in the International Crimes Act, although this has not been granted retroactive effect.

The circumstances on which the legislation establishing the Tribunals was based have been radically changed by the prescribed Completion Strategy of the Tribunal. As a result, there is now a need to take over criminal cases of (in this case) the Rwanda Tribunal. However, the Court of Appeal has been obliged to conclude that Dutch statutory instruments are inadequate as regards derivative jurisdiction*.[note in original text: When introducing the Act establishing the Rwanda Tribunal the legislator indicated that it was aware that it was 'not immediately conceivable' that the Netherlands had adequate (original) jurisdiction. However, the Rwanda Tribunal has primary jurisdiction and the Netherlands can undoubtedly comply with a request for transfer. See Memorandum following the Report, Kamerstukken II, 1995–1996, 24 818, no. 5, p. 6.]

No matter how much the Court of Appeal sympathises with the wish not to let the most serious crimes, as in the present case, go unpunished (as is emphasised in the Explanatory Memorandum to the International Crimes Act), this wish cannot create a sufficient basis for jurisdiction in the matter of genocide. The Court of Appeal points out in this connection that the above considerations have no bearing on the (continued) prosecution of the same set of facts for war crimes or torture.

31. It follows from the above that the case brought by the Public Prosecution Service for prosecution of the suspect in the matter of genocide is declared inadmissible.

6. Assessment of the ground of appeal of the Advocate General at the Court of Appeal

6.1. The ground of appeal takes issue with the view of the Court of Appeal that no derivative jurisdiction can be derived from Article 4a of the Criminal Code.

6.2. The present case involves a Rwandan national who is accused—in so far as of relevance in the cassation proceedings—of having committed crimes within the meaning of Article 1 of the Genocide Convention (Implementation) Act against non-Dutch nationals in Rwanda in 1994. The ground of appeal does not dispute the fact that the Netherlands does not have original jurisdiction in this case, as rightly held by the District Court and the Court of Appeal.

The suspect's presence in the Netherlands is not a sufficient ground for assuming jurisdiction. Although Article 2, paragraph 1, opening words and (a) of the International Crimes Act admittedly declares that Dutch criminal law is applicable in such a case with respect to crimes of this kind, the Act did not take effect until 1 October 2003. No provision granting retroactive effect to this jurisdictional arrangement was made either by statute or elsewhere, although—having regard, inter alia, to Article 7(2) of the European Convention on Human Rights—there was no legal rule barring this.

6.3. It follows from the above that the suspect can be prosecuted and tried in the Netherlands in respect of the crimes concerned only if the conditions of Article

4a of the Criminal Code with regard to the establishment of derivative jurisdiction are fulfilled, namely that the prosecution is taken over by the Netherlands from a foreign State on the basis of a treaty from which the jurisdiction to prosecute follows for the Netherlands.

6.4. The first part of the ground of appeal takes issue with the view of the Court of Appeal that the Rwanda Tribunal cannot be deemed to be a "foreign State" within the meaning of Article 4a of the Criminal Code from which the Netherlands could take over the prosecution by treaty.

6.5.1. When Article 4a of the Criminal Code was introduced, the legislator could not have envisaged that this provision would cover the transfer of a prosecution by a UN Tribunal such as the present one to the Netherlands, but instead used the term "State" in the specific meaning attributed to it in (national and international) legal parlance. The terminological distinction between "State" and "tribunal" has always been observed hitherto. This is why, in the absence of indications to the contrary, it should be assumed that even now the term "foreign State" in Article 4a of the Criminal Code does not include tribunals.

There are no indications that subsequently, after the establishment of these tribunals and the introduction of the implementing legislation considered necessary for this purpose, the legislator abandoned the customary linguistic distinction between the concepts of 'State' and 'tribunal' in other statutes. Nor did the legislator give any indication when Article 4a of the Criminal Code was amended by the Act of 22 December 2005, Stb. 2006, 24, that it interpreted the concept of 'State' as including a tribunal and that it did not therefore consider any addition or change to Article 4a of the Criminal Code to be necessary in connection with the transfer of a prosecution by a tribunal to the Netherlands. This also applies to the recent Bill for partial amendment of the Criminal Code, the Code of Criminal Procedure and some related statutes in connection with legal developments, international obligations and identified technical defects and gaps in the law (Kamerstukken II 2007–2008, 31 391).

6.5.2. Seen against this background the view of the Court of Appeal is correct. Nor is this altered by the mere fact that, as this part of the ground of appeal submits, a provision such as Article 4a of the Criminal Code is capable of extensive interpretation.

6.6. In the second part of the ground of appeal it is argued that the Court of Appeal wrongly held that Article 4a of the Criminal Code did not provide a basis for the Netherlands to take over the prosecution from the Rwanda Tribunal since, according to the Court of Appeal, no treaty exists between the Netherlands and the Rwanda Tribunal as referred to in that provision.

6.7.1. A treaty from which the jurisdiction to prosecute follows for the Netherlands as referred to in Article 4a of the Criminal Code is a treaty under which derivative jurisdiction is created for the Netherlands. The Court of Appeal has held that no such treaty exists in the present case, where the Prosecutor of the Rwanda Tribunal has requested the Netherlands to take over the prosecution of the suspect in respect of genocide committed in Rwanda in 1994.

6.7.2. In essence, this part of the ground of appeal is based on the view that—given the object and scope of the Charter of the United Nations, the Statute of the Rwanda Tribunal and the so-called Completion Strategy based on Resolution 1503 (2003) of the Security Council of the United Nations of 28 August 2003, in combination with Article 11*bis* of the Rules of Procedure and Evidence of the Rwanda Tribunal (under which States have an obligation to cooperate with the Rwanda Tribunal in relation to mutual assistance in criminal matters, surrender and transfer in respect of the serious violations of international humanitarian law as defined in the Resolution)—a "treaty" as referred to in Article 4a of the Criminal Code also exists in a case where, as here, the Prosecutor of the Rwanda Tribunal has requested that the Netherlands take over the prosecution of the suspect and the Minister of Justice has agreed to this orally.

This view is incorrect. The Court of Appeal held rightly and on correct grounds that jurisdiction had not been established in a treaty as referred to in Article 4a of the Criminal Code since such a treaty basis cannot be found in the provisions referred to above or in any other treaty, nor can it be found in this case in the arrangement to which the Court of Appeal has referred under the heading "mini treaty".

6.8. The Court of Appeal's opinion that Article 4a of the Criminal Code does not provide a basis for derivative jurisdiction of the Netherlands in relation to the present transfer of the prosecution is therefore correct, and there is consequently no need to discuss the arguments that the reasoning is insufficient.

6.9. The ground of appeal is therefore proposed in vain …'[118]

7.25 MILITARY JURISDICTION
See: 3.2113 **A**

8.2 TERRITORRIAL JURISDICTION
See: 1.203, 7.213 (n 107)

[118] On 23 March 2009 the District Court of The Hague sentenced Mumbara to 20 years' imprisonment for torture. The District Court based its universal jurisdiction on Article 5 of the Torture Convention (Implementation) Act. The Rwanda Tribunal supplied witness statements to the Dutch Public Prosecution Service, subject to measures to protect the identity of the witnesses. On 13 August 2008 the Trial Chamber of the Tribunal terminated this protection after the persons concerned had, on request, given consent for this to the Public Prosecution Service. The District Court applied the rules of evidence of Dutch criminal law, not the broader rules of the Tribunal, but the District Court once again drew on the practice of international tribunals for the meaning of inconsistencies. The offences did not constitute war crimes; although there had been a non-international armed conflict in Rwanda, there was no close connection (nexus) between the offences and the armed conflict. For the definition and actual determination of the nexus the District Court relied on the practice of the Yugoslavia and Rwanda Tribunals. When sentencing the District Court looked at the practice of the Rwanda Tribunal and national courts in Switzerland and Belgium. Although a life term was not prohibited by Article 3 of the European Convention on Human Rights, the District Court did not consider this sentence to be appropriate in this case, LJN No. BI2444. Both Mumbara and the Public Prosecution Service have appealed.

8.24 RECOGNITION AND ENFORCEMENT OF ACTS OF FOREIGN STATES
See: 6.06 (n 79)

9.924 POLLUTION OF INTERNATIONAL RIVERS

Municipality of Rotterdam v. Mines de Potasse d'Alsace S.A., District Court of Rotterdam, 17 December 2008, LJN No. BH1978

- *As the average proportion of the dredge spoil of Mines de Potasse d'Alsace in the total dredging load in the Rotterdam harbours in the period from 1961 to 2004 was in the order of magnitude of less than 1%, this comes within the range of damage from the MDPA discharges that Rotterdam must accept.*
- *It is also important that the extraction in the potash mines has now ceased as the reserves are exhausted and that the discharges have been scaled back.*
- *Although the discharges therefore admittedly constitute a financial burden/nuisance for Rotterdam as a downstream user of the river, they cannot in the circumstances—taking account of the nature, seriousness and duration of the discharges—be deemed unlawful in relation to Rotterdam.*
- *Nor can MDPA be held liable on any other ground to offer financial compensation to Rotterdam for extra dredging work.*

The Facts: Until 2004 Mines de Potasse d'Alsace S.A. (referred to below as MDPA) extracted potash salt from mines situated in the Alsace region of France. One of the substances released during the process of extraction was a clayish soil. The water used for flushing, which contained clay/sludge particles, had been discharged by MDPA into the River Rhine through a connecting canal—the Grand Canal d'Alsace—since the 1930s. The company held a licence for the discharges granted by the French authorities, and complied with the conditions of the licence. As owner and user of the harbour basins in the Waterweg area (part of the Rhine delta), the Municipality of Rotterdam believed that these discharges constituted an unlawful act against it. It therefore decided to attempt to recover from MDPA part of the costs of the dredging work in the port and issued a writ against MDPA in 1988 summoning it to appear for this purpose before the District Court of Rotterdam.[119] It claimed a sum of over 27 million guilders and an order to cease and desist from the discharges with effect from 2002.

Held: '…2.4. Subject to the above, it is now necessary to determine whether the discharges by MDPA constituted an unlawful act against Rotterdam. In this

[119] In September of that year three horticultural businesses in the Westland region came to a financial settlement with MDPA for the nuisance suffered by them as a result of the salt. The Dutch Supreme Court gave judgment in their case against MDPA on 23 September 1988, cf. 21 NYIL (1990) pp. 434–440.

context, it has already been held in the interim judgment of 15 April 1999[120] that a downstream user of this river may have to tolerate a degree of nuisance as a consequence of the use made of the river upstream, but that in view of the nature, seriousness and duration of the discharges and the nuisance and damage caused as a result, this may constitute an unlawful act. […]

2.7.1. If it is assumed that the quantity of (settled) sludge in the Rotterdam harbours averaged 27,000 tonnes of dry matter per year (equivalent to 54,000 m^3 of dredge spoil) in the period between 1971 and 1990, the District Court considers on the following grounds that MDPA was not guilty of committing an unlawful act against Rotterdam.

2.7.2. The District Court considers it right when assessing the actions of MDPA to take as the starting point the average quantity of MDPA dredge spoil over the years in question. To assess the actions of the MDPA this should be viewed as a whole over the longest possible period and not just in certain years in which there was an extra dredging load in the Rotterdam harbours that was attributable to MDPA to a greater degree than average. In the latter case, this would represent an unduly fragmented approach to the issue of liability, to which the nature, seriousness and duration of the discharges are relevant.

The above applies all the more because the assumption that there was a higher than average extra dredging load in certain years is based on the arithmetic ratio of the MDPA sediment in Rotterdam in a given year and the quantities dredged in that year in the Rotterdam harbours, although it has not been alleged or shown—and can also not be considered likely for the time being—that all parts of the harbour are actually dredged each year. As it is therefore not possible to assume the existence in a given year of an actual relationship between the dredged MDPA sediment and the quantities of dredge spoil, the above-mentioned arithmetic ratio need not in fact be correct for the relevant year.

2.7.3 The conclusions and findings of the expert relate to the years 1971 to 1990. Since the expert's report was published, Rotterdam has based its assumptions on an average of 27,000 tonnes a year for the entire period from 1961 to 2004, which has not been contested by MDPA.

It should be noted, in particular, that it has not been alleged by Rotterdam (on which the burden of proof rests; see the interim judgment of 15 April 1999, at 6.4.2) that in the period from 1961 to 1970 and/or the period from 1990 to 2004 the average dredging load exceeded the above-mentioned 27,000 tonnes a year and/or that MDPA accounted for a relatively larger share of the total dredging load.

Nor has the District Court seen any evidence of this in the expert's report and the documents lodged by the parties. The expert's report merely notes that no data are available for the period from 1961 to 1970. It can be inferred from Table 1 of the expert's report that in the period from 1961 to 1970 the quantities of MDPA discharges were (on average) smaller than in the period from 1971 to 1990, whereas it follows from the data supplied by Rotterdam (see the Potash Mines

[120] NIPR (1999) No. 258.

Claim Report of March 1990, p. 7) that the quantities dredged in the Rotterdam harbours in the period from 1961 to 1970 were higher on average than in the period from 1971 to 1990. It can also be inferred from the data supplied that the quantities of MDPA discharges were (on average) smaller in the period from 1991 to 2004 than in the period from 1971 to 1990, whereas the (average) dredged quantities did not change or in any event did not change significantly for these purposes.

On the assumption that the percentage of MDPA discharges that settled in the Rotterdam harbours—the so-called sludge balance—in the periods from 1961 to 1970 and from 1991 to 2004 did not differ significantly from the percentage in the period from 1971 to 1990, the above-mentioned data provide no support for the (theoretical) possibility that the MDPA dredging load was greater in the former periods either in absolute or relative terms (i.e. the share of the MDPA dredge spoil in the total dredging load) than in the period assessed by the expert, i.e. from 1971 to 1990.

On these grounds the District Court agrees with Rotterdam's basic assessment that the volume of MDPA dredge spoil amounted (on average) to 27,000 tonnes a year throughout the period from 1961 to 2004.

2.7.4. It is not in dispute between the parties that 27,000 tonnes of dry matter can be equated to 54,000 m^3 of dredge spoil. According to Rotterdam, an average of 54,000 m^3 of MDPA dredge spoil in the Rotterdam harbours is equivalent on average to 0.8% of the total dredging load in the Rotterdam harbours, whereas according to MDPA it is equivalent to 0.6%. This difference can basically be attributed to differences in the quantities of MDPA dredge spoil used for the purposes of the calculation.

In the opinion of the District Court, it is not necessary to determine which of these percentages is correct because the difference between the two is not decisive in deciding on the liability issue.

2.7.5. As the average proportion of the MDPA dredge spoil in the total dredging load in the Rotterdam harbours in the period from 1961 to 2004 was in this order of magnitude (less than 1%), this comes, in the opinion of the District Court, within the range of damage from the MDPA discharges that Rotterdam must accept. The following circumstances have been taken into account in this connection.

2.7.6. The said damage consists solely of the costs of the extra dredging work (see the interim judgment of 15 April 1999, at 6.3). To this extent it is relevant that even if there had been no MDPA discharges, Rotterdam, as the owner/manager of the harbours and as the body responsible for maintaining the depth of the harbours, would still have had to carry out dredging work throughout the entire period on account of the clay and sludge washed down, mostly by natural means, from the upstream reaches of the river. According to Rotterdam's own submissions, MDPA was found, after investigation, to be the only known "major discharger" of sludge.

The amount of the extra dredging work necessitated by the MDPA discharges, in relation to the total dredging work, is too small to warrant classifying the (lawful) acts of MDPA as unlawful in relation to Rotterdam.

2.7.7. The significance of the quantities of MDPA dredge spoil in the Rotterdam harbours cannot, in the opinion of the District Court, be viewed separately from the fact that the party suffering the resulting damage is a professional market participant, which (as noted previously) was already carrying out a very large volume of dredging work as owner/manager of the harbours and as the party responsible for maintaining their depth. In absolute terms the quantities of MDPA dredge spoil in the Rotterdam harbours are very different for this party than for a random third party. The same applies if the costs of the extra dredging work are regarded in absolute terms. In this light, the District Court therefore considers that the absolute quantities of MDPA dredge spoil are not of such a magnitude as to substantiate a claim of unlawful action.

2.7.8. Nor is this altered by Rotterdam's observation (see the memo of 14 October 2008 from [person 1], exhibit 5) that the river sludge settles in a very small percentage of the total (harbour) surface area and that it is apparent from empirical data that 80% of the dredging work takes place in 30% of the surface area of the harbours. Rotterdam has structured its claims in such a way that the assessment should be based on the entirety of the harbours under its management, which is, incidentally, a yardstick that the District Court considers to be correct in assessing the (financial) harm suffered by Rotterdam from the MDPA discharges. Moreover, without further explanation (which has not been given), it is not clear how the empirical data would alter the percentage share of the MDPA dredge spoil in the total dredging load in the various harbours or parts of the harbours.

2.7.9. The District Court would observe in this connection that, in the context of the liability issue, it considers the extent of the MDPA dredging load as now established in law to be smaller to a relevant degree than as determined in the expert's provisional report: "The discharge of 0.827 million tonnes of dry matter by the potash mines results in a sludge load in the Rotterdam harbour basins of 78,000 tonnes of dry matter or 156,000 m^3 of dredge spoil. (…)" This quantity of 78,000 tonnes of dry matter, converted into 156,000 m^3 of dredge spoil, is (almost) three times higher than the quantity determined in the final report, which would mean, on the basis of the approach adopted by the parties, that the percentage share of MDPA's dredge spoil in the total dredging load in the Rotterdam harbours is approximately 2.4% according to Rotterdam and approximately 1.8% according to MDPA.

2.7.10. It has also been taken into account that a factor in MDPA's favour is that it has made these discharges since the 1930s. This is admittedly a long time, but the discharges have been made pursuant to and in accordance with a licence (see the interim judgment of 15 April 1999, at 2.2) and MDPA was not held accountable by Rotterdam for the dredging load until the late-1980s.

It is also important (as is not in dispute between the parties) that the extraction in the potash mines has now ceased as the reserves are exhausted and that the discharges have been scaled back (according to the overviews provided by the parties: to a considerable extent in the period from 1998 to 2002 and to quantities of (only) 36,500 tonnes a year in 2003 and 2004) to the point where they can now be regarded as minimal.

2.7.11. Although the discharges therefore admittedly constitute a financial burden/nuisance for Rotterdam as a downstream user of the river, they cannot in the circumstances—taking account of the nature, seriousness and duration of the discharges—be deemed unlawful in relation to Rotterdam. Nor can MDPA be held liable on any other ground to offer financial compensation to Rotterdam for extra dredging work. It follows that Rotterdam's claims should be refused. The other submissions and defences, in so far as not already assessed in the previous interim judgments, need not be considered …'

10.1 SOVEREIGNTY OVER AIRSPACE
See: 6.23

10.2 AIR NAVIGATION
See: 6.23

11.12 INTERNATIONAL TORT
See: 1.203, 4.73 **B** (n 65), 5.273, 11.2171

11.212 EXECUTIVE ACTS
See: 4.73 **B**, 5.273, 11.2171

11.213 LEGISLATIVE ACTS
See: 1.203

11.214 JUDICIAL ACTS
See: 4.73 **B**

11.216 REPARATION
See: 1.203, 4.73 **B**, 5.273, 11.2171

11.2171 DIPLOMATIC PROTECTION

State Secretary for Justice v. X, Administrative Law Division of the Council of State, 10 February 2009, LJN No. BH4190, JV (2009) No. 168[121]

– *As the alien was not informed of his right to consular assistance, this in itself harmed his interest as protected by Article 36 (1) (b), of the Vienna Convention*

[121] Note by P.J.A.M. Baudoin.

on Consular Relations[122] *in conjunction with Article 5.5, para. 2, of the Aliens Decree 2000.*[123]

– *This does not mean, however, that there was no scope for the different interests to be weighed against each other. It has been established that the alien did not dispute the grounds for his detention and completely refused to cooperate in his expulsion both before and at the time of the imposition of the custodial measure. Nor is there any evidence that as a consequence of the established defect the alien's interests were harmed to a greater extent than they would otherwise have been or that the detention was otherwise in breach of the law. In these circumstances, the absence of a criminal record or of a declaration that the alien was an undesirable alien or a danger to state security does not warrant the decisive significance attached to it by the District Court. It follows that, contrary to what the District Court has held, there is no ground for the view that the interests served by the detention were not in reasonable proportion to the seriousness of the defect and the interests violated as a result.*

The Facts: X was detained in custody on 14 October 2008 pending deportation. His application for review of this decision was held to be well-founded by the District Court of The Hague (sitting in Groningen) by judgment of 3 November 2008. The District Court ordered the termination of his detention and awarded him compensation. The State Secretary for Justice appealed against this judgment to the Administrative Law Division of the Council of State.

Held: '…2.1. Under Article 36 (1), opening words and (b) of the Vienna Convention on Consular Relations (referred to below as the Convention), with a view to facilitating the exercise of consular functions relating to nationals of the sending State, if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Article 5.5, para 2, of the Aliens Decree 2000 provides, in so far as relevant here, that where an alien so requests, notice of a custodial measure under Article 59, para 1, of the Aliens Act 2000 will be given as quickly as possible to a diplomatic or consular mission, established in the Netherlands, of the State of which he is a citizen.

2.2. The decision of 14 October 2008 states, in so far as relevant here, that the imposed measure is required in the interest of public policy as there are reasons to believe that the alien will seek to evade expulsion, which is apparent from the fact that the alien:

[122] 596 UNTS p. 261, Trb. 1965 No. 40. For the text of Art. 36(1)(b) see under Held.

[123] For the text of Art. 5.5(2) see under Held.

- does not have an identity document as referred to in Article 4.21 of the Aliens Decree 2000;
- has not complied with the period set for his departure.

2.3. The District Court held, in so far as relevant here, that since the alien had not been informed of his right to consular assistance and since the State Secretary did not allege that there were important grounds for not providing this information, for example that the alien had a criminal record, had been declared an undesirable alien or was a danger to state security, it cannot be said that the interests served by the detention were in reasonable proportion to the seriousness of the defect and the interest that was thereby violated.

2.4. In ground of appeal 1 the State Secretary argues that the District Court, by arriving at this decision, failed to recognise that no such imbalance existed. The alien did not contest the grounds of the custodial measure and completely refused to cooperate in his expulsion both before and at the time of the imposition of the custodial measure. The alien has not alleged the existence of any facts and circumstances that would show that his interests were harmed by the fact that he was not informed of his rights to consular assistance. Nor is this altered by the fact that there has been no submission of compelling interests for example that the alien had a criminal record, had been declared an undesirable alien or was a danger to state security. Furthermore, according to the State Secretary, the alien's interest that would have been protected by a right to consular assistance was not harmed since the alien was not deprived of legal assistance either before or at the time of the imposition of the custodial measure and his counsel could and should have drawn his attention to his right to consular assistance.

2.4.1. The appealed judgment cannot be set aside on the ground that, in essence, counsel could and should have drawn the attention of the alien to his right to consular assistance. As what has been alleged does not raise any questions that need to be answered in the interests of legal unity, the development of the law or legal protection in a general sense, this finding is sufficient by virtue of Article 91, para 2 of the Aliens Act 2000.

Nor can the argument that the alien did not allege any facts or circumstances showing that his interests had been harmed also result in the appealed judgment being set aside. As the alien was not informed of his right to consular assistance, this in itself harmed his interest as protected by Article 36 (1), opening words and (b), of the Convention in conjunction with Article 5.5, paragraph 2, of the Aliens Decree 2000.

The ground of appeal fails to this extent.

2.4.2. The above finding does not mean, however, that there was no scope for the different interests to be weighed against each other. It has been established that the alien did not dispute the grounds for his detention and completely refused to cooperate in his expulsion both before and at the time of the imposition of the custodial measure. Nor is there any evidence that as a consequence of the established defect the alien's interests were harmed to a greater extent than they would otherwise have been or that the detention was otherwise in breach of the law. In

these circumstances, the absence of a criminal record or of a declaration that the alien was an undesirable alien or a danger to state security does not warrant the decisive significance attached to it by the District Court. It follows that, contrary to what the District Court has held, there is no ground for the view that the interests served by the detention were not in reasonable proportion to the seriousness of the defect and the interests violated as a result. To this extent the ground of appeal succeeds.

2.5. In view of this, ground of appeal 2, which takes issue with the granting of compensation to the alien and the order that the State Secretary pay the costs incurred by the alien in the proceedings, also succeeds.

2.6. The appeal is manifestly well-founded. The appealed judgment should be reversed. Doing what the District Court should have done, the Division will assess the decision of 14 October 2008 in the light of the grounds of the application for its review, in so far as they still need to be discussed in view of what has been held above. […]

2.8. The Division will hold the application of the alien for review of the decision of 14 October 2008 to be unfounded. There is no ground for compensation …'[124]

11.243 RESPONSIBILITY OF CORPORATIONS
See: 9.924

11.3 'INTERNATIONAL CRIMES', WAR CRIMES, CRIMES AGAINST PEACE, CRIMES AGAINST HUMANITY
See also: 7.213

Frans van Anraat v. the Public Prosecution Service, Supreme Court, 30 June 2009, LJN No. BG4822, RvdW (2009) No. 877, NJ (2009) No. 481[125]

– *The accused was an accessory to the violation of the laws and customs of war as from 1984 to 1988 he supplied the rulers in Iraq with very large quantities*

[124] The Administrative Law Division gave similar judgments on 20 February 2009, LJN No. BH4680 and 23 February 2009, LJN No. 5066. The District Court of The Hague (sitting in Amsterdam) held on 18 August 2009 that it does not follow from Article 36(1)(b), in conjunction with Article 5.5(1) of the Aliens Decree, that the alien should be given the opportunity to contact her consular representative even before the detention, LJN No. BJ6309, JV (2009) No. 421.

[125] Note by N. Keijzer. Summarised in Ars Aequi (2009) p. 744, with note by E. van Sliedrecht. Discussed by G. den Dekker in 'Het arrest van Anraat, het gebruik van chemische wapens tegen de burgerbevolking en "generale preventie"'[The Van Anraat judgment, the use of chemical weapons against the civilian population and "general prevention"], NJB (2009) p. 1330 and by W. Huisman and E. van Sliedrecht in Rogue traders. Dutch businessmen, international crimes and corporate complicity, 8 Journal of International Criminal Justice (2010) pp. 803–828.

of a precursor for the mustard gas used by them in Iraq and Iran in 1987 and 1988.

- *This involves a violation of international customary law* (*in particular the prohibition on the use of chemical weapons and/or the prohibition on the use of asphyxiating, poisonous or other gases and/or the prohibition on inflicting unnecessary suffering and/or the prohibition on carrying out attacks which do not distinguish between military and civilians*) *and/or the provisions of the Geneva Gas Protocol of 1925*[126] *and/or Article 147 of the Fourth Geneva Convention of 1949*[127] *and/or the common Article 3 of the Geneva Conventions of 1949.*[128]
- *Pursuant to Article 3* (*old*) *of the Wartime Offences Act,*[129] *the Dutch courts have universal jurisdiction in respect of the criminal offences defined in Article 8 of the Wartime Offences Act.*[130]
- *The application of Article 8 of the Act does not conflict with the 'requirement of determinability' as contained in Article 7 of the European Convention on*

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[126] 94 LNTS p. 65, Stb. 1930 No. 422.

[127] 75 UNTS p. 287, Trb. 1951 No. 75. Art. 147 reads: 'Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.'

[128] Art. 3(1) reads: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (…).'

[129] Art. 3 reads: 'Without prejudice to the relevant provisions of the Criminal Code and the Military Criminal Code, the provisions of Dutch criminal law are applicable to: 1°. any person who commits a crime as referred to in Articles 8 and 9 outside the Kingdom of the Netherlands in Europe; ().'

[130] Art. 8 reads: '1. Any person who violates the laws and customs of war shall be liable to a term of imprisonment not exceeding ten years or a fifth-category fine. (…) 3. Life imprisonment, a determinate sentence not exceeding 20 years or a fifth-category fine shall be imposed: 1°. if the offence results in the death or serious bodily injury of another person or involves rape; 2°. if the offence involves the joint use of violence against one or more persons or the use of violence against a dead, sick or injured person; (…).'

Human Rights[131] *or Article 15 of the International Covenant on Civil and Political Rights.*[132]

- *It is not necessary to determine whether the rule now contained in Article 79(2) of the Judiciary (Organisation) Act*[133] *relates to international customary law as relevant in this case, since facts or circumstances that are generally known, on which the Court of Appeal evidently based its determination of international customary law, require no proof.*
- *The statements of the expert witness based on his experience in UNSCOM and UNMOVIC are not incomprehensible.*
- *The 1994 report produced by Max van der Stoel as Special Rapporteur for Human Rights can be used as evidence within the meaning of Article 344(1)(5) of the Code of Criminal Procedure even though this is not first hand evidence, provided they are used in addition to other evidence.*
- *The claim for compensation by the victims as 'injured parties' will not be dealt with as the claim is not of a straightforward nature.*
- *The judgment of the Court of Appeal will be set aside as regards the sentence on account of violation of the reasonable time requirement in Article 6 of the European Convention on Human Rights: sentence reduced by six months to 16 and a half years' imprisonment.*[134]

The Facts: In 2004 criminal proceedings were instituted against Frans van Anraat, a Dutch national suspected of having supplied raw materials for the production of mustard gas to the regime in Iraq between 1984 and 1988. He was charged before the District Court of The Hague with being an accessory to genocide and war crimes committed by the Iraqi regime, involving the use of mustard gas in both Iraq and Iran in 1987 and 1988. Although the District Court considered the genocide and war crimes committed by the Iraqi regime to have been proven, it held that the requirement of intent on the part of van Anraat had

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[131] 213 UNTS p. 221, ETS No. 5, Trb. 1964 No. 69. Art. 7 reads: '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'

[132] 999 UNTS p. 171, ILM (1967) p. 368, Trb. 1969 No. 99. Art. 15 reads: '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.'

[133] For the text of Art. 79(2), see under Held.

[134] For the text of Art. 6(1) see n 64.

been shown to exist only in relation to the charge of being an accessory to war crimes. For being an accessory to war crimes it sentenced him on 23 December 2005 to 15 years' imprisonment, less the time spent in pre-trial custody.[135] Van Anraat appealed against this judgment to the Court of Appeal of The Hague. The Court of Appeal found him guilty of the same offences, but increased the prison sentence to 17 years (judgment of 9 May 2007).[136] Van Anraat appealed in cassation against this judgment to the Supreme Court.

Held: '…2.1. The Court of Appeal held the following to have been proven against the accused:

> 1. alternatively, that Saddam Hussein Al-Tikriti and Ali Hassan Al-Majid Al-Tikriti and/or one or more other persons did—on 5 June 1987 in Zewa in Iraq, on 16 March 1988 in Halabja in Iraq and on 3 May 1988 in Goktapa (Gukk Tapah) in Iraq—together and in association with others (repeatedly) violate the laws and customs of war, such offences (repeatedly) resulting in the death of others and (repeatedly) inflicting grievous bodily harm on others and such offences being (repeatedly) expressions of a policy of systematic terror or unlawful actions against a specific population group, by—at that time and place and contrary to international customary law (in particular the prohibition on the use of chemical weapons and/or the prohibition on the use of asphyxiating, poisonous or other gases and/or the prohibition on inflicting unnecessary suffering and/or the prohibition on carrying out attacks which do not distinguish between military and civilians) and/or the provisions of the Geneva Gas Protocol (1925) and/or the provisions of Article 147 of the Geneva Convention on the Protection of Civilian Persons in Time of War ('Fourth Geneva Convention', 1949) and/or the provisions of the 'common' Article 3 of the Geneva Conventions of 12 August 1949, (as members of the government (of the Republic) of Iraq) belonging to one of the combatant parties in a (non-international and/or international) armed conflict several times at places in the territory of Iraq—(intentionally) using chemical weapons (mustard gas) against persons who were present at that time and place, as a result of which those persons died or suffered grievous bodily harm, and by (systematically) terrorising (part of) that Kurdish population group, such chemical weapons (also) having been used against persons who did not directly participate in the hostilities, being civilians from Zewa and/or Halabja and/or Goktapa (Gukk Tapah) (Bergin), or in any event civilians in Northern Iraq, and the use of those chemical weapons involved the cruel and/or inhuman treatment and/or mutilation of these persons and purposely caused serious suffering to these persons, in which connection the accused and his co-perpetrators,

[135] LJN No. AU8685 and AV6353, English translation in LJN No. AX6406. Discussed by H.G. van der Wilt in 'Genocide, complicity in genocide and international versus domestic jurisdiction: reflections on the Van Anraat case', 4 J Int Crim Justice (2006) pp. 239–257, by S. Onate, B. Exterkate, L. Tabassi and E van der Borght in 'Lessons learned: chemicals trader convicted of war crimes, 2 Hague Justice J (2007) No. 2 and by N. Keijzer and E van Sliedrecht in 8 YIHL (2005) pp. 476–477.

[136] LJN No. BA4676, English translation in LJN No. BA6734 and in ILDC No. 753 with note by H.G. van der Wilt. Discussed by H. van der Wilt in 'Genocide v. war crimes in the Van Anraat appeal,' 6 J Int Crim Law (2008) pp. 557–576, by N. Keijzer and E. van Sliedrecht in 10 YIHL (2007) pp. 382–383 and by R. Buisman in 'Voorkomen dat grote vissen door de mazen van het net zwemmen. De gevolgen van de niet volledige implementatie van het Chemische wapenverdrag en de van Anraat-zaak'[Preventing big fish from escaping through holes in the net. The consequences of incomplete implementation of the Chemical Weapons Convention in the Van Anraat case], NJB (2008) pp. 2426–2430.

together and in association with one another, did—at points in time in the period between 19 April 1984 through 25 August 1988 in Iraq and/or in Switzerland and/or in Italy and/or in the United States of America and/or in Japan and/or in Singapore and in Aqaba in Jordan—intentionally provide the opportunity for the commission of these crimes by intentionally supplying thiodiglycol (TDG) intended for the production of mustard gas to (the Republic of) Iraq at such time and places.

2. … that Saddam Hussein Al-Tikriti and Ali Hassan Al-Majid Al-Tikriti and/or one or more other persons did—on 11 April 1987 in Khorramshar in Iran, around 16 April 1987 in Alut in Iran, on 28 June 1987 in Sardasht in Iran, in Rash Harmeh (in the immediate vicinity of Sardasht) in Iran, on 22 July 1988 in Zardeh in Iran and around 2 August 1988 in Oshnaviyeh in Iran—together and in association with others (repeatedly) violate the laws and customs of war, such offences (repeatedly) resulting in the death of others and (repeatedly) inflicting grievous bodily harm on others, by—at that time and place and contrary to international customary law (in particular the prohibition on the use of chemical weapons and/or the prohibition on the use of asphyxiating, poisonous or other gases and/or the prohibition on inflicting unnecessary suffering and/or the prohibition on carrying out attacks which do not distinguish between military and civilians) and/or the provisions of the Geneva Gas Protocol (1925) and/or the provisions of Article 147 of the Geneva Convention on the Protection of Civilian Persons in Time of War ('Fourth Geneva Convention', 1949) [as members of the government (of the Republic) of Iraq] belonging to one of the combatant parties in an (international) armed conflict several times at places in the territory of Iran—(intentionally) using chemical weapons (mustard gas) against persons who were present at that time and place, as a result of which those persons died or suffered grievous bodily harm, such chemical weapons (also) having been used against persons who did not directly participate in the hostilities, being civilians from Khorramshar and/or Alut and/or Sardasht and/or Rash Harmeh and/or Zardeh and/or Oshnaviyeh, or in any event citizens of Iran, and the use of those chemical weapons involved the cruel and/or inhuman treatment and/or mutilation of these persons and purposely caused serious suffering to these persons, in which connection the accused and his co-perpetrators, together and in association with one another, did—at one or more points in time in the period between 19 April 1984 through 25 August 1988 in Iraq and/or in Switzerland and/or in Italy and/or in the United States of America and/or in Japan and/or in Singapore and/or in Aqaba in Jordan—intentionally provide the opportunity for the commission of these crimes by intentionally supplying thiodiglycol (TDG) intended for the production of mustard gas to (the Republic of) Iraq at such time and places."

[…]

4. Assessment of the first ground of appeal of the accused

4.1. It is submitted in this ground of appeal that the Court of Appeal applied Article 8 of the Wartime Offences Act without providing adequate reasons for holding that there was an armed conflict within the meaning of Article 1 (old) of the Wartime Offences Act, which gave the Dutch criminal courts jurisdiction. This submission is based on the view that the Dutch criminal courts have jurisdiction under Article 1 (old) of the Wartime Offences Act only if the offences were committed in the context of an armed conflict involving the Netherlands.

4.2. The charge and conviction are based on Article 8 of the Wartime Offences Act. Articles 1 (old) and 3 (old) contain an arrangement for jurisdiction which relates, inter alia, to Article 8 of the Wartime Offences Act.

4.3. Pursuant to Article 3 (old) of the Wartime Offences Act, the Dutch courts have universal jurisdiction in respect of the criminal offences defined in Article 8 of the Wartime Offences Act (cf. Supreme Court 8 July 2008, LJN BC7418,

finding of law 6.3).[137] The ground of appeal is therefore based on an incorrect interpretation of the law and has therefore been put forward in vain.

5. Assessment of the third ground of appeal of the accused

5.1. It is submitted in this ground of appeal that the Court of Appeal wrongly held that Article 8 of the Wartime Offences Act was not non-binding. The position is taken in the explanatory notes on the ground of appeal that this statutory provision conflicts with, inter alia, Article 7 of the European Convention on Human Rights, Article 15 of the International Covenant on Civil and Political Rights and Article 1, paragraph 1, of the Criminal Code because it does not fulfil the 'requirement of determinability'.

5.2. Insofar as relevant here, the appealed judgment includes the following passage:

'Considerations regarding the applicable legislation.

The Wartime Offences Act (WOS) as applicable in the period to which the charges refer was amended several times afterwards; when the International Crimes Act (WIM) came into force on 1 October 2003, war crimes were transferred from the Wartime Offences Act to the International Crimes Act. Only the statutory amendments of 27 March 1985 (Stb. 1986, 139) and 14 June 1990 (Stb. 1990, 369) are important when determining whether the later statutory provisions are more favourable for the defendant than the law that was applicable during the period to which the charges refer. The Act of 27 March 1986 inserted a new article 10a in the Wartime Offences Act, making it possible to impose the additional sentence referred to in Article 28, para 1, at 3°, of the Criminal Code (deprivation of right to vote and stand for election) for, inter alia, a conviction for war crimes, and the Act of 14 June 1990 removed the death penalty as a possible sentence from the Wartime Offences Act. In view of the possible sentences, the text of the Wartime Offences Act in force on 1 January 1991, after amendment by the Act of 14 June 1990, is more favourable to the accused. The transfer of the penal provisions relating to war crimes from the Wartime Offences Act to the International Crimes Act on 1 October 2003 cannot be said to have created more favourable provisions for the accused. On the basis of the provisions of Article 1, para 2, of the Criminal Code, the Wartime Offences Act as it read with effect from 1 January 1991 will have to be taken as the starting point.

5.3. Contrary to what is alleged in the ground of appeal, Article 8 of the Wartime Offences Act is not contrary to the "requirement of determinability". In view of the nature of the subject matter, The rule formulated in Article 8 of the Wartime Offences Act makes it sufficiently clear what acts constitute criminal offences and gives the accused sufficient opportunity to take account of this when determining his behaviour, even if the nature and content of this provision is such that a certain vagueness in the definition of the offence is inevitable.

5.4. The ground of appeal fails.

[137] See 40 NYIL (2009) p. 443.

6. Assessment of the second and fifth grounds of appeal of the accused

6.1. One of the submissions in these grounds of appeal is that it cannot be inferred from the evidence considered by the Court of Appeal that the requirement of intent on the part of the accused has been proved in relation to the charge of being an accessory.

6.2. The Court of Appeal held that the accused—together with others—had been proved to have intentionally provided opportunity and means for the acts described in its finding of fact, as committed by the persons designated in that finding of fact, which acts constitute an aggravated violation of Article 8 of the Wartime Offences Act.

For the finding by the Court of Appeal that the accused acted as an accessory, it is necessary to show not only that the accused intended to provide opportunity and means, as referred to in Article 48, opening words and 2°, of the Criminal Code, but also that the accused's intent related, whether conditionally or otherwise, to the crime of the perpetrator(s) (cf. Supreme Court 13 November 2001, LJN AD4372, NJ 2002, 245 and Supreme Court 2 October 2007, LJN BA7932, NJ 2007, 553). It should be noted, however, in this connection that it follows from Articles 47, 48 and 49 of the Criminal Code, when read together and in their mutual context, first that in relation to the accessory the judicial finding of fact and the finding that the violation was of an aggravated nature must be based on the act committed by the perpetrator, even if the accessory intended only part of these acts, and second that the maximum sentence that may be imposed on the accessory is a third less than the maximum sentence carried by the crime envisaged by the accessory (cf. Supreme Court 27 October 1987, NJ 1988, 492 and Supreme Court 2 October 2007, LJN BA7932, NJ 2007, 553).

6.3. The reasoning of the Court of Appeal as set out at 2 above includes its findings at 11.12, 11.16 and 11.17 of its judgment:

- that the accused knew in the course of 1984, but in any case in 1986, that the TDG supplied by him would serve for the production of poison/mustard gas in Iraq, and that efforts were being made to conceal that destination;
- that the accused was aware that his supplies of TDG served for the production of mustard gas in a country that was involved in a protracted war with a neighbouring country and that efforts were being made to conceal as far as possible the supplies of a precursor of that gas and the production of the poison gas itself;
- that the accused also knew that the mustard gas would be used by Iraq in the war that it was fighting in and against Iran and against the allies (or those States that were considered as such) insofar as they were involved in an armed conflict with the Iraqi regime in Iraq itself (this use of mustard gas did indeed take place);
- that, as a result of his deliberate contribution to the production of mustard gas in a country at war, the accused knew that in those circumstances he was providing opportunity and means for the actual use of that gas, in the sense that he was perfectly aware that once the mustard gas had been produced its use could not and would not—in the ordinary course of events—fail to materialise;

- that even after the accused became aware of the attack on Halabja in March 1988 the horrors of poison or mustard gas attacks did not deter him from supplying TDG to Iraq, even though he had long known of the use of mustard gas in the First World War and of its consequences.

In addition, the Court of Appeal held, inter alia, in its findings as set out above at 2:

- that the accused played an important part in the supply of the precursor Thiodiglycol to the Iraqi regime for the production of mustard gas: at least 38% of this substance had been supplied by him in the period from 1980 to 1988.
- that when the supplies by others eventually stopped, which was in the course of 1984 at the latest, the accused supplied at least another 1,116 tonnes of this precursor until the spring of 1988;
- that the first consignment of TDG supplied by the accused arrived in Iraq towards the summer of 1985 and that in that year he supplied a total of approximately 197 tonnes; in the course of that year the TDG supplied by the accused was actually used for the production and finally ended up in munitions that were for the attacks described in the charges;
- from 1985 onwards, the Iraqi regime was completely dependent on the accused's supplies for replenishing its stocks of TDG, the precursor essential for the production of mustard gas;
- the continued implementation of this policy of the regime, which involved the annual use of hundred of tonnes of poison gas from 1984 onwards, was therefore very largely, if not entirely dependent on these supplies.

Since it is based on these factual and not incomprehensible findings, the view of the Court of Appeal that the intent on the part of the accused required for the present finding of fact had been shown to exist is not evidence that the District Court incorrectly interpreted the law and is sufficiently reasoned, given the findings set out above at 6.2.

6.4. In its finding at 11.19 the Court of Appeal noted that, in its view, the accused's intent in relation to the acts charged as an alternative count at 1 did not extend to the circumstance that these doings were acts of systematic terror or unlawful behaviour against a certain group of the population. Insofar as the grounds of appeal are based on a different interpretation of the appealed judgment, they fail for lack of a factual basis. It should be noted, incidentally, that there is no support in law for the view that, in a case such as the present one, for a judicial finding of fact there must have been intent on the part of the accessory too with regard to the aggravating circumstance.

6.5. To this extent the grounds of appeal are unfounded.

7. Assessment of the fourth ground of appeal of the accused

7.1. It is submitted in this ground of appeal that the judgment of the Court of Appeal is not reasoned in the manner required by law as, contrary to Article 79, paragraph 2, of the Judiciary (Organisation) Act, it does not include the facts from which the applicable international customary law can be inferred.

7.2. Article 79, paragraph 2, of the Judiciary (Organisation) Act reads as follows:

> Facts from which the applicability or non-applicability of a rule of customary law can be inferred are deemed to have been established, insofar as they require proof, only on the basis of the disputed decision.

7.3. The present Article 79, para 2, of the Judiciary (Organisation) Act was originally inserted in the Judiciary (Organisation) Act as Article 99, para 2. This occurred in the context of a change in the cassation procedure, which formed part of a revision of proceedings in civil cases. It is not necessary to determine whether, in view of the legislative history of this provision, the rule now contained in Article 79, para 2, of the Judiciary (Organisation) Act relates to international customary law as relevant in this case, since facts or circumstances that are generally known, on which the Court of Appeal evidently based its determination of international customary law, require no proof.

7.4. The ground of appeal fails.

[…]

9. Assessment of the ninth ground of appeal of the accused

9.1. One of the submissions in the ground of appeal is that the Court of Appeal used statements of expert witness [A] as evidence which fell outside his specific expertise as a microbiologist.

9.2. The relevant parts of the statements of [A], who was designated by the Court of Appeal as an expert witness, as reproduced in the explanatory notes on the ground of appeal, concern answers to:

– the question whether, during the period of the deliveries by the accused, a textile industry existed in Iraq in which this material could have been used (i.e. other than for the manufacture of mustard gas);
– the question of what was known about the involvement of the Iraqi regime in the delivery contracts and the use of TDG;
– the question of whether he could estimate the most likely date on which the TDG supplied by the accused was first used on the battlefield;
– the question of the issuing (and the reasons for this) of the first real Full, Final and Complete Disclosure (FFCD) of chemical weapons by the Iraqi regime and the manner in which the reliability of these data could be checked.

9.3. In response to the defence concerning the expertise of the expert witness, the Court of Appeal dealt with the question of the expertise of expert witness [A] in its findings as reproduced at 2, under 12.1.5 and 12.1.6.

9.4. In assessing the ground of appeal, it must be stated at the outset that it is a matter for the court of fact to decide, within the bounds of the law, what part of the available material it considers useful for this purpose in terms of reliability and to set aside evidence that it considers to be of no value. This freedom of the court to select and value the available evidence also applies in cases where the evidence consists of statements by experts and relates in part in this connection to the question of whether and, if so, to what extent someone should be designated as an

expert. It should also be noted that the knowledge on the basis of which someone may be treated as an expert (which forms the 'knowledge' referred to in Articles 343 and 344, para 1, opening words and 4°, of the Code of Criminal Procedure, on which the expert bases his assessment) need not have been acquired solely through training, but may also have been acquired, for example, through experience.

9.5. In view of this and taking account of what the Court of Appeal held in finding 12.1.6 concerning the experience of [A] as an employee of UNSCOM and UNMOVIC, the view of the Court of Appeal that [A] could give expert testimony on subjects such as the matter is referred to above is not incomprehensible and no further reasons needed to be provided for that view, even in the light of the defence put forward.

9.6. The ground of appeal is unfounded.

10. Assessment of the eleventh ground of appeal of the accused

10.1. One of the submissions in this ground of appeal relates, among other things, to certain evidence used by the Court of Appeal, in particular witness testimony which contains a view, guess or conclusion and cannot be treated as statements about facts or circumstances which they witnessed or experienced at first hand.

10.2. The ground of appeal relates, inter alia, to the evidence used by the Court of Appeal as set out below at 4, 5, 58 and 61. The parts in italics are identified in the ground of appeal as containing an unauthorised view, guess or conclusion:

4. a document, namely the Report on the Situation of Human Rights in Iraq of 19 February 1993, drawn up by Max van der Stoel, Special Rapporteur of the Commission on Human Rights, in accordance with the Commission's resolution 1992/71 (VN Doc. E/CN.4/1993/45, H75—pp. 25–27):

[…]

5. a document, namely the Report on the Situation of Human Rights in Iraq of 19 February 1993, drawn up by Max van der Stoel, Special Rapporteur of the Commission on Human Rights, in accordance with the Commission's resolution 1993/74 (VN Doc. E/CN.4/1994/58, H74—pp. 36–43):

[…]

58. a document containing the Dutch translation of an official report of a witness examination, drawn up by Japanese police officers in Osaka (Japan) on 22 June 2005, which includes the statement of witness [witness 1] made on 22 June 2005, the essence of which is as follows (G92—pp. 839–856):

'Between 1984 and 1988 [the accused] was my business partner in chemicals. As regards the trade in chemicals with [accused] I knew that those chemicals would be transported to Iraq. When I started negotiations with [accused] in 1984, he told me that their final destination would be Baghdad, Iraq. [Accused] had also asked me to keep it a secret that the chemicals would be transported to Iraq.

It became clear from the negotiations that the chemicals would be used as precursor for the production of chemical weapons. And I knew these weapons had been deployed in 1988 when Kurds were killed in Iraq. As the trading conditions negotiated by [accused] were favourable, I thought that this would be profitable

work and therefore participated actively in this trade. For business in the United States, I used not only my own name but also the nicknames […] and […].

[Accused] wanted to import chemicals from Japan. Someone gave me [accused]'s telephone and telex numbers. I contacted [accused] by phone and telex. It transpired that he knew me and approached me directly and said that he wished to import the chemical substance TMP. This was in around May or June 1984. During the first negotiations [accused] told me: "The chemicals will first be shipped to Trieste, Italy. From there they will be transported by road to Baghdad, Iraq. Keep it secret that the chemicals will be exported to Iraq."

When I heard this story, I realised that the chemicals would be converted into chemical weapons. As I was involved in exports I was aware that there were stringent restrictions on goods exported to the Middle East and to Eastern Europe. As I thought that the chemicals would be used for the production of chemical weapons, I asked [accused] about their end use. He explained to me that the chemicals would be used for consumer goods such as textiles and leather. I believed his explanation to be a lie. If they were to be used for consumer goods such as textiles, as [accused] had said, there would have been no need to keep secret that Iraq was the final destination. Furthermore, the condition set by [accused], a commission of 15 to 20% of the freight charges, was very good. I believed a dangerous business was the reason for these excessively good conditions. I thought it included a reward for the fact that I would not disclose that the final destination was Iraq and that the chemicals would be used for the production of chemical weapons.

My contract with [accused] was to export the goods from Japan to Italy. [Accused] would organise the export from Italy to Iraq. I just had to pretend that I had not heard that the chemicals were to be transported to Iraq. So it was not my concern that the chemicals would be transported to Iraq or how they would be used. As I was a layman in the field of chemicals, I asked [E], the company with which I worked in relation to the export of steel, to introduce me to a TMP trader. I was then introduced to [F], a Tokyo-based chemical company. During the negotiations about the TMP both [party 5] and [party 6] explained that TMP is a precursor for poison gas and that one needed to be alert in cases where it was being exported. When I heard this I was certain that the production of poison gas in Iraq was the objective of [accused]. The contact persons at [party 5] and [party 6] asked me for an explanation about the final destination of 'TMP' and its end use. The answer that was given was that the final destination was Trieste, Italy, and that it would be used for consumer goods such as textiles. My contract with [accused] stated that the chemicals were to be shipped to Italy and that I had heard only that they would be used for consumer goods. The first time I met [accused] was around July 1984. I met [accused] at [D] in Singapore. Apart from [accused], a female clerk known as [party 14] worked at the office of [D].

The negotiations about TMP with [accused], which had started in May or June 1984, produced an agreement in due course, and 80 metric tonnes of TMP from [party 6] were exported from the port of Yokohama in October 1984. This was the first business deal with [accused]. The chemicals were initially sold by [party 6] to

[party 5] and subsequently resold to [G], who exported them. The English name of [G], [H] was used for the export procedures.

The L/C was issued by the Banca del Gottardo, Lugano Branch, in Switzerland and was made out in the name of [accused] of [I]. The L/C listed the details of the goods. I had the impression that [I] was a company that had been established by [accused] for dealing in chemicals. I thought it was a sham company. As General Manager of [D], [accused] was able to do business in this name. The address of this company was the home address of [accused] in Milan. After July 1984, when I had visited the offices of [D], [accused] changed his place of business to Milan, Italy.

During the first negotiations with [party 6], [accused] also mentioned other chemicals, including TDG. TDG was bought from [B]. During the negotiations this company explained that these chemicals could be converted into chemical weapons such as poison gas.

You are showing me a telex in English dated 11 September 1984 sent to [accused]. You have asked me what is meant by “Transport by truck from Italy to Baghdad via Turkey”. In May or June 1984 [accused] told me that TMP would be transported over land to Baghdad in Iraq. [Accused] was experienced in the export field. He asked me about the re-export procedures to Iraq, after the goods had been exported to Italy.

When [accused] told me that the chemicals would be transported to Iraq, I knew they would be used for the production of chemical weapons. So I asked him about this, but did not get a clear answer.

You are telling me that underneath the same telex is a telex from me sent to [accused] and entitled ‘thiodiglycol’. You are asking what that is. This is a telex about the chemical substance thiodiglycol. During the negotiations about TMP he also approached me about thiodiglycol. This is a telex that I sent to [accused] about this. You tell me that it reads: “You need authorisation from the government for thiodiglycol”. At the time I had been told by chemical companies or by [party 5] that MITI’s consent was was necessary for the export of thiodiglycol from Japan to Middle Eastern countries such as Iraq.

You are asking ask me what “easy to use for the production of poison gas” means. I had received explanations from [party 5] and other chemical companies that thiodiglycol is a precursor for poison gas. You are asking me what “a ‘necessary lie’ may be used for the end users” means. That means tell whatever lies are necessary. I had heard that government authorisation was needed for exports to countries in the Middle East. We therefore needed a country and an end user for which we did not need government authorisation.

I had told the chemical companies and [party 5] that the final destination of the chemicals was Trieste, Italy, and that they would be used for consumer goods such as textiles, but the Japanese companies asked me for a more detailed explanation. I had heard that the chemicals would go to Iraq, but I believed that I did not need to take the responsibility if [accused] were to tell a “necessary lie”. That was why I sent a telex to [accused] telling him that he needed to give the Japanese

companies the name of a country and an end user to convince them of his bona fides and facilitate the export procedures, even if it were a lie.

Afterwards the chemical companies and [party 5] requested me to specify the end user and the end use, but I exported the chemicals without providing further clarity, stating Italy as the final destination. As far as I know, [accused] visited Japan twice. The first time was in October 1984. I accompanied him, together with [party 15] of [party 5]. [Party 6] asked [accused]: "These chemicals can easily be converted into poison gas, but can we trust the end user?". He replied: "There's no chance that they will be converted into poison gas because they are to be used for textiles and leather goods in Italy." After [accused] had given his explanation these three companies seemed to be reasonably convinced and no further questions were asked about the end user in Italy. The second time he visited Japan was one year later, around March 1985. This time he was accompanied by his wife [party 12]. Together with [accused] I visited [company 14], [company 13] and [company 15] in Osaka. They too asked what the chemicals would be used for, but [accused] answered, just as he had to [party 6], that they would be used for textiles and definitely not for the production of poison gas. These three companies too seemed to be satisfied with the explanation given by [accused] and did not ask any further questions.

During the negotiations the chemical companies and [party 5] told us that, depending on the countries of destination, exports were subject to restrictions because some chemicals could easily be converted into chemical weapons. In 1984 I was told by [party 5] and [party 7] that restrictions had been established for the export of TDG to the Middle East. You are asking me if I told [accused] about these restrictions. I informed [accused] about them by phone or by telex.

I had heard that the chemicals would eventually go to Iraq. I was sure the chemicals would be used for the production of poison gas. You are asking me if [accused] knew that the chemicals could be converted into chemical weapons such as poison gas. From the start of the negotiations the Japanese companies and I told him so. And from his words it appeared that he was already aware of this. [Accused] had a lot of knowledge of chemicals.

Between October 1984 and May 1986, [accused] and I exported chemicals from Japan, as indicated on the statement of details of deliveries, numbers 1 to 28. [Accused] kept asking about the export of chemicals, but because of the appreciation of the Japanese yen we could not agree on a sale price for the chemicals and for that reason it became difficult to arrange exports. That is why the last chemicals were exported from Japan by [accused] and me in May 1986. But [accused] still seemed to want to import the chemicals. During the negotiations [accused] asked me if it would not be possible to export from the United States. [Accused] asked me if I could find American chemical companies to export chemicals. [Accused] told me that American chemicals were cheaper to export.

The conditions for trading with [accused] were attractive. That is why I wanted to continue to do business with him. As I did not have any contacts with American chemical companies, in the summer of 1987 I asked [party 13], president of the New York-based [J], with whom I was dealing in steel and iron, if he could

introduce me to a chemical company. At the same time I put the same question to [name], president of [company 17], a San Francisco-based exporter of non-ferrous metals, with whom I also did business. I soon received an answer from both companies. [Party 13] suggested [C], a company located in Baltimore, Maryland and [party 18] suggested [L], a company located in Columbia, North Carolina. In August 1987 I went to the United States for negotiations with the chemical companies. And in New York I met [accused], who came from Italy. We went to [L] in North Carolina. [Party 19], the vice- president of [K] also came along. The three of us, the president [party 20] and a person who was in charge of the sales department entered into negotiations, which were concluded the same day. It was about the chemical substance thiodiglycol and the export destination was Belgium. [L] negotiated the details with [accused] in a separate room.

In October 1987 I travelled to the United States for negotiations with [C]. Accompanied by vice-president [party 21] of [J] and [accused] I visited [C]. We negotiated with three representatives of the sales department. Just as when we visited [L], [accused] told them that he wanted to import thiodiglycol into Belgium and the negotiations were quickly completed.

You are asking me if the final destination of the exports from the United States was also Iraq. During the first negotiations I heard from [accused] that the chemicals would be sent to Iraq.'

(…)

61. An official report of a witness examination drawn up and signed on 17 November 2004 by C.M.J. Peters, examining magistrate responsible for handling criminal cases in the District Court of Arnhem, and H.M.P. Boerboom-Vos, clerk of the court. The official report contains, in essence, the statement made by [witness 1] (G18.I) on 16 and 17 November before the examining magistrate.

'In 1981 I was a regular soldier and responsible for checking the quality of, among other things, mustard gas. I met [accused] at a complex of the Al Muthanna production facility for the first time in 1991. Someone said that [accused] was a close acquaintance of […], an important supplier of precursors for chemical weapons.

He told me that he had come into contact with the Al-Muthanna production facility. He provided me with information about the precursors that had been supplied to Al-Muthanna. He told me that he had supplied precursors to the regime in Iraq. The names SOTI, SEPP and SORGI had been used as cover names as suppliers could not deliver to Al Muthanna on account of its bad reputation and because it was known to be a chemical weapons production facility. From 1984 onwards there had been rumours in the press that there was a factory in Samarra which was producing chemical weapons. This was known in the press. In 1984 I heard that there had been an attack using chemical weapons. We heard this on the news. [Accused] knew that SOTI, SEPP and SORGI were cover names. This was apparent from my conversations with him. In my opinion, [accused] was the sole supplier of TDG in 1987 and 1988.'

10.3. The Court of Appeal evidently treated the items of evidence referred to above at 4, 5 and 58 as documents within the meaning of Article 344, paragraph 1,

opening words and 5, of the Code of Criminal Procedure. Contrary to the notion on which the ground of appeal is evidently based, the law does not require that what is stated in such documents should relate to facts and circumstances observed or experienced by the author of the document at first hand. The law merely provides that such documents can only be taken into account in conjunction with the content of other exhibits—a requirement which has been fulfilled in the present case.

10.4. The Court of Appeal evidently treated the official report referred to above as exhibit 61 as a document within the meaning of Article 344, paragraph 1, opening words and 2, of the Code of Criminal Procedure. As far as such an official report contains the written account of a statement made by a witness in the presence of the reporting officer, the content of the statement must comply with the requirement for witness statements made at the trial, as contained in Article 342, paragraph 1, of the Code of Criminal Procedure, namely that the statements concerns facts or circumstances observed or experienced by the witness at first hand (cf., Supreme Court 20 December 1955, NJ 1955, 202).

10.5. The passages of exhibits 58 and 61 set out in italics at 10.2 do not relate to things which could have been observed or experienced at first hand by [party 1] or [witness 1], as the case may be. As regards the last sentence of the italicised part of the statement of [witness 1] it should be noted that the Court of Appeal evidently—and not unsurprisingly in the light of the content of the other exhibits from which it could be inferred that the accused was the sole supplier of TDG to Iraq from 1985 onwards-based the conclusion it contains on the knowledge which the witness possessed by virtue of his position as a member of the Iraqi military responsible for checking the quality of, among other things, mustard gas.

10.6. The ground of appeal fails.

11. Assessment of the thirteenth ground of appeal

11.1. This ground of appeal argues that there was an infringement of Article 359 of the Code of Criminal Procedure as the Court of Appeal failed to provide a sufficient explanation as to why it had imposed a heavier sentence than claimed by the Advocate General. It is argued that the sentence is astonishing in the light of the fact that the Advocate General had asked the Court of Appeal to impose a sentence of 15 years' imprisonment on the assumption that the charges in count 1, principal charge, and count 2 had been proved.

11.2. Insofar as relevant to assessment of this ground of appeal, the Court of Appeal sentenced the accused to a term of 17 years' imprisonment for the offences in count 1, alternative charge, and count 2. It explained the reasons for the sentence as follows:

"Reasons for sentence

The Advocate General has recommended that the appealed judgment be set aside and that the accused be sentenced to a term of 15 years' imprisonment, less the time spent in pre-trial custody, for the offences under count 1, alternative charge, and count 2. In deciding what sentence to impose, the Court of Appeal has taken into account the following considerations.

Over a number of years the accused supplied precursors to the Iraqi regime for the production of chemical weapons. For example, in the period from 1985 until

early 1988 he supplied at least 1,100 tonnes of thiodiglycol (TDG) in a total of twenty shipments on the basis of three letters of credit. That substance was used for the production of mustard gas that was deployed during the war in Iran as well as in Iraq. By doing so over a number of years, the accused deliberately made a substantial contribution to the continuing violation of the laws and customs of war committed by the Iraqi regime. According to the provisions of Dutch criminal law in force at that time, the maximum sentence for being an accessory to an offence that carries a life sentence is 15 years' imprisonment. As the accused was guilty of being an accessory on several occasions, the maximum term of imprisonment in his case is 20 years, pursuant to the provisions on concurrent offences in Article 57, para. 2, of the Criminal Code.

In determining the sentence in this case, the Court of Appeal has taken into account the following factors: first, the seriousness of the offences, the circumstances in which they were committed and the intended aim of the sentencing and, second, the personal circumstances of the accused.

As is apparent from the case file (in the period referred to in the charges), the Iraqi regime carried out multiple attacks using mustard gas and other weapons during the war with Iran at places in that country, as well as in the border region between Iraq and Iran where Kurdish population groups lived that were suspected of collaborating with the Iranian enemy. Those attacks at least caused the death of thousands of civilians (who did not participate in the conflict) and caused very many people permanent and severe health problems. There is no doubt, therefore, that the regime in Baghdad committed extensive and extremely grave violations of international humanitarian law by using a weapon that was already prohibited by the Geneva (Gas) Protocol of 17 June 1925.

The accused made an essential contribution to these violations—at a time that many, if not all other suppliers had bowed to the increasing international pressure and pulled out—by supplying very large quantities of a precursor for mustard gas on many occasions over a period of several years; in doing so the accused made substantial profits. Those supplies enabled the Iraqi regime to sustain their deadly (air) attacks over a number of years (almost) without let-up. In providing this deliberate support for these grave violations the accused acted, apparently, not out of sympathy for the aims of the regime but—it should be assumed—exclusively in pursuit of large gains and completely ignored the consequences of his actions. Even today the accused does not show any sense of guilt or any compassion for the numerous victims of the mustard gas attacks.

The Court of Appeal recognises that the proven offences were committed over 20 years ago and that the accused is a man of advanced age, who is expected to spend a large part of the remaining years of his life in prison. The Court of Appeal will be able to attach only very limited weight to these slightly mitigating circumstances. Given the extremely grave nature of the violation of the principles of humanitarian law that took place and the important supporting role played by the defendant in this connection, the main consideration in sentencing must be to make clear to the victims and survivors, as well as to the international legal community,

just how much seriously the actions of the accused are viewed and that the only possible consequence is the imposition of a heavy sentence.

Finally, in determining the sentence, the Court of Appeal has taken into account the general prevention aspect. People or companies that engage in (international) trade, for example in weapons or raw materials used for their production, should be warned that—if they do not exercise great vigilance—they may become involved in extremely serious criminal offences.

It should be made clear to them that they will then face prosecution and long prison sentences, in accordance with the seriousness of the crimes they have committed.

After taking into account and considering all the above circumstances, the Court of Appeal concludes that the very long prison sentence mentioned below is a suitable and necessary reaction."

11.3. In assessing this ground of appeal, the Supreme Court would note at the outset that paragraph 2 of Article 359 of the Code of Criminal Procedure does not require that further reasons be given for a sentence simply because it differs from the sentence demanded by the Public Prosecution Service. Nonetheless, cases may occur in which the sentence imposed by the trial court differs to such an extent from the sentence demanded by the Public Prosecution Service that it would be incomprehensible unless the reasons for the disparity were explained (cf., Supreme Court 3 October 2006, LJN AX5479, NJ 2006, 549). This is not the case here.

11.4. This ground of appeal must therefore share the fate of the other grounds of appeal. […]

13. Assessment of the ground of appeal of the injured parties

13.1. It is submitted in the ground of appeal that the Court of Appeal was wrong to hold that the claims for damages brought by the injured parties were not admissible as the statutory provisions applicable in this case do not allow for the possibility of declaring the claim of an injured party to be inadmissible on the grounds that it is not of a straightforward nature.

13.2. The appealed judgment, in so far as relevant to assessment of the ground of the involves: […]

13.5. According to the legislative history, the legislator intended the joinder of the injured party in the criminal proceedings to be of an auxiliary nature. It was in keeping with this auxiliary nature that the procedure should be simple. As the statutory limitation on joinder restricting the claim to a given amount is also in keeping with the intention of the legislator not to burden the criminal courts with responsibility for hearing substantial and complicated civil cases, it follows that the joinder should be limited to 'small amounts and cases that are not intrinsically complicated'. In view of this, it must be assumed that the statutory provisions applicable in this case, which have since been abolished, did not prevent the criminal courts from declining to consider a complicated claim of an injured party even where the amount of the claim was below the statutory limit. The Court of Appeal has not therefore erred in law by taking this view.

13.6. The ground of appeal cannot result in cassation.

14. Assessment of the appealed judgment *ex proprio motu*

The accused is on remand in custody. The Supreme Court is giving judgment more than 16 months after the cassation appeal proceedings were instituted. This means that the 'reasonable time' referred to in Article 6, para 1, of the European Convention on Human Rights has been exceeded. It follows that the term of imprisonment of 17 years imposed on the accused must be reduced.

15. Conclusion

As none of the grounds of appeal can result in cassation, and the Supreme Court sees no ground for setting aside the appealed judgment ex proprio motu—other than as referred to at 14 above—it follows from the above findings that the following decision must be taken.

16. Decision

The Supreme Court sets aside the appealed judgment, but only as regards the length of the term of imprisonment imposed. It accordingly reduces this term in such a way that it will be for 16 years and 6 months, and dismisses the appeal in other respects …'

12.2701 COMPETENCE OF THE COURT
See: 7.213

12.2704 EXECUTION AND OTHER CONSEQUENCES OF THE JUDGMENT
See: 4.66

12.272 INTERNATIONAL COURT OF JUSTICE
See: 3.2113 **B**, 7.213

12.273 COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES
See: 4.66

12.273 EUROPEAN COURT OF HUMAN RIGHTS
See: 1.203, 4.66, 4.73

12.273 INTERNATIONAL CRIMINAL COURT
See: 3.2113 **B**

12.273 INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
See: 7.213

12.273 INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA
See: 3.2113 **B**, 7.213

12.273 INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
See: 3.2113 **B**

14.1 INTERNATIONAL WAR
See: 11.3

14.1132 LIMITATION AND REDUCTION OF NUCLEAR WEAPONS

H. Slebos v. Public Prosecution Service, Court of Appeal of Amsterdam, 30 January 2009, Institute's Collection No. R8654

- *Imposition of an 18-month prison sentence* (*of which 6 months were suspended for an operational period of 2 years*) *for exporting certain goods to Pakistan without a permit, in contravention of the provisions of the Import and Export Act.*
- *The goods included strategic goods, otherwise known as dual-use goods, such as manometers, triethanolamine and graphite, as well as O-rings, for which there was an obligation to obtain a permit under the so-called catch-all decision of the Minister of Economic Affairs.*
- *The provisions that have been contravened are intended to prevent the spread of weapons of mass destruction and thus promote international peace and security. Great importance is attached at both national and international level to compliance with and enforcement of these non-proliferation provisions.*

The Facts: Slebos was charged with having contravened the provisions of the Import and Export Act in his capacity of director of Slebos Research BV and Bodmerhof BVin the period from 1999 to 2002 by having exported goods to Pakistan without a permit. The goods concerned included (1) 6 MKS Barathon Absolute Capacitane Manometers (as designated in Annex I to Decision No. 94/942/CFSP of the Council of the European Union),[138] (2) 20 kilos of triethanolamine (97% Assay) as designated in Annex I to Council Regulation (EC) No. 1334/2000 (item 1C 350.46),[139] (3) 2 boxes containing 104 pieces of graphite as designated in Annex I to Decision No. 94/942/CFSP and (4) 9000 O-rings of Viton (with a hardness of 70% Shore), in respect of which the Minister of Economic Affairs had provided in (catch-all) decisions of 10 August 2001 and 14 August 2001 under Article 2a(6) of the Import and Export Act that a permit was required for the export of these goods (where the final destination was Pakistan).

[138] OJ (1994) No. L 367/1.
[139] OJ (2000) No. L 159.

The District Court of Alkmaar considered that he was guilty of exporting these goods and sentenced him to 12 months' imprisonment (of which 8 months were suspended for an operational period of 2 years) and a fine of 100,000 euros (judgment of 16 December 2005).[140] Slebos (and the Public Prosecution Service) appealed against this judgment to the Court of Appeal of Amsterdam.

Held: '…The Court of Appeal agrees with the appealed judgment in so far as this is at issue on appeal and will therefore uphold it, except as regards the sentence […] On appeal the Court of Appeal has determined the appropriate sentence on the basis of the seriousness of the offences and the circumstances in which they were committed and having regard to the person of the accused. The Court of Appeal has taken particular note of the following.

In the period to which the charges relate, goods were exported by the companies Slebos Research BV and/or Bodmerhof BV, of which the accused was the sole shareholder and director at that time, without the permit required for this purpose under the Import and Export Act. The accused was in actual charge of this export.

In three of the cases, the export concerned strategic goods, otherwise known as dual-use goods, namely manometers, triethanolamine and graphite. These are goods which it can be assumed are capable of being used both for innocent civil purposes and for the development and production of weapons, in particular weapons of mass destruction. The export controls on these dual-use goods are intended to prevent the use of these goods for these military purposes after their export from the Netherlands. The fourth case concerned the export of o-rings, for which there was an obligation to obtain a permit under the so-called catch-all decision of the Minister of Economic Affairs. This decision was taken because it was suspected, partly in view of the export destination, that these O-rings were intended for the production of weapons of mass destruction.

The provisions that have been contravened are intended to prevent the spread of weapons of mass destruction and thus promote international peace and security. Great importance is attached at both national and international level to compliance with and enforcement of these non-proliferation provisions.

The accused not only failed to apply for the necessary permits, but also let it be known within the companies concerned that he considered that such applications were pointless and merely a source of trouble for him, as was confirmed by the accused at the appeal hearing. In this way, the accused actively contributed to the corporate culture in which the proven offences occurred. The accused took no notice of the existing regulations and thus undermined the system for the control of

[140] LJN No. AU8250. The District Court also held as follows: 'All the goods were destined for the Institute of Industrial Automation (I.I.A.) in Pakistan, which is said to be linked with the Dr. A.Q. Khan Research Laboratories (KRL) and the Pakistan nuclear weapons programme.' In an interim judgment of 27 May 2004 the District Court did not consider it necessary to hear staff of the KRL as witnesses or a number of Dutch ministers. LJN No. AP0145. For the criminal proceedings formerly instituted against Khan, see 17 NYIL (1986) p. 302 n 134.

the trade in strategic goods, which was developed for the benefit of international legal order.

According to an extract from the judicial records of 18 July 2007 the accused was convicted in a judgment of 17 June 1988, which has become final and unappealable, for an intentional contravention of a regulation introduced pursuant to Article 2, para 1, of the Import and Export Act committed by a legal person in circumstances where the accused was in actual charge of the prohibited act, and was sentenced to a 6-month prison sentence suspended for an operational period of 2 years, and to a fine of NLG 20,000 or, alternatively, 6 months' detention.[141] In addition, the accused agreed to a settlement penalty of NLG 1,000 proposed by the public prosecutor in Alkmaar on 17 January 1989 for a comparable offence.

The Court of Appeal deems, all things considered, that in principle a prison sentence of 21 months, five of which are suspended for an operational period of 2 years, is appropriate and necessary.

As, however, the Court of Appeal, like the District Court, considers that a reduction in the sentence would be appropriate on account of the provision of Article 110 of the Code of Criminal Procedure which has been contravened,[142] the sentence will be reduced to 21 months, seven of which are suspended for an operational period of 2 years.

Reasonable period exceeded

The judgment at first instance was handed down on 16 December 2005. Appeal was lodged on behalf of the accused against this judgment on 28 December 2005. The appeal hearing started on 18 September 2007. Final judgment was given on 30 January 2009. 37 months elapsed between the institution of the appeal and the final judgment on appeal. It follows that the reasonable time referred to in Article 6 (2) of the European Convention on Human Rights has been exceeded. The Court of Appeal will therefore reduce still further the sentence referred to above, by imposing on the accused a prison sentence of 18 months, six of which are suspended for an operational period of 2 years.

Applicable statutory provisions

The sentence to be imposed is based on Articles […] 2a of the Import and Export Act, Article 2 of the Import and Export (Strategic Goods) Decree,[143] Articles 14a, 14b, 14c, 47, 51 and 57 of the Criminal Code and Articles 1, 2 and 6 of the Economic Offences Act. These statutory provisions are applied in the form in which they existed at the time of the proven offences …'

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[141] For the conviction at first instance by the District Court of Alkmaar, see 17 NYIL (1986) p. 304, n. 136.

[142] Art. 110 relates to the searching of premises for the purpose of seizure by the examining magistrate. However, Dutch intelligence officers were present during police investigations.

[143] The articles concerned empower the Minster of Economic Affairs to prevent the export of categories of goods which are of strategic importance by refusing the requisite permit.

14.1133 LIMITATION AND REDUCTION OF CHEMICAL WEAPONS
See: 11.3

14.1222 TERMINATION AND SUSPENSION OF OPERATION OF TREATIES AS A CONSEQUENCE OF WAR
See: 6.43

14.125 HUMANITARIAN LAW
See: 11.3

14.1251 RED CROSS CONVENTIONS
See: 11.3

14.1274 CHEMICAL WEAPONS
See: 11.3

14.2 CIVIL WAR
See: 11.3

16.112 MEASURES RESULTING IN PROMOTION OR RESTRICTION OF TRADE AND OTHER TRAFFIC OF GOODS
See: 11.3, 14.1132

16.143 CONTROL OF FOREIGN INVESTMENTS
See: 6.06 (n 78)

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See: 6.23

16.5 SOCIAL AND HEALTH MATTERS
See: 1.203, 3.2113 **B**

16.55 ENVIRONMENTAL QUESTIONS
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16.83 ARMS TRADE
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The table of cases was compiled by Ms C.C. Diepeveen, Middelburg, The Netherlands.

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