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Foreword

Professor Sir Elihu Lauterpacht CBE QC LLD[*]

Those who may regard themselves as traditionalist or 'black letter' international lawyers will welcome the content and style of this addition to the contemporary literature of the subject. The energy of its editors and the participation of its contributors reflect the continuation of the place that Cambridge has come to hold in this field and its continuing contribution to the regeneration of the scholars committed to the discipline. The appearance of this periodical tells us that the torch lit by Oppenheim more than a century ago and carried forward by his distinguished successors is still burning brightly.

[*] Honorary Professor of International Law, University of Cambridge and Founding Director of the Lauterpacht Centre for International Law.

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Editors' Introduction: Continuity and Change

Andrew Sanger
Rumiana Yotova[*]

The *Cambridge Journal of International and Comparative Law* (CJICL) was born in Cambridge on 1 August 2011, named by Professor James Crawford SC (now known as 'The Godfather') and 'baptised' by the Faculty of Law at its Board Meeting. The independent Journal naturally complements the renowned series of Cambridge monographs—currently edited by Professors Crawford and Bell—which were established in 1946 by Professors Lauterpacht, Gutteridge and McNair. Whereas the monographs are edited by accomplished academics in the fields of international and comparative law, the Journal is run by a young, up and coming team of doctoral candidates at the Law Faculty, and builds on the experience of its predecessor, the *Cambridge Student Law Review* (2003–2011).

It is this balance between preserving continuity with the past while fostering change for the future that the Journal seeks to capture. It focuses on public and private international law, while employing a comparative method to bridge gaps between legal orders and to assess the intersection between international, regional and national legal orders. Our vision is for the Journal to become an open platform for a constructive and critical dialogue between the junior and senior ends of the academic spectrum, as well as between international scholars and practitioners. The authors of our first issue reflect this vision—ranging from an unpublished piece of work by Sir Hersch Lauterpacht (he will therefore have featured prominently in establishing both the monograph and Journal series) to Ms Anna Cowan, who was recently awarded her LL.M. Our second issue is equally balanced: submissions by three eminent judges are published alongside the work of fifteen doctoral and masters' candidates.

The first issue also contains a piece by HE Judge Greenwood CBE QC, who, after sketching a picture of the increase in international tribunals, focuses on some of the challenges of international litigation: work level, diversity, jurisdiction and compliance. Complementing this piece, but from a different

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perspective, is Sir Daniel Bethlehem's 'Secret Life of International Law', which examines international law from the perspective of one who must shape the approach and compliance of actors by 'giving advice'. We are very grateful to Professor Sir Elihu Lauterpacht CBE QC for allowing us to publish, for the first time, Sir Hersch Lauterpacht's Draft Nuremberg Speeches. These draft speeches formed a significant part of the final speeches delivered by the British prosecutor at Nuremberg, Sir Hartley Shawcross. In his article, Professor Philippe Sands QC puts the speeches in context, draws out key themes and discusses their significance.

Alongside the work of these established international and comparative lawyers, we also have contributions from younger members of the field. Dr Lorand Bartels assesses the intersection between general international law and the EU legal order, specifically with regard to the applicability of the law of treaties in the provisional application of the Economic Partnership Agreements between the European Union and several African, Caribbean and Pacific states. Dr Filippo Fontanelli also looks at the sources of international law, but from the perspective of 'private law analogies' and examines whether the contractual exception of non-performance has crystallised as a general principle of international law.

The case analysis articles cover the jurisprudence of general, specialised and regional courts and tribunals, exhibiting the opinions of both senior and junior academic minds. Professor Robin Churchill provides an in-depth analysis of the judgment in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal*, the first maritime delimitation decision by the International Tribunal for the Law of the Sea. Drs Alex Mills and Kimberley Trapp offer a critical review of the long-awaited decision of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, and Dr Francesco Messineo examines the decision of the ICJ in the *Application of the Interim Accord (the former Yugoslav Republic of Macedonia v Greece)* case and its impact on the 'Macedonia name dispute'. Thomas Liefländer looks at the first substantive judgment of the International Criminal Court—the *Lubanga* Judgment—and Anna Cowan provides a fresh perspective on the *Banković* judgment of the European Court of Human Rights in the light of *Al-Skeini*.

A word should be said about CJICL's second issue, published separately but alongside the first: the UK Supreme Court Review. It is the only dedicated annual publication that analyses the jurisprudence and approach of the UK Supreme Court. It is written by a selected team of CJICL Editors and contains an overview of cases from the legal year of 2010–11 as well as five thematic

articles that provide an in-depth examination of the Court's case law. Under the accomplished leadership of Lorne Neudorf, the issue also features sharp and engaging contributions from the Honourable Madam Justice Marie Deschamps, the Right Honourable Lord Phillips of Worth Matravers, and the Honourable Justice K. M. Hayne. This is the second issue of the UKSC series—the first was published by our predecessor, the *Cambridge Student Law Review*—and it introduces a specific focus on the international and comparative law aspects of the Court's jurisprudence, reflecting the late Lord Bingham's observation that "[j]udicial horizons have widened and are widening".[1]

The CJICL embraces continuity and change not just in the work of our authors but also in how we operate and publish the Journal. All submissions undergo a rigorous double blind peer review process, with reviewers drawn from our distinguished Academic Review Board (consisting of young and established academics) and our Editorial team (consisting of Cambridge doctoral candidates). The Review Board is made up of over forty academics and lawyers in the fields of international and comparative law: well-established and senior academics alongside younger members. We are already deeply indebted to them for their selfless and enthusiastic commitment to providing carefully crafted reviews for our first issues. Our uncompromising approach to the peer review process is vital not only for the academic value of the CJICL, but also for maintaining the high standards of our discipline as a whole.

Continuity is also maintained in our adoption of established copy-editing procedures, benefiting from the knowledge of our experienced law journal editors. Equally, however, we are embracing change in our approach towards publishing: for the reader, the author and the editor. Central to this change is our decision to establish our primary 'open access' home online rather than in print: the Journal is made freely available via our website—http://www.cjicl.org.uk—and in established online databases such as Westlaw and HeinOnline. It can be read as a single PDF, separate article PDFs and through our custom website browsing system. Our editorial process—from submission to the final copy—is also managed online through a bespoke management system skillfully designed by Sidney Richards.

The second—and perhaps most important—change is the decision to make the Journal 'open access'. There are (as we quickly learnt) several variations on 'open access' with the key question being: open for whom? Some journals claim to be open access but limit access to specific institutions or require authors to pay to have their articles published. Others are open in the sense of being 'free'

[1] T. Bingham, *Widening Horizons* (CUP, 2010), at 3.

but cannot be reprinted and distributed in classrooms or lecture halls. The CJICL is open for readers and authors: there is no charge to publish and anyone can access and use the Journal in whatever way they want, so long as it is not for a commercial purpose or a direct re-print in another journal or book (for which express permission is required). For the reader, this means easy, free and unobstructed access to academic material and the ability to access our content via cross-journal searches. For the author, this means greater exposure at a time when funding bodies and universities are strongly encouraging authors to maximise their appeal and publish in open-access journals.

To complement the work of the Journal and to cultivate debate and ideas for future articles, we have established an online blog—available on our website: http://www.cjicl.org.uk—which regularly publishes short, cutting edge discussion pieces on topical issues of the day. Recent entries include a discussion on peremptory norms and the ICJ's judgment in *Jurisdictional Immunities of the State*, and an examination of the US Supreme Court's decision on patentable subject matter in *Mayo Collaborative Services v Prometheus Laboratories*. Readers can engage directly with the authors by posting their comments and reactions online. The Journal is hosting its first annual conference in May 2012 on 'Agents of Change: The Individual as a Participant in the Legal Process'; we hope that the conference presentations and debates will form the basis of a future thematic issue.

The Journal is the result of the hard work of a wide range of colleagues, friends and scholars. We owe a significant and heartfelt thank you to everyone who has helped us along the way: from advice and expertise to support and financial assistance. We are particularly indebted to the Faculty of Law at the University of Cambridge and the *Cambridge Law Journal* for financial support, to Daniel Wilkins for designing the website, to Julia Powles for her advice on the licence agreement, to Yin Harn Lee our skilled and always reliable Secretary and Treasurer, and to Finola O'Sullivan, Ella Colvin and Kirsten Purcell of Cambridge University Press for their friendship and support. We are also extremely grateful for the enthusiasm and assistance of our Academic Review Board, without whom the rigorous process of selecting articles could not have taken place. We would like to thank Bluepoint Cambridge, in particular Alex and Gordon, for accommodating our idiosyncratic and often last minute requests! To our wonderful team of Editors and Managing Editors—Fernando Lusa Bordin, Samuel Dahan, Lorne Neudorf, Sidney Richards (who demonstrated great skill in producing the final layout) and Claire Simmonds—we owe the greatest debt of all: thank you all for your tireless, dedicated and exemplary team work! Finally, we would like to express our special thanks to

our Senior Treasurer, Professor James Crawford SC and to Professor Sir Elihu Lauterpacht CBE QC—as The Godfather and Grand-Godfather respectively—for their guidance, expertise and unparalleled enthusiasm and support.

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Some Challenges of International Litigation

HE Judge Sir Christopher Greenwood CMG QC[*]

Keywords
International litigation, International Court of Justice

1 Introduction

I first studied international law 35 years ago. As a candidate for what was then Section D of the LL.B. (the public international law papers) at Cambridge, I attended lectures and seminars on the International Court of Justice (ICJ) and on international, that is inter-state, arbitration. It was a wonderful time to be a student of these subjects, not least because we were studying case law when there were comparatively few cases to study, which left plenty of scope for the enjoyment of other aspects of student life. The ICJ, whose reports for 1977 are only four pages long, had only one case pending before it (over which it would soon decide that it lacked jurisdiction).[1] The European Court of Human Rights (ECtHR) was then the only functioning human rights court and its entire jurisprudence could still fit into a single volume of law reports, although the European Commission of Human Rights, to which at that time all applications had to be made, had decided many more cases. Investor-state arbitration was largely unknown. There were no international criminal courts or tribunals and almost no serious discussion of the possibility of creating such bodies.

Moreover, it would be difficult to argue that the proceedings which did take place at that time occupied a central place in international relations. Although some of the judgments given by the ICJ during the 1970s were to have an important effect on the development of the law, they had less obvious impact at the time. Between 1971 and 1980 only nine contentious cases were brought before the Court. One of those was withdrawn[2] and one was still pending at

[*] Judge, International Court of Justice.

[1] *Aegean Sea Continental Shelf (Greece v Turkey)*, Judgment, ICJ Reports 1978, p. 3.

[2] *Trial of Pakistani Prisoners of War (Pakistan v India)*, Interim Protection, Order of 13 July 1973, ICJ Reports 1973, p. 328. An Order officially recording the discontinuance of the proceedings was issued on 15 December 1973.

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the end of the decade.[3] In six of the remaining seven cases, the respondent state boycotted all or part of the proceedings.[4]

Yet the ICJ underwent a revival in the 1980s and 1990s, years which also saw a remarkable increase in the number and variety of international courts and tribunals and the matters being brought before them. The result was to propel litigation into a far more prominent place in international relations than it had ever occupied before. Even in matters as fundamental as war and peace, for many states the prospect of having to defend their decisions before a court is now a reality which it would be dangerous to ignore. One example must suffice. In 1982 the United Kingdom and Argentina fought an armed conflict over the Falkland Islands which left several hundred dead. The record shows that the United Kingdom government took legal advice throughout the conflict but, so far as I have been able to discover, neither government's actions were challenged before a court with the exception of a case that went to the Supreme Court of the United States about the inexplicable sinking of a US-owned merchant ship by Argentina many hundreds of miles away from the islands.[5] By contrast, the Kosovo conflict, in which United Kingdom forces were involved less than twenty years later, saw the Federal Republic of Yugoslavia (FRY) challenge ten NATO states before the ICJ while the hostilities were still going on[6] and

[3] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1982, p. 18. The case was commenced by special agreement between the parties and entered on the Court's General List in 1978.

[4] The *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)*, Judgment, ICJ Reports 1972, p. 46 was the only case to be commenced and brought to a decision during the decade in which the Respondent took a full part in the proceedings. The Respondent boycotted the proceedings from the outset in *Fisheries Jurisdiction (United Kingdom v Iceland)*, Merits, Judgment, ICJ Reports 1974, p. 3; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)*, Merits, Judgment, ICJ Reports 1974, p. 175; *Nuclear Tests (Australia v France)*, Judgment, ICJ Reports 1974, p. 253 and *Nuclear Tests (New Zealand v France)*, Judgment, ICJ Reports 1974, p. 457; *Aegean Sea Continental Shelf*, *supra* note 1; and *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, ICJ Reports 1980, p. 3.

[5] *Argentine Republic v Amerada Hess Shipping Corp.*, 488 US 428 (1989); 81 ILR 658. Another case was brought unsuccessfully before the ECtHR many years later. On 19 July 2000, the Court declared inadmissible an application from the parents of two men killed when British forces torpedoed and sank the Argentinean warship the *General Belgrano*. The applicants alleged that the ship's sinking was a violation of their sons' rights to life under Article 2 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221. The application was declared inadmissible by a Committee of three judges for having been submitted well beyond the six month time limit stipulated in the Convention: *Luisa Diamantina Romero de Ibanez and Roberto Guillermo Rojas v United Kingdom*, Admissibility Decision of 19 July 2000 (Application No. 58692/00).

[6] See, *e.g.*, *Legality of Use of Force (Yugoslavia v Belgium)*, Provisional Measures, Order of 2 June

the Grand Chamber of the ECtHR deliver a landmark decision regarding the air attack on the Radio Television Serbia studios in Belgrade.[7] The conflict featured in the charges against several of the defendants brought before the International Criminal Tribunal for the Former Yugoslavia (ICTY), including the former President of the FRY, Slobodan Milosevic. The Prosecutor of the ICTY also conducted an investigation into whether there was a case for bringing charges against any NATO personnel.

It will come as no surprise that international lawyers have generally reacted with pleasure and sometimes delight to these developments. As the late Oscar Schachter once told the ICJ, "to a shoemaker there is nothing like leather, to a lawyer there is nothing like a court".[8] That sense of delight—which I share—is understandable. Even if we now regard some of the idealistic thinking about international adjudication which characterised much of "civil society" at the time of the Hague Peace Conferences in 1899 and 1907 as overstated, there is no doubt that the effective and impartial adjudication of international disputes makes the world a safer place and one in which justice plays a greater role. Moreover, it is not simply the disputes which come before a court which are affected by the judgments which that court gives. The clear and coherent articulation of legal principles on, for example, the delimitation of maritime boundaries, and the availability of fora in which those principles can be applied, also facilitate the settlement of disputed boundaries by negotiation. Moreover, the new prominence of courts and tribunals in which individuals and other non-state entities can vindicate their rights against states—for example, in human rights courts or investor-state arbitration—has made those rights a reality in many cases where they would otherwise have had only a paper existence.

Nevertheless, this new world of adjudication has also created challenges, the existence of which is all too often overlooked. My purpose today is to look at some of the challenges of international litigation. In doing so, I have taken a broad view of what constitutes litigation. I include not only litigation

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1999, ICJ Reports 1999, p. 124. The requests for provisional measures were rejected. The cases against Spain and the USA were removed from the Court's List in 1999 for manifest absence of jurisdiction. The Court decided in 2004 that it lacked jurisdiction regarding the remaining eight cases: see, *e.g.*, *Legality of Use of Force (Serbia and Montenegro v Belgium)*, Preliminary Objections, Judgment, ICJ Reports 2004, p. 279.

[7] *Bankovic v Belgium*, Admissibility Decision of 12 December 2001, 123 ILR 94.

[8] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*; hearings, 15 October 1997; CR 1997/19, at 31.

between states but also litigation in which a state is challenged by an individual or corporation, as in cases before a human rights court or in investor-state arbitrations at the International Centre for Settlement of Investment Disputes (ICSID) or elsewhere. I have also included proceedings before international criminal courts and tribunals. Although criminal proceedings are not strictly "litigation", international criminal proceedings share enough of the features of other proceedings before international courts that it would be wrong to exclude them. I have, however, confined myself to litigation before international courts and tribunals, whether global or regional, and have not attempted here to explore the equally important subject of the litigation of international law issues before national courts; that must be the subject of a future paper.[9]

2 The growth of international litigation

First, however, let us get a sense of perspective. To do that, I need to demonstrate the extent to which international litigation has grown over the last 35 years. It makes sense to start with the ICJ, which is the only court that is both global (in the sense that any of the 193 member states of the UN may participate in its activities) and general (in that its jurisdiction potentially covers any aspect of international law). From the low point of 1977 with one pending case and an empty volume of law reports, the Court has been revitalised, and in recent years has never had fewer than 12 cases on its List.[10] Those cases come from all parts of the world. In the last few years, the Court has ruled on disputes involving states from every inhabited continent. The cases also cover a wide spectrum of issues.

[9] On the litigation of international law issues before domestic courts, see Shaw's excellent lectures as part of the Hersch Lauterpacht Memorial Lectures Series, 'Regulating the Relationship between International and Domestic Law' (Part One: 2 March 2010; Part Two: 3 March 2010; Part 3: 4 March 2010). On the interaction of European Union law and international law, see van Rossem, 'Interaction Between EU Law and International Law in Light of *Intertanko* and *Kadi*: The Dilemma of Norms Binding the Member States but not the Community', (2009) 40 *Netherlands Yearbook of International Law* 183.

[10] At the time this paper was originally delivered, the Court had fifteen cases before it. Since then, the delivery of a judgment in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, 3 February 2012 (not yet published), available at <http://www.icj-cij.org/docket/files/143/16883.pdf> [last accessed 15 May 2012], and an advisory opinion in *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Request for Advisory Opinion)*, 1 February 2012 (not yet published), available at <http://www.icj-cij.org/docket/files/146/16871.pdf> [last accessed 15 May 2012], has reduced the List to thirteen.

During my first three years as a judge, the Court considered cases involving river navigation, pollution, sovereign immunity, the prosecution of a former head of state, land and maritime boundaries, a declaration of independence, diplomatic protection, armed conflict and a dispute between two neighbours over one's opposition to the other's choice of name. More new cases were filed in 2008 alone than in the decade from 1961–1970. Participation in the activities of the Court has also been more widespread than is sometimes realised. 88 states have at some time been party to a contentious case before the Court and, in 2009, 43 states took part in one way or another in the proceedings on the General Assembly's request for an advisory opinion on Kosovo's declaration of independence.

One aspect of this growth in the work of the ICJ which should not go unremarked is that it has not been at the expense of other methods of inter-state dispute settlement. When the UN Convention on the Law of the Sea[11] was concluded in 1982, its elaborate provisions on dispute settlement led to gloomy predictions that either the newly created International Tribunal for the Law of the Sea (ITLOS) and arbitration tribunals operating under Annex VII would bring about the end of maritime boundary delimitation work in the ICJ, or they would themselves be left without work. That has not happened. While maritime boundary work in the ICJ has increased,[12] in recent years there have also been a number of Annex VII arbitrations[13] and ITLOS, long busy with other types of case, has recently delivered its first delimitation judgment.[14]

The growth in international litigation has, however, been even more conspicuous in four other areas. First, investor–state arbitration, which barely existed 35 years ago[15] (even though the Washington Convention[16] which created

[11] 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3.

[12] See, most recently, the judgments in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment, ICJ Reports 2007, p. 659 and *Maritime Delimitation in the Black Sea* (*Romania v Ukraine*), Judgment, ICJ Reports 2009, p. 61. At the time of writing, the Court had two further maritime boundary cases on its General List, *Territorial and Maritime Dispute (Nicaragua v Colombia)* and *Maritime Dispute (Peru v Chile)*.

[13] *Barbados v Trinidad and Tobago*, (2006) 139 ILR 449; *Guyana v Suriname*, (2007) 139 ILR 566. See also the pending case of *Bangladesh v India* (Permanent Court of Arbitration).

[14] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012 (not yet published), available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14_02_2012.pdf> [last accessed 15 May].

[15] See, however, the three Libyan oil arbitrations decided between 1973 and 1980; Greenwood, 'State Contracts in International Law: The Libyan Oil Arbitrations', (1982) 53 BYIL 27.

[16] 1965 Convention on the settlement of investment disputes between states and nationals of other states, 575 UNTS 159.

ICSID had been in force for a decade) has acquired enormous importance since the mid-1990s. Between 1972 and the end of 2011, ICSID registered 369 cases, of which 334 were registered since 1995. 2011 saw the largest number of new cases (38) registered by ICSID.[17] Although there are no centrally compiled statistics, it is generally believed that at least as many investor-state arbitrations have been decided by non-ICSID tribunals during the years since 1995. Mention must also be made of the Iran–US Claims Tribunal which has finalised nearly 4,000 cases since it was established in 1981.

Secondly, there has been the emergence of international criminal courts and tribunals. I should, perhaps, say the re-emergence, for the tribunals which tried the major war criminals at Nuremberg and Tokyo had (at least in some respects) an international character, but each was assembled for a single case and then dissolved. It was not until 45 years later, when the ICTY was established by the Security Council, that criminal cases were again heard by an international tribunal, as opposed to a body deriving its legal authority from national law. I confess to having been sceptical about the prospects for the ICTY in 1993. I thought at the time that there was a serious risk that the Tribunal would try hardly any cases and be perceived as a failure which would have had the effect of setting back the prospects for international criminal law. I am pleased to have been proved wrong—or at least to have been too pessimistic, for I still believe that the risk existed and it is a remarkable achievement that it was overcome. After nearly twenty years, the ICTY has tried over 160 defendants and all of the leading suspects indicted by it have been taken into custody. It has been joined by the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Tribunal for Lebanon and, of course, the International Criminal Court (ICC). The ICC, established by the 1998 Rome Statute[18] handed down its first verdict a few days before this paper went to press.[19] All of these courts and tribunals have cases pending before them.

Thirdly, the dispute settlement mechanism of the World Trade Organization is the most prolific of the international dispute settlement systems, with some 419 requests lodged in its first 15 years of operation between 1995 and 2010. Almost 200 of these have proceeded through to completion or settlement.[20] With a far higher profile than its predecessor under the GATT, the

[17] ICSID, *The ICSID Caseload-Statistics (Issue 2012–1)* (2012), at 7.

[18] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3.

[19] *Prosecutor v Lubanga,* 14 March 2012 (not yet published), available at: <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> [last accessed 12 May 2012].

[20] Agha, 'WTO Dispute Settlement Body developments in 2010', (2011) at <http://www.wto.org/english/tratop_e/dispu_e/speech_agah_4mar10_e.htm> [last accessed 22 March 2012].

mechanism has given several decisions of far-reaching importance in international economic relations.

Lastly, there has been the dramatic increase in litigation before international human rights courts and tribunals. In 1977 the only such court was the ECtHR (although its work was shared with the European Commission of Human Rights which was merged with the Court in 1998). Its workload has swelled to the point where it now gives well over 1,000 judgments a year.[21] Moreover, it has been joined as a body which can hear individual claims or petitions by the UN Human Rights Committee, the Inter-American Court and Commission of Human Rights, the African Court of Human and Peoples' Rights and a number of specialist committees which can hear individual petitions under specific human rights agreements such as the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[22]

3 Challenges

The increase in international litigation in one generation has thus been remarkable. What are the challenges associated with it? The answer to that question is likely to vary according to the perspective of the person addressing it. I am conscious that the issues which strike me as most important as a judge are not the same as the ones I would have focussed upon a few years ago as an advocate, and that the list I would have produced as a professor would probably have been even more different. Conscious, therefore, that this is in no sense an exhaustive list, I want to focus on four areas where I believe there are challenges which need to be overcome.

3.1 The volume of work

The first issue that I want to consider is the challenge posed by the sheer volume of cases now being brought before some international courts and tribunals. In one sense this is an example of what a British Prime Minister once referred to as "the problems of success". While the fact that more international disputes are being resolved by adjudication and more individuals are able to vindicate their rights in court is a matter for rejoicing, we need to face the fact that it has

[21] ECtHR, *Overview: 1959–2011* (2012), at 4.

[22] 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.

also placed a considerable strain on systems designed to deal with far smaller workloads.

The problem is most acute in the field of human rights and, in particular, in the ECtHR based in Strasbourg. The jurisdiction of that court now extends to 47 states with a combined population of over 800 million.[23] In 2011 the Court gave 1,511 judgments and dealt with 52,188 applications, but its list of pending applications still increased from 139,650 to 151,600, with another 22,600 at an early administrative stage.[24] It would be presumptuous of me to suggest how the Court—and, perhaps more importantly, the member states of the Council of Europe—should seek to tackle this problem, but anyone can recognise that the burden on the Court has become almost intolerable.

It might be thought that the ICJ, with thirteen cases currently pending, stands at the other extreme, but the comparison is a false one. The ICJ is certainly not pressed to anything like the extent of the ECtHR but, unlike the ECtHR, the ICJ has no power of summary dismissal and none of the cases before the Court could reasonably be described as frivolous. On the contrary, most are cases of considerable importance and complexity which require extensive pleading by the parties and careful deliberation by the Court, whose working methods (described in unusual detail in the Resolution concerning the Internal Judicial Practice of the Court adopted in 1976, when the Court had very few cases) necessarily have to be very thorough. While a backlog of work built up in the late 1990s and early 2000s, a series of internal reforms introduced by the Court, and the addition of new legal assistants, meant that the backlog has now largely been cleared and, at present, the Court is able to keep on top of its case-load while being faithful to the working methods laid down in the 1976 Resolution. Nevertheless, I believe the matter must be kept under constant review. The old maxim that "justice delayed is justice denied" is just as true of international law as of any other legal system, and all international courts need to be able to deal with the cases brought before them in a reasonably expeditious fashion.

3.2 Jurisdictional limits

The second challenge to which I want to draw attention is the effect of limits on the jurisdiction of international courts and tribunals. It is one of the best established principles of international law that the jurisdiction of an

[23] Council of Europe, *Living Together: Combining Diversity and Freedom in 21st-Century Europe: Report of the Group of Eminent Persons of the Council of Europe* (2011), at 52.

[24] ECtHR, *Analysis of Statistics 2011* (2012), at 4.

international court has to be based upon the consent of the states concerned. The ICJ has stated that principle in the following terms:

> ... one of the fundamental principles of [the Statute of the Court] is that it cannot decide a dispute between States without the consent of those States to its jurisdiction; and ... the Court therefore has jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned.[25]

Of course, as the passage quoted recognises, the relevant consent may have been given many years earlier in a bilateral or multilateral treaty and, if that has been done, the respondent state will be bound by that consent however much it might object at the time proceedings are brought against it. Moreover, in the sphere of international criminal law, and within some treaty regimes, the requirement of state consent has been somewhat qualified. The ICTY and ICTR were created by the UN Security Council and exercise jurisdiction over persons, some of whom were high state officials, irrespective of the lack of consent of the states concerned. The Security Council also possesses, and has used, the power to refer cases to the ICC even where the defendants come from states not party to the Rome Statute. Within the treaty regime created by the European Convention on Human Rights, acceptance of the jurisdiction of the ECtHR is now compulsory for parties to the Convention.

Nevertheless, consent remains the normal requirement. That can mean that an international court has jurisdiction over a complaint against one state when an identical complaint, based on the same facts, against another state cannot be heard, because only the first of these states has consented to the jurisdiction of the court concerned. It was for that reason that the ICJ had jurisdiction to rule on the Democratic Republic of the Congo's application against Uganda,[26] but not on its application, which made essentially the same allegations, against Rwanda.[27] Uganda (like the Democratic Republic of the Congo) had made a declaration accepting the jurisdiction of the ICJ under Article 36(2) of the

[25] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda),* Provisional Measures, Order, ICJ Reports 2002, p. 219, at 241, para. 57.

[26] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* Judgment, ICJ Reports 2005, p. 168.

[27] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda),* Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 6.

Statute of the Court (the so-called "optional clause"), whereas Rwanda had not.[28] While the number of states accepting the jurisdiction of the Court under the optional clause has increased over the years, at 66 out of a UN membership of 193 it still represents a far smaller percentage of the international community than that which accepted the compulsory jurisdiction of the pre-war Permanent Court of International Justice (42 out of 55 states). Moreover, while three of the five permanent members of the Security Council accepted the compulsory jurisdiction of the Court in the 1960s, only the United Kingdom continues to do so.

To some extent, the deficiencies in the jurisdiction of the ICJ under the optional clause are compensated for by the jurisdiction conferred upon it by the growing number of multilateral conventions which provide for disputes regarding their interpretation or application to be referred to the Court.[29] But if jurisdiction can be based only upon a clause of this kind, the consequence may be that the Court has jurisdiction only in respect of one aspect of what may be a far broader dispute between the states concerned. For example, in its 2007 judgment in the case brought by Bosnia and Herzegovina against Serbia and Montenegro,[30] the Court was able to rule only on the issues relating to the Genocide Convention (Article IX of which provided the sole basis of jurisdiction), and could not consider other aspects of the broader dispute between the two countries such as the application of the international law on the use of force or of the Geneva Conventions on international humanitarian law.

One of the challenges for counsel in a case where the only basis for jurisdiction is a treaty dealing with a specific subject is to frame the case in such a way as to bring it within that treaty. An even greater challenge for the Court is to deal effectively with the case before it while remaining faithful to the proper interpretation of the clause which confers jurisdiction and to the fundamental principle of consent as the basis for jurisdiction.

[28] I make no comment on what the Court would have decided in the case against Rwanda if it had possessed jurisdiction.

[29] For example, the Convention Against Torture, *supra* note 22, and most of the conventions on terrorism contain a clause of this kind.

[30] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, at 101–2, para. 141.

3.3 Diversity

The third challenge I want to discuss is that caused by diversity within the "system" of international courts and tribunals. International courts and tribunals inevitably bring together judges and lawyers of different nationalities and backgrounds. That is, of course, both necessary and desirable. A global court must comprise judges from across the globe and not from just one region or legal tradition. It is for that reason that the Statute of the International Court of Justice precludes two persons of the same nationality serving as judges at the same time[31] and provides that—

> At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.[32]

The comparable provision for the ICC is even more elaborate.[33] Moreover, international judges tend to come from a wider range of professional backgrounds than their counterparts in national courts. While judges in England, for example, are almost invariably former barristers or solicitors, the current composition of the International Court of Justice contains a large number of former diplomats and foreign ministry legal advisers, as well as professors of international law.

This diversity in the international judiciary is a strength for international courts. Yet it is important not to underestimate the far greater difficulty of achieving a unified approach to procedural questions (where differences between legal systems are frequently far more marked than in substantive law, and where underlying assumptions tend to be taken for granted) when the members of the bench do not have the advantage of many years of common experience as counsel or as career judges that is typical in most national courts. For example, anyone trained in common law tends to take for granted certain basic propositions about the burden and standard of proof but those assumptions are by no means shared across legal systems, or by judges whose legal experience has been rooted more in advisory work in a foreign

[31] 1945 Statute of the International Court of Justice, 33 UNTS 993, Article 3(1). This provision does not apply to judges *ad hoc* and it is often the case that one or even both such judges are of the same nationality as members of the regular Court.

[32] *Ibid.*, Article 9.

[33] Rome Statute, *supra* note 18, Article 38.

ministry, or in the United Nations, rather than in advocacy. They often have different (and equally valid) assumptions about such matters. Even between lawyers with similar experience but in different systems there can be marked differences. In the early days of the international criminal tribunals, difficulties arose even between lawyers from the very similar United States and English systems because the latter considered that they were prohibited from preparing witnesses for cross-examination, while the former believed they were required to do just that. The challenges provided by this kind of diversity are manageable, and are more than outweighed by the strengths which it produces, but it is a mistake to pretend that such challenges do not exist.

There is another type of diversity, however, which has the potential to be far more problematic; that is, the diversity of courts and tribunals themselves. The same issue can—and not infrequently does—now come before more than one international court. To date that has tended to be in different factual contexts; that is to say two different courts have had to consider the same question of international law but have done so in relation to different sets of facts. It is, however, perfectly possible for the same set of facts to generate proceedings in more than one international jurisdiction. Let us take what is, at least so far, a hypothetical example. The ICC issues an arrest warrant for an official (X) of a state not party to the Statute of the ICC (state A). That warrant is executed by a state (state B) which is a party to the Statute and in which X happens to be present. X contests the legality of his arrest before the ICC, claiming (with the support of state A) that he is entitled to immunity. He also brings proceedings against state B before a regional human rights court to challenge the process by which he was surrendered to the ICC, a challenge which also involves the issue of his claim to immunity. In addition, state A brings proceedings against state B in the International Court of Justice, claiming that state B's decision to disregard the immunity to which state A considers X was entitled amounted to a violation of an obligation owed by state B to state A. In such circumstances, all three courts would have to consider the question of immunity and might well come to different conclusions. In the absence of a hierarchy in which one court is given the last word, so it is said, there is scope for something approaching anarchy.

That is the nightmare of those who see the multiplication of international courts and tribunals bringing about a fragmentation of the international legal system. There is, of course, much more to the debate about fragmentation than just the possibility of different courts reaching different conclusions on the same question. The International Law Commission has undertaken a study

of the subject[34] which has attracted much scholarly comment.[35] This is not the place for me to enter into all the aspects of that debate. Suffice it to say that, at least as far as the multiplication of international courts and tribunals is concerned, I believe that the dangers of fragmentation are greatly exaggerated.

It is true that there was a notable difference of view in the International Court of Justice and the Appeals Chamber of the ICTY regarding the circumstances in which a state may be held responsible for the acts of non-state actors with which it is associated. In its judgment in *Prosecutor v Tadić*[36] in 1999, the Appeals Chamber expressly declined to accept the principles laid down by the ICJ thirteen years earlier in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*.[37] The matter came before the ICJ again in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,[38] when the ICJ reaffirmed its earlier approach in *Nicaragua* notwithstanding the decision in *Tadić*. Yet the attention paid to this difference between two adjudicative bodies tends to ignore the fact that the ICJ in its 2007 judgment, far from disregarding *Tadić*, followed the findings of fact made by the ICTY in that case. Moreover, the difference over the legal question of responsibility in this saga is almost the only example of its kind. Other instances in which two courts have apparently differed, such as the refusal of the ECtHR in *Loizidou* v. *Turkey*[39] to apply to declarations regarding its own jurisdiction principles developed by the ICJ in cases concerning declarations under Article 36(2) of the Statute of the ICJ, turn out to be cases not of disagreement but of one court finding that the reasoning of another should not be transplanted to the different context of the issue which it had to decide. In *Loizidou*, the ECtHR did not say (as the ICTY did in *Tadić*) that the ICJ was wrong; rather it distinguished the reasoning of the ICJ on the ground that the acceptance of the jurisdiction of the ECtHR in the context of a treaty designed to protect the rights of individuals rather than states was to be approached differently from the acceptance of the jurisdiction of the ICJ in inter-state proceedings.

[34] See 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', forthcoming (2006) II(ii) ILC *Ybk*.

[35] For a comparatively recent and very perceptive example, see Simma, 'Universality of International Law from the Perspective of a Practitioner', (2009) 20(2) *EJIL* 265.

[36] Case No IT–94–1–T, 1999, at 40–62, paras. 99–145.

[37] Judgment, ICJ Reports 1986, p. 14.

[38] Judgment, ICJ Reports 2007, p. 43, at 209–11, paras. 403–7.

[39] *Loizidou v Turkey*, Preliminary Objections, Judgment of 23 March 1995, [1995] ECHR (Ser A.), paras. 82–6.

While such fragmentation is a danger against which international lawyers must be on their guard, it is a danger which can be met and is very far from being the present reality which some commentators have suggested.

3.4 Compliance

The last challenge that I wish to mention is that of securing compliance with the judgments of international courts and tribunals. The importance of ensuring that the judgment of a court or tribunal is actually carried out is obvious. A judgment which is ignored by the losing party is not only ineffective, it may serve to discredit the court which gave it and, indeed, the entire international legal system. It is, however, well known that international courts and tribunals have at their disposal little if any of the apparatus with which national courts can compel the implementation of their decisions. While Article 94(2) of the UN Charter gives the Security Council power to take measures against a recalcitrant state to give effect to a decision of the ICJ, that power has never been used.[40] The difficulties in securing the surrender of those indicted for the most serious international crimes which were faced in the past by the ICTY and are faced today by the ICC have long been a matter of notoriety. Is this the challenge which is going to overwhelm the international system of adjudication ? That is an important question and one which requires a far more detailed study than is possible here. The risk is undoubtedly a real one. Nevertheless, there are grounds for at least cautious optimism.

First, the overall picture is far less gloomy than might be imagined. Notwithstanding the lack of any effective means of compulsion, judgments of the ICJ are generally respected by the parties and the record of compliance is good.[41] The same has been true of most of the other courts and tribunals in the international legal system. The decisions of the WTO dispute settlement mechanism, the judgments of ITLOS, the awards of investment arbitration tribunals and of the various inter-state arbitration tribunals have in recent years attracted a good record of compliance. Perhaps more surprisingly, given the extent to which they intrude upon what many national authorities still regard

[40] The Security Council has, however, with the consent of all parties established monitoring missions to supervise compliance with certain judgments of the Court. See, *e.g.*, Report of the UN Secretary-General, UN Doc. S/1994/512 (1994) and SC Res 915, 4 May 1994 regarding the work of such a mission in supervising compliance with the judgment of the Court in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, p. 6.

[41] For a detailed study, see Schulte, *Compliance with Decisions of the International Court of Justice* (OUP, 2004).

as matters of domestic concern and the sheer number of cases, the picture is also quite positive with regard to human rights judgments. Problems there tend to stem from the inability of some governments to come to terms with what is required to comply, for example, with a requirement to avoid lengthy delays in judicial processes, rather than acts of outright defiance.

Secondly, it should come as no surprise that it is international criminal law which has, in recent years, given rise to the largest number of refusals to comply with the orders of international courts and tribunals. It is this part of international law which confronts most directly the sovereignty of states and challenges often deep-seated national feelings. It is also this part of international law where the jurisdiction of international courts and tribunals has moved furthest from a basis in the consent of the states concerned. Moreover, it is in the sphere of criminal law that national courts most often have to call upon the full resources of their states to compel compliance. Yet even here, the challenge can be met if there is the will to do so. Despite initial pessimism, the ICTY eventually secured the presence of all the defendants it had indicted, including the former head of state of the FRY, the President, Prime Minister and Commander-in-Chief of Republika Srpska and a number of prominent figures from all sides in the conflict. At the time of writing, the Special Court for Sierra Leone was about to give judgment in the trial of Charles Taylor, former President of Liberia, and the former President of Côte d'Ivoire was in custody awaiting trial at the ICC. One lesson is that ensuring compliance in this context may well be a long game.

4 Conclusions

The growth in importance of international courts and tribunals in the last thirty or so years has contributed much to international society. The record of international disputes peacefully resolved by adjudication which, only a few decades ago, might have led to war is an impressive one. Even where war was not a possibility (or at least a likelihood), the contribution has been important. The changes in the law of the sea in the 1970s could have led to a maritime version of the scramble for Africa of a century earlier had it not been for a series of judicial and arbitral decisions on delimitation. The WTO, with its dispute settlement mechanism, has helped so far to prevent a slide into protectionism of the kind which followed the last great financial crisis in the 1930s. International criminal courts and tribunals have made the prospect of a war criminal or *génocidaire* being called to account for their actions a reality, even if the full

implications may not be realised for years to come. Human rights courts and tribunals have played a major part in bringing about a substantial improvement in respect for human rights in much of the world.

Nothing in the present paper is intended to minimise the importance or the value of these developments. But it is important to see them in perspective. That requires consideration of the challenges facing the international adjudicative system. In this paper, I have tried to set out a few of those challenges. None of them is insuperable but they are nonetheless real.

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The Secret Life of International Law

Sir Daniel Bethlehem KCMG QC[*]

Keywords
International Law, Foreign and Commonwealth Office, Legal Adviser, Practice, Sources of Law, Litigation

Let me say at the outset, particularly as this is being recorded, that you will all be disappointed about the 'secret life' of international law. It will not be nearly as illuminating as the title suggests. I hope, though, that it will be revealing, not in a classified way, but revealing about some appreciations that I formed over the course of the past five years in the Foreign Office Legal Adviser's seat. As will become apparent, aspects of what I will be talking about could benefit from greater academic study and consideration.

Let me start off with a number of introductory remarks before I get to the meat of the topic. My opening observation, or question, is what constitutes international law as we know it? I do not here refer to Article 38 of the Statute of the International Court of Justice. We all know what this says. The question is rather an enquiry in practical terms about what it is that constitutes the law or legal obligation.

It seems to me that in fact there is a rather smaller subset of what constitutes the law and legal obligation than Article 38 of the Statute suggests. In practice, this comprises, first, treaties, namely, the text of the treaties. Second, there are principles of customary international law that have been declared by courts or by other authoritative bodies. By courts I mean both international courts and national courts. By other authoritative bodies, I mean, although with a question mark, bodies such as the treaty monitoring bodies in Geneva. Third, there are binding decisions of the UN Security Council. And fourth, perhaps, although a smaller category, there are binding decisions of other international organisations. In reality, everything else does not constitute law; it constitutes

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evidence of law. So, for example, when we look at General Assembly resolutions or the practice of states or the observations of foreign ministers, these go to the possible content of customary international law or to questions of treaty interpretation. In other words, they are evidence of law rather than dispositive statements of what the law actually is.

So, in practice, from the seat in which I was sitting until recently, dispositive law actually has a much smaller profile than one would expect, especially compared to the vast array of practice that there is on questions of the creation, interpretation and application of the law. From the perspective of a foreign ministry legal adviser, this is quite an important appreciation because you only need to open a newspaper or turn on the radio or the television to hear someone saying that this or that is contrary to the law and, unsurprisingly, such comments are often, if not mostly, inaccurate and certainly proceed without any appreciation of the nuance and complexity of the law. And, uniquely in the case of international law, the interpretation and application of the law by states is an important part of the creation and development of the law—through state practice, through *opinio juris*, through the conduct of states in the interpretation and application of treaties—for example, under some of the sub–provisions of Article 31 of the Vienna Convention on the Law of Treaties, such as subsequent practice in the interpretation of treaties—in their conduct relevant to the interpretation and application of Security Council resolutions, and so on.

Given this, if one is concerned to undertake a rigorous, considered exercise of deciding what the law is, you cannot simply look at the text of an instrument. You have to look more widely at a whole range of other things. And some of this is visible and collected, for example, in the British Yearbook, British practice. Most of it, however, is invisible to the world at large because it happens internally within governments and never needs to be, and sometimes would not appropriately be, made public. And that is what I mean by the secret life of international law. It is really the invisible life of international law, that part of international law that is not readily open to the public gaze. And this corpus of law, if I can put it in these terms, is very considerable in volume terms. It is also highly developed in its substantive detail. As you can imagine, for example, when it comes to advising on the drafting or the interpretation of Resolution 1973 in respect of Libya,[1] this is not a matter that will simply have merited a one–line piece of advice from a Foreign Office legal adviser. Further, it is highly relevant practice because it is part of the process of determining what the law is. But, for obvious reasons, it is not practice that gets a great deal of attention

[1] SC Res 1973 (2011), 17 March 2011, S/RES/1973 (2011).

in academic writings.

When I was the Director of the Lauterpacht Centre for International Law, before taking up my Foreign Office post, unsurprisingly, my sense of international law and of international relations was that international lawyers owned international relations. We had a view on everything. Our domain was the law and everything that we saw and did was directed through this prism. When I moved into the Foreign Office, however, having come from a private practice in which I advised many governments, even if not with quite the same proximity, it was immediately clear to me that I was responsible for a team of about 40 lawyers in an organisation of 14,000 who, given that scale, had a very considerable volume of work to do, and that we did not lead on everything, or indeed even on most things.

This said, let me identify a number of features of foreign ministry legal advisory teams, not particular to the Foreign Office but to many other governments as well.

First of all, legal teams are horizontal teams, a rather important consideration because most policy teams in foreign ministries are stove–piped, dealing, for example, with geographic matters (such as the Middle East) or thematic matters (such as international criminal justice). In contrast, Foreign Office or other foreign ministry legal advisers work horizontally across all of these teams. That means that a foreign ministry legal team is often better placed than most to make connections, both legal and policy, across different aspects of foreign policy.

Second, it is a team led at senior levels. Not all policy teams are led at senior levels. My position was a Director–General position, one of three or four just below the Permanent Under–Secretary, and overall, foreign ministry legal teams are generally structured at a higher level of seniority, given the professional training and experience of its members.

Third, the Legal Adviser will have direct access to and engagement with Ministers. In my experience, any time that I wanted or needed to see the Foreign Secretary, I was always able to do so.

Fourth, the law is a powerful tool. There is a clear imperative on the part of the United Kingdom government, and indeed other democratic governments, to act lawfully. So, when one speaks as a legal adviser, one has a very powerful voice around the table.

Fifth, that powerful tool is often not very well understood by others around the table. It can be a bit of a black box, with the result that there are not many around the table who can second guess your assessment. Whereas everyone may have a view on, for example, questions of development in South Sudan, not

everyone will be able to talk about the intricacies of the interpretation of Article 16 of the International Law Commission's Articles on State Responsibility dealing with questions of aiding and assisting.

Sixth, legal issues arise for consideration in virtually everything that is done in the foreign policy field.

Seventh, systemic questions arise frequently on issues of law because an approach that might be taken to the interpretation of legal obligations in respect of, let us say, Kenya and the International Criminal Court (ICC), and whether a Security Council resolution should be adopted pursuant to Article 16 of the Rome Statute of the ICC postponing an investigation, could immediately have implications in the case of Libya, in the case of Sudan, and perhaps elsewhere.

So, unusually, the law is cross–cutting in that way. But there are also equally important challenges facing lawyers and the law.

First, as you can see simply by the bare numbers—40 lawyers and 14,000 others—there are huge capacity issues. You cannot be everywhere at once. You can not know everything. And you may not always be able to get to grips with it in detail.

Second, there is a perception in some quarters that the law is only there to constrain rather than to shape and to facilitate. This is a cultural issue that needs to be addressed.

Third, the law is not well understood. It is highly technical—the flip side of what I was saying a moment ago about the advantages, sometimes, of being the owner of the black box.

Fourth, there are some big and interesting issues about the challenges of being influential in a foreign ministry. You must have access—there are a whole series of consideration relevant to access. You must have the trust of your principal. And you must have expertise.

Within this framework, the law is an integral and fundamental part of the policy decision–making process within foreign offices. Lawyers do not in most instances lead on policy, even if there may be some instances in which we might do so. For example, the drafting of the ICC Statute would be something on which the lawyers would lead, but in most instances lawyers do not lead on policy issues. The lawyers will not, for example, generally hold the pen on the drafting of Security Council resolutions or treaties, even if they play an important part in the process. We just could not do it, simply for reasons for capacity. But the lawyers tend to be consulted on, if not absolutely everything, virtually everything. Law therefore is a feature of, or it should be a feature of, every significant foreign policy decision that is made within an office such as

the Foreign Office.

To give you a number of examples of more contemporary relevance; there are legal issues associated with questions of how to address the Palestinian application for membership to the UN addressed to the Security Council. There are issues around the drafting and the interpretation of Security Council Resolutions 1970[2] and 1973[3] on Libya. There are issues around the provision of capacity and development training to foreign police forces. There are issues around the exploration and exploitation of resources in the waters around the Falkland Islands. There are questions about the legal implications of ICC arrest warrants. There are issues around the implications of judgments of the European Court of Human Rights, for example, the *Al Skeini*[4] and *Al Jedda*[5] cases for military operations in Afghanistan. And I could go on. This is a very long list indeed. So, you can assume that virtually every major foreign policy issue that is the subject of a decision coming out of the Foreign Office or the State Department or other foreign ministry will have had legal advice associated with it. And, as this suggests, there is therefore a vast body of practice and advice in foreign ministries on such matters as the interpretation and application of treaties; the content of customary international law, and how one goes about identifying such rules; the legal consequences of particular kinds of conduct; issues of accountability; systemic implications of, for example, persistent objection for the development of the law, etc.

Of some importance, the kind of advice given by foreign ministry legal advisory teams necessarily also addresses a range of other issues. It addresses areas in which the law is uncertain. It addresses areas where the law is evolving. It addresses circumstances in which there may be gaps in the law. And it addresses circumstances in which there may be no law at all.

Let me give you a number of examples in illustration. If you take the question of torture and ill–treatment, for example, very much in the public mind, and you look at the 1978 Judgment of the European Court of Human Rights in *Ireland v UK,* you will see that in respect of the conduct in question—conduct such as hooding, sleep deprivation, and other forms of ill–treatment associated with interrogation—the Court of Human Rights concluded that that conduct amounted to inhuman or degrading treatment.[6] When you fast forward 27 years, however, to the House of Lords Judgment in

[2] SC Res 1970 (2011), 26 February 2011.

[3] *Supra*, note 1.

[4] *Al Skeini v United Kingdom*, Decision of 7 July 2011, (2011) 53 EHRR 18.

[5] *Al Jedda v United Kingdom*, Decision of 7 July 2011, (2011) 53 EHRR 23.

[6] *Ireland v United Kingdom*, Decision of 18 January 1978, [1978] ECHR (Ser A, No 25).

2005 in *A & Others,* which concerned the use of evidence derived from torture, Lord Bingham, the Presiding Law Lord, indicated in his judgment that the conduct that was described by the European Court of Human Rights in 1978 as inhuman and degrading would be described today as torture falling within Article 1 of the Convention against Torture.[7] So, here you have an example of how legal appreciation on a bright–line issue has evolved over time.

To take another example, the application of the Geneva Conventions in circumstances in which there is no other state party involved in the conflict; a very big issue in the context of the application of the Geneva Conventions in the context of counter–terrorism military operations. Those of you who are familiar with the Geneva Conventions will know that Common Article 2 of the 1949 Conventions is cast in terms of a conflict involving two or more states parties. In such circumstances, even if one party does not respect the law, the other party remains obligated to do so. What happens, however, if there is not a second state party to the conflict, if it is a conflict between a state and a non–state actor? Do the Geneva Conventions apply? In similar vein, what about the issue of the law relevant to detention in circumstances of non–international armed conflict? Afghanistan is a non–international armed conflict. There is not a whole lot of dispositive law about these issues. So, what law does one advise one's military forces to apply?

There are many other areas in which the law is uncertain, where the law is evolving, where there are larger or smaller gaps in the law, or where there is just no law at all. So, the task of a foreign ministry legal adviser is not simply to advise on the application of the law. It is often to advise by analogy on what the law would say, or, if there is no law, on the consequences of the gap, and, of course, also often on litigation risks. And it is important to observe that while courts may be disinclined to say there is no law, sometimes there is no law!

One of the tasks of a foreign ministry legal advisers team, one of the many tasks, is to be the guardian of the bright lines. This is a nice phrase, amenable to appreciation by those to whom one is speaking. But, in truth, when one begins to look at this idea of bright lines of law, and take by way of example the brightest of those lines, the prohibition on torture, a principle of ius cogens, you can see from the example that I gave of the European Court of Human Rights decision in 1978[8] and the House of Lords decision in 2005[9] that in fact the bright lines of the law, when you come to bring them into sharper focus,

[7] *A and others v Secretary of State for the Home Department* [2005] UKHL 71, para. 53.
[8] *Supra*, note 6.
[9] *Supra*, note 7.

often have a more pixelated quality. When you look at them from a distance, they are sharp; the contours are clear. When you come to look at them up close, however, and put them under a microscope for purposes of advising on specific issues of conduct, the bright lines often devolve into pixels with the result that you may struggle to identify their edges with great precision. This is one of the big challenges for a foreign ministry legal adviser.

Against that background, let me address a number of rather more tangible topics: first, what is it that is not visible to the world at large. Second, I will say a word or two about something that I will call the challenge of indirect opposability and issues of acquiescence and protection. Third, I will say something about the challenge of precautionary advice. Fourth, I will say a very brief word about the issue of classified conduct, or highly sensitive conduct. Fifth, there is the issue of the challenge of persuading courts. Sixth, I will say something about the question of the supremacy of international law over domestic law. Finally, I will conclude with the question of whether conduct needs to be public in order to inform the law.

Let me start off with the issue of what is it that is not visible. What is it that you here in the room do not see? There may be many categories. I have identified five. The first category is things that happen that are not visible, and there is a good deal that happens that is not visible. I have found it striking over the course of the last number of years picking up a newspaper to find comment on things on which I have been working and seeing quite how wide of the mark the comment is. So, there is a lot that happens that is simply not visible.

Second, and perhaps more interesting, is that there is a great deal that does not happen, and it may not happen because of the law. How, therefore, does one construe the absence of something?

Third, there are the legal appreciations that are not seen that inform decision–making and conduct. For good and proper reasons, including principles of legal professional privilege, this element is seldom visible outside of government.

The fourth aspect that is invisible is the political decision–making process relevant to the legal advice. It is not the case that I would advise and that would be an end of the matter. My advice would be part of a wider array of advice relevant to a particular political decision.

The fifth category is rather broader—the coincidence, or the divergence, of bilateral and multilateral practice and appreciations. It is often the case, for example, that the United Kingdom will be acting alongside or together with others. If you look at the International Security Assistance Forces (ISAF) in

Afghanistan, for example, there are around 130,000 personnel from 50 states. Do we all agree on the interpretation of the ISAF resolutions? If not, what is the consequence of this disagreement? And, if we do agree, what is the consequence of that? Because, if you could collect together the practice of 50 states, or even simply of some of them specially affected, interpreting the ISAF resolutions that could be pretty weighty stuff in terms of state practice, opinio juris, practice in the interpretation of a treaty–like text, etc.

All of this practice and these appreciations are simply not visible outside of government, save in the relatively unusual instances in which it becomes visible because it is leaked or because it is disclosed in court proceedings or because it is disclosed in some other manner.

Let me give you a number of real world examples, and in doing so stress for the microphone that I am hypothesising. I am not delving into the practice of the British or the American or any other government.

What about issues, for example, to do with the engagement with governmental authorities in Somaliland or in Puntland on questions of anti–piracy or counter–terrorism? This may be an example of something that happens but is not visible. It would surprise me if this were not going on, given the proximity of Somaliland and Puntland to these issues.

As a separate issue, what about the absence of anything formal, said or done, concerning the status of Somaliland and Puntland? What does one infer, for purposes of the law, from the apparent absence of conduct?

Another example focuses on questions of interpretation of Security Council Resolution 1973 on Libya. Let us consider, for example, operational paragraph 4 of the resolution, the paragraph that addresses the protection of civilians. It is remarkable how ill informed the discussion is on these issues, concerning what the resolution is said to have addressed, or not addressed. It would not surprise you to hear that careful consideration will have been given to such phrases, in operational paragraph 4, as (a) 'all necessary measures', (b) 'to protect civilians and civilian populated areas', (c) 'civilian and civilian populated areas under threat of attack', and (d) 'while excluding a foreign occupation force of any form on any part of Libyan territory'. This last phrase, for example, is very precise legal language that refers implicitly to the Hague Regulations of 1907, the Fourth Geneva Convention of 1949, and other elements of legal appreciation. There is a significant amount of legal advice that goes into these issues.

Another example: what about the political decision to breach or abrogate a treaty? There may be all sorts of reasons why treaties are breached or abrogated. This happens frequently, for example, in the case of the WTO, and members are

subsequently found to be in violation. How is the assessment made, when a state decides that it is going to act in breach of a treaty commitment or to abrogate the treaty? Does it do so with the appreciation sharply in its mind that it is acting unlawfully and will take the consequences, but that there is a good reason for the action that it takes? Or does it do so on the basis of an appreciation that in fact it is acting lawfully, but that there is a degree of uncertainty? Or does it have a much clearer view of the legality of its position?

Another example is that which I gave you a moment ago in respect of the ISAF forces operating in Afghanistan: 50 states, 130,000 personnel; there on a number of possible legal bases for the military action, including the consent of the government of President Karzai, the inherent right of self–defence, and the authorisation of the UN Security Council on the basis of a series of resolutions which authorise 'all necessary measures'. How are these elements to be interpreted? A sense of each of these will be fundamental to our collectively forming a considered appreciation of what the law is and of the legality of conduct. In most instances, however, what we see addressed in the media, and perhaps also in academic articles, turns only on the visible terms of the text of the relevant instrument or legal proposition. When it comes to the interpretation of the legality of ISAF conduct, therefore, the tendency, even amongst those well informed on the issues, is simply to look at the resolution and extrapolate from that; the meaning turning simply on a plain and ordinary construction of the words on the page. There is seldom an appreciation that the exercise of interpretation is more intricate than that.

We come, then, to the topic of what I describe as the challenge of indirect opposability and issues of acquiescence and protection. There is a great deal of binding decision–making out there, and of conduct that is not directly opposable to a particular state, for example, the United Kingdom. Let me give you two examples, but there are multitudes. One is the *Wall* advisory opinion of the International Court of Justice, not binding in respect of the UK both because it is an advisory opinion and because it did not address UK conduct.[10] In paragraph 106 of that advisory opinion, the Court, in a couple of sentences, addressed the inter–relationship between international humanitarian law and human rights law, and did so with the broadest of brushes—there are two bodies of law; this suggests that there are three possible ways of interaction: either one applies or the other applies or they both apply. But when you sit in the kind of seat that I was sitting in until recently, you have to make sense of this, and

[10] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 3.

statements of this kind hardly give any guidance at all for the practical purpose of advising a state.

Take another example, perhaps rather sharper, *Guyana/Suriname*, a maritime boundary delimitation arbitration concerning two states far distant from any UK interest.[11] Plugged into the middle of that arbitration award, however, are a couple of paragraphs, almost gratuitously, which make some observations on the application of Article 2(4) of the UN Charter prohibiting the threat or use of force in circumstances in which a coastal protection vessel from one state crossed the maritime boundary of the other.

Let me put the following observation very much in personal terms so that there is no mistaking that I am not talking on behalf of any state. In my view, both of the observations I have just noted are fundamentally flawed as a matter of law. And if you think about the volume of other judicial and arbitral judgments and awards, you can appreciate that there is a tremendous amount of dispositive law out there, in the sense that it is binding upon someone, but that is not opposable directly to the UK, and is not in fact opposable to any state other than those directly concerned.

What does one do if you are the UK or some other indirectly interested state in such circumstances, both to protect your own interests and to ensure that the development of the law stays on a sensible track? These statements or determinations are not directly opposable to you, but they nonetheless form part of a growing body of dispositive legal principles that in many cases is of very variable quality. A state such as the UK could object, but the consequences of objection are very significant. First of all, if you take the *Guyana/Suriname* arbitration, can you just imagine the consequences if the UK or the US or Australia or some other state had said 'we think that this arbitration award is wrong, or is wrong in respect of these paragraphs'? Were we to do so, we would be intruding into a private dispute settlement award between two other states with potentially all sorts of problematic repercussions. Second, it would be utterly impossible for us to be comprehensive in an approach of this kind. The volume of material that is out there is both considerable and not always readily visible. But if we were not comprehensive, the question that would inevitably arise would be whether our silence on some or other issue would be regarded as acquiescence. Third, if a state is going to object, it is not simply a matter for the foreign ministry legal adviser to speak out in some or other forum, without having first discussed and cleared the statement carefully with others, to say that this or that point is problematic. It has to be the state speaking, formally,

[11] *Guyana/Suriname Arbitration* (2007) 139 ILR 566.

properly considered, cleared and authorised. The consequence of all of these considerations is that in the vast majority of cases states simply say nothing. But the problem remains that these dispositive appreciations of variable quality ultimately inform the development of the law.

Moving to my next category, the challenge of precautionary advice. When one sits in a foreign ministry legal adviser's seat, you are advising a client; you are advising the state. Legality is paramount; not for reasons of lip service, and not simply for the reason that we are a democratic state whose conduct is based on law, but also because such issues engage wider governmental considerations, including of a reputational character, for both governments and individuals. Governments may stand or fall by reference to considerations of legality.

As a foreign ministry legal adviser, you must advise on what the law is today. But, you should also advise on the uncertainties and the risks that may be associated with your advice, because the law may be unclear. You ought to advise on the consequences of your advice turning out to be wrong. You ought to advise on the potential for the evolution of the legal principle in question away from your interpretation if the matter came before a court, and this against the background of a significant increase in litigation against government. So, if you are a responsible and sensible legal adviser, an element of your advice will be precautionary: 'Secretary of State, there is a significant risk that if you act in this way, and it goes to court, you may be found to be in breach with all the risks, political, reputational, and other that this may bring'.

But a government, as with any other party, is entitled to act on the basis of the law as it is, not required to act on the basis of the law as it might evolve to become at some point in the future. And the challenges of precautionary advice are both that it is speculative and that it speeds up the evolution of the law in unpredictable ways. One person, with a relatively narrow vision, sitting in a bubble in a foreign ministry legal team, speculates on what the law might evolve to be if various uncertain circumstances come to pass.

This is an important challenge for government legal advisers. It is also something that needs to be factored in when considering the question of what the law is for purposes of assessing governmental action. Sometimes a government may act in a precautionary manner, not because it believes that its conduct is required by law but rather because it wishes to avoid political risk.

Perhaps the best example of this is the issue of the interpretation of Article 16 of the International Law Commission's Articles on State Responsibility dealing with aiding and assisting. The language of that text is limited, hinged on knowledge. And if you have a look at the judgment of the International Court

of Justice in the *Bosnian Genocide* case, it talks about actual knowledge in the case of genocide.[12] It is therefore entirely appropriate for a government to take the standard of aiding and assisting as being that of actual knowledge and belief; also because this is the standard that is consistent with domestic criminal law. This notwithstanding, on many issues, the view may be taken that if this or that matter came before a court, the court may frame the issue not in terms of what was actually known but rather in terms of what ought reasonably to have been known, i.e., the concept of constructive knowledge. In such circumstances, how should one properly grapple with the issue of the cascading evolution of international law in consequence of precautionary legal advice?

Let me move briefly to the issue of classified conduct. I do not propose to say a great deal about this for obvious reasons but only to underline a couple of points.

A great deal of what states do, and do properly and legitimately, is highly sensitive, both internally within the government and in their engagement with other governments. And this is not simply in the military or intelligence fields but across the wider panoply of what one might call the national security and international relations space.

This conduct, even more so than the other kinds of conduct that I have been addressing, really is very largely invisible. But it is nonetheless the case, absolutely without question, that, particularly in these fields, a great emphasis is given to considerations of law. So here too there is a whole body of specialist practice that is for the most part utterly invisible to the outside world.

Turning to the challenge of persuading courts. There is an increasing volume of litigation, especially before domestic courts. And there are many cases that go to court in which the state may have an interest but may have no involvement at all in the proceedings and indeed may not even be aware of them. For example, in proceedings before the Family Division of the High Court dealing with issues of child abduction or forced marriages, the litigation may be between two private parties, not involving the state, but it may nonetheless involve not simply questions of the interpretation of a treaty but perhaps also other quite sensitive issues of foreign relations, particularly if the government may be required to take certain action at the direction of the court. By way of example, I recall one instance in which I was in receipt of correspondence that said that the High Court in case X, a case we knew nothing about, had directed that the Ambassador in State Y should provide diplomatic refuge to abducted

[12] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43.

wife Z who had been taken into that jurisdiction against her will. This raised big issues of both law and international relations relating to refuge in diplomatic premises, as well as other issues addressed to us by the court but until that point completely outside of our purview.

There is a whole range of questions that arise from this. First, how does one keep track of these issues? Second, how, if indeed it is appropriate, does one make one's views known? Third, what are the consequences of not making one's views known? Fourth, there is the challenge of addressing international law to a national court, or indeed an international court. And, just to state the obvious, taking the issue of a national court, they tend not to be expert in international law, and may additionally not have any expertise at all in the kind of practical matters that may be in issue. If you take issues of intelligence, for example, there has been a good deal of litigation in this area over recent years. There is a very deeply developed practice in the bilateral/multilateral intelligence field. And, certainly when I first arrived in the Foreign Office, I did not have any real sense of the intricacy of such issues. How is a judge, engaging with such issues at most on an occasional basis, to deal with such matters in a sufficiently well informed manner? Fifth, in a dispute before a court, the court is concerned largely with the dispute between the parties before it and the narrow question with which it is faced. It is not invariably concerned with systemic/strategic issues. How, though, are what may be highly important systemic/strategic issues to be addressed in the proceedings? Sixth, there are also particular challenges associated with addressing a court on highly sensitive and classified matters.

This leads to two brief concluding observations. The first concerns questions of supremacy. As an international lawyer, the proposition is in our DNA that international law prevails over domestic law. That is the notion of supremacy, at least as it applies in the international space, and that is the approach that one would expect the International Court of Justice to take.

In practice, however, the position may be rather different, particularly in areas concerned with national security, because a state is likely to be driven by appreciations of its own law, even if its own law is informed by international law. And we, as international lawyers, in my view, need a much more sophisticated appreciation of how national law and international law interact than we have today. We cannot simply rest on the peg of supremacy. It does not adequately and sufficiently address the issues, and it means that our voice is less weighty when it comes to a discussion of these matters.

Finally, let me conclude with a question. Does conduct need to be public in

order to inform the law?

It clearly must be public, at one level, for reasons of predictability, for reasons of accountability, for reasons of opposability, and for reasons of objection. So, at one level conduct must be public in order to be appreciable for reasons of the law. But this does not detract from the weight of the invisible conduct, which is immensely important and relevant. My concluding observation would therefore simply be that in very many cases one cannot make assumptions about what the law is, or reach considered conclusions on whether conduct is lawful or unlawful, until one has considered the invisible conduct, as well as the visible. The secret life of international law has a tremendous bearing on the visible life of international law. I am not an astronomer or a physicist, but I understand that black holes have the ability to assert gravitational or other effects even though they are invisible. They are there, and are influential, even though they cannot be seen. But their existence can be deduced, and they can be identified, by observing their effects. It is the same with the secret life of international law. It may not be visible, but it is there, it is weighty, it has effects, and it can, with sufficient scholarship and informed enquiry, be deduced and identified.

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Twin Peaks: The Hersch Lauterpacht Draft Nuremberg Speeches

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During 1945 and 1946, Hersch Lauterpacht was actively engaged in preparing extensive sections of the opening and closing speeches delivered by Sir Hartley Shawcross at the Nuremberg International Military Tribunal. In that role, which focused largely on addressing legal rather than factual issues, he made a singular contribution to the arguments and outcome.

His involvement in the Nuremberg process followed earlier advices he had given to Robert Jackson and Hartley Shawcross on other matters.[1] Even before the Tribunal was proposed, he prepared a scholarly piece on war crimes, and by the summer of 1945 had completed his book on a Bill of International Rights, recognising the role and rights of the individual in international law. In July 1945 he was consulted by Robert Jackson on the crimes to be included in the Nuremberg Statute, and came up with the idea of inserting the phrase "Crimes against Humanity" in Article 6(c). In August 1945, he was asked by the British Foreign Office to join the British War Crimes Executive, a body tasked with planning and preparing for the prosecution of German officials under the London Charter.[2] In this capacity, he had several meetings with the Chief British and American prosecutors, Attorney General Sir Hartley Shawcross and Robert H Jackson, to discuss how the Trial would proceed.

Lauterpacht attended the Trial on three occasions. He was present in Nuremberg when it opened on November 20th 1945, and reviewed the draft British case that dealt with the planning and waging of a war of aggression (count two on the indictment). He considered the case "was bad to the point of being ridiculous" and was asked to prepare a new draft.[3] Lauterpacht spent the period from November 24th to 29th preparing what became Parts I and III

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[1] E. Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge University Press, 2010), at 131–2, 135, 180–2, 188–9.

[2] *Ibid.*, at 272–3. See also *The Times*, 15 September 1945, at 2, for a full list of members.

[3] Lauterpacht, *supra* note 1, at 275–6, HL to RL, 29 November 1945.

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of the Shawcross' opening speech.[4] The speech delivered by Shawcross on 4 December 1945, adopts "[w]ith some changes of language to avoid too obvious a change of style", a great part of Lauterpacht's original text.[5] As his son, Sir Elihu Lauterpacht has noted, "[a] line-by-line comparison of Hersch's draft with what Shawcross actually said shows that, of the fifteen printed pages of the legal argument, twelve were drawn almost verbatim from Hersch's draft."[6]

On 17 May 1946, Shawcross wrote to Lauterpacht requesting assistance on the preparation of the British closing speech.[7] Further correspondence took place and, on 29 May, Lauterpacht travelled to Nuremberg to consult with Sir David Maxwell Fyfe before reporting to Sir Hartley on 3 June.[8] On 6 June 1946, Sir Hartley once again wrote to Lauterpacht and asked him to prepare a draft speech that would "deal with the legal and historical part of the case, which I want to make the main feature of the speech."[9] Lauterpacht subsequently prepared a draft and sent 76 pages of typed foolscap to Shawcross on the 10 July 1946 (the original handwritten manuscript runs to 109 pages).[10] Shawcross delivered his final speech on 26 and 27 July 1946, adopting significant portions of Lauterpacht's draft. Of the sixteen pages devoted to the law in the final speech (sixty-one pages were devoted to the facts, of which Hersch was specifically asked not to deal with), "twelve pages (three-quarters) were drawn from Hersch's draft."[11]

Shawcross expressed his gratitude for the assistance:

> Now that the Nuremberg trial is finally over I should like, both officially and personally, to thank you for the important part which you played in it. For your help to me personally, in regard to the speeches and other matters, I shall always remain most grateful.
>
> I hope that you will always feel some satisfaction in having had this leading hand in something which may have a real influence on the future conduct of international relations...[12]

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[4] *Ibid.*, at 276.
[5] *Ibid.*
[6] *Ibid.*, at 277.
[7] *Ibid.*, at 293, Sir Hartley Shawcross to HL, 17 May 1946.
[8] *Ibid.*, at 294.
[9] *Ibid.*, Sir Hartley Shawcross to HL, 6 June 1946.
[10] *Ibid.*, at 295, HL to Sir Hartley Shawcross, 10 July 1946.
[11] *Ibid.*, at 278.
[12] *Ibid.*, at 297, Sir Hartley Shawcross to HL, 8 October 1946.

The originals of the drafts have remained, since Lauterpacht's death, in the Hersch Lauterpacht Archives at 7 Herschel Road, Cambridge. These have been seen by only a small number of scholars, and have never before been published in full. The speeches are a source of great inspiration. They enable the reader to gain an insight not only into the law and politics of the tribunal, but also into the mind of a great international lawyer who learnt, between his first and second attendance at the Trial, that he lost every member of his family that remained in Lwow (Lemberg), with the exception of his niece Inka Katz. It is a remarkable feature of the draft of the closing speech that the text almost wholly excludes any personal connection to the terrible facts that underpinned the legal arguments he crafted.

The opening speech deals primarily with the prohibition against aggression in international law and the crime against peace under the London Charter. The closing speech is broader and discusses all three crimes under the Charter, as well as procedural matters, the law to be applied by the Tribunal, and certain potential defences raised by the defendants. It is possible to identify four broad areas of argument: (i) the prohibition of aggression and the crime against peace in existing law; (ii) considerations relating to state and individual responsibility; (iii) the rejection of sovereignty as a defence and bar to individual criminal responsibility; and (iv) the fairness of the Trial, having regard to its aims.

1 The prohibition of aggression and the crime against peace

Lauterpacht began his opening speech with the claim that the notion of a war of aggression as an international crime "is not in any way an innovation".[13] In Part I, he spends six pages discussing several instruments referring to "aggression"—these were adopted verbatim by Shawcross—to demonstrate that war was illegal, referring to the "solemn, rigid, and unequivocal obligation of the General Treaty for Renunciation of War".[14] He explains that the prosecution of a crime of aggression is merely a procedural means to enforce existing law, and not an *ex post facto* crime: it means that individuals cannot hide from their violations behind the veil of state. Yet it is clear that the *ex post facto* argument was of considerable concern to Lauterpacht; this is evident from letters to the

[13] HL Draft Opening Speech, Part I, typed foolscap, at 17; 49 of the final speech.
[14] *Ibid.*, typed foolscap, at 17; not contained in the final speech.

Foreign Office Legal Advisors, [15] his draft of *Oppenheim*[16] and the closing speech.

In the closing speech, Lauterpacht is more defensive. He explains that the charge of war crimes "is by itself sufficient to seal the fate of these defendants",[17] but "if we were to-day called upon to frame the Charter", we would "not hesitate to include crimes against the peace and crimes against humanity".[18] Nevertheless,

> …there is no doubt that in the minds of some persons and circles, including counsel for the defence, these two charges of article 6 have given rise to questioning of the legal basis and of the propriety of the indictment. It is with regard to these counts that the shrill argument of retroactivity and of post facto legislation has been raised repeatedly and insistently.[19]

According to Lauterpacht, "we do not forget that they are additional, though not secondary, to the principal charge of the Charter—that of violations of the laws and customs of war."[20] He dedicates several pages to crimes against humanity[21] and key examples of war crimes: mass shooting of hostages, aerial bombardment for the sole purpose of terrorizing the civil population; and the extermination and murder of civilians and non-combatants in occupied territory (he never refers to the concept of genocide, as coined by Rafael Lemkin and referred to in the Indictment (in relation to war crimes) but not the Statute,

[15] Lauterpacht, *supra* note 1, at 273, HL to Patrick Dean, 20 August 1945 ("The main criticism which the Government may have to meet in this matter will be that (c) [that the initiation of a war of aggression can properly be regarded as the principal instance of an international criminal act]—as accepted in Article 6(a) of the Agreement—is an innovation." Later in the letter, Hersch frankly states that "Paragraph (c) of Article 6 of the Agreement—Crimes against humanity—is clearly an innovation. It is a fundamental piece of international legislation affirming that international law is not only the law between States but also the law of mankind and that those who transgress against it cannot shield themselves behind the law of their State or the procedural limitations of international law.").

[16] Lauterpacht, *ibid.* An advanced copy of *Oppenheim,* Volume I, 6th edition, was sent to Patrick Dean at the Foreign and Commonwealth Office ("Its purpose is to show: (a) that there is in international law such a thing as criminal responsibility of States; (b) that the criminal responsibility of States means criminal responsibility of the individuals who are the organs of the State; and (c) that the initiation of a war of aggression can properly be regarded as the principal instance of an international criminal act.").

[17] HL Draft Closing Speech, typed foolscap, at 10–11; not in the final speech

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*, at 12; not in the final speech.

[21] *Ibid.*, at 48–50.

and makes almost no reference in the two speeches to the killing of particular groups, including Jews, a reflection no doubt of his desire to avoid the reification of groups as such).[22] Notwithstanding this "secondary" status, Lauterpacht is clear that "in a very real sense, the crime of war had become the parent of and the opportunity for the war crimes".[23]

2 State responsibility and individual criminal responsibility

Although Nuremberg is often remembered as the trial at which individuals were held responsible for violations of international law, much of Lauterpacht's attack on statehood is left for the closing speech. His draft weaves between individual and state responsibility. For example, having referred to the *Trail Smelter* arbitration between the United States and Canada,[24] he concludes that:

> There is thus nothing startlingly new in the adoption of the principle that the State as such is responsible for its criminal acts. In fact, save for the reliance on the unconvincing argument of sovereignty, there is in law no reason why a State should not be answerable for crimes committed on its behalf…[25] The Charter lays down expressly that there shall be individual responsibility for the defendants for the crimes… The State is not an abstract entity. Its rights and duties are the rights and duties of men. Its actions are the actions of men. It is a salutary principle of the law that politicians who embark upon a war of aggression should not be able to seek immunity behind the intangible personality of the State…[26]

In the final pages of his draft, Lauterpacht remarks that, "[t]hey, the defendants, were the State. They, in their deeds, embodied the greatest perversion, known in the history of man of the true meaning and function of the State. Even in the

[22] *Ibid.*, at 31–3.

[23] *Ibid.*, at 35; not in the final speech.

[24] Koskenniemi has noted that the analysis of the *Trail Smelter* arbitration is "strangely out of place, yet included as an indication of the willingness of (some) states to accept liability for breaches of international law": M. Koskenneimi, 'Hersch Lauterpacht and the Development of International Criminal Law' (2004) 2 *Journal of International Criminal Justice*, 810–25, at 821.

[25] HL Draft Opening Speech, Part III, typed foolscap, at 3; 57 of the final speech.

[26] *Ibid.*, at 4; 58 of the final speech.

course of this trial the good of the German State remained for them the supreme test and the final justification of conduct."[27]

3 Rejecting state sovereignty as a defence

In Part III of the opening speech, Lauterpacht mounts a strong attack on sovereignty:

> For the first time in history we see a State in the dock. We behind the Government of what was a sovereign nation and most of the moving agents of its destructive malevolence placed as accused at the bar of mankind. The mystical sanctity of the sovereign State, shorn of the paraphernalia of pomp and power, is here arraigned before the judgment of the law.[28]

Shawcross dropped this text. In the second part of his closing speech, Lauterpacht once again takes up the argument that international criminal responsibility "is incompatible with the basic assumption of international law, namely with the sovereignty of States".[29] He states that "[i]t is not easy to see why the sovereign will of States should be subject to responsibility in contract and tort, but not with regard to crimes. Many theories have been made to rest upon the broad shoulders of sovereignty, but these theories have not always been accurate."[30]

Indeed, "the will of the Nazi State as formed and governed by these defendants" is not by the mere fact that it was the will of the State necessarily entitled to be regarded as law and as an absolute justification of acts committed in pursuance thereof."[31]

In the final part of his closing speech, Lauterpacht deals with the act of state doctrine and the defence of superior orders. Although the Charter rejected both defences, Lauterpacht felt that it was the duty of the prosecuting powers to justify their exclusion by reference to general international law. He directs his attack towards state sovereignty:

[27] HL Draft Closing Speech, typed foolscap, at 74–5; not in the final speech.
[28] HL Draft Opening Speech, Part III, typed foolscap, at 2–3; not in the final speech.
[29] HL Draft Closing Speech, typed foolscap, at 44; not in the final speech.
[30] *Ibid.*, at 45–6; not in the final speech.
[31] *Ibid.*, at 50; not in the final speech.

> In no other sphere is it more necessary to affirm the principle that the rights and duties of States are the rights and duties of men and that unless they are the rights and duties of individual persons they are the rights and duties of no one. In no other sphere is it more imperative to disdain the artificial distinction between the corporate entity of the State and those who act on its behalf. The Charter of the Tribunal has ignored that distinction. In doing so it has confirmed and clarified a legal doctrine of transcending beneficence and authority.[32]

4 Fairness

Lauterpacht begins his closing speech with a defence of the Tribunal itself, explaining the sources of law applied by the tribunal—relying on Article 38 of the PCIJ[33]—and the fairness of the trial itself, specifically the safeguards accorded to the defendants.[34] He ends the closing speech by reflecting on the important aims of the trial, which for Lauterpacht were to "declare and clarify such rules and principles of the law of nations as are relevant to the Indictment and to the interpretation of the provisions of the Charter":[35] "[f]or this is a trial not only before this Tribunal, but also before the enlightened conscience of the entire civilized world."[36]

5 Conclusion

The two draft speeches he prepared for Sir Hartley Shawcross merit careful consideration. The astute reader will pick up themes addressed in Lauterpacht's seminal work—*The Function of Law in the International Community*—the preface to which emphasises his interest in the place that individuals should have in the evolving international legal order. "The well-being of an individual is the ultimate object of all law", he wrote in 1932, "and whenever there is a chance of alleviating suffering by means of formulating and adopting legal rules, the law ought not to abdicate its function in deference to objections of apparent cogency and persuasiveness".

[32] *Ibid.*, at 59; not in the final speech.
[33] *Ibid.*, at 7; not in the final speech.
[34] *Ibid.*, at 8; not in the final speech.
[35] *Ibid.*, at 71; not in the final speech.
[36] *Ibid.*, at 73; not in the final speech.

These two drafts, which are here made generally available for the first time, provided an unhappy opportunity to put the words into practise. Taken together, they are as significant as anything else he ever wrote, helping to define the current international legal order, with its commitment to limits on state sovereignty, an emergent international criminal justice system, and the real protection of individuals.

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Draft Nuremberg Speeches

Sir Hersch Lauterpacht, QC, FBA, LLD[*]

Opening speech–Part I

In pursuance of Article 6(a) of the Charter under which this Tribunal is constituted,[1] the Second Count of the Indictment states as follows:

> All the defendants with diverse other persons, during a period of years preceding 8th May, 1945, participated in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances.

It is my duty as Representative and Chief of Counsel for the United Kingdom to present this part of the Indictment on behalf of the four States parties to the Agreement of 8 August, 1945[2], setting up this Tribunal. The formidable and unprecedented catalogue of wars of aggression with the planning, preparation, initiation and waging of which the defendants are charged, is set forth in the Particulars of the Second Count of the Indictment. These wars were:[3] against Poland, 1st September, 1939; against the United Kingdom and France,

[*] Sir Hersch Lauterpacht was Whewell Professor of International Law, University of Cambridge (1938–1955) and a Judge at the International Court of Justice (1955–1960). A line in the outer margin indicates that the text was used verbatim by Sir Hartley Shawcross in the final speech delivered at Nuremberg. Wherever possible, we have tried to preserve the original text and formatting used by Sir Hersch Lauterpacht. Footnotes refer the reader to the relevant pages of the final speech. The *Cambridge Journal of International and Comparative Law* is very grateful to Professor Sir Elihu Lauterpacht CBE QC LLD for his kind permission to publish the original draft, and to Bart Smit Duijzentkunst, Maria Fanou, Yin Harn Lee, Andrew Sanger and Rumiana Yotova for preparing the manuscript for publication.

[1] 1945 Charter of the International Military Tribunal, annexed to the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 280.

[2] *Ibid*.

[3] International Military Tribunal, *Speeches of the Chief Prosecutors* (His Majesty's Stationery Office, 1946), at 48.

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3rd September, 1939; against Denmark and Norway, 9th April, 1940; against Belgium, the Netherlands and Luxembourg, 10th May, 1940; against Yugoslavia and Greece, 6th April, 1941; against the U.S.S.R., 22nd June, 1941; and against the United States of America, 11th December, 1941.

The long list of treaties, agreements, and assurances in violation of which these wars of aggression were undertaken is set forth in Appendix C of the Indictment. They include the Hague Conventions relating to resort to pacific procedure prior to recourse to war,[4], to the peace treaties between Germany and the Allied and Associated Powers and the United States of America,[5] to the Locarno Agreement of October 1925,[6] to the express assurances given by Germany to countries which she invaded and subjugated in 1939, 1940, 1941[7] and—primarily and above all—to that fundamental enactment of international society the General Treaty for the Renunciation of War.[8]

The task of the prosecution under this second Count of the Indictment falls into two parts: The first is to establish the fact of the violation of international undertakings, general or particular, in which Germany renounced any right which she may have possessed to resort to war. In this respect the task of the prosecution under Count II of the Indictment is, and has been, to a large extent covered by the presentation of Count I in so far as it refers to the gigantic, malevolent and ruthlessly executed conspiracy to bring about a war of aggression in violation of repeated and solemnly undertaken international obligations. For these breaches of international law were not isolated phenomena. They were not sporadic transgressions of a State driven to desperate means by unforeseen emergencies in defence of its very existence. They were the result of a preconceived long-range plan executed, with scientific precision, with a malice and a premeditation unparalleled in the annals of

[4] 1899 Hague Convention for the Pacific Settlement of International Disputes, 187 CTS 410; 1907 Hague Convention for the Pacific Settlement of International Disputes (1907 Hague Convention No. I) 205 CTS 233; 1907 Hague Convention Relative to the Opening of Hostilities (1907 Hague Convention No. III), 205 CTS 263; 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907 Hague Convention No. V), 205 CTS 299.

[5] 1919 Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), 225 CTS 188.

[6] 1925 Treaty of Mutual Guarantee (Treaty of Locarno), 54 LNTS 289.

[7] Appendix C lists assurances to Austria, the Netherlands, Belgium, Czechoslovakia, (including the 1938 Munich Agreement), Norway, Luxembourg, Denmark, Yugoslavia and the USSR (specifically the 1939 Treaty of Non-Aggression, also known as the Molotov-Ribbentrop Pact).

[8] 1928 General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), 94 LNTS 57.

history. That plan was unfolded in overwhelming detail in the presentation of the First Count of the Indictment by Counsel for the United States and by his associates.[9] As the violations of these international undertakings are inseparable from the plan and the conspiracy to violate them, there must be some unavoidable overlapping in the elaboration of the first two Counts of the Indictment. That overlapping I will try to reduce to a minimum compatible with a coherent presentation of the charge. Some such slight degree of repetition, it is submitted, may not be altogether misplaced. It is imperative, accusing as we do before the bar of history, that the crime against the peace of the world—the crime of the greatest war which has brought civilization to the very brink of ruin—be proven up to the hilt. The question of "war guilt" must not be permitted to linger for decades in the realm of controversy or doubt. It must be settled by this Tribunal with authoritative finality. So persuasive and so overwhelming must be the impact of the evidence put before this Tribunal that enlightened public opinion and the conscience of the world will be able to brush aside, with quiet and righteous contempt, the objection that the verdict was given by a tribunal set up by and composed of the nationals of the victorious States.[10] For these victorious States, whose cause has been identified with the survival of the law of nations, represent the vast majority of the inhabitants of the earth. It is not open to the defeated German nation, after it has defied, outraged, and brought upon itself the effective wrath of practically the entire civilized world, to make the legal and moral validity of any judgment passed upon it conditional upon its being pronounced by a neutral tribunal. There were, with insignificant exceptions, no neutrals left in a world which had risen to vindicate the violated rule of law and decency and to defend the very bases of its civilized existence. But because it is a Tribunal set up by the victorious nations, though acting in a very real sense on behalf of the enduring interests of the international community at large, we deem it our duty to present the evidence with an elaboration which history, far from considering an excessive or repetitive, will surely judge to be commensurate with dignity and with the necessities of this great occasion.

Our second task, though more general, we deem to be no less essential. The Charter has stigmatized the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international

[9] The US Chief Prosecutor was Robert H. Jackson, Associate Justice of the US Supreme Court.

[10] The judges of the International Military Tribunal were Sir Geoffrey Lawrence (President, UK), Sir Norman Birkett (Alternate, UK), Francis Biddle (US), John J. Parker (Alternate, US), Henri Donnedieu de Vabres (France), Robert Falco (Alternate, France), Iona Nikitchenko (USSR) and Alexander Volchkov (Alternate, USSR).

treaties, agreements, and assurances, as being crimes against the peace, that is to say, as being international crimes coming within the jurisdiction of the Tribunal. The Charter has removed the initiation and execution of an aggressive war in violation of treaties from the category of a mere unlawful act under international law. It has placed them in the same category as ordinary war crimes and crimes against humanity. For the most obvious of reasons the Charter has put them first in the enumeration of crimes to be judged by the Tribunal. For the crime against the peace, the crime of war, was in the Second World war the parent and the occasion for the horrors of war crimes and of crimes against humanity. The term "crime against the peace" may create in some minds the impression of novelty. Moreover, inasmuch as the preparation and waging of war has been generally regarded as an action of the State, the Charter has deliberately adopted the notion that the State is capable of criminal conduct. Inasmuch as the Charter has expressly provided, in the second paragraph of Article 6, for individual responsibility for that crime, it has accepted a principle which, though not altogether alien to international law as hitherto practiced, is apt to be regarded as an innovation.

Now it would be entirely sufficient and proper for the prosecution to rely on the letter and the spirit of the express provisions of the Charter and to limit itself to showing that the wars into which Germany plunged mankind were wars of aggression and wars in violation of treaties, engagements and assurances. It is not incumbent upon the prosecution to prove that wars of aggression and wars in violation of treaties are or ought to be an international crime. The Charter has prescribed that this is so, and the Charter is the law of this Tribunal.

Yet, though this is the clear and mandatory law governing the jurisdiction of the Tribunal, we feel that the prosecution would not be fully acquitting itself of its task unless we made the effort, in the abiding interest alike of international justice and morality, to put in its proper perspective that apparent innovation of the Charter. The right of the belligerent to punish nationals of the enemy for transgressions against the laws and customs of war has been firmly established in international law for centuries. In this respect the Charter is declaratory of the law of nations. It embodies a significant concession in favour of the accused inasmuch as instead of facing a summary trial by a purely military court of one belligerent, they enjoy all the safeguards and all the indulgence of public judicial proceedings, almost literally within the hearing of the whole world, under the aegis of a high international tribunal of unimpeachable authority, learning and experience. Similarly, with regard to crimes against humanity, the community of nations has in the past claimed and successfully asserted the right to intercede on behalf of the violated rights of man trampled upon by

the State in a manner calculated to shock the moral sense of mankind. The right of humanitarian intervention has for a long time been considered to form part of the law of nations. In this respect, too, the Charter merely develops a pre-existing principle. It provides not for repression but for punishment of crimes, including those committed by Germany in Germany against her own nationals, which have stirred and sickened the conscience of mankind to the point of doubting the human nature of the perpetrators of these horrors unknown in the annals of individual or collective crime.[11]

However, with regard to crimes against peace—the crime of war—covered by the second Count of the Indictment, we feel it incumbent upon the prosecution to comment, with some degree of elaboration if necessary, upon the provision of the Charter which is the foundation of this part of the Indictment. It is with regard to this aspect of the Charter that the public opinion of the world and, possibly, the judgment of history may, unless enlightened by the prosecuting nations responsible for this Indictment and the judgment of this Tribunal, be warped by plausible catchwords and by a distorted and uniformed refinement of a sentiment of justice towards these defendants. It is easy to fall a prey to such phrases as that resort to war in the past by sovereign States has never been a crime; that is has been of the essence of the prerogatives of sovereignty; that the Charter in retroactively constituting wars of aggression a crime has imitated one of the most obnoxious doctrines of National-Socialist jurisprudence, namely, post factum legislation; that the Charter is in this respect reminiscent of bills of attainder; and that it is no more than a measure of vengeance, subtly concealed in the garb of judicial proceedings, which the victor wreaks upon the vanquished.[12] It would be easy for the prosecution to ignore these objections. It would be entirely within its legal right in insisting that the Charter is the law of the Tribunal and that it is in no need of any sort of apologia. But it would be contrary to the fitness of things for us to confine our purpose within such a narrow compass. Neither is it our wish to deny that some of the aspects—though not the principal aspect—of this part of the Charter are of significant novelty. But it is our view of the law and our conviction—which we affirm before this high Tribunal and before the opinion of the world—that, in essence, the provision of the Charter which constitutes wars of aggression an international crime is not in any way an innovation. It provides a competent jurisdiction for the punishment of what not only the enlightened conscience of mankind but also international law as enlarged and developed in the period

[11] *Speeches of the Chief Prosecutors*, *supra* note 3, at 48.
[12] *Ibid.*, at 49.

between the two World Wars regarded as a crime for many years before the Charter of 8 August, 1945, constituting this Tribunal became part of the public law of the world.[13]

The terms "aggression" and "war of aggression" are not an invention of the Charter. They have figured prominently in numerous treaties, in governmental pronouncements and in declarations of statesmen in the period preceding the Second World War. In treaties concluded between the Union of Soviet Socialist Republics and other States—such as Persia (1 October, 1927)[14], France (2 May, 1935)[15], China (21 August, 1937)[16]—the Contracting Parties undertook to refrain from any act of aggression whatsoever against the other Party. In 1933 the Soviet Union became a party to a large number of treaties containing a detailed definition of aggression.[17] The same definition appeared in the same year in the authoritative Report of the Committee on Questions of Security set up in connection with the Conference for the Reduction and the Limitation of Armaments.[18] But States went beyond commitments to refrain from wars of aggression and to assist States victims of aggression. They condemned wars of aggression. Thus in the Anti-War Treaty of Non-Aggression and Conciliation of 10 October, 1933, a number of American States—subsequently joined by practically all the States of the American Continent and a number of European countries—the Contracting Parties solemnly declared that "they condemn wars of aggression in their mutual relations or in those of other States".[19] That Treaty was fully incorporated into the Buenos Aires Convention of December 1936 signed and ratified by a large number of American countries,

[13] *Ibid.*

[14] 1927 Treaty of Guarantee and Neutrality between Persia and the Union of Soviet Socialist Republics, 112 LNTS 275.

[15] 1935 Treaty of Mutual Assistance between France and the Union of Soviet Socialist Republics, 167 LNTS 389.

[16] 1937 Treaty of Non-Aggression between the Republic of China and the Union of Soviet Socialist Republics, 181 LNTS 101.

[17] See the 1933 Convention for the Definition of Aggression between Afghanistan, Estonia, Latvia, Persia, Roumania, the Union of Soviet Socialist Republics and Turkey, 147 LNTS 67; 1933 Convention for the Definition of Aggression between Roumania, the Union of Soviet Socialist Republics, Czechoslovakia, Turkey and Yugoslavia, 148 LNTS 211; Convention for the Definition of Aggression between Lithuania and the Union of Soviet Socialist Republics, 148 LNTS 79.

[18] Report of the Committee on Questions of Security (Politis Report), 24 May 1933, League of Nations Doc. Conf. D/C.G.108.

[19] 1933 Anti-War Treaty of Non-Aggression and Conciliation between the Argentine Republic, Brazil, Chile, Mexico, Paraguay and Uruguay (Saavedra Lamas Pact), 163 LNTS 393.

including the United States of America.[20] Previously, in February 1928, the Sixth Pan-American Conference adopted a Resolution declaring that as "war of aggression constitutes a crime against the human species … all aggression is illicit and as such is declared prohibited." In September 1927 the Assembly of the League of Nations adopted a resolution affirming the conviction that "a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime" and declaring that "all wars of aggression are, and shall always be, prohibited."[21] The first Article of the Draft Treaty for Mutual Assistance of 1923 read: "The High Contracting Parties, affirming that aggressive war is an international crime, undertake the solemn engagement not to make themselves guilty of this crime against any other nation."[22] In the Preamble to the Geneva Protocol of 1924 it was stated that "offensive warfare constitutes an infraction of solidarity and an international crime."[23] These instruments remained unratified, for various reasons, but they are not without significance or instruction.[24]

These repeated condemnations of wars of aggression testified to the fact that, with the establishment of the League of Nations and with the legal developments which followed it, the place of war in international law had undergone a profound change. War was ceasing to be the unrestricted prerogative of sovereign States. The Covenant of the League[25] did not totally abolish the right of war. It left certain gaps which probably were larger in theory than in practice. In effect it surrounded the right of war by procedural and substantive checks and delays which, if the Covenant had been observed, would have amounted to an elimination of war not only between Members of the League, but also, by virtue of certain provisions of the Covenant, in the relations of non-Members. Thus the Covenant restored the position as it existed at the dawn of international law, at the time when Grotius was laying the foundations of the modern law of nations and established the distinction, accompanied by profound legal consequences in the sphere of neutrality, between just and unjust wars.

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[20] 1936 Convention for the Maintenance, Preservation and Re-establishment of Peace, 188 LNTS 9.

[21] League of Nations Assembly, Declaration concerning Wars of Aggression, 24 September 1927.

[22] Draft Treaty of Mutual Assistance, League of Nations Doc. A.35 (1923) IX.

[23] 1924 Geneva Protocol on the Pacific Settlement of International Disputes, 19 AJIL Supp. (1925), at 9.

[24] *Speeches of the Chief Prosecutors*, *supra* note 3, at 51.

[25] 1919 Covenant of the League of Nations, 225 CTS 195, at 128.

Neither was that development arrested with the adoption of the Covenant. The right of war was further circumscribed by a series of treaties—numbering nearly one thousand—of arbitration and conciliation embracing practically all the nations of the world. The so-called Optional Clause of Article 36 of the Statute of the Permanent Court of International Justice[26] which conferred upon the Court compulsory jurisdiction with regard to most comprehensive categories of disputes and which constituted in effect the most important compulsory treaty of arbitration in the post-war period, was widely signed and ratified. Germany herself signed it in 1927; her signature was renewed in 1933 and renewed, for a period of five years, by the National-Socialist Government in July 1933. (Significantly, that ratification was not renewed on the expiration of its validity in March 1938.) Since 1928 a considerable number of States signed and ratified the General Act for the Pacific Settlement of International Disputes[27] which was designed to fill the gaps left by the Optional Clause and the existing treaties of arbitration and conciliation.

All this vast network of instruments of pacific settlement testified to the growing conviction that war was ceasing to be the normal and legitimate means of settling international disputes. The express condemnation of wars of aggression, which has already been mentioned, supplied the same testimony. But there was more direct evidence pointing in that direction. The Treaty of Locarno of 16 October, 1925, to which I will refer later on and to which Germany was a party, was more than a treaty of arbitration and conciliation in which the parties undertook definite obligations with regard to the pacific settlement of disputes that may arise between them. It was, subject to clearly specified exceptions of self-defence in certain contingencies, a more general undertaking in which the parties agreed that "they will in no case attack or invade each other or resort to war against each other". This constituted a general renunciation of war and was so considered to be in the eyes of jurists and of the public opinion of the world. For the Locarno Treaty was not just one of the great number of arbitration treaties concluded at that time. It was regarded as the corner stone of the European settlement and of the new legal order in Europe in partial, voluntary and generous substitution for the just rigours of the Treaty of Versailles. With it the term "outlawry of war" left the province of mere pacifist propaganda. It became current in the writings on international law and in official pronouncements of governments. No jurist of authority and no statesman of responsibility would have associated himself, subsequent to the

[26] 1920 Statute for the Permanent Court of International Justice, 6 LNTS 389.
[27] 1928 General Act for the Pacific Settlement of International Disputes, 93 LNTS 343.

Locarno Treaty, with the plausible assertion that, at least as between the parties, war had remained an unrestricted right of sovereign States.

But although the effect of the Locarno Treaty was limited to the parties to it, it had a wider influence in paving the way towards that most fundamental and truly revolutionary enactment in modern international law, namely,[28] the General Treaty for the Renunciation of War of 27 August, 1928, known also as the Pact of Paris, or the Kellogg–Briand Pact, or the Kellogg Pact. That Treaty—a most deliberate and carefully prepared piece of international legislation—was binding in 1939 upon more than sixty nations, including Germany. Next to the International Postal Convention,[29] it was—and has remained—the most widely signed and ratified international instrument. It contained no provision for its termination, and was conceived as the corner-stone of any future international order worthy of that name. It is fully part of international law as it stands to-day, and has in no way been modified or replaced by the Charter of the United Nations.[30] It is indicated, in this solemn hour in the history of the world when the responsible leaders of a State stand accused of a premeditated breach of this great Treaty which was—and remains—a source of hope and faith for mankind, to set out in detail its two operative Articles and its Preamble.

> The Preamble
>
> The President of the German Reich, ……
>
> Deeply sensible of their solemn duty to promote the welfare of mankind;
>
> Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;
>
> Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly progress, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty;

[28] *Speeches of the Chief Prosecutors*, *supra* note 3, at 52.

[29] 1874 Treaty Concerning the Formation of a General Postal Union (Treaty of Bern), 19 Stat. 577. In 1878, the treaty was amended to give the organization its current name, the Universal Postal Union.

[30] 1945 Charter of the United Nations, 1 UNTS XVI.

> Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy;.....
>
> Article I
>
> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
>
> Article II
>
> The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

In that General Treaty for the Renunciation of War practically the entire civilized world abolished war as a legally permissible means of enforcing the law and of changing it. Prior to that Treaty the right of war was of the essence of sovereignty.[31] International law permitted resort to war not only for redressing an injury, but for challenging and destroying legitimate rights of other States. That right of war, so widely conceived, was, in the eyes of many, destructive of the claim of international society to be a community under the law. The victorious States at the end of the First World War, representing as they did almost the whole civilized world whose law Germany had defied and outraged, refused to recognize it. In Article 231 of the Treaty of Versailles they affirmed, and Germany accepted

> the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.

In Article 227 of the Treaty of Versailles they publicly arraigned "William II of Hohenzollern, formerly German Emperor, for a supreme offence against

[31] *Speeches of the Chief Prosecutors*, *supra* note 3, at 53.

international morality and the sanctity of treaties". This they did although the Commission on Responsibilities set up by the Peace Conference considered that even "a war of aggression may not be considered as an act directly contrary to positive law" and although it recommended that "the acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal." It is probable that that was the law in 1918—although the Allied and Associated Powers by a supreme act of international legislation and by way of solemn warning to any future aggressor went beyond the law as it stood at that time. But is it conceivable that in 1939 or in 1945 any committee of jurists, with the Pact of Paris on the international statute book, would hold that a war of aggression is not contrary to positive law? That international enactment, which effected a change so fundamental in the law of nations, was repeatedly broken by the Axis Powers: by Japan in 1931, by Italy in 1935, by Germany in 1938, and by all three of them in 1939, 1940 and 1941. These breaches did not affect its validity. In a very true sense, except to the cynic and the malevolent, they added to its vitality. They provoked the sustained wrath of peoples angered by the contemptuous disregard of that great statute which was to make possible for the anguished world to rest securely under the shelter of the law.

It was not, I may add, a clumsy enactment likely to become a signpost for the guilty. It did not enable Germany to go to war against Poland and yet rely, as against Great Britain and France, on any immunity from warlike action because of the provisions of the Pact of Paris. For that Pact laid down expressly in its Preamble that no State guilty of a violation of its provisions may invoke its benefits. When on the outbreak of the Second World War Great Britain and France communicated to the League of Nations the fact that a state of war existed between them and Germany as from 3 September, 1939, they declared that by committing an act of aggression against Poland Germany had violated her obligations assumed not only towards Poland but also towards the other signatories of the Pact of Paris. A violation of the Pact in relation to one signatory was an attack upon all other signatories and they were fully entitled to treat it as such. It may be useful to refer to this point expressly in case any of the defendants should seize upon the letter of the Particulars of Count Two of the Indictment and maintain that it was not Germany who initiated war with the United Kingdom and France on 3 September, 1939. The declaration of war came from the United Kingdom and France; the act of war and its commencement came from Germany in violation of the fundamental enactment to which she

was a party.[32]

The General Treaty for the Renunciation of War, that great constitutional instrument of international society awakened to the deadly dangers of another Armageddon, did not remain an isolated effort soon to be forgotten in the turmoil of recurrent international crises. It became, in conjunction with the Covenant of the League of Nations or independently of it, the starting point for a new orientation of governments in matters of peace, war and neutrality. It is of importance to quote some of these statements and declarations. In 1929, His Majesty's Government in the United Kingdom said in connection with the question of conferring upon the Permanent Court of International Justice jurisdiction with regard to the exercise of belligerent rights in relation to neutral States:

> … But the whole situation … rests, and international law on the subject has been entirely built up, on the assumption that there is nothing illegitimate in the use of war as an instrument of national policy, and, as a necessary corollary, that the position and rights of neutrals are entirely independent of the circumstances of any war which may be in progress. Before the acceptance of the Covenant, the basis of the law of neutrality was that the rights and obligations of neutrals were identical as regards both belligerents, and were entirely independent of the rights and wrongs of the dispute which had led to the war, or the respective position of the belligerents at the bar of world opinion.
>
> … Now it is precisely this assumption which is no longer valid as regards states which are members of the league of nations and parties to the Peace Pact. The effect of those instruments, taken together, is to deprive nations of the right to employ war as an instrument of national policy, and to forbid the states which have signed them to give aid or comfort to an offender. As between such states, there has been in consequence a fundamental change in the whole question of belligerent and neutral rights. The whole policy of His Majesty's present government (and, it would appear, of any alternative government) is based upon a determination to comply with their obligations under the Covenant of the League and the Peace Pact. This being so, the situation which we have to envisage in the event of the war in which we were engaged is not

[32] *Ibid.*, at 54.

> one in which the rights and duties of belligerents and neutrals will depend upon the old rules of war and neutrality, but one in which the position of the members of the League will be determined by the Covenant and the Pact …. (Memorandum on the Signature of His Majesty's Government in the United Kingdom of the Optional Clause of the Statute, Misc. No. 12 (1929), Cmd. 3452, p. 9).

Chief of Counsel for the United States referred in his opening speech before this Tribunal to the weighty pronouncement of Mr. Stimson, the Secretary of State, in which, in 1932, he gave expression to the drastic change brought about in international law by the Pact of Paris. It is convenient to quote the relevant passage in full:

> War between nations was renounced by the signatories of the Briand–Kellogg Treaty. This means that it has become illegal throughout practically the entire world. It is no longer to be the source and subject of rights. It is no longer to be the principle around which the duties, the conduct, and the rights of nations revolve. It is an illegal thing. Hereafter when two nations engage in armed conflict either one or both of them must be wrongdoers—violators of this general treaty law. We no longer draw a circle about them and treat them with the punctilios of the duelist's code. Instead we denounce them as law-breakers.

Nearly ten years later, when numerous independent States lay prostrate, shattered or menaced in their very existence before the impact of the war machine of the Nazi State, the Attorney-General of the United States—subsequently a distinguished member of the highest tribunal of that great country—gave weighty expression to the change which had been effected in the law as the result of the General Treaty for the Renunciation of War. He (Mr. Robert H. Jackson, Attorney-General of the United States) said on 27 March, 1941:

> … The Kellogg–Briand Pact of 1928, in which Germany, Italy, and Japan covenanted with us, as well as with other nations, to renounce war as an instrument of policy, made definite the outlawry of war and of necessity altered the dependent concept of neutral obligations.[33]

[33] *Ibid.*, at 55.

> … The Treaty for the Renunciation of War and the Argentine Anti-War Treaty deprived their signatories of the right of war as an instrument of national policy or aggression and rendered unlawful wars undertaken in violation of their provisions. In consequence, these treaties destroyed the historical and juridical foundations of the doctrine of neutrality conceived as an attitude of absolute impartiality in relation to aggressive wars. …
>
> It follows that the state which has gone to war in violation of its obligations acquires no right to equality of treatment from other states, unless treaty obligations require different handling of affairs. It derives no rights from its illegality.
>
> … In flagrant cases of aggression where the facts speak so unambiguously that world opinion takes what may be the equivalent of judicial notice, we may not stymie international law and allow these great treaties to become dead letters. Intelligent public opinion of the world which is not afraid to be vocal and the action of the American states has made a determination that the Axis Powers are the aggressors in the wars today which is an appropriate basis in the present state of international organization for our policy. …

There is thus no doubt that by the time the National-Socialist State had embarked upon the preparation of the war of aggression against the civilized world and by the time it had accomplished that design, aggressive war had, in virtue of the Pact of Paris and of other treaties, become illegal beyond all uncertainty and doubt. It is on that universal Treaty that Count Two of the Indictment is principally based.[34] That Count refers indeed, in Appendix C, to a long series of other international conventions violated by Germany such as the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, Hague Convention No. III of 1907 relative to the Opening of Hostilities, and Hague Convention No. V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. These Conventions have been included for the sake of completeness rather than with the intention to make them the subject matter of detailed argument before the Tribunal. Their substantive obligations, such as they are, are not in the same category as the solemn, rigid, and unequivocal obligation of the General Treaty for Renunciation of War. The Tribunal may not desire to see this trial prolonged by a detailed discussion of these instruments. Neither, especially with regard to

[34] *Ibid.*, at 56.

Hague Convention No. V (item 4 of Appendix C) do we wish to allow ourselves to be entangled in the meshes of the controversy bearing on the operation of the so-called general participation clause. We are content to submit that all these particular undertakings were merged in and rendered absolute by that great instrument of 1928 which prohibited and condemned all wars waged as an instrument of national policy.

The Prosecution has deemed it necessary—indeed imperative—to establish beyond all possibility of doubt, at what may appear to be excessive length, that only superficial learning or culpable sentimentality can assert that there is a decisive element of retroactive operation of the law in the determination of the authors of the Charter to treat aggressive war as conduct which international law has prohibited and stigmatized as criminal. We have traced the progressive limitation of the right of war, the renunciation and condemnation of wars of aggression, and, above all, the total prohibition and condemnation of all war conceived as an instrument of national policy. What statesman or politician in charge of the affairs of a nation could doubt, from 1928 onwards, that aggressive war, that all war—except in self-defence, or for the collective enforcement of the law, or against a State which has itself violated that Pact of Paris—was unlawful and outlawed? What statesman or politician embarking upon such war could reasonably and justifiably count upon an immunity other than that afforded by a successful outcome of the criminal venture? What more decisive evidence of a prohibition laid down by positive international law could any lawyer desire, than that which has been adduced here?[35] But the National-Socialist State had little use for international law. It relegated it to what it called "external State law". At the outset it paid lip-service to it for the transparent reason that Germany, at that time still complaining of the restrictions of the Treaty of Versailles, claimed with shrill insistence that equality of States is the principal tenet of international law. When equality was achieved, German lawyers prostituted international law as an ideology of "Grossraumsordnung"—the order of large spaces—under the hegemony of the master race. And they ended by defining it as "an intercorporative law of co-ordination based on racial co-sanguinity".

Yet, it may be argued—as it will probably be argued on behalf of the accused—that although war has been outlawed and forbidden, it has not been criminally outlawed and criminally prohibited. They will maintain that although international law has now made aggressive war an unlawful act, it has not made it a crime. They will assert that only an express international

[35] *Ibid.*

enactment could make an unlawful war a crime, and this for two reasons: The first, they will urge, is that international law, as we know it, does not attribute criminality to States; a State cannot commit a crime. The second argument on which they will rely is that international law is a law between States only and exclusively and that individuals acting on their behalf cannot be guilty of criminal acts under international law. They will claim, once more, that in so far as the Charter has introduced the principle of criminal responsibility of the State and of the individuals acting on its behalf, it is retroactive and contrary to a general principle of jurisprudence which they, in their day of power, treated with ridicule and contempt. The Charter is the law of this Tribunal. It would be open to the Prosecution to leave matters at that. But this is not a course which we propose to adopt at this historic trial. These are matters of the very highest moment for international morality, for the future peace of the world, and the authority of the law of nations on which that peace ultimately depends, and we propose to go into them, in due course, with an earnestness which we will do our best to make approximate to the magnitude of the occasion. In the meantime we must turn to the main object of this presentation of Count Two of the Indictment which is to put before the Tribunal the charge and the evidence of Crimes against Peace—crimes of which all the defendants stand accused.[36]

Opening Speech—Part III

This, then, is the evidence substantiating the charge, under Count Two of the Indictment, of planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances. It is by reference to these acts that the defendants—all the defendants—stand accused of an international crime, of crimes against peace. I devoted the opening part of this statement to showing that the Charter has not, in this respect, introduced into the realm of international law a new offence with retroactive effect. It has provided an appropriate jurisdiction to judge the authors of a long series of aggressive wars. Will it be said on behalf of the defendants that States, including their own, have merely renounced war, that they have merely made it unlawful, that they have merely condemned it—but that they have not rendered it criminal? Will it be said by or on behalf of the defendants that the offence of these aggressive wars, which plunged millions of combatants to their death, which, by dint of war crimes and crimes against humanity, brought about the torture, starvation and extermination of millions of

[36] *Ibid.*, at 57.

civilians, which has devastated cities, which has destroyed the amenities—nay, the most rudimentary necessities—of civilization in many countries, which has brought the world to the brink of economic ruin from which it will take it generations to recover—will it be earnestly urged that such a war, that any war, is only an offence, only an illegality, only a subject of condemnation, but not a crime? Will the defendants say that breaches of treaties prohibiting war are in the same category as a breach of a convention providing for the most-favoured-nation clause or for the exchange of postal parcels or for the repayment of a debt?

Will it be seriously maintained on behalf of the defendants that in making aggressive war a crime the authors of the Charter have resorted to retroactive legislation and have imposed upon the Tribunal the invidious duty of applying it? No law worthy of that name can permit itself to be reduced to an absurdity. Certainly the Powers responsible for the Charter have refused to allow it.[37] They drew the inescapable consequences from the renunciation, prohibition, and condemnation of war—all of which have become part of the positive law of nations. They refused to reduce justice to impotence by subscribing to the twin doctrines that the sovereign State cannot commit a crime and that neither can a crime be committed by those acting on its behalf. Their refusal to do so has decisively shaped the law of the Tribunal.

But we do not wish to stop at that. We submit that in so far as, in this respect, the Charter implies an innovation in international law, it is a desirable and beneficent innovation fully consistent with justice, with decent respect for the opinion of the world, with common sense which is of the essence of the law, and with the abiding purposes of the law of nations.[38]

In the first instance, Mr. President, this is a truly awe-inspiring and epoch-making occasion. For the first time in history we see a State in the dock. We behold the Government of what was a sovereign nation and most of the moving agents of its destructive malevolence placed as accused at the bar of mankind. The mystical sanctity of the sovereign State, shorn of the paraphernalia of pomp and power, is here arraigned before the judgment of the law. The salutary and indispensable doctrine that a State is capable of committing a criminal act and that it can become the subject of criminal responsibility, is here fully accepted. There was a time when international lawyers used to maintain that the liability of a State is, because of its sovereignty, limited to contractual responsibility. International tribunals have not accepted

[37] *Ibid.*
[38] *Ibid.*

that view. They have repeatedly affirmed that a State can commit a tort; that it may be guilty of trespass, of a nuisance, of negligence. They have gone further. They have held that a State may be bound to pay what [is] in effect penal damages for failing to provide proper conditions of security to aliens residing within their territory. In a recent case decided in 1935 between the United States and Canada an arbitral commission, with the concurrence of its American member, decided that the United States were bound to pay what amounted to penal damages for an affront to Canadian sovereignty.[39] On a wider plane the Covenant of the League of Nations, in providing for sanctions, recognized the principle of enforcement of the law against collective units—such enforcement to be, if necessary, of a penal character. There is thus nothing startlingly new in the adoption of the principle that the State as such is responsible for its criminal acts. In fact, save for the reliance on the unconvincing argument of sovereignty, there is in law no reason why a State should not be answerable for crimes committed on its behalf. In a case decided nearly one hundred years ago Dr. Lushington, a great English Admiralty judge, refused to admit that a State cannot be a pirate.[40]

History, very recent history, does not warrant the view that a State cannot be a criminal. On the contrary, the immeasurable potentialities for evil inherent in the State in this age of science and organization would seem to demand imperatively means of repression of criminal conduct even more drastic and more effective than in the case of individuals. In so far therefore as the Charter has put on record the principle of the criminal responsibility of the State it must be applauded as a wise and far-seeing measure of international legislation.

Admittedly, the conscience shrinks from the rigours of collective punishment, which fall upon the guilty and the innocent alike—although, it may be noted, most of those innocent victims would not have hesitated to reap the fruits of the criminal act if it had been successful. Humanity and justice will find means of mitigating any injustice of collective punishment. Above all, much hardship can be obviated by making the punishment fall upon the individuals directly responsible for the criminal conduct of the State. It is here that the Powers who framed the Charter took a step which justice, sound legal sense and an enlightened appreciation of the good of mankind must acclaim without cavil or reserve. The Charter lays down expressly that there shall be individual responsibility of the defendants for the crimes, including the crime against the peace, committed on behalf of the State. The State is not an abstract entity. Its

[39] See *Trail Smelter Case (US v Canada)*, 3 RIAA 1905 (1935).
[40] See *The Serhassan Pirates,* (1845) 166 E.R. 788, 2 W. Rob. 354.

rights and duties are the rights and duties of men. Its actions are the actions of men. It is a salutary principle of the law that politicians who embark upon a war of aggression should not be able to seek immunity behind the intangible personality of the State. It is a salutary legal rule that persons who, in violation of the law, plunge their own and other countries into an aggressive war, do so with a halter round their necks.

The principle of individual international responsibility for offences against the law of nations is not altogether new. It has been applied not only to pirates. The entire law relating to war crimes—as distinguished from the crime of war—is based on that principle. The future of international law and, indeed, of the world, depends on its application in a much wider sphere—in particular in that of safeguarding the peace of the world. There must be acknowledged not only, as in the Charter of the United Nations, fundamental human rights, but also, as in the Charter of this Tribunal, fundamental human duties. Of these none is more vital or more fundamental than the duty not to vex the peace of nations in violation of the clearest legal prohibitions and undertakings. If this is an innovation, then it is one which we are prepared to defend and to justify. It is not an innovation which creates a new crime. International law had already, before the Charter was adopted, constituted aggressive war a criminal act.

There is therefore in this respect no substantial retroactivity in the provisions of the Charter. It merely fixes the responsibility for a crime, clearly established as such by positive law upon its actual perpetrators. It fills a gap international criminal procedure.[41] There is all the difference between saying to a man: "You will now be punished for an act which was not a crime at the time you committed it", and telling him: "You will now pay the penalty for conduct which was contrary to law and a crime when you executed it though, owing to the imperfection of international machinery, there was at that time no court competent to pronounce judgment against you." If that be retroactivity, we proclaim it to be most fully consistent with that higher justice which, in the practice of civilized States, has set a definite limit to the retroactive operation of laws. Let the defendants and their protagonists complain that the Charter is in this as in other matters an ex parte fiat of the victor. These victors, composing as they do the overwhelming majority of the nations of the world, represent also the world's sense of justice which would be outraged if the crime of war, after this Second World War, were to remain unpunished. In thus interpreting, declaring and supplementing the existing law they are content to be judged by the verdict of history. Securus judicat orbis terrarum. In so far as the Charter of this

[41] *Speeches of the Chief Prosecutors, supra* note 3, at 58.

Tribunal introduces new law, its authors have established a precedent for the future—a precedent operative against all, including themselves. In essence that law, rendering recourse to aggressive war an international crime, had been well established when the Charter was adopted. It is only by way of corruption of language that it can be described as a retroactive law.

There remains the question, with which it will not be necessary to detain the Tribunal for long, whether these wars launched by Germany and her leaders in violation of treaties, agreements or assurances, were also wars of aggression.[42] If the proof of that particular charge were unduly onerous or complicated, we might be inclined to dispense with it altogether. It would be enough for the Prosecution to show that these wars were in violation of international treaties, agreements and assurances and thus came fully within the orbit of Count Two of the Indictment. However, the proof that these wars were also wars of aggression does not present a difficulty. A war of aggression is one which is resorted to in violation of the international obligation not to have recourse to war or, in cases in which war is not totally renounced, when it is resorted to in disregard of the duty to utilize the procedure of pacific settlement which a State has bound itself to observe. There was, in the period between the two World Wars, a divergence of views among jurists and statesmen whether it was preferable to attempt in advance a legal definition of aggression or to leave to the States concerned and to the collective organs of the international community freedom of appreciation of the facts in any particular situation that might arise. Those holding the latter view urged that a rigid definition might be abused by an unscrupulous State to fit in with its aggressive design; they feared, and the British Government was for a time among those who thought so, that an automatic definition of aggression might become "a trap for the innocent and sign-post for the guilty". Others held that in the interest of certainty and security a definition of aggression, like a definition of any crime in municipal law, was proper and useful; they urged that the competent international organs, political and judicial, could be trusted to avoid in any particular case a definition of aggression which might lead to obstruction or to an absurdity. In May 1933 the Committee on Security Questions of the Disarmament Conference proposed a definition of aggression on the following lines:

> The aggressor in an international conflict shall, subject to the agreements in force between the parties to the dispute, be consid-

[42] *Speeches of the Chief Procesutors*, *supra*, note 3, at 57–9.

ered to be that State which is the first to commit any of the following actions:

(1) declaration of war upon another State;[43]

(2) invasion by its armed forces, with or without a declaration of war, of the territory of another State;

(3) attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another State;

(4) naval blockade of the coasts or ports of another State;

(5) provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory all the measures in its power to deprive those bands of all assistance or protection.[44]

The various treaties concluded in 1933 by the Union of Soviet Socialist Republics and other States followed closely that definition. So did the Draft Convention submitted in 1933 by His Majesty's Government in the United Kingdom to the Disarmament Conference.

However, it is unprofitable to elaborate here the details of the problem or of the definition of aggression. It is to be hoped that this Tribunal will not allow itself to be deflected from its purpose by attempts to ventilate in this Court what is an academic and, in the circumstances, an utterly unreal controversy as to what is a war of aggression. There is no definition of aggression, general or particular, which does not cover abundantly and irresistibly and in every material detail the premeditated onslaught by Germany upon the territorial integrity and the political independence of so many States.[45] This has been, during the first fortnight of this trial, the main burden of the evidence presented on behalf of the Prosecution under the first two Counts of the Indictment.

There is, in very abstract theory, only one defence to the crime, of which the defendants stand accused jointly and severally, of planning, preparing, initiating and waging wars of aggression which were also wars in violation of specific and general international obligations. That answer is that these were wars in self-defence. We do not know whether the defendants and their advisers will

[43] *Ibid.*
[44] Politis Report, *supra* note 18.
[45] *Speeches of the Chief Prosecutors*, *supra* note 3, at 60.

choose the path of challenging, with the mixture of cynicism and naivety to which other nations have now become accustomed on their part, the natural meaning of words. German leaders may have been used to inflicting brazen language of arrogant and patent insincerity upon their own people cut off from the outer world and incapable of gauging its astonished and angry reactions. But of what use is it to appeal before this Tribunal and before the world to the notion of self-defence—unless a carefully thought out design of aggression executed over a period of years is consistent with self-defence, unless the right to live includes the right to destroy the lives of others, unless the extension of the Lebensraum is a primordial right rising sovereign over all accepted notions of law, of morals, of decency, and of compassion?

It might be said by or for the defendants that in the authoritative declarations preceding and accompanying the signature and the ratification of the General Treaty for the Renunciation of War self-defence was not only recognized as an inherent and inalienable right of the parties to the Treaty, but also that they reserved for themselves the right to judge whether circumstances called for the exercise of that right. There have been some who considered the reservation of self-defence so interpreted as destructive of the purpose and of the legal value of the Treaty. If Germany, under the Pact of Paris, was entitled to have recourse to war in self-defence and if she was entitled to determine in what circumstances she was permitted to exercise the right of self-defence, can she ever be considered as having violated the solemn obligations of the Treaty? The clear answer to that specious argument is that a solemn treaty subscribed to by more than sixty nations is not a scrap of paper devoid of meaning. The Treaty did not—no treaty could—take away the right of self-defence. Neither did it deprive its signatories of the right to determine, in the first instance, when there is danger in delay and when immediate action in face of an attack is imperative.[46] But the State thus acting is not the ultimate judge of the propriety and of the legality of its conduct. It is answerable if it abuses its discretion, if it avails itself of the faculty of self-defence as an instrument of conquest and lawlessness, if, in a futile attempt at deception which is not even intended to deceive, it twists the natural right of self-defence into a weapon of predatory aggrandizement and lust.[47] This is what the German leaders have done. Any appeal on the part of the defendants to the right of self-defence would be no more than further evidence of that guilty design which underlay their transgressions against the peace of the world.

[46] *Speeches of the Chief Prosecutors*, *supra* note 3, at 55.
[47] *Ibid.*, at 56.

This, in general outline, is our case under Part II of the Indictment. We shall ask the Tribunal, after it has heard the full evidence presented by the Prosecution, to find that the defendants are guilty of the crime against the peace by planning, preparing, initiating and waging wars of aggression in violation of international treaties, agreements and assurances. We shall ask the Tribunal to find that they are guilty of this crime of war which, in turn, proved the source and the occasion for the horrors of war crimes and crimes against humanity. This is not a vindictive trial of vengeance and retribution. The lives of these defendants mean little when put against the calamities of suffering and death which they inflicted upon millions of men, women and children. But justice must be vindicated so that this trial and this Tribunal may make their proper contribution towards restoring the hope and the faith of men of good will that the rule of law, and all that it means and stands for, shall not perish from this earth.

Closing speech—Introductory

Members of the Tribunal: with the speeches for the defence and with the concluding addresses of the prosecution this, the greatest and one of the most significant trials in history has entered upon its final stage. We now see clearly the pattern of this trial which, in the weighty words which you, My Lord, uttered at the opening session, "is unique in the history of the jurisprudence of the world" and which "is of supreme importance to millions of people all over the globe". As the wearying months of the proceedings were passing—and they have been wearying not only by reason of the duration of the trial but also, and incomparably more so, because of the nature of the terrible story which unfolded itself—as those months passed it was becoming abundantly clear to those in this Courtroom and to the world at large that, against, it would seem, overwhelming odds, this Court was triumphantly, by common consent, asserting its authority as a venerable instrument of law and justice. According to the Four Power Agreement of 8 August, 1945, which established this Tribunal and which framed its Charter, this was to be an International Military Tribunal. If that name conveyed to some circles, including the defendants, the impression of a court martial, bound by rigid rules to follow a summary procedure neglectful of principles of fair trial and wielding an arbitrary military law, then this impression was soon dispelled. The Charter designated this Court to be a Military Tribunal because of the executive method of appointment, because the primary task of the Tribunal is to pronounce judgment in the matter of war

crimes, i.e., offences laid down by the international law of war as expressed in international custom and in conventions concerned with rules of warfare, and because it was deemed desirable to make provision for an expeditious progress of the trial unhampered by obstructive technicalities. Yet, my Lord, seldom in history has a criminal court shown fewer characteristics of what is in the popular mind associated with purely military procedure. In fact, as the trial has been progressing there has been taking shape, in the hands of the Tribunal, a body of criminal procedure and rules of evidence which, it may be confidently asserted, will stand the test, however exacting, of any international enactment for safeguarding the rights of accused persons. As occasion arose, the Tribunal laid down rules as to examination and cross-examination, as to the use of affidavits, and as to the admissibility of evidence. These rules have been accepted by all concerned as fair, just, and reasonable. They have provided a most valuable precedent for any future International Criminal Court whether connected with the business of war or not.[48] Fears which have often been expressed in this connection to the effect that differences of national conceptions of jurisprudence and methods of criminal trials may be a serious impediment in the way of the conduct of the proceedings and of the elucidation of the truth have proved unfounded. This is one of the indirect but important results of this State trial under the aegis of nations with widely differing systems of law.

Seldom, my Lord, have the inherent qualities of justice and law triumphed more conspicuously over inauspicious circumstances. On the face of it this was to be an ad hoc, improvised, military tribunal created by a treaty concluded inter se by four victorious Powers still in the flush of triumph in a most complete victory over a prostrate adversary and still in the flush of righteous anger over evil deeds of unprecedented compass and horror. It might have seemed that what they created was a political body thinly cloaked in the transparent garb of judicial authority and called upon to give effect to a political decision. Any such suspicion or impression vanished almost from the very outset of the trial. As the months passed it became clear even to the prejudiced mind that the proceedings before this Tribunal fully vindicated the exhortation which you, Mr. President, addressed at the opening Session to all concerned—the admonition that "there is laid upon everybody who takes any part in this trial a solemn responsibility to discharge their duties without fear or favour in accordance with the sacred

[48] On 17 July 1998, more than fifty years after the Nuremberg trial, the Rome Conference adopted the Statute of the International Criminal Court, 2187 UNTS 3. As of May 2012, 139 states have signed the Rome Statute, while it has received 121 ratifications.

principles of law and justice."

Undoubtedly, the will of the victorious Powers—Powers representing over one-half of the civilized world—is responsible for the establishment of this Tribunal. But, essentially, this is a Tribunal administering the law of nations. As you have occasionally reminded us, my Lord, both in matters of wider import and in points of detail, this is a Tribunal of international law. On some questions, such as that of the plea of superior orders—a matter with which I propose to deal at some length later on—the Four Powers themselves clarified the existing law and lightened the task of the Tribunal by nipping in the bud a doctrine which tends to reduce the law to an absurdity. They also deemed it proper to lay down, with all requisite clarity, that the principle of individual responsibility which international law has invariably applied to war crimes proper is of general application with regard to acts which the law as it stood at the outbreak of the Second World War stigmatized as illegal and as criminal. But in general they left intact the competence of this Tribunal to apply international law in the full and unhampered exercise of its judicial independence. In particular the Tribunal will be called upon to pronounce upon questions of international law in passing judgment upon war crimes, that is to say, upon acts which the prosecution asserts to be contrary to indisputable rules and principles of international law. The very notion of a war crime is a conception of the law of nations, and it has properly been so treated by the defence. Whether the mass shootings of hostages is illegal and criminal is a question of international law; the accused maintain that it is in accordance with the law of nations. Whether forcible deportation of the inhabitants of occupied territory for compulsory labour for purposes directly connected with the conduct of war or for any other purpose is illegal and criminal is a question of international law; it has been maintained on behalf of the accused that, in modern conditions of warfare, this is not an act which is contrary to the law of nations. The killing of commandos who surrender as prisoners of war after the successful accomplishment of their mission has been represented on behalf of the accused as being in conformity with international law. Direct action of annihilation taken against the crews of merchantmen sunk without warning has here been claimed not to be contrary to the London Agreements respecting Submarine Warfare[49] and to customary international law. The Tribunal will pass judgment upon these legal submissions. Admittedly it has not been claimed

[49] 1930 International Treaty for the Limitation and Reduction of Naval Armament, Part IV, 112 LNTS 65, at 88; 1936 *Procès-Verbal* relating to the 1930 Rules of Submarine Warfare set forth in Part IV of the Treaty of London, 173 LNTS 353.

on behalf of the accused that the murder of five to six million non-combatants in occupied territory could be reconciled with the letter or with the spirit of the laws of war, even in modern warfare. But it has been put forward as a sound legal proposition that the responsibility for this most terrible act in history does not rest either upon those who wielded paramount military power in occupied territory or upon those who were members of the Government under whose aegis these deeds of horror and shame were perpetrated, nor upon those who were direct associates of the man who alone, it is claimed, ordered these deeds to be done, nor finally, upon those who were moral and doctrinal and ideological authors of that act whose commission they prepared, induced, and applauded. Of this proposition of law the Tribunal, too, will be the judge. Similarly, these proceedings will provide an important occasion for judicial determination of the extent to which the plea of superior orders may be taken into account as an extenuating circumstance in meting out punishment.

If, my Lord, this view of the functions of the Tribunal is the correct view, then there is special significance attaching to the fact, which you and this Tribunal have repeatedly acknowledged, that this is an international court administering international law. It is true that the Tribunal is a creation of the Agreement of 8 August, 1945, and of the Charter; it is also true that, in a very substantial sense, the law of the Charter is the law of the Tribunal. It is mandatory upon the Tribunal to pronounce punishment for crimes laid down in Article 6 in accordance with any special provisions of the Charter such as in the matter of superior orders. But that mandate the Tribunal, being an international tribunal, is fulfilling within the framework of general international law. Having created this international Tribunal the contracting parties must be presumed to have authorized it to give judgment on the basis of international law. There is in this respect no difference between an international court established for the purpose of adjudicating upon a dispute between States and a tribunal created for a purpose like the present. For this reason we fully accept the implications of the statement made by you, Mr. President, at the opening Session of this Tribunal that "the four signatories, having invoked the judicial process, it is the duty of all concerned to see that the trial in no way departs from those principles and traditions which alone give justice its authority and the place it ought to occupy in the affairs of all civilized states." The sources of law on which, as an international court, this Tribunal is in the positions to rely are the same as those of any other international tribunal. They are, in the language of Article 38 of the Statute of the Permanent Court of International Justice:

(a) International conventions laying down rules expressly agreed upon by the

parties. The rules thus agreed upon include all those specifically laid down in the Charter. They also comprise all the relevant treaties, such as the various Hague Conventions on the conduct of hostilities and the Geneva Convention of 1929 on the Treatment of Prisoners of War.

(b) International custom as evidence of the practice followed by States. This includes the customary rules of war which constitute the principal source of law in relation to the part of the indictment bearing on war crimes.

(c) General principles of law as recognized by civilized States. These, in the case before the Tribunal, will include in particular the general principles of criminal law—a source of law of special significance in connection with crimes against humanity.

Posterity will finally assess the place of this great trial in history. But it is clear already now that its effects will reach far beyond the punishment of the guilty. Issues larger than the fate of the twenty-one defendants are at stake. Of these issues, a conscientious and meticulous administration of international justice is not the least important. The Tribunal has resolved—and assuredly history will acclaim its decision—that this, and not the apprehension that this trial might become unduly prolonged, must be the decisive consideration. In the perspective of history it will matter little whether this trial has lasted six months or ten. What will matter will be the fact that by dint of sustained perseverance in face of very considerable physical fatigue this Tribunal has adhered to and with great patience went outside the safeguards of a fair and full trial as provided in the Charter;[50] that it gave the procedural safeguards of the Charter a vitality of which few thought them capable; that an overwhelming mass of evidence not only was assembled but also sifted and clarified in examination, cross-examination, and re-examination; that no attempt was tolerated or, indeed, made to obtain evidence or admissions by sharp methods of surprise or intimidation; and that full protection was given to the defendants to the point of observing minutiae of form and address the finer meaning of which may possibly have been lost upon some of the accused accustomed to the rough jurisprudence of their own judicial practice. Thus the Tribunal has repeatedly refused to permit prosecuting counsel to ask questions in a form implying that the acts with which the accused are charged have already been adjudged to be crimes or violations of treaties.

[50] *Closing Speeches of the Chief Prosecutors*, *supra* note 3, at 34.

However, it is possible that the unavoidable length of the trial may have the effect of blurring to some extent the general objects of this trial, and I intend, therefore, with your permission, my Lord, to devote this concluding speech for the prosecution to three matters. In the first instance we propose to put before the Tribunal our final submissions on the matters of law in connection with the charges brought against the accused and with the defence adduced on their behalf. Secondly, and principally, as the Tribunal will naturally expect the prosecution to deal with the case of each individual defendant in the light of the indictment, of the evidence produced in this Court and of the submissions of defending counsel, I intend to devote to this subject the greater part of the time allotted to me. Finally, it is essential in proceedings of this nature and importance to put on record both before this Tribunal and, indirectly, before the civilized world and the forum of history, the view of the prosecution and of the Governments on whose behalf we appear as to the bearing of this trial, of the Charter, of the Indictment and of the just judgment of the Tribunal upon the wider issues of international justice, international morality and international peace. In the long run the authority of the law and of the verdict given in its name must depend upon their approval by the enlightened and informed public opinion of the world. We are very confident that the judgment of this Tribunal will, also in this respect, be a contribution of the very highest value. In the meantime it is incumbent upon the prosecution to state their view on the subject, and I propose therefore to devote the concluding part of my address to this aspect of the case before the Tribunal.

Closing Speech—Part I

My Lord, all the accused in the dock stand indicted of some or all of the following crimes as laid down in Article 6 of the Charter: Crimes against the peace, war crimes, and crimes against humanity. In particular, with one or two possible exceptions, all the accused are charged with the commission as actual perpetrators, accomplices, or instigators of war crimes, namely, of violations of the laws and customs of war. The Charter provides that "such violations shall include, but not be limited to, murder, ill treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns and villages, or devastation not justified by military necessity." I propose to submit in the second Part of this address that, according to the

evidence, all the accused, with the possible exception of the defendants Schacht and von Papen, stand convicted of one or more of these crimes. The charge of war crimes is the foremost and principal count of the Indictment, and it will be our submission that that count is by itself sufficient to seal the fate of these defendants. The remaining two charges of Article 6, those of crimes against the peace and of crimes against humanity, we consider to be good in law and absolutely unavoidable as a matter of conscience and of duty to the world, and if we were to-day called upon to frame the Charter which we adopted in August of 1945 we would not hesitate, with all the experience which we have now of the misunderstanding and the misrepresentation to which these two charges lend themselves—we would not hesitate to include them in the indictment. But there is no doubt that in the minds of some persons and circles, including counsel for the defence, these two charges of Article 6 have given rise to questioning of the legal basis and of the propriety of the indictment. It is with regard to these counts that the shrill argument of retroactivity and of post facto legislation has been raised repeatedly and insistently.

We do not propose to shirk the challenge of that argument. In the meantime, we attach the greatest importance to stating that if this were a trial with the exclusive purpose of exacting just punishment and retribution from the defendants, the charge of war crimes would serve that purpose amply, abundantly, and conclusively. We assert that, but for one or two exceptions, not one of the defendants would incur additional jeopardy to his person because of the charge of crimes against the peace or against humanity. So overwhelming is the charge of war crimes that we cannot even concede that the other two charges constitute to any substantial degree an aggravating circumstance likely to add to the penalties of the verdict to be given by the Tribunal. There are crimes the penalties for which cannot be increased because of some other crime. We had therefore to consider at a very early stage whether we ought to incur the danger of obscuring the very clearest of issues by coupling it with charges likely to be misunderstood or misrepresented. Every reason of convenience and opportunism counselled a simplification of the Indictment and the omission of the charges of crimes against the peace and crimes against humanity. Every consideration of principle and of wider duty counselled the contrary course. These reasons of principle and wider duty determined the four Governments to adopt Article 6 of the Charter in its present form. These two additional charges we are resolved to press with the utmost vigour. But we do not forget that they are additional, though not secondary, to the principal charge of the Charter—that of violations of the laws and customs of war. What are the war

crimes of which the defendants are accused? They are many and manifold.[51] They are enumerated, though only by way of illustration, in Article 6 of the Charter. They vary most considerably in the number of victims. There are the fifty murdered prisoners of war who escaped from Stalag Luft III; there are the hundreds of commandos and airmen put to death under orders transmitted under the personal responsibility of some of the defendants; there are tens of thousands of civilians shot as hostages in a campaign apparently intended to safeguard the security of the troops but in fact used for the liquidation of elements deemed politically undesirable; there are tens of thousands of sailors and passengers who perished in a piratical campaign of terror; there are tens of thousands of Polish and Czech intellectuals and Russian political workers murdered in pursuance of a systematic plan of liquidation; there are hundreds of thousands of prisoners of war, especially Russian prisoners of war, led to their doom by ill-treatment or by outright murder; there are hundreds of thousands of civilians who met their death because of the rigours and cruelties to which they were exposed in a foreign land where they were brought by force, torn from their kith and kin, to slave as direct helpers in a war against their own State; and there are the five million civilians who were murdered either outright or by the slower method of deliberate starvation for no other reason than that they were of Jewish race or faith.

Obviously, my Lord, the mere number of victims is not the only criterion of the criminality of an act. The majesty of death, the compassion for the innocence, the horror and the detestation of the ignominy inflicted upon man created in the image of God—these are not a fit subject for mathematical computation. Nevertheless, it is clear that, somehow, numbers are relevant. For this reason the principal war crime, in extent and intensity, with which the defendants are charged is the violation of the most fundamental, the most firmly established and the least controversial of all the rules of warfare, namely, that non-combatants must not be made the direct object of hostile operations. In particular, to use simpler language, they must not be killed or made to suffer in their persons or their liberty unless they wage war against the occupant or unless they break laws issued by him in accordance with international law. The Hague Convention No. IV on the Laws and Customs of War[52] merely formulated that fundamental rule when it laid down, in the matter of belligerent occupation, that "family honour and rights, the lives of persons, and private

[51] *Ibid.*

[52] 1907 Hague Convention Respecting the Law and Customs of War on Land (1907 Hague Convention No. IV), 205 CTS 277.

property, as well as religious convictions and practice, must be respected" (Article 46). The murdering, on the orders of the German Government whose members are here in the dock, in the territory occupied by its military forces whose leaders are here in the dock, the murdering of six million civilians in pursuance of a policy of racial extermination, as the result of and in connection with deportation for forced labour, in consequence of a policy of doing away with the intellectual and political leaders of the nations whose territories had been occupied, as the result of the application of terror through collective reprisals upon the innocent population and upon hostages—this killing of six million non-combatants is a war crime. Both imagination and intellect, bewildered and nauseated by the horror of the fate and of the sufferings of these countless victims, recoil from putting that greatest crime in history into the cold formula of war crimes as described in text books of international law.[53] There is, therefore, a tendency, which is perfectly natural in the circumstances, to speak of these crimes as being crimes against humanity. So they are in the sphere of conscience and of morals. For the purposes of law, of the Indictment, and of this trial, they are war crimes pure and simple. We attach considerable importance to establishing that distinction. There may otherwise be a tendency, which has revealed itself in some quarters, to argue that these crimes are so terrible that they must be considered as being against humanity and to proceed to argue that as international law knows nothing of crimes against humanity the Indictment is in the nature of an innovation. Every consideration of justice, of decency, and of fitness of things requires that the matter be put outside the sphere of argument. These are war crimes pure and simple. There is every justification for brushing aside, with impatient and angry contempt, any suggestion of retroactive legislation so far as these crimes are concerned. There is, in international law, no shadow of retroactivity either about the Indictment so far as it concerns these crimes or about the decision of the Charter that their perpetrators are liable personally and individually. These are war crimes which, notwithstanding their enormity, are ordinary war crimes against the law of war in general and against the law of belligerent occupation in particular. They are war crimes irrespective of the locality where they were committed or even, to a substantial extent, of the nationality of the victims. The extermination in occupied Polish territory of millions of non-combatants is a crime against the laws of war and of belligerent occupation. It is entirely irrelevant whether these murdered non-combatants were of Polish nationality or of allied nationality or even of German nationality. They were crimes committed upon the civilian

[53] *Closing Speeches of the Chief Prosecutors*, *supra* note 3, at 60.

population in occupied territory. Article 6 of the Charter refers expressly to the murder of the civilian population of or in occupied territory. It is equally irrelevant whether the crime, set afoot in occupied territory, was consummated there. Dutch nationals killed in extermination centres in Poland or Polish nationals killed in extermination camps on Czechoslovak soil were victims of war crimes committed in occupied territory. Let us not forget in this connection that, as a matter of law, Czechoslovakia must be considered to have been under enemy occupation at least as from October and December 1939, when France and Great Britain, respectively, recognized the Czechoslovak National Committee as the competent agency responsible, inter alia, for the reconstitution of the Czechoslovak Army. Weighty arguments may be adduced in support of the view that the enemy occupation began with the invasion of Czechoslovakia on March 15, 1939.

What is the responsibility of the defendants for this war crime? Part of this question is necessarily connected with what I propose to submit with regard to the guilt of each individual defendant, but there are questions of law which apply to the defendants in general and to groups of defendants and which bear not only upon this war crime, the greatest of all, but also upon others. There are, in the first instance, those defendants who, like Kaltenbrunner or Frank, were the direct agents, short of physical execution, of these crimes of extermination. Of those nothing further need be said here. Secondly, there are those who, like the defendant Streicher, were the instigators, the theorists, the propagandists and the approvers of these crimes. It is possible, though not probable, that the majority of the German people were not cognizant of the gigantic process of mass murder the proceeds of which fed their soap and hair-mattress factories and filled the vaults of their bank. But, my Lord, we submit that the way of that minority which conceived, ordered and executed the satanic plan was only made possible by years of steady incitement to and justification of murder on the part of this group of defendants. Those who decreed these murders would not have had the courage to order them, and those who executed and helped to execute these orders might have shrunk with the panic of amazement and fear from the terrible deed but for the fact that through the activity of these defendants a mental climate was created in Germany which made of these horrors an act of State, a measure of national purification, a grim but just necessity. Nearly eighty years ago Lord Acton, that great historian, in expressing his abhorrence of persecution and his deep conviction of the sanctity of human life, said: "The greatest crime is Homicide.

The accomplice is no better than the assassin; the theorist is the worst."[54] There has never been a greater and more tragic confirmation of these pregnant words. My Lord, I submit as a sound proposition of law and as a corollary of those general principles of law which the Tribunal is authorized to apply that direct responsibility for crime, in proportion to the potential and actual magnitude of the evil caused, attaches to persons guilty of incitement to and encouragement of such acts or what naturally leads to such acts.

There are, thirdly, those defendants who, in our submission, are guilty of the war crime of mass murder of the civilian population in occupied territory as well as of other war crimes by virtue of their membership of the Government under whose aegis and in the course of whose rule these deeds were perpetrated. This, my Lord, is not a question of any constructive responsibility. It is a criminal liability which flows from the patent absurdity of the plea that these accused knew nothing of these horrors. For these accused, as in the case of the defendant Goering, were closely associated in the conduct of the war with the persons to whom they now ascribe sole responsibility, and they were wielding powerful secret agencies of information of their own. The principle of collective responsibility of members of a government is not an artificial doctrine of constitutional law. The defendants do not in fact deny that had they known of these things they would have been criminally responsible by virtue of their continued membership of the Government. What they deny is any knowledge of these things. Can that denial be believed for an instant? Can it be believed with regard to any of these defendants? Can it be believed, in particular, with regard to acts which are a matter of common knowledge such as the avowed and publicly proclaimed policy of extermination through systematic starvation?

The same applies, my Lord, to their pretended ignorance of the unspeakable horrors of torture and extermination in concentration camps. We ask the Tribunal to declare that it does not lie with these defendants to shield themselves behind any lack of knowledge as to the conditions which prevailed in concentration camps during the war and as to the fact that one of the objects of these camps was to exterminate those sent to them. Torture and murder in concentration camps were not isolated acts of perverted sadists. They were part of a system. Such things are not done or permitted to be done on such a vast and uniform scale unless those in charge of the camps know that those in authority approve of these acts and desire them to happen. Is it a cause of astonishment to the defendants that—apart from those millions killed in a systematic

[54] Lord Acton, *Historical Essays and Studies* (MacMillan, 1907), at 506 (Letter to Bishop Creighton).

action of extermination—tens and hundreds of thousands of civilian persons from occupied territories were put to death or maimed by torture in concentration camps? Surely this was not the case of an institution which degenerated into something which was entirely alien to the minds of those who conceived it. The whole doctrine of terror, of cruelty, of panic assiduously fostered, of bestiality and bestialization and debasement of human nature—all this, as a part of a political system of force and fear, was planned and approved by most of the defendants in the dock at the very outset of the régime.

Fourthly, we ask the Tribunal to declare, as a matter of interpretation of the customary and conventional law of belligerent occupation, that it is not open to the commanders of the army of occupation to relieve themselves of responsibility for the murder of the civilian population in countries which their forces temporarily conquered by permitting an official body which is part of the machinery of the State and over which they pretend to have no formal control, to execute or to prepare the execution of the criminal design. The commander of an army of occupation who fails to protect the civilian population against murder and deprivation of liberty is as guilty of a war crime as if he himself authorized the murder. The responsibility of the military commanders is in this respect absolute. They can attempt to avoid it by pleading superior orders—a plea which, as I shall submit, is in their case ineffectual by virtue not only of the Charter but also on wider grounds. They can attempt to escape liability by pleading ignorance of what was in fact happening to millions of victims of war crimes—an excuse which can be accepted only if we assume that the generals did not wish to know or to hear or to see things patent to all. The same applies to Governors of occupied territory such as the defendants Seyss-Inquart or Rosenberg. We urge that the Tribunal should finally reject as a matter of law the attempt to escape liability by means of the flimsy and clumsy device of the plea of a dual sovereignty in the occupied territory—of the parallel reign of law and murder, of the apparently orderly functioning of the authorities of occupation and the uncontrolled and uncontrollable reign of a gang of mass-executioners in the shape of an SS and a Gestapo. The military authorities which submit to such a transparent combination of law and lawlessness become accomplices of the crime. In view of this the isolated though frequent instances of direct participation of the armed forces in the process of extermination—witness the vain-glorious and inglorious part of the German army in the butchery in the Warsaw Ghetto—are a mere detail. Admittedly, in the course of a war cases may occur when, with the enemy advancing irresistibly and the disintegrating forces of occupation retreating in disorder, the power of the

military commanders to prevent atrocities against the civilian population is reduced to a minimum. Extenuating circumstances of this nature were recently urged, against the majority of the Court, by the two dissenting Justices of the United States Supreme Court in the case of General Yamashita who was convicted and hanged for violation of the laws of war.[55] In the case before this Tribunal murder—wholesale, planned, and systematic—became part and parcel of a firmly entrenched and apparently secure belligerent occupation.

This, then, my Lord, is the principal crime against the laws of war of which the accused, according to the evidence and according to the universally accepted principles of the law of war, are guilty in various degrees and in various capacities as I propose to show when I come to the individual defendants.

For obvious reasons counsel for the defence made no attempt to put somehow that major crime against the civilian population within the orbit of the law by using in relation to it the stock argument of changed conditions of modern warfare. But attempts of this nature have been made with regard to other war crimes. Of these three require special consideration before this Tribunal. They are the crime of deportation to Germany for forced labour, the crimes at sea in connection with submarine warfare, and, even more significantly, the shooting of commandos by virtue of orders transmitted and executed by some of the defendants.

The deportation of the civilian population for forced labour is, of course, a crime both according to international customary law and to conventional international law as expressed in the Hague Convention. Article 46 of Hague Convention No. IV enjoins the occupant to respect "family honour and rights" and "the lives of persons". Article 52 of the same Convention lays down that "services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation" and that "they shall be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in the operations of war against the country." With these simple and categorical provisions we have to contrast the staggering dimensions of the operation which defendant Saucket directed and in which other defendants participated, the ruthlessness with which peaceful citizens were torn from their families, surroundings and employment, the manner in which they were transported, the treatment which they received on arrival, the conditions in which they worked and died in thousands and tens of thousands, and the kind of work which they were compelled to perform as direct helpers in

[55] See *Yamashita v Styer*, 327 U.S. 1, 90 L. Ed. 499 (1946), Justices Murphy and Rutledge dissenting.

the production of arms, munitions and other instruments of war against their own country.[56]

This attempt to enslave the population of the occupied territory for purposes directly hostile to their own State is not a new page in German practice. In October 1916 the German Supreme Command issued orders providing for the deportation from Belgium to Germany of certain classes of persons. This decree was couched in terms suggesting that it applied only to idle and vagrant persons and that it had been adopted mainly as a measure for dealing with unemployment in Belgium. We are not mentioning this, my Lord, in order to rake up an unsavoury past. I mention it in order to draw attention to the fact that these German deportations in Belgium in 1916, although almost trifling when compared with the practice of deportation during the Second World War, drew upon themselves the horrified protests not only on the part of the Belgian people but also of neutrals. The United States of America, at that time scrupulously neutral, formally protested in a note addressed to Germany "against this action which is in contravention of all precedent and of those humane principles of international practice which have long been accepted and followed by civilized nations in their treatment of non-combatants in conquered territory". As the result that practice was abandoned within a year of its initiation. It may be noted that in a Legal Opinion issued by the Reich Chancellery prior to the deportation order of October 1916 it was declared that "under the law of nations the intended deportation of idle Belgians to Germany for compulsory labour can be justified if: (a) idle persons become a charge on public relief, (b) work can not be found for them in Belgium, (c) forced labour is not carried on in connection with operations of war" and that, hence, "their employment in the actual production of munitions should be avoided." It may also be noted that after the First World War the Commission of the German Reichstag which investigated charges of violations of the laws of war did not go further than to attempt, in specious argument, to bring the deportations within the four corners of the Hague Convention by maintaining that they took place with the view to relieving unemployment and were thus in accordance with the obligation which the Hague Convention imposes upon the belligerent to ensure "public order and safety" in the occupied territory. We submit, my Lord, that the deportation of civilians from occupied territory for forced labour abroad is not only a violation of international custom and treaties but also, in view of the sufferings and loss of life involved in the manner of its execution by Germany, a criminal violation of the law of nations. It has been suggested on

[56] *Speeches of the Chief Prosecutors*, *supra* note 3, at 61.

behalf of the accused that that particular prohibition of international law has become obsolete in the face of modern developments of totalitarian warfare which requires the vastest possible use and production of goods and resources and that, in modern conditions, no occupant of enemy territory could possibly be expected to stultify his efforts by refraining from the exploitation to the full of the man-power available in occupied territory.[57] (The Tribunal will have noticed that the same argument has been applied with regard to the wholesale exploitation, on a gigantic scale, of the economic resources of the occupied countries in violation of Article 52 of The Hague Convention which applies to requisitions the same principles as those applied to services.) We urge the Tribunal to condemn emphatically, as a matter of international law, any such attempt to adapt the conduct of war to changed conditions at the expense of the life, honour, dignity and property of the civilian population in occupied territory. Let the belligerent, if he finds it imperative, use his own resources and his own man-power to the very fullest. To enslave foreign nationals for that purpose is to commit a criminal act. The defendants must have sensed the unconvincing character of that particular attempt at justification. For, eventually, they fell back upon the plea of necessity. This is what the defendant Sauckel did when pressed in cross-examination. He did not, he admitted, enquire as to the position of international law on the subject. He had to do his duty by his own people. We know what the plea of necessity means in the hands of German politicians and strategists. It is the assertion of the right to live—and to live prosperously at the expense of the life and of the misery of others. The Tribunal will brush aside this clumsy attempt to reform international law—an attempt which is only in degree less frivolous than that made by the defendant Seyss-Inquart who explained that the compulsory use of the Dutch population for building the Atlantic fortifications was not contrary to law seeing that these civilians viewed with apprehension the prospects of the Allied invasion and were glad to be able to make their contribution towards preventing it.

Neither have the defendants a shadow of a right to invoke any material change of conditions in relation to their war crimes at sea in connection with submarine warfare—crimes which cost the lives of sixty thousand British seamen alone.[58] The fact of a planned and systematic sinking of merchantmen without warning is proved by abundant evidence. This, my Lord, was not a piece of lawlessness embarked upon hesitatingly and reluctantly in the course of an unforeseen and uncontrollable development of events in which reprisals

[57] *Ibid.*
[58] *Ibid.*

succeed counter-reprisals with the result that the border line between lawful retaliation and illegality becomes shadowy and elastic. It was a lawlessness conceived and initiated at the very outset of the hostilities. At the beginning, as in the case of the Athenia, it was concealed, clumsily and brazenly. Subsequently it became part of a system. Now, my Lord, we do not rest our case in this matter on the mere violation of the customary rules of warfare as embodied in the London Protocols of 1930 and 1936, fully subscribed to by Germany and prohibiting sinking without warning as well as sinking with warning but without proper provision for the safety of the passengers and crew.[59] We do not wish to be entangled in the meshes of the seemingly interminable controversy which agitated the minds of lawyers and governments in the course of the First World War, whether the fact of defensive armament of merchantmen made impossible the observance of the customary rules of international law (as they were subsequently embodied in the London Protocols); whether in practice and in fairness no distinction is possible between offensive and defensive armament; and whether the defensive armament of and anticipatory offensive action by merchantmen were not in themselves the necessary answer to and a precaution against illegal sinking. For the guilt of the German Naval Command does not rest alone on the proved fact of sinking without warning. The evidence which has been produced in this Court shows that, also in this respect, the determination to throw over, brutally and with a cynicism accentuated by the studied secrecy and ambiguity of apocryphal orders, an established rule of war conceived for the protection of non-combatants. Orders were given that no attempts should be made to rescue survivors; orders were issued which could be interpreted and were in fact interpreted as meaning that steps ought to be taken to prevent the shipwrecked from surviving; and orders were framed for the use of weapons of destruction calculated to ensure the rapid sinking of ships so that there should be no question of survivors.[60] The Court has heard reasons why these orders were deemed desirable and excusable. Modern conditions as shown in the ubiquitous presence of hostile aircraft render the work of rescue dangerous for the submarines; the same modern conditions make it probable that survivors will summon forces likely to attack the submarine; and the modern conditions of a totalitarian war coupled with the supreme importance for the enemy State of the mercantile marine require that no crews should be left to man it and that an atmosphere of terror should discourage others from joining it. We urge the Tribunal to consign, with the utmost rigour,

[59] *Ibid.*
[60] *Ibid.*

these attempts at modernizing rules of war to the category where they properly belong, namely, to the category of crime pure and simple. The same applies, my Lord, to the orders, for which the former chiefs of the Germany Army and Navy cannot escape responsibility, relating to the shooting of commandos. The evasive and surreptitious manner in which these orders were drafted, transmitted and executed shows the conviction of guilt which they created in their authors. Witness the contradictory and unconvincing explanations given in this Court such as that the order may well have been one of legitimate reprisals for the close combat practice of the British commandos or that those who handed over the brave attackers of the Tirpitz to the Gestapo to be shot at dawn, one by one, without trial and without warning of their impending execution, did not know and were not reasonably expected to know what fate awaited them. The Tribunal will assess these excuses at their proper value. But we urge the Tribunal to repudiate and to condemn the doctrine, which has been put forward on behalf of the accused, that that new form of attack by commandos and parachutists, combined with the innovation introduced by the advent of aircraft, permits a belligerent to kill prisoners of war who surrender unconditionally. This was the law which was put forward tentatively before the Tribunal on behalf of the defendants—the doctrine that as the attackers knew in advance that they would have to surrender they relinquished the right to be treated as prisoners of war and that their life was forfeit. This kind of adaptation of international law to new conditions and instrumentalities of war must be solemnly branded as criminal. The sanctity of life of the soldier in uniform who surrenders after the completion of his mission and who is not guilty of a war crime committed prior to his capture is and must remain an absolute principle of international law. Those who trample upon it in disregard of law, humanity and chivalry must pay the penalty.[61]

With regard to the prisoners of war killed on their way to escape, the defendants concerned admit that this act amounted to murder pure and simple. They say that they disapproved of it—though there is no evidence of any emphatic action of theirs in that sense. However that may be, we put it forward as an accurate proposition of law that the active chiefs of the armed forces bear a distinct personal responsibility of a general character for the fate of prisoners of war whom they have made captive. That responsibility is additional to that of the belligerent government. Clearly they are not responsible for every individual violation of the law in relation to prisoners of war. But they are liable for any systematic failure to punish such violations; they are liable for

[61] *Ibid.*, at 62.

the toleration of and the acquiescence in a system which makes such breaches possible. A military chief who tolerated a system in which prisoners of war were handed over, under any pretext whatsoever or for any reason whatsoever, to an organization whose very essence was murder and terror and lawlessness cannot avoid responsibility. The safety and well-being of prisoners of war is the responsibility of the military authorities. This is not only an obligation of honour; it is a clear legal duty. In the case of the murder of prisoners of war nothing short of a determined protest, of an insistence on the punishment of the guilty and of assurances for the prevention in the future of any outrages of a similar character would have sufficed to reduce their responsibility or to relieve them of it. We submit that the same principle of law applies to the proved barbarous treatment of Russian prisoners of war. No serious attempt has been made by the defence to challenge the figures which the prosecution submitted on this count—the terrible figure of four hundred thousand Russian prisoners of war who died as the result of maltreatment or outright murder.

My Lord, I am not concerned in this part of my submission to survey the entire field of war crimes with which the accused are charged and which we believe the evidence has substantiated to an overwhelming extent. I am here concerned only with the question of the relation of war crimes to the Indictment as a whole and with those particular war crimes with regard to which we deem it desirable that the Tribunal should authoritatively declare the existing law with all requisite clarity. I pass therefore over the lamentable series of other war crimes arising out of seizure, confiscation and destruction of private and public property, of pillage, plunder, and destruction. These will come for review in connection with the cases of the individual defendants. These crimes have not been in the forefront of the Indictment or, generally, of public reprobation for the reason that, vast and unprecedented as these spoliations and depredations are, they pale before the horror of the irretrievable destruction of millions of lives. Property can be rebuilt, compensated and restored. Life cannot—though it must never be forgotten that spoliation, plunder and devastation were indirectly responsible, on the very largest scale, for irreparable loss of life. Neither shall I dwell here upon the war crimes which took place as the result and in the wake of the initial illegality of purported annexation of French and Polish territory. That wanton act, for which the defendants as members of the Government were responsible and in which the defendants in their capacity as military chiefs participated, was responsible, among others, for the criminal impressment of the nationals of these countries as members of the German armed forces. Trials have recently taken place in

which members of German Military Courts were indicted for sentencing to death persons who, thus illegally impressed, deserted from the German army. The present defendants cannot escape ultimate responsibility for these crimes.

There are, however, two categories of most serious offences with regard to which the defendants have invoked existing law and practice and which nevertheless clearly belong to the heinous category of war crimes at their worst. The first is the mass shooting of hostages. The overwhelming majority of legal opinion as voiced in text books has expressed itself emphatically against the taking of hostages for any purposes whatsoever. Some believe that hostages may be taken for the purpose of ensuring with their presence the safety of buildings and conveyances exposed to danger. The Hague Convention is silent on the matter. There is no writer of repute who considers to be consistent with international law the killing of hostages as a reprisal for acts of which they are clearly innocent. Such scant support as exists in favour of killing hostages has come from Germany. During the Franco-Prussian war she initiated that practice and she pursued it with vigour during the First World War. Her action was defended by some German professors and by the Commission appointed by the German Reichstag to investigate charges of violations of the laws of war by Germany. But even those who were prepared to justify the German action in the matter agreed that there are clear legal limitations to the extraordinary and revolting measure of killing hostages. In particular, it must not be flagrantly contrary to the principle that collective punishments are prohibited. And it must be wielded with extreme caution and restraint. In the Second World War the German Government and the German military and occupation authorities contemptuously brushed aside these principles. The taking of hostages became not only a method of ensuring by terror the safety of and respect for German troops. It became part of the terror itself. More than that, directed as it was predominantly against communists and other politically suspect elements, it became a weapon of political extermination. We maintain that the murdering of hostages on this unprecedented scale became part and parcel of the German conduct of war and of the German machinery of belligerent occupation. We assert that the leading members of the German High Command and of the German Government are directly responsible for these murders. They have admitted and justified in this Court the authorship of orders directing ruthless terrorization of the population as part of a system of security. The killing of fifty thousand hostages was part of that system. We ask the Tribunal to declare that there is no warrant in existing international law for the proposition that hostages may be killed for the acts and omissions

of others; that, possibly—although we admit that possibility with the very greatest hesitation—such action may be excused in case of extreme necessity when the security of the army of occupation is exposed to danger of a most serious character which cannot otherwise be averted; and that resort to it on the scale adopted by the German High Command and the German occupation authorities with the knowledge and approval of the German Government in the years 1940 to 1945 constitutes a war crime differing only in extent from others which horrified and nauseated the civilized world in the Second World War.

Finally, although we do not wish to ask this Court to pronounce upon questions of law which were not fully settled before the Second World War and which the war itself did little to clarify, we will ask the Tribunal to declare that aerial bombardment for the sole purpose of terrorizing the civilian population is unlawful and a crime. We are conscious of the as yet unsolved complexities of the problem of aerial bombardment. We realize that the Hague Rules of Air Warfare adopted in 1923 did not secure ratification. We know that the bombardment of centres of civilian population as begun by Germany in 1940 was followed by the allied attacks upon German centres of industry and communications on a very large scale. But we feel fully justified in asking the Tribunal to declare as an uncontroverted rule of law that aerial bombardment of towns and cities for the mere purpose of instilling terror into the civilian population of the enemy State and without giving it the opportunity to seek places of safety is a war crime and a violation of the most fundamental principle of warfare which prohibits armed attack upon non-combatants as the exclusive target of the operation. We assert that as a matter of international law the aerial bombardment of Rotterdam and of Russian and Polish towns following upon the undeclared launching of hostilities, is a war crime for which some of the defendants in the dock must bear responsibility.

My Lord, I have surveyed the main legal aspects of the principal part of the Indictment, namely, of war crimes, and in particular those relating to the extermination and murder of the inhabitants of occupied territory. These war crimes, we submit, have been abundantly proved by the evidence in relation to the various defendants acting in their various capacities. The legal position with regard to this part of the Indictment is clear and uncontroverted. It was not challenged in the general speech for the defence. It was ignored there. The one general speech for the defence— that of Professor Jahrseiss—was devoted exclusively to what was apparently considered to be the easier subject of the criminality of wars of aggression, of the mischiefs of retroactivity in criminal legislation, of the alleged novelty of the principle of the responsibility of the

agents of the State for crimes committed on behalf of the State, and of the metaphysics of the doctrine of sovereignty. There is no trace of retroactivity about war crimes. There is no novelty about the principle that— barring the question of superior orders, which has been settled by the Charter and which I will deal with in due course—war criminals are individually responsible for their transgressions. There is no innovation implied in the claim of the belligerents to try enemy nationals for war crimes—the only departure from precedent in this case being in favour of the defendants, namely, that instead of being tried by the summary process of a court martial established by a single belligerent they are arraigned before an authoritative tribunal of unimpeachable competence and impartiality sitting in open court and affording the accused the greatest possible latitude in presenting their defence.

My Lord, if the object of this trial were merely to exact just retribution from the defendants, it would not have been necessary for us to go outside the charge of war crimes. We should not have prolonged these proceedings and we would have done nothing which might have encouraged irrelevant controversy by introducing the two other charges contained in Article 6 of the Charter. But this is not an ordinary criminal trial intended to bring upon twenty persons the full penalty of the law. As I have said, my Lord, we have anxiously considered in the Summer of 1945 whether we should be justified in including charges likely to confuse the principal aspect of the indictment. The Tribunal will have noted how adroitly that principal charge was ignored in the only speech for the defence. And the historian will note that contemporaneous criticism of these proceedings as a whole was based almost exclusively upon the parts of the Indictment charging the accused with crimes against the peace and crimes against humanity. Yet the Four Powers came to the conclusion that it would be a dereliction of duty to yield in this matter to shortsighted considerations of convenience and expediency. For, in a very real sense, the crime of war had become the parent of and the opportunity for the war crimes. In addition, it had become responsible for the deaths of ten million lawful combatants and for bringing to the very brink of ruin the material structure of our civilization. Ought we to have forborne to bring home to these defendants—and, indeed, to the world at large—that existing law stigmatizes wars of aggression to be a crime and that international law neither is nor need be powerless to exact from the guilty just punishment for this, the greatest of all, crimes? Ought we to have forborne to claim for international law the power, which is inherent in its very nature, to vindicate effectively the rights of man against the cruelty and barbarity of his own State and to penalize crimes against humanity which, with

fatal necessity, become the source and the starting point of the crime of war? The Charter has provided a full answer to these questions.

I will deal, first, in the light of the evidence and of the submissions of defence counsel, with the general aspect of the charge of crimes against the peace. The speech for the defence on the subject was free of ambiguity. The learned counsel submitted that though the Kellogg–Briand Pact and the other international declarations and treaties rendered aggressive war illegal, they did not make it criminal; that they could not have done so because any such attempt would be contrary to the sovereignty of States; that even if they had done so the entire system of prohibition of war had collapsed before the outbreak of the Second World War and therefore ceased to be law; that, in any case, these treaties were not taken seriously by numerous writers and politicians and were not entitled to be treated seriously seeing they contained no provision for coping with the problem of the[62] peaceful change of the status quo; that, further, there could be no question of a criminal—or even unlawful—breach of the Pact of Paris for the reason that that Treaty left to each State, including Germany, the right to determine whether it was entitled to go to war in self-defence; that the State could not become the subject of criminal responsibility; that, if that proposition were not admitted, the crime was one of the German State and not of the individuals who directed its actions; and that in any case there could have been no question of individual responsibility because in the German State which launched that war upon the world there was no will of individuals but one sovereign, uncontrolled and final will—that of the Dictator.[63] This, my Lord, I believe to be a truthful summary of an argument richly supported by references to writers, carefully selected and sifted, and by interesting appeals to general jurisprudence and to European conceptions of law.

My Lord, it would be quite proper to say that this entire line of argument is beside the point and cannot be heard in this Court inasmuch as it is in contradiction to the Charter. For the Charter lays down expressly that the planning, preparation, initiation, or waging of a war of aggression or of a war in violation of international treaties, agreements, or assurances shall be considered crimes coming within the jurisdiction of the Tribunal. It would appear, therefore, that the only way in which the accused can escape liability is to show to the satisfaction of the Tribunal that these wars were not wars of aggression or in violation of treaties. They have not done that. This being so, what is the purpose of the argument which has been advanced on their

[62] *Ibid.*, at 53.
[63] *Ibid.*, at 54.

behalf? Is it to deny the jurisdiction of this Tribunal in this matter on the ground that, being an international Tribunal, it has no competence to adjudicate upon an Indictment which, on the face of it, is contrary to fundamental notions of international law? Or, what is more probable, is it a political appeal to an outside audience which is easily impressed by the complaint that the accused are being made the object of ex post facto legislation?[64]

I submitted, my Lord, in the opening statement which I made last December that although, of course, we fully realize that the Charter is the law of the Tribunal, it is incumbent upon us to attempt to answer this important part of the case for the defence. I am anxious not to take up the time of the Tribunal by repeating what I said in the opening statement on the change effected in the position of war in international law as the result of the long series of treaties, in particular the General Treaty for the Renunciation of War. I submitted that this Treaty, one of the most generally signed international treaties, established a rule of international law with a solemnity and clarity which is often lacking in customary international law; that the profound change which it produced was reflected in weighty pronouncements of governments and statesmen; that it rendered illegal recourse to war in violation of the Treaty; and that there is no difference between illegality and criminality in a breach of law involving the deaths of millions and an attempt at the very foundations of civilized life. Neither do I propose to take up the time of the Tribunal by answering in detail the fantastic chain of legal argument put forward by the defence such as that that Treaty had no effect attributed to it by its signatories on the ground that it was received in some quarters with disbelief or cynicism. Even more extraordinary, to ordinary legal thinking, is the reasoning that in any case that Treaty—and the other treaties and assurances which followed it—ceased to be legally binding by 1939 because by that time the entire system of collective security had collapsed. The fact that the United States declared its neutrality in 1939 was cited as an example of the collapse of the system of collective security, as if the United States had been under any legal obligation to act otherwise. In any case what is the relevance of the fact that the system devised[65] to enforce these treaties and to prevent and to penalize criminal recourse to war failed to work? Did the aggressions of Japan and Italy, followed by the German aggressions against Austria and Czechoslovakia, deprive these treaties and obligations of their binding effect for the reason that these crimes achieved a temporary success? Since when has the civilized world accepted the principle that the temporary

[64] *Ibid.*
[65] *Ibid.*, at 54.

impunity of the criminal deprives the law of its binding force and gives the imprimatur of legality to his crime? It will be noted, incidentally, that both in the case of the Japanese and Italian aggressions the Council and the Assembly of the League of Nations denounced these acts as violations both of the Covenant and of the General Treaty for the Renunciation of War and that in both cases sanctions were decreed.[66] The astonished and angry reaction of the world to both these aggressions was not such as to lend credence to the view that the obligation to refrain from aggressive war had lost its legal or moral force. If the Italian onslaught on Abyssinia had taken place in 1914 there would have been sympathy with the victim and, probably, disapproval of the annexation, but the conquering State would have been considered to act within its legal rights. Contrast with it the reaction of the world to the Italian challenge in invading Abyssinia in 1935. That contrast is the measure of the state of the law and of the opinion of the world at that time on the subject of war of aggression. It is characteristic that counsel on behalf of the accused leaders of the principal Axis Power deemed it fit to invoke the repeated successful violations of the law on the part of the Axis Powers as a reason for the alleged obsolescence of the law which they defied and outraged. We maintain that the prohibition and the criminality of aggressive war were as much part of the juridical and moral conscience of the civilized world in the year 1939 as they were immediately after the enactment and acceptance of the various instruments outlawing aggressive war. Article 6 of the Charter which instructs the Tribunal to treat as crimes wars undertaken in violation of these instruments is declaratory of the existing law.

My Lord, one would have expected that considerations of good taste would have suggested to German counsel the impropriety of adducing the repeated and previously successful violations of treaties by the Axis Powers as a reason for the lapse of the legal validity of those treaties. One would also have thought that similar considerations of delicacy would have suggested to German counsel the inadvisability of referring in this connection to the question of self-defence. For not even the German Government presided over by Adolf Hitler had the naïve effrontery to present this war—even before the German people—as a war of self-defence. Possibly what the accused say is not that that war was one in self-defence, but that as the Pact of Paris not only left intact the right of self-defence but also the sovereign right of each State to determine whether recourse to war in self-defence was justified in the circumstances, it did not in fact contain any legal obligation at all and could not therefore be broken.[67] My

[66] *Ibid.*, at 55.
[67] *Ibid.*

Lord, whatever may be the connotation in which this argument of self-defence has been adduced and however farfetched and inaccurate it may prove upon examination, it is a plea which we are not at liberty to ignore. In a case in which the launching of the greatest and the most disastrous aggressive war in history is part of the indictment, the judgment of this Tribunal is a proper opportunity for condemning finally and authoritatively the abuse of an otherwise legitimate and proper legal conception for justifying the greatest crime of which a State is capable. It is true that in the authoritative declarations preceding and accompanying the signature and the ratification of the General Treaty for the Renunciation of War self-defence was not only recognized as an inherent and inalienable right of the parties to the Treaty; they reserved for themselves the exclusive right of judgment as to whether circumstances called for the exercise of that right. Was the reservation of self-defence thus defined destructive of the purpose and the legal value of the Treaty? If Germany was entitled to have recourse to war in self-defence and if she was entitled to determine in what circumstances she was permitted to exercise the right of self-defence, can she ever be considered as having violated the solemn obligation of the Treaty? To this question counsel for the defence gave a clear answer in the negative. This answer amounts to an assertion that that solemn Treaty subscribed to by more than sixty nations is a scrap of paper devoid of meaning. It amounts to an assertion that every prohibition or limitation of the right of war is a mere scrap of paper if it expressly provides for the right of self-defence. We hope that the Tribunal will emphatically consign that parody of legal reasoning to where it properly belongs. Neither that particular Treaty nor any other treaty intended to—or could—take away the right of self-defence. Neither did it deprive its signatories of the right to determine, in the first instance, whether there is danger in delay and whether immediate action is imperative. This is the correct meaning of the express proviso that each[68] State judges for itself whether action in self-defence is necessary. But this does not mean that the State thus acting is the ultimate judge of the propriety and of the legality of its conduct. It is answerable if it abuses its discretion, if it avails itself of the faculty of self-defence as an instrument of conquest and lawlessness, if it twists the natural right of self-defence into a weapon of predatory aggrandizement and lust. The ultimate decision of the lawfulness of action in self-defence does not lie with the State concerned. For this reason the right of self-defence, whether expressly reserved or implied, does not impair the nature of a treaty as creating legal obligations. Under the Covenant of the League Japan was entitled to decide,

[68] *Ibid.*

in the first instance, whether events in Manchuria justified resort to force in self-defence. But it was left to an impartial body of enquiry to find, as it did find, that there was in fact no justification for action in self-defence. To mention a more recent example, Article 51 of the Charter of the United Nations lays down that nothing in the Charter shall impair the inherent right of individual or collective self-defence in case of an armed attack. But it expressly leaves to the Security Council the power of ultimate action and determination. It is to be hoped that the judgment of this Tribunal will discourage, with appropriate finality, any future reliance on the argument that because a treaty reserves for the signatories the right of action in self-defence it becomes, for that reason, incapable of imposing upon them any effective legal obligation.[69]

[Note for Attorney-General: German counsels have not so far advanced the argument that this was not a war of aggression and that it was merely a war of self-defence. I am therefore not dealing, for the time being, with the question of the meaning and definition of aggression. H.L.]

I come now, my Lord, to that part of the case for the defendants in the matter of crimes against the peace which we anticipated at the opening of this trial, but which, in the circumstances, we expected would be put with more moderation. It has been strongly urged on behalf of the defendants that the very notion of criminal responsibility is incompatible with the basic assumption of international law, namely, with the sovereignty of States. A State, in the submission of Professor Jahrreiss, can commit an offence against international law; it cannot be made criminally responsible and punishable. To do that would mean to deny the sovereignty of States as what he called co-ordinated units of international society and to run counter to the established European conception of the State as the super-person.

My Lord, it is pathetic to see the accused who in their capacity as the German Government overran most of the States of Europe, who trampled brutally upon their sovereign independence, and who, with boastful and swaggering cynicism, made their sovereignty subservient to the new conception of the "Grossraumsordnung"—it is pathetic to see these defendants appealing to the mystic virtues of the sanctity of State sovereignty. It is equally pathetic to see them invoking orthodox international law to protect the defeated German State and its rulers from just punishment at the hands of the victorious Powers. Orthodox international law offers them no hope.[70] It sets no limit to the legal power of the victor. The victor makes international law as between him-

[69] *Ibid.*, at 56.
[70] *Ibid.*

self and the vanquished. There are few propositions so elementary in accepted international law as this simple statement of the legal position. Even if there were a clear rule of international law excluding expressly the punishment of sovereign States—and we deny emphatically that there exists any such rule—it would be open to the victors, as a matter of law, to change that rule. It would have been easy for the Four Powers to make a treaty with a German Government expressing its concurrence in the provisions of the Charter—as they did in the analogous case at the end of the First World War. The full legal validity of that treaty would have been unimpaired by the fact that it was made under duress—although we can imagine a German Government which would very willingly endorse a treaty of this nature.

Of course, my Lord, in a sense these proceedings are not concerned primarily with punishing the German State. They are concerned with the punishment of individuals.[71] On the other hand, the Four Powers have indicted the accused for acts which they committed as organs of the German State. For that reason we do not feel at liberty to ignore altogether the general question of criminal responsibility of States under international law. We submit, my Lord, that there is no substance at all in the view that by its very nature international law rules out any criminal responsibility for States for the reason that because of their sovereignty States cannot be coerced.[72] As I pointed out in the opening speech for the prosecution, international practice in no way supports the view that the responsibility of States is limited to contractual liability. It is not easy to see why the sovereign will of States should be subject to responsibility in contract and tort, but not with regard to crimes. Many theories have been made to rest upon the broad shoulders of sovereignty, but these theories have not always been accurate. In the course of the work of the Permanent Court of International Justice it became a stock argument to rely on State sovereignty in support of the view that, as States are sovereign, treaty obligations entered into by them ought to be interpreted restrictively. The Court consistently discouraged that view. In its very first Judgment—a judgment given against Germany in The Wimbledon case[73]—it rejected the plea of sovereignty as a reason for restrictive interpretations of obligations in treaties. The Court declined to see in the conclusion of a treaty, by which a State undertakes to observe a definite line of conduct, an abandonment of its sovereignty. The Court reminded Germany that the very right to enter into

[71] *Ibid.*

[72] *Ibid.*

[73] *SS Wimbledon* (UK, France, Italy and Japan v Germany; Poland intervening), PCIJ Series A, No. 1 (1923).

international engagements is an attribute of State sovereignty. The view that as States are sovereign they cannot be coerced has been abandoned long ago. The Covenant of the League of Nations made provision, in Article 16, for sanctions against sovereign States—sanctions being only another name for coercion, probably coercion of a punitive character. The Charter of the United Nations has followed suit—much more decisively.[74] It is apparently not contrary to the dignity and the sanctity of the sovereign State that, when defeated, it can be subjected, with perfect legal propriety, to the ruthless and unfettered will of the victor, but, it is being suggested, it is contrary to its sovereignty if its criminal conduct is made subject to judicial proceedings. It is true that in the past, because of the absence of a competent compulsory jurisdiction, there is no judicial precedent for States being arraigned before a criminal tribunal. But to deny criminal responsibility for that reason is to suggest that there is equally no contractual responsibility seeing that, apart from treaty, there is no compulsory jurisdiction of international tribunals to adjudicate in matters of contract. The only innovation which the Charter has introduced has been to provide machinery which has been long overdue.[75] On wider grounds the human mind revolts against the notion that the State whose potentialities for mischief are immeasurable should be exempt from criminal responsibility and that there should be no remedy, other than compensation, for the suffering inflicted by the author of aggression. Admittedly, there are compelling reasons for mitigating the rigours of the collective responsibility of the State in such a way as to prevent, so far as possible, the innocent from suffering for the guilty. It is for this very reason that we have indicted these defendants individually. But even this fails to satisfy counsel for the defendants. After having argued with learning that the State cannot be criminally responsible, they proceed to argue, with even greater learning, that individual persons acting on behalf of the State are not liable. Who then is liable? Who bears responsibility for these oceans of blood and for these calamities of suffering inflicted upon mankind? No one? Is there no limit to these attempts to reduce international law to an absurdity? However, enough has been said—assuming that it was necessary to say it at all in spite of the clear provision of the Charter—to show that there is no foundation for the complaint of the defendants that the Charter is a piece of post facto legislation either in declaring wars of aggression to be a criminal act or in assuming that the sovereign State is a proper subject of criminal responsibility.[76]

[74] *Closing Speeches of the Chief Prosecutors*, *supra* note 3, at 57.
[75] *Ibid.*
[76] *Ibid.*

I come now to the third part of the Indictment, namely, the crimes against humanity—a charge which, like that of crimes against the peace, has caused the defendants and their protagonists to raise the strident complaint of novelty and retroactivity. That complaint, as we shall try to show, is unfounded. In the meantime it must be stated clearly that to a very large extent, so far as the fate of most of the defendants is concerned, the charge of crimes against humanity is almost theoretical. If the object of this trial were merely to bring just retribution upon the persons of these defendants we would have conveniently omitted all references to crimes against humanity. I will therefore ask your indulgence, my Lord, for stating as briefly as possible why we have nevertheless attached the very greatest importance to including the charge of crimes against humanity as part of the Indictment in this historic trial.

What are the crimes against humanity in the sense of the Indictment? In the first instance, to put it negatively, war crimes are not, in law, crimes against humanity. The object of the charge of crimes against humanity was to cover such acts as would not come under the clear legal category of war crimes. With regard to the latter the Tribunal possesses in any case an ample and undisputed jurisdiction. Crimes committed by Germany during the war in relation to belligerents and their nationals, whether committed in or outside Germany are war crimes—even though, of course, in the realm of conscience and morality they are also crimes against humanity. Similarly, crimes committed by Germany against German nationals in occupied territory are war crimes inasmuch as they constitute crimes against the civilian population in occupied territory. What then are crimes against humanity in the sense of the Indictment? They are clearly and exhaustively enumerated in Article 6 of the Charter, and perhaps it will be proper for me, with the permission of the Tribunal, to read that paragraph aloud: They are "murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country concerned." They are acts which the general principles of law, of criminal law—and not merely morality and decency—stigmatize as crimes. They are acts which the courts in any civilized country would treat as criminal but for the fact that they have been ordered by the State or by persons acting on behalf of the State. Now according to the Charter—and this is admittedly and undoubtedly an innovation—these acts of the defendants ordered or done by them in their capacity as the rulers and organs of the German State are to be treated as crimes

irrespective of whether they were in accordance with the law of the German State as created and ruled by them. Acts of murder and of physical and spiritual persecution, even if done in accordance with the law of the State, are to be treated as crimes.

We do not deny the tremendous significance of the political and jurisprudential doctrine implied in that charge. It means not only that the will of the Nazi State as formed and governed by these defendants is not by the mere fact that it was the will of the State necessarily entitled to be regarded as law and as an absolute justification of acts committed in pursuance thereof. It means not only that the German Nazi State is not considered by the civilized world to have been a State under the rule of law. For this must henceforth be regarded as a doctrine of indisputably general application. The Charter affirms the principle that with regard to the fundamental rights of man there exists a higher forum than the positive law of any single State. As a rule international law recognizes that it is for the State to decide how it shall treat its nationals; this, in the current phrase, is a matter which is exclusively within the domestic jurisdiction of the State. The Covenant of the League of Nations and the Charter of the United Nations recognize that right. But at the same time international law claims that there is a limit to the omnipotence of the State, and the individual human being, the ultimate unit of all law, is entitled to the protection of the society of nations when the State tramples upon his rights in a manner which shocks and outrages the conscience of mankind. That principle was expressed more than three hundred years ago by Grotius, the founder of modern international law who described as just a war undertaken for the purpose of defending the subjects of a foreign State from injuries inflicted by their ruler. He affirmed, with reference to atrocities committed by tyrants against their subjects, that intervention is justified for "the right of human social connection is not cut off in such a case".[77] It was given expression at the end of the last century by John Westlake, the most distinguished of British international lawyers, when he insisted that "it is idle to argue in such cases that the duty of neighbouring[78] peoples is to look on quietly." "Laws", he said, "are made for men and not creatures of the imagination, and they must not create or tolerate for them situations which are beyond endurance."[79] The same principle of humanitarian intervention was acted upon by the European Powers to protect the Christian subjects of Turkey against cruel persecution.[80] It is true that there have been occasions

[77] W. Whewell, *Grotius on the Rights of War and Peace: an abridged translation* (CUP, 1853), at 288.
[78] *Closing Speeches of the Chief Prosecutors*, *supra* note 3, at 63.
[79] J. Westlake, *International Law: Peace* (CUP, 1910), at 320.
[80] *Closing Speeches of the Chief Prosecutors*, *supra* note 3, at 64.

calling with extreme urgency for such humanitarian intervention and in which international society remained passive. This is what happened in relation to the abominations of the National-Socialist State in the years 1933–1939. The reason for that inaction was not that these outrages did not provoke the sustained wrath of humanity, but because of what were deemed to be the higher considerations of international peace. Thus the Charter of the Tribunal signifies an affirmation of an established and beneficent, though occasionally dormant, principle.[81] Even in this respect it is not purely retroactive. International society may as yet lack means to enforce, by ordinary and effective processes, the respect of the inalienable rights of man. The Charter of the United Nations has inaugurated a further significant step in that direction. The Charter of this Tribunal gives warning to dictators and gangsters masquerading as a State that if they debase the sanctity of man by savage acts of persecution they do so at their own risk and peril.[82] So far as these defendants are concerned this part of the Indictment is, in a sense, merely symbolic. Their conviction on this count cannot add to their punishment. For they stand accused and, we assert, convicted by overwhelming evidence of war crimes proper. Compared with the horror of war crimes, their crimes against their nationals, in their own country—for these are the crimes against humanity—cruel and outrageous as they were, are inconsiderable. Yet we ask the Tribunal to find that these defendants, in varying degrees and each within his own sphere, ranging from active evil-doing to active association with evil, are guilty of crimes against humanity which they committed by a vile assault on the dignity of men of their own race and of other races; by the persecution, humiliation and murder, without pity or compassion, of hundreds of thousands of their own nationals; by contemptuous disregard of the sanctity of man; by brutally invading the innermost recesses of the human mind and of man's relation to God; and by utterly depraving, in their own country, the very institution of the State which they set themselves to glorify.

I will now pass on, my Lord, to a survey of the particulars of the Indictment in relation to the various defendants.

Closing Speech—Part III

I have surveyed the acts with which the individual defendants and groups of defendants are charged as being war crimes, crimes against the peace, and crimes against humanity. It remains for me now to deal with two matters. The

[81] *Ibid.*
[82] *Ibid.*

first is to attempt to reply to the two principal objections which the defence has put forward, as a matter of law, to the propriety of the Indictment. The first of these objections relies on an alleged rule of international law according to which persons acting as organs of a sovereign State—that is to say, performing an Act of State—are not personally accountable to other States and that the only available legal remedy is against the State. The second objection is based on the doctrine of superior orders. My second and final task will be to try to answer some of the doubts which have been raised, as a matter of international justice and jurisprudence, with regard to the proceedings before this Tribunal as a whole.

My Lord, with regard to the doctrine of Act of State and of the plea of superior orders we could, of course, cut short the argument by pointing to the clear letter of the Charter. The Charter rejects the doctrine of Act of State. It says expressly that there shall be individual responsibility of the defendants in respect of the crimes with which they are charged. And, subject to the proviso of extenuating circumstances, it lays down that the plea of superior orders shall be no defence. However, for reasons which I have already stated, we deem it our duty to meet the defence on their own ground and to examine whether, as they maintain, the Charter is in these respects yet another example of ex post facto legislation inconsistent with accepted principles of international law. We shall submit to you, my Lord, that as the law stands the defendants are not entitled to the moral and political advantages of the claim that in these matters the Charter is retroactive. It is not. It is in accordance with international law and with general principles of criminal law as recognized by civilized States.

And first as to the plea of Act of State. The argument of the defence is that according to international law individuals acting as organs of a State are subject to the jurisdiction of that State only. If a foreign State were to assume jurisdiction over them it would, in effect, be assuming jurisdiction over their State—an act which would clearly be contrary to the principles of State sovereignty, of State equality and of jurisdictional immunity of States in general. We will examine these submissions in some detail. But let it be explained at the outset that whatever be the rule of international law on this subject generally, there is no doubt that with regard to war crimes proper the belligerent has full and uncontested jurisdiction over the nationals of the enemy State. It is of no consequence that in committing a war crime the accused acts as the organ or on behalf of the State. (I am not dealing here, my Lord, with any question of superior orders—a subject to which I will come later on. I am concerned with war crimes committed on the responsibility of the accused.) It is of the

very essence of the branch of international law relating to war crimes that it is concerned primarily with acts done on behalf of the State—although, of course, it covers also private acts of lawlessness such as plunder and other crimes of lust and greed. To give an example, if it is proved that the German Naval High Command issued orders which aimed at or had the effect of preventing the rescue of shipwrecked members of crews, this would be a war crime and it would be entirely irrelevant to say that the accused acted for the German State. Counsel for the defendants have not challenged this view of the legal position. Their appeal to the doctrine of Act of State was directed, it appears, only to the charge of crimes against the peace. As in our submission ordinary war crimes are the main burden of the Indictment it would be natural if we declined to enter into a controversy which is in any case of a theoretical character with regard to all three parts of the Indictment seeing that the Charter prescribes individual responsibility with regard to all of them. Yet we do not propose to allow the defence and its protagonists to reap the advantage, which they may put to a variety of uses, of having invoked what they assert to be an established principle which the prosecution did not even attempt to challenge. What authority is there for the proposition that because of the rule, recognized in international law, of jurisdictional immunities of foreign States, a State is bound invariably to refrain from exercising its own jurisdictional rights with regard to unlawful acts committed against it or against the laws of humanity? Such authority is said to be grounded in a long series of judicial decisions in which courts have affirmed that one State has no jurisdiction over another sovereign State, over its head of State, over its property, including its public ships, and over its diplomatic representatives. The reason underlying these decisions is said to be that to assume jurisdiction over a State and its representatives would mean to deny its independence. These decisions go back to the important judgment of Chief Justice Marshall in the case of *Schooner Exchange* v. *McFaddon* in which that great Judge ruled that American courts had no jurisdiction over a public ship of the French State.[83] But there is every reason to assert that he would have been astonished to find his judgment relied upon in support of the claim that, apart from the drastic remedies of war and reprisals, a State is impotent to protect itself against unlawful acts undertaken on behalf of a foreign State. What Chief Justice Marshall said was that "all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers." He added: "… all exemptions from territorial jurisdiction

[83] 7 Cranch 116, 11 U.S. 116 (1812)

must be derived from the consent of the sovereign of the territory. … [T]his consent may be implied or expressed; and … when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act." And he added further that "without doubt, the sovereign of the place is capable of destroying that implication." And these guarded and qualified propositions, in relation to a matter of limited compass, have been magnified to embrace the impunity of acts directly injurious to the territorial sovereign and the general immunity of persons acting on behalf of the State! The decisions of English courts have invariably placed that rule of jurisdictional immunity of foreign States and their agents on the precepts of comity of nations and of peaceful and smooth international intercourse. They are no authority whatsoever for the sweeping deductions which have been made from the principle of immunity of foreign States.[84] Thus while interpreting most generously the rules as to diplomatic immunity, they declined to base it on any sacrosanctity of foreign sovereignty. They based them on requirements of smooth diplomatic intercourse: ne impediatur legatio. Continental countries have declined to treat jurisdictional immunity as absolute. They have drawn a distinction between public acts and acts of a private law nature. And there are indications that English and American courts may adopt that distinction with regard to treatment of public vessels.

While judicial practice thus affords no support whatsoever for any rigid and far-fetched interpretation of the principle of jurisdictional immunity of States in the sense contended for by the defendants, considerations of common sense make such interpretation appear to be grotesque. Suppose a State were to send a body of persons into the territory of another State with instructions to rob and murder, would these persons be immune from ordinary criminal processes because, in the fulfilment of the criminal design, they were acting as organs of another sovereign State? Suppose the individuals who ordered the predatory expedition were to fall into the hands of the attacked State, would they be entitled to plead an Act of State?[85] The analogy with the predatory aggressions of the Nazi State—that magnum latrocinium of modern times—is close. My Lord, we submit that the principle of the immunity in the international sphere of persons committing criminal acts on behalf of their State is unsupported either by authority or by common sense and is a figment of half-baked learning.

I come now to the second complaint concerning the express provision of

[84] *Closing Speeches of the Chief Prosecutors*, *supra* note 3, at 58.
[85] *Ibid.*

the Charter which lays down the principle of individual responsibility of the defendants. It has been asserted that the Charter is in this respect contrary to a basic principle of international law according to which States only, and not individuals, are subjects of international law, that is to say, subjects of international rights and duties. My Lord, there is no such basic principle of international law. There are numerous examples of duties being imposed by international law directly upon individuals. In the case of piracy and breach of blockade individuals are directly subject to international law. War crimes, as distinguished from crimes against the peace, have always been generally recognized as being in that category. So are spies. In the recent case Ex parte Quirin, decided by the Supreme Court of the United States, that great tribunal fully affirmed the same view.[86] In England and in the United States courts have invariably acted on the view that universally recognized customary rules of the law of nations are part of the law of the land and directly binding upon the subject and the citizen. The position is essentially the same in most countries. In Germany itself Article 4 of the Weimar Constitution laid down that generally recognized rules of international law must be regarded as an integral part of German Federal Law. What else does this all mean but that rules of international law are directly binding upon the individual? Shall we suspend the operation of that principle for the mere reason that we are confronted with the gravest offence of all, with offences against the peace of nations and humanity? In no other sphere is it more necessary to affirm the principle that the rights and duties of States are the rights and duties of men and that unless they are the rights and duties of individual persons they are the rights and duties of no one. In no other sphere is it more imperative to disdain the artificial distinction between the corporate entity of the State and those who act on its behalf. The Charter of the Tribunal has ignored that distinction. In doing so it has confirmed and clarified a legal doctrine of transcending beneficence and authority.

It will not be necessary to take up a great deal of the time of the Tribunal in considering the question of the plea of superior orders—although this is a defence which has loomed most prominently in the speeches for the defence. The orders of the Führer were the supreme law operating with irresistible physical compulsion and spelling the doom of any person who failed to comply with them. My Lord, if the matter before this Tribunal were not one transcending and forbidding the natural impulses of pity, there would be commiseration with those once proud leaders of the nation now in abject

[86] 317 U.S. 1, 87 L. Ed. 3 (1942).

self-debasement screening themselves behind the orders of a man whom they now denounce as the author of the greatest murders in history. There is no difficulty about the plea of superior orders in this Court, my Lord. This is so not because the Charter expressly rules out such considerations. It is because of more compelling considerations. As is well-known, the question of the relevance of the plea of superior orders is one of great complexity in constitutional law. It is an established principle in most countries, including Germany, that obedience to manifestly illegal orders does not relieve the author of the act of legal responsibility. In some countries, like Great Britain and the United States, it is not even necessary that the order should be patently illegal. On the other hand, it is recognized that military law prescribes obedience to orders and sometimes immediate and drastic sanctions for disobedience. In practice, common-sense and the exercise of the executive prerogative of pardon affect a reconciliation of two apparently conflicting legal principles. However, in the case before the Tribunal all these difficulties and complexities hardly arise. The Tribunal is not confronted with humble soldiers and officers obeying unlawful and criminal orders, in isolated cases of killing and murder, on pain of themselves being exposed to proceedings before a court martial or immediate death. The Tribunal is confronted with leaders, with friends, co-operators, associates and advisers of the person to whom they now, with nauseating unanimity, attribute the authorship of the criminal acts which they executed or helped to execute. Can it be believed that their opposition to these orders would have exposed them to mortal danger to their persons? Or is it not pre-eminently reasonable to assume that determined resistance on their part would have resulted, possibly after an initial outburst of fury in the person of the Führer, in a modification or abandonment of the criminal command? Defendant Jodl, and other gallant defendants in the dock, have said that disobedience to the orders of the Führer would have resulted in their immediate dismissal and arrest. It is highly improbable that that would have been the result—especially if the Führer knew that this would also have been the attitude of those called in to replace them. But even if we assume that dismissal and arrest would have followed—even if we assume that, is it possible, my Lord, to stifle a feeling of incredulous disgust at the brazen clumsiness of the explanation? What are the dangers conjured up by the accused in comparison with the enormity of the crimes which they helped to execute? Even if these accused could produce the fantastic proof that their own death would have followed the refusal to associate themselves with the criminal policies and orders of the Führer, we submit, with the utmost urgency, as an absolutely irresistible proposition of law, that such proof would be utterly futile and irrelevant. It may be permissible to attempt

to save one's own life by killing another—though this is certainly not the law of my own country—but it is without a shadow of doubt criminal to try to save one's life by bringing about or helping to bring about the deaths of thousands and millions. We accordingly submit to the Tribunal, as a matter of law, that, even if the Charter had been silent on the subject, these defendants would be clearly precluded from invoking the justification of superior orders. It follows from the considerations we have adduced that they are not entitled to rely on the provision of the Charter which permits the plea of superior orders as an extenuating factor in mitigation of the punishment decreed by the Tribunal.

The accused may say, as some of them seem to have said in the course of these proceedings, that in obeying unlawful orders because of jeopardy to their lives, they had in mind not their own personal well-being but the subsection of the German State to the service of which they were dedicated. We do not wish to probe into the motives which made their lives appear to them so precious. But if there is a semblance of substance in that, then it does away with the plea of superior orders conceived as irresistible physical compulsion. The right of a nation to commit crimes—and, in this case, what crimes!—for promoting its ends is not a legitimate factor in the plea of order.

For these reasons we deny that Article 8 of the Charter which authorizes the Tribunal to mitigate punishment on account of orders of superiors if justice so requires is relevant to the case of the present defendants. That Article may be applicable to subordinate members of the groups or organizations which the Tribunal may declare to be criminal in accordance with Article 9. With regard to such persons the Charter, far from being in the nature of retroactive legislation, confirms and interprets generously the existing rule of international law on the subject. The overwhelming majority of legal opinion declines to accept the plea of superior orders inasmuch as it reduces the laws of war to an absurdity by shifting responsibility from one superior to another until it reaches the Chief of State who is often claimed not to be subject to any liability whatsoever. The members of criminal organizations may attempt to rely on the British and American military manuals which is mistaken reliance on a mistaken view of a single writer, for a time seemed to regard superior orders as an unqualified justification. That view was subsequently abandoned. In any case these provisions of military manuals, being out of keeping to the general principles of constitutional and criminal law of these countries cannot be regarded as an authoritative and binding expression of their views on the subject. They were in the nature of information, now shown to be incorrect, transmitted to military authorities. On the other hand, the Charter can be properly construed

as authorizing the Tribunal to prescribe for the guidance of those charged with the prosecution of members of criminal groups and organizations, in what circumstances justice may require the mitigation of punishment on account of superior orders. Actual and continuous participation in the execution of orders which are both patently illegal and inhuman necessarily rules out any mitigation of punishment. At the same time the Tribunal may deem it proper to lay down that isolated assistance in carrying out orders which are not manifestly criminal, in circumstances excluding any reasonable possibility on the part of the accused, to disobey or to attempt to modify the order, is a factor which be adduced in mitigation of punishment. This would apply, in particular in cases in which owing to the uncertainty as to the actual rules of international law or to an asserted exercise of the right of reprisals within the limits of international law, the criminality of the act was not manifestly obvious.

These submissions relating to Article 7 of the Charter in the matter of responsibility of persons in official position—the Act of State doctrine—and to Article 8 in the matter of superior orders conclude the purely legal part of this final address for the Prosecution on behalf of His Majesty's Government. We have been concerned, my Lord, to show that with regard to neither of them is there sufficient justification for the complaint that the Charter, far from merely applying existing law, constitutes an innovation and a departure from basic principles of international law. We have attached throughout the very greatest importance to dispelling the assiduously fostered impression of retro-activity. We attempted to do the same with regard to the parts of the Indictment bearing upon crimes against the peace and crimes against humanity. There is, of course, no question of any post factum legislation in the matter of the principal part of the Indictment, namely, war crimes proper. Now, my Lord, the reasons for which the charge of retro-activity has been put forward and re-iterated in a variety of ways before this Tribunal and outside this Court room is transparent. It is, in law, a challenge to the jurisdiction of the Tribunal. To that extent the Tribunal is bound to ignore it. But it is also a challenge to the moral authority of the Charter, of the Court and of its judgment. It is an appeal to the outside world.

We would have been failing in our wider duty if we had not attempted to show that that shrill complaint has no foundation whatsoever in relation to the principal count of the Indictment; that it is, in substance, unfounded with regard to the others; and that it has no support in international law with regard to Articles 7 and 8 of the Charter bearing on official acts and superior orders. The defence has exhibited some ingenuity in cultivating this particular

argument so tenaciously and so solemnly. The civilized world is sensitive, and justly sensitive, on this point. The principle that no person shall be punished for an act which was not a crime at the time when it was committed must now be regarded as a general principle of criminal law recognized by civilized States. It is also an elementary principle of justice. To deny it is to sanction legislative tyranny in its most objectionable form. Its prohibition goes back to the weighty declaration of the rights of man in the French Declaration of 1789[87] and of the American Constitution.[88] Most modern constitutions expressly forbid the retroactive [application] of criminal law.

It would have been easy for us, as it would have been perfectly justifiable, to insist that as the principle nulla poena sine lege is in itself primarily a principle of justice it must be made to yield to situations in which justice requires that it be disregarded. We have not chosen to follow this line of reasoning. It would have been open to us to argue that if the Charter be retroactive it merely applies the innovation introduced by the Nazi régime which permitted retroactive punishment according to what it describes as "the people's sense of justice". The Tribunal will have noted the subtle explanation of the counsel for the defendant Goering according to which that latitude of courts was to be exercised within the Courts of National-Socialist ideology—what a safeguard and what an ideology! The Nazi régime expressly repudiated Article 2 of the German Criminal Code which forbade punishment unless it is prescribed by a statute enacted before the act was committed. We might argue that it is just to apply to the accused a rule which they themselves enacted. We might urge that it is unjust that these accused should be permitted to invoke a rule which they themselves rejected and ridiculed. But we should be sorry to descend to their level of jurisprudence. We do not wish to see the formal rules of estoppel applied to fundamental principles of law and justice. Instead we have urged that there is no question of retroactivity in Article 6 of the Charter which lays down the jurisdiction of the Tribunal. War crimes are war crimes and have always been so; crimes against the peace were recognized to be such by virtue of solemn treaties and of customary international law which has grown around them; crimes against humanity and crimes by virtue of general principles of law—of law, and not only of justice—which these defendants outraged and defiled. We beg all—except those who are intent upon misleading or being

[87] 1789 Declaration of the Rights of Man and [of] the Citizen (Déclaration des droits de l'homme et du citoyen), available at <http://avalon.law.yale.edu/18th_century/rightsof.asp> [last accessed 12 May 2012].

[88] 1787 Constitution of the United States, available at <http://www.house.gov/house/Constitution/Constitution.html> [last accessed 12 May 2012].

misled—to ponder most seriously before they lend countenance to the charge that the Charter created, to the prejudice of the defendants, a series of crimes which were not crimes before 1939 and 1945.

Undoubtedly the Charter introduced one innovation: It created an instrument for trying these crimes. That instrument has always existed with regard to war crimes though in a form less perfect and less favourable to the defendants than in the present case; it was absent in the matter of crimes against the peace and of crimes against humanity. For that innovation we take full responsibility before the [Court] of history. To that extent the Tribunal is an improvisation. But this is not in itself a defect or a legitimate cause of criticism. Prior to the establishment of the Permanent Court of International Justice all international tribunals were improvised bodies set up ad hoc by special agreements. All civilized communities improvise remedies and institutions in time of emergency. There has never been a graver emergency in the administration of International justice—confronted as we are with the greatest crimes ever committed by a human agency. It would shock the conscience of mankind as it would sap the very foundations of international order and morality if we were to abstain from meeting that emergency because of any fear of procedural innovation. It is of no consequence that the rules of procedure and of evidence have been improvised so long as the Tribunal which administers them succeeds in imbuing them with these qualities of wisdom, of fairness and of impartiality which are the life of law. Can any unprejudiced person entertain doubts as to whether this Tribunal has succeeded in achieving that result?

The way in which the Tribunal gave meaning and vitality to the few and general rules of procedure and evidence laid down in the Charter ought to dispose of the suggestion that this is [a] trial of revenge at the instance of the victor. But there are even more compelling reasons which make any such suggestion improper and, in a very real sense, blasphemous. Is this a trial the main object of which is to take the lives of these defendants? What are the lives of these twenty defendants put against the lives, the agony, the torture, the suffering, and the humiliation of the millions which they sent to their doom? It is only by an ignominious and malevolent corruption of language that one can speak of revenge in a case such as this. Revenge implies some proportion between punishment and crime. There cannot be such proportion in this case. It is probable that those who were not present throughout these proceedings or who have not read the full record, may find it difficult to realize the infinite chasm between the horror of the crimes here recounted and the possibilities of any physical retribution upon the persons of these defendants. Torture is

but a word and human imagination finds it difficult to grasp what is implied in it unless it is confronted with a picture as terrifying and as authentic as those who were here rendered by Dr. Blaha and by many others. The death of one innocent person and of many innocent persons inspires compassion and anger. But the death of innocent millions almost tends to become a mere political concept to persons who, unlike those present in this Court, have not come to agonizing grip with the evidence of that most catastrophic event in human history. To those who have been present here and who will read the evidence before presuming to pronounce judgment, the idea that this trial is a trial of revenge will be as fantastic as the notion that any imaginable retribution upon the defendant could, in any true sense of the word, avenge the deaths of the millions murdered by them or at their behest or with their assistance, connivance, and encouragement.

Yet if this is not a trial of revenge what is its purpose? This trial, my Lord, is intended to serve three objects. In the first instance, its purpose is to mete out justice according to law and to punish the guilty. Of such punishment retribution is one, but only one element. But clearly, the ends of punishment reach beyond that elementary purpose. The fate of these accused will be a deterrent not only to any intending transgression of the laws of war. It will be a warning to potential authors of wars of aggression. And, it will serve as a most explicit reminder that the domain of exclusive domestic jurisdiction ends where crimes against humanity begin. Such warning may or may not be heeded in the future. But we would be guilty of a dereliction of duty if we omitted to issue it at this juncture of history or if we were to flout the outraged conscience of mankind by failing to vindicate the fundamental law of the world.

Secondly, these prolonged judicial proceedings and the judgment of the Tribunal will provide a most authoritative, thorough and impartial ascertainment of the sombre facts of these crimes and these tragedies. What many have hitherto appeared to the incredulous mind as a morbid and studiously exaggerated figment of propaganda has here been revealed in the stark reality of an historical event not challenged even by the accused. Would private research have succeeded in assembling that mass of evidence and documents, carefully authenticated under stringent judicial safeguards, subjected to conscientious scrutiny as to its admissibility and relevance, and exposed to the oral procedure, in full Court, of examination, verification, and explanation? There cannot now be a dispute as to the facts or as to the judgment of the Tribunal as based on them. This is one—although certainly not the most important reasons for dismissing the frivolous advice that the guilt of these defendants is so obvious that they

ought to have been done away with, out of hand by executive decision, without it being necessary to stage a costly and prolonged trial. It is possible that their guilt may have been obvious in any event—but there is a difference, which is of the very essence of the jurisprudence of civilized nations, and which counts heavily in the balance of history between guilt as proved by popular consent and guilt as ascertained by ordinary and exhaustive judicial processes. I need not elaborate the point that we consider [the] executions of persons by political decision and without the safeguards of judicial trial to be utterly contrary to those abiding tenets of the sanctity of human personality with the contemptuous disregard of which we charge these defendants.

Finally, one of the most important aims of this trial is to declare and to clarify such rules and principles of the law of nations as are relevant to the Indictment and to the interpretation of the provisions of the Charter which bear upon it. The Tribunal is an international Court and the Charter is an international treaty. It will be interpreted not arbitrarily but by reference to international law, the rules and doctrines of which counsel for the defence have invoked. The Tribunal will decide on such contentions as that the changed conditions of modern warfare permit the belligerent to throw overboard fundamental principles of the law of war; or that the reservation of self-defence in treaties prohibiting resort to war deprives these treaties of any element of effective legal obligation; or that the individual responsibility of the defendants for acts committed by them is contrary to basic doctrines of the law of nations. The Tribunal will note incidentally that many of the defendants caused frequent researches to be made into various branches of international law and that the proved object of these researches was not to honour the law of nations but the resolve to break it with a minimum of risk and a maximum of plausibility. And the Tribunal will not be the occasional admission, as in the case of counsel for the defendant Goering, that as this was a war for the very existence of nations and as it was a war in which all values had changed "the defendant had the right feeling when he declared: After all there is no legality in the fight for life or death?"

These then, my Lord, are the objects of this trial. It is to[o] much to hope that the accused and their German defenders and protagonists will henceforth refrain from proclaiming that this was a trial of revenge. But the proceedings of this Tribunal have been a most compelling exhortation to all persons of good will not to fall prey to the facile assumption that this trial, being a trial before Court set up by the victors is a mere trial of revenge. These victors—the four signatories of the Charter and the nineteen States which adhere to it—represent

the overwhelming majority of the population of the world. For this reason the moral and judicial standing of this Tribunal remains unshaken by the fact that it is composed only of the nationals of the victors. It is, in the nature of things, a tribunal as international as is practicable after a war in which practically the entire civilized world managed itself against the authors. No decisive accession of impartiality and detachment could be expected from the presence of a neutral national on this Tribunal. It is no disparagement of the few remaining neutral States to say that they would not and could not claim to embody that authority which the victors claim for themselves, namely, that in that struggle for their own survival their fate was identified with the very survival of the law of nations.

It will be objected in some quarters that this is a sanctimonious claim. History will judge. Neither is the significance of these proceedings in the least impaired by the fact that the victors have, so far, failed to make provision for the indictment of any war criminals of their own. We do not rule out that possibility. But we deny, with the utmost conviction, that matter is relevant to the moral and legal authority of these proceedings. If the victors were to indict any war criminals of their own they would be establishing a kind of symmetry in the administration of justice. But it would be a symmetry which would be purely formal, elusive, and deceptive. Because we proclaim—and, again, history will judge—that there is no legitimate comparison between any isolated war crimes committed by the armed forces of the United Nations and that gigantic accumulation of horrors of crimes against the peace, against the laws of war, and against the laws of humanity perpetrated by these defendants. It would have been unjust, it would have been indecent, it would have been unreasonable in the highest degree to allow the abysmal disparity between any war crimes of the forces of the United Nations and the great crime of these defendants to be blurred by any simultaneous or even parallel proceedings.

My Lords, I have now come to the close of these final submissions of the Prosecution on behalf of His Majesty's Government. This trial would have been shorter if the Charter had confined the proceedings to war crimes proper. Any such limitation of the scope of the trial would not have materially affected the fate of these defendants—apart from one or two exceptions. However, for reasons already stated, this was, in the view of the Four Powers, an absolutely imperative occasion for providing an international jurisdiction for giving effect to the rules of international law rendering criminal wars of aggression and the violation of the enduring laws of humanity. These final submissions of the Prosecution would have been shortened if we had been content merely to ask

for the application of the mandatory provisions of the Charter. But we have deemed it our inescapable duty to present these clear articles of the Charter in the background of the law of nations as a living and growing body of principled doctrine. For this is a trial not only before this Tribunal, but also before the enlightened conscience of the entire civilized world.

The Charter does not prescribe the penalties to be imposed by the Tribunal, and it is not our intention to make submissions under this head. But we consider it pre-eminently proper, in this context, to submit to the Tribunal that in the light of the evidence produced in this Court these defendants, with the exception of a few, are guilty of murder—not only of that constructive murder which is synonymous with a war of aggression, but of murder—or a definite part in murder—in its direct, literal, common connotation. This, in its stark reality, is the gist of the evidence here produced. The Tribunal will lay down, in words commensurate with the tragic magnitude of the business before it, that murder does not cease to be such for the mere reason that its victims are numbered in millions or that it is committed on behalf of the State. They, the defendants, were the State. They, in their deeds, embodied the greatest perversion, known in the history of man, of the true meaning and function of the State. Even in the course of this trial the good of the German State remains for them the supreme test and final justification of conduct.

Neither have they seriously attempted to palliate the anger of the civilized world by a simple admission of guilt. Even the abject confessions, with a ring of sincerity about them have been no more than artful evasions. Witness, for instance defendant Frank confessing to a sense of deepest guilt because of the terrible words which he had uttered—as if it were his words that mattered and not the terrible deed which accompanied them. What might have become a redeeming claim to a vestige of humanity reveals itself as a crafty device of desperate men. He, like other defendants, have pleaded, to the very end, full ignorance of that vast organized and most intricate ramification of the foulest crimes that ever sullied the record of a nation.

These crimes transcend any conceivable measure of individual retribution. They have raised issues infinitely weightier than the fate of the defendants. These issues will, we hope, find a proper and solemn place in the judgment of the Tribunal in terms not only of stern justice and of legal principle but also of the loftier hopes of international society. Of these hopes the very Charter of this Tribunal is an auspicious augury. It has given formal sanction the principle that the duties of States are the duties of the human beings who compose them and who govern them. The duties enjoined and enacted by the law of

nations are the duties of man. In a different sphere another Charter—that of the United Nations—has taken the first steps towards the enthronement of the rights of man—of fundamental human rights and freedoms—as an integral part of the constitution. We know now that that great outcome is due in no small measure to the revulsion against the assault which the State governed by these defendants had made upon the inalienable human rights. Thus a new epoch is opening in human government with the rights and duties of the individual in the very centre of the constitutional law of the world. But these new mansions of faith, progress and order will not be built on secure foundations until the impersonal sovereignty of the law has, through this Tribunal, pronounced judgment upon these authors of the greatest evils and the greatest crimes yet inflicted by human beings upon their fellow men.

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Withdrawing Provisional Application of Treaties: Has the EU Made a Mistake?

Lorand Bartels[*]

1 Introduction

It is a common practice, recognized by Article 25 of the Vienna Convention on the Law of Treaties (VCLT), for negotiating parties to a treaty to apply some or all of the provisions of the treaty provisionally prior to the treaty's entry into force.[1] Sometimes, if the treaty never comes into force, it can operate on the basis of provisional application for many years. The General Agreement on Tariffs and Trade (GATT) is a stand out example. This agreement, signed in 1947, was intended to apply on a provisional basis for only a few years, until the framework International Trade Organization came into force. However, when the GATT failed to gain favour in the US Congress, the ITO was abandoned, and the GATT continued as a provisionally applied agreement until 1995, when it was replaced by the World Trade Organization.

The practice of provisional application presents numerous theoretical and practical difficulties, and the inclusion of Article 25 into the Vienna Convention was not uncontroversial.[2] One problem is that, the practice can bypass normal democratic controls on the treaty-making process. Some countries guard against this possibility, for example by subjecting provisional application to the same procedures as treaty ratification.[3] Other legal systems are more flexible. The European Union, for example, expressly authorises the EU Council to

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[1] Technically, a negotiating or signatory party only becomes a 'party' to a treaty once it is in force.

[2] D. Mathy, 'Article 25' in Oliver Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP, 2011), Volume I, at 641–2.

[3] A. Quast, *The Binding Force and Legal Nature of Provisionally Applied Treaties*, PhD thesis (University of London, 2010), at 52.

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adopt a decision provisionally applying a treaty prior to its entry into force. This final step requires the consent of the European Parliament.[4]

Other problems exist at the international level. It is clear, as held by the arbitral tribunal in *Yukos*, that provisional application is binding and enforceable,[5] although the theoretical basis for this is still not certain.[6] This note considers two other questions, which do not appear to have received scholarly attention, and which have recently presented themselves in a case involving the EU's treaty practices. The first is whether, under Article 25(1) of the Vienna Convention, provisional application must be reciprocal, or whether it can be unilateral. The second concerns the conditions under which provisional application may be withdrawn, and whether Article 25(2), which governs withdrawal, is perhaps too strict in certain cases. In this respect it is worth noting at the outset that, while Article 25(1) might be considered to represent customary international law, doubts have been expressed as to the status of Article 25(2),[7] although it was cited with approval in *Yukos*.[8]

2 The EU's Economic Partnership Agreements

These two questions have recently arisen in relation to a set of reciprocal free trade agreements, known as interim (and in one case full) Economic Partnership Agreements (EPAs), between the EU and a number of African, Caribbean and Pacific (ACP) states.[9]

The EPAs were designed as reciprocal free trade agreements that were to replace the unilateral trade preferences that were granted by the EU to the ACP states under the Cotonou Agreement. Due to their unilateral nature, these preferences were permitted under WTO law only because of a specific waiver

[4] Article 218 of the Treaty on the Functioning of the European Union, [2008] OJ C 115/49, 9 May 2008.

[5] *Yukos Universal Limited (Isle of Man) v The Russian Federation,* Interim Award on Jurisdiction and Admissibility, 30 November 2009, PCA Case No AA 227, available at <http://www.italaw.com> [last accessed 7 May 2012], para. 388.

[6] Article 243(3) and (4) 'apply', as per Article 24(4) VCLT. There is significant academic debate on what the legal force is of this 'application'; the most convincing theory is that there is a collateral agreement to this effect (which may be unwritten): see Quast, *supra,* note 3, at 190.

[7] Mathy, *supra,* note 2, at 641–2.

[8] *Yukos*, *supra,* note 5, para. 388.

[9] These can be found on the EU's website at <http://eur-lex.europa.eu/en/index.htm> [last accessed 7 May 2012]. For convenience, these will be referred to here as 'EPAs'.

to this effect. Both the waiver and the preferences were due to expire on 31 December 2007, at which point the EPAs were intended to come into effect. As it turned out, however, the negotiation process took longer than expected, and as the deadline approached the most that could be achieved was a mutual initialling of the EPAs, with signature to follow. This was however a sufficient basis for the EU to adopt a regulation, under which it would continue to grant unilateral preferences from 1 January 2008, until the relevant procedures could be completed.[10]

Naturally, the EU was wary of the possibility that its new regulation might have the effect that the other negotiating parties would not adhere to their side of the bargain. To guard against this risk, the regulation provided for the withdrawal of preferences from a beneficiary, inter alia, if:

> ratification of an agreement … has not taken place within a reasonable period of time such that the entry into force of the agreement is unduly delayed.[11]

As it turned out, after four years 18 of the original 36 negotiating parties had still not taken steps to ratify their respective agreements. Frustrated, on 30 September 2011 the European Commission issued a proposal to withdraw preferences from these beneficiaries by 1 January 2014, unless steps were taken by then to ratify the agreements.[12] On 13 April 2012, David Martin, Rapporteur of the International Trade Committee of the European Parliament, issued a draft report broadly approving the Commission's proposed resolution, though with a later withdrawal date of 1 January 2016. This resolution, possibly amended, will go forward to a vote by the European Parliament, before being decided also by the EU Council.

It can be seen from this description of events that the question of provisional application arises in an unusual context. In the first place, the application of the EPAs is so far one-sided, with only the EU having taken steps to implement

[10] Council Regulation 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states that are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements [2007] OJ L 348/1 (31 December 2007).

[11] Article 2(3)(b) of Regulation 1528/2007, *ibid.*

[12] Commission Proposal to amend Annex I to Council Regulation (EC) No 1528/2007 COM(2011) 598 final. The proposal lists 18 countries: Botswana, Burundi, Cameroon, Comoros, Cote d'Ivoire, Fiji, Ghana, Haiti, Kenya, Lesotho, Mozambique, Namibia, Rwanda, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe. Zimbabwe has now completed its ratification procedures.

provisions under the EPAs. Second, the EU is threatening to withdraw this application of the EPAs not—as is usual—because it no longer wishes to be a party to the agreements but rather for precisely the opposite reason: it wishes to put pressure on the other negotiating parties to conclude negotiations and implement their obligations under the agreements. How, then, does this fit into the framework set out in Article 25 of the Vienna Convention?

3 The EU regulation as an act of provisional application

The first question is whether the EU's regulation constitutes an act of provisional application within the meaning of Article 25 of the Vienna Convention. Article 25(1) states:

> A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
> (b) the negotiating States have in some other manner so agreed.

The EPAs all contain provisions on their application pending entry into force. Indeed, this is done in a particularly elaborate way. Each of the treaties provides for both 'provisional application' and 'application'. Article 105 of the Interim Economic Partnership Agreement between Southern African Development Community (SADC) and the EU and its Member States is an example. First there are two paragraphs on 'provisional application':

> 4. Pending entry into force of this Agreement, the European Community and the SADC EPA States agree to apply the provisions of this Agreement which fall within their respective competences ('provisional application'). This may be effected either by provisional application where possible or by ratification of this Agreement.
>
> 5. Provisional application shall be notified to the depositary. This Agreement shall be applied provisionally ten days after either the receipt of notification of provisional application from the European Community or of ratification or provisional application from all the SADC EPA States, whichever is the later.

Next, there is a paragraph on unilateral 'application' before 'provisional application':

> 6. Notwithstanding paragraph 4, the European Community, the EC Party and SADC EPA States may unilaterally take steps to apply this Agreement, before provisional application, to the extent feasible.

The question then is how these provisions are to be understood in terms of Article 25(1) of the Vienna Convention. It seems relatively straightforward that the treaty provisions on 'provisional application' fall under Article 25(1)(a) of the Vienna Convention. But what about the provision on unilateral 'application'? This is certainly a treaty provision, and therefore potentially within the scope of Article 25(1)(a), but does it concern 'provisional application'? In answering this question, it is perhaps helpful to begin by examining the difference between these two provisions in practice.

As mentioned, the EU adopted a regulation on 1 January 2008 continuing the former unilateral tariff preferences provided until then under the Cotonou Agreement. This regulation purported to be a unilateral 'application' of the EPAs. This can be seen from Recital 4 of the regulation, which makes direct reference to the respective provisions of these agreements:

> Whereas … [t]hose agreements establishing, or leading to the establishment of, Economic Partnership Agreements for which negotiations have been concluded provide that the parties may take steps to apply the agreement, before provisional application on a mutual basis, to the extent feasible. It is appropriate to take action to apply the agreements on the basis of these provisions.[13]

There has subsequently been one case of mutual 'provisional application', following this act of unilateral 'application', namely of the Cariforum-EU EPA.[14] Interestingly, aside from the obvious fact that one of these acts is mutual, and the other unilateral, from the EU side the two acts are virtually identical. There are some minor changes in rules of origin and rules on the suspension of preferences in cases of fraud, and certain institutions have been established, but otherwise nothing significant has changed.

[13] Council Regulation 1528/2007, *supra,* note 10.

[14] Notice concerning the provisional application of the CARIFORUM-EC Economic Partnership Agreement [2008] OJ L352/62 (31 December 2008).

In substantive terms, then, there seems to be no reason why the unilateral 'application' of the EPAs could not be considered a case of 'provisional application' under Article 25(1)—unless Article 25(1) does not recognize *unilateral* provisional application. This does not, however, appear to be the case. Textually, Article 25 simply refers to the act of provisionally applying a treaty: there is no requirement that such an act be mutual. Indeed, this appears to be uncontroversial. Sir Ian Sinclair, in his classic work *The Vienna Convention on the Law of Treaties* noted that "there are other instances where some only of the negotiating States may agree to apply the treaty or part of it provisionally pending its entry into force."[15] A recent example is the 2003 social security agreement between the Netherlands and Romania, which provides that "[t]he Netherlands shall apply Article 4 of this Agreement provisionally from the first day of the second month following the date of signature."[16]

What, then, of the fact that the EPAs use distinct terminology for each of two types of 'application'? Here, too, there does not appear to be much by way of objection. Certainly, it does not matter that unilateral 'application' is not called 'provisional application': there are numerous treaties that use varying terminology. Examples are the 1949 Air Transport Agreement between Czechoslovakia and Finland, which provided that its provisions 'shall be applied from the date of signature', and the 1947 Air Transport Agreement between Chile and the US, which provided that "[b]oth contracting parties shall undertake to make effective the provisions of this agreement, within their respective administrative powers, from the date on which it is signed."[17] Nor is there any other reason to think that unilateral 'application' is special, other than that it is unilateral. If the negotiating parties wished to remove it from the application of the rule reflected in Article 25(1), they should probably have said so.

In sum, everything points to the EU's regulation as an instance of provisional application of the respective EPAs. It does not matter that the provisional application is triggered by one of the parties acting unilaterally, or that it is not called 'provisional application'. But if this is true, then when can the EU's unilateral 'application' of the agreements be terminated?

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[15] I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), at 46. See also A. Mitchie, 'The Provisional Application of Arms Control Treaties', (2005) 10 Journal of Conflict and Security Law 345.

[16] This example is in Mitchie, *ibid.*

[17] These examples are found in H. Blix and J. Emerson, *The Treaty Maker's Handbook* (Oceanea, 1973), at 85.

4 Termination of provisional application

This question is dealt with in Article 25(2) VCLT, though admittedly, as mentioned above, this rule may not reflect customary international law. This provision states as follows (with emphasis):

> Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated *if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.*

The point of this provision is to strike a balance between legal security and flexibility. But the present case points out its limitations. It is clear that the negotiating states have not agreed to the EU's termination of its provisional application of the treaty, and the treaties do not 'otherwise provide' that the EU may terminate its application of the respective treaties. But nor does the EU propose not to become a party to the respective treaties. To the contrary, the EU is now acting in order that the other negotiating states will be persuaded to ratify the agreements as soon as possible.

5 Consequences

As such, the EU is now in a dilemma. But there is also a broader question: whether the rule set out in Article 25(2) of the Vienna Convention is too restrictive.

The problem, as this case study illustrates, is that Article 25(2) can lead to a perverse result. As we have seen, it means that a negotiating party that undertakes an obligation, provisionally, in order to encourage other parties to do the same, is then trapped by those obligations unless it wishes to denounce the agreement. This makes no sense in situations in which it wishes the exact opposite, and, moreover, entered into those obligations precisely in order to encourage the ongoing participation of the other negotiating parties in the process.

This does not appear to be a sensible state of affairs, and may even lead to the conclusion that Article 25(2) does not reflect customary international law. On the other hand, if this is true, then perhaps the EU's proposal is valid after all.

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The Invocation of the Exception of Non-Performance: A Case-Study on the Role and Application of General Principles of International Law of Contractual Origin

Filippo Fontanelli[*]

Keywords
Exception of non-performance, General principles of international law, International Court of Justice, Law of treaties, Law of responsibility

1 Introduction

In a recent cartoon from the New Yorker, a lawyer is seen standing before a judge, his arms stretched, making him a passionate request: "Can we, just for a moment, Your Honor, ignore the facts?"[1] This cartoon brilliantly encapsulates the centrifugal force of legal argumentation, which at times causes otherwise consummate professionals to lose touch with the facts in which disputes should be firmly rooted.

Admittedly, this article attempts a similar exercise, but deliberately. Its purpose is to analyse the technicalities of an objection raised in a recent proceeding before the International Court of Justice (ICJ), as if the facts

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[1] See <http://www.condenaststore.com/-sp/Can-we-just-for-a-moment-Your-Honor-ignore-the-facts-Cartoon-Prints_i8534482_.htm> [last accessed 2 May 2012]. A framed copy of this cartoon is in the office of Judge Kenneth J. Keith of the International Court of Justice, who first showed it to me.

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underlying the dispute did not matter. In reality, the facts mattered so much that the Court did not feel the need to peruse this objection in anything more than a cursory fashion. This, it is submitted, was unfortunate, because it prevented the judges from clarifying some basic elements of the system of sources of international law.

In December 2011, the ICJ delivered the judgment in the *Application of the Interim Accord of 13 September 1995* case,[2] finding that Greece had objected to the former Yugoslavian Republic of Macedonia's (FYROM) accession to NATO and, by so doing, had violated a provision of the Interim Accord (IA) concluded between the two states in 1995.[3] Greece then challenged FYROM's claims, contending that no such objection had occurred within the meaning of the treaty, and that in any case the wrongfulness of that conduct was precluded by FYROM's previous breaches of the IA.[4]

In order to strengthen this second defense, Greece listed all of FYROM's actions that allegedly constituted a breach of the IA[5] which predated Greece's own wrongful conduct (i.e. Greece actively preventing NATO from extending to FYROM an invitation to NATO's April 2008 summit). In Greece's view, these violations entitled it to withhold—in part—performance of the IA: (a) under Article 60[6] of the Vienna Convention on the Law of Treaties[7] (VCLT); (b) under the discipline of state responsibility;[8] or (c) in application of the exception of non-performance, whereby performance need not be extended in light of a counterpart's default: *inadimpleti contractus non est adimplendum*.

This article focuses exclusively on the *exceptio* defense and uses it as a pretext to observe the process of identification, interpretation and application of general principles of international law drawn from domestic civil law doctrines.

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[2] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)*, Judgment, 5 December 2011 (not yet published), available at <http://www.icj-cij.org/docket/files/142/16827.pdf> [last accessed 15 May 2012].

[3] 1891 UNTS 4, Art. 11: "[Greece] agrees not to object to the application by or the membership of [the FYROM] in international, multilateral and regional organizations and institutions of which [Greece] is a member […]."

[4] Greece also advanced several preliminary jurisdictional objections. On this judgment, see F. Fontanelli and E. Bjorge's comment: (2012) 61 *ICLQ* (forthcoming).

[5] Namely FYROM's failure to conduct the negotiations about the name dispute in good faith (IA Art. 5(1)), its interference in Greece's internal affairs (IA Art. 5(2)), its tolerance of hostile activities performed by State entities and the use of the symbol of the Sun of Vergina and of other cultural symbols belonging to Greek cultural heritage (IA Art. 7(1), (2) and (3)).

[6] Governing the termination or suspension of a treaty as a consequence of its breach.

[7] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[8] As codified in the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts, 2001/II(2) ILC *Ybk*, 31. See in particular Arts. 22, 49–53 on countermeasures.

In the case at hand, the ICJ rejected the exception on the facts, noting that Greece could not prove any of the alleged breaches by FYROM, except for a single minor one.[9] Accordingly, the exception could not apply in any event, and the ICJ did not bother to establish whether it actually exists as a principle of the law of treaties or of the law of responsibility, and what its real content is.

The superficial treatment of the *exceptio*, dictated by judicial economy, was met with disappointment by Judges Simma and Bennouna. They devoted a Separate Opinion and a Declaration respectively to this point, lamenting that the Court had relied on the reconstruction of the principle proposed by Greece and shied away from an autonomous review of the exception[10] under the cover of *iura novit curia*. This exercise, however, was ultimately unnecessary to resolve the relevant dispute, in which the *exceptio* seemed to play the ungrateful role of the defendant's old college try.[11]

This article offers a brief introduction to the *exceptio* as a legal concept (II), and considers its possible inclusion among the general principles of international law (III). Assuming that this inclusion is warranted, the international norms that govern the same matters touched by such principle are observed, jointly (IV) and severally (V), to assess whether there actually is a gap in the normative fabric of international law to be filled by the *exceptio*. In the conclusion (VI), it is argued that this step-by-step analysis, if performed by the Court, would have not changed the outcome of the case, but could have helped to further elucidate the role of general principles in international law.

2 The *exceptio*, historical origins and content

The *exceptio non adimpleti contractus* is a principle governing the regime of the mutual obligations between the parties to the same contract. It bestows on a subject (A), at once debtor and creditor in the framework of the same agreement, the power to paralyze the other party's (B) request of performance subsequent

[9] Namely, the use of the Sun of Vergina on the uniforms of a regiment of FYROM's army, which was disbanded in 2004.

[10] *Application of the Interim Accord*, *supra* note 2, para. 161; para. 6 (Judge Simma); at 1 (Judge Bennouna). A similar reasoning was used to rebut Namibia's invocation of the principle of acquisitive prescription: "the conditions cited by Namibia itself are not satisfied in this case": *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Reports 1999, p. 1045, at 1105, para. 97.

[11] From Babe Ruth's *Own Book of Baseball* (G.P. Putnam's Son, 1928), at 301: "'giving it the old college try' [means] ... making strenuous effort to field a ball that obviously cannot be handled". See *Application of the Interim Accord*, *supra* note 2, para. 3 (Judge Simma).

to B's own non-performance. Performance by A, therefore, can be withheld, at least temporarily, to prevent the asymmetric and unfair execution of the agreement. When one of the parties defaults on his or her obligation, the exception freezes the status of mutual non-performance, restoring reciprocity.

Although the kernel of this principle is a heritage of Roman law traceable back to the discipline of the sale and purchase of goods (*emptio-venditio*),[12] its full formulation is a medieval development.[13] Its rationale is somewhat ambivalent. On the one hand, it aims at preventing the unfair judicial sanction that would otherwise be levied against the aggrieved party who refuses to discharge his obligation (*procedural exception*). On the other, the *exceptio* may be seen as a particular principle of contractual law, reflecting the idea that the contractual synallagma (συνάλλαγμα) is essential, and that, as a consequence, the validity of contractual obligations is inherently dependant on reciprocity (*condition of validity*).

The first interpretation (procedural exception) has proved more convincing over time: it is accepted that the *exceptio* entitles the aggrieved party to withhold performance when the other party has not performed without incurring the normal legal consequences, and can be raised in court to avoid an unfair finding of liability. However, the *exceptio* also appears to have some substantive implications on the obligations of the parties in reciprocal agreements, as posited by the German scholarship, in particular after the publication of Bechmann's '*Der Kauf nach gemeinem Recht, I, Geschichte des Kaufs im römischen Recht.*'[14] In this seminal work, Bechmann perused the concept of

[12] See P. O'Neill, and N. Salam, 'Is the *Exceptio Non Adimpleti Contractus* Part of the New *Lex Mercatoria*?', in E. Gaillard (ed), *Transnational Rules in International Commercial Arbitration* (ICC, 1993), 147, at 152.

[13] See G. Scaduto, 'L'exceptio non adimpleti contractus' nel diritto civile italiano', (1921) *VII Annali dell'Università di Palermo* 79, attributing to Bartolo da Sassoferrato the comment of Justinian's *Digest* [D. 19.1.13.8] that reads: *'contractu ultro citroque obligatorio non potest effectualiter agi, nisi ab eo qui effectualiter totum contractum ex parte sua impleverit'* [only that who performed it effectively in its entirety can successfully invoke a contract producing reciprocal obligations]. According to others, this formula comes from a passage of the Digest [Code 2.3.21], which includes the expression '*Nec adversario tuo transactione uti concendendum est, nisi ea, quae placita sunt, adimplere paratus sit*' [you shall not let your counter-party take advantage of a transaction, unless he is ready to perform what is agreed] that was commented as follows (referring to certain specific cases): *'non es[t] servanda[] fide[s] non servanti'* [one must not be faithful to that who is unfaithful]: see *e.g.* R. Cassin, *De l'exception tirée de l'inexécution dans les rapports synallagmatiques [exceptio non adimpleti contractus] et de ses relations avec le droit de rétention, la compensation et la résolution* (Paris, 1914), at 1 (note 1) and G. Persico, *L'eccezione di inadempimento* (Giuffrè, 1955), at 2 (note 2).

[14] A. Bechmann, *Der Kauf nach gemeinem Recht, I, Geschichte des Kaufs im römischen Recht*

synallagmaticity, and distinguished between its implications at the moment of formation of the obligation and at that of its performance (the *exceptio* affecting the latter). However, this elaboration has never led to the conclusion that the execution of contractual obligations is conditioned *de iure* upon the performance of the "reciprocal" counter-obligations. As noted by V. Arangio Ruiz, the *exceptio* can be considered a trend, a benchmark of evaluation of the parties' good faith in the execution of the agreement, rather than an absolute principle of interdependence of contractual obligations.[15]

To sum up, in modern legal practice, the exception of non-performance can be characterised as follows: a refusal to perform by one party which would be objectively wrongful under the terms of the contract may be lawful in light of the previous conduct of the other party. The power to avail oneself of the *exceptio non adimpleti contractus* boils down to the possibility to adopt conduct in violation of the contractual commitment and to invoke the other party's non-performance together with the evidence proving it as a justification for non-performance.[16] It is reasonable to rely on the findings of those who have performed a full comparative analysis, and submit that this principle of the law of contracts is indeed traceable in most modern legal orders.[17]

3 The *exceptio* as a general principle of the civilised nations

The application of private law principles to matters of international law, and in particular the scope of the analogy between contracts and treaties has been

(Erlangen, 1876).

[15] V. Arangio Ruiz, *La compravendita in diritto romano* (Jovene, 1956), at 214ff, noting that in Roman law "there was a trend to evaluate the position of both parties as a whole, because the obligations entered by each party were the cause for those entered by the other one … This trend, however, had to be harmonized with the rules of procedure, as well as other needs of equity and economic nature".

[16] S. Pugliatti, 'Eccezione (teoria generale)' in *Enciclopedia del Diritto* (Giuffrè, 1965), at 151.

[17] *Application of the Interim Accord*, *supra* note 2, para. 12 (Judge Simma). J. Crawford and S. Olleson underscore the divide between civil and common law systems in this respect: 'The Exception of Non-performance: Links between the Law of Treaties and the Law of State Responsibility', (2001) 21 *Austr YIL* 55. See also O'Neill and Salam, *supra* note 12, at 159, examining whether the *exceptio* is diffused enough to be a general principle of law and form part of *lex mercatoria*. The test used is similar to that implied under Art. 38(1)(c) of the ICJ Statute: *ibid.*, at 151 ("the bottom line in ascertaining general principles seems to be whether the rules of various legal systems, although differently formulated, nevertheless produce the same result in gauging whether a rule is a general principle").

discussed extensively. As it was once said, "the Law of Nations is but private law 'writ large'",[18] insofar as it applies to states the legal ideas applicable to relations between individuals. This cannot mean that every rule of private law, by its own existence, deserves to be transplanted to the international level "lock, stock and barrel": the judge must treat them as a reminder of the "policies and principles" that ought to be applied in every legal order,[19] a repository of the *ratio scripta*.[20] This process of abstraction, however, might result in formulating international norms with little or no substance,[21] tautologies whose only weight seemingly resides in their Latin garb.[22]

However, importing principles from domestic systems seemed at one time inevitable due to the perceived insufficiency of the formal international sources combined (treaties and customs). Indeed, the Advisory Committee of Jurists that in 1920 drafted the Statute of the Permanent Court of International Justice[23] adopted Baron Descamps' proposal to include general principles among the sources of law applicable by the Court with a view to preventing rulings of *non liquet*.[24] This source, resorted to as an incarnation of natural law, and then "re-construed as an emanation of domestic traditions"[25] to meet the approval of the positivist members of the Committee,[26] was accepted even by those members who fiercely objected to giving the new Court any law-creating power (such as the American Elihu Root). Indeed, it was clarified that applying a general principle would be tantamount to "merely br[inging] to

[18] T. E. Holland, *Studies in International Law and Diplomacy* (Clarendon, 1898), at 152. This view was in turn supported by H. Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green & Co, Ltd, 1927), at 81.

[19] *International Status of South-West Africa*, Advisory Opinion, ICJ Reports 1950, p. 128, at 148 (Judge McNair, dissenting).

[20] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Second Phase, Judgment, ICJ Reports 1970, p. 6, at 66, para. 5 (Judge Fitzmaurice). See also France's pleadings in *Phosphates in Morocco (Italy v France)*, PCIJ Reports Series C No 85, at 1060–1.

[21] Weil, (1992/VI) 237 Hague *Recueil* 9, at 146: "D'une certaine manière, le processus d'abstraction-généralisation est autodestructeur."

[22] O. Schachter, *International Law in Theory and Practice* (Martinus Nijhoff, 1991), at 54.

[23] Upon mandate conferred by the Council of the League of Nations, acting under Art. 14 of the Covenant of the League of Nations, relating to the establishment of the PCIJ.

[24] For a detailed account of the *travaux préparatoires* of Art. 38 of PCIJ–ICJ Statute, see A. Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice: a Commentary* (OUP, 2006), 677, at 684ff; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius, 1953), at 6–22.

[25] J. D'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP, 2012), at 171.

[26] On this compromise, see in particular PCIJ, *Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, 16 June to 24 July 1920* (Van Langenhuysen Brothers, 1920), at 335, 345.

light a *latent* rule"[27] among those already accepted in *foro domestico*,[28] and would only intervene to fill the a *lacuna* of positive law.[29] As Hersch Lauterpacht noted, examining in detail the various theories on the use of Roman and private law principles in the practice of international law:

> When, in international disputes, rules of general jurisprudence are referred to, what is meant is that not a rule of one particular system of private law is to be applied, but only such a rule—usually a private law rule—as has gained recognition by the general body of civilized nations. *This is so for the simple reason that international law has not, in the particular sphere, developed any rules on its own. In fact, there would be no need to have recourse to general jurisprudence, if there were an international rule ready at hand.*[30]

This approach is premised on the view that international law is a complete system,[31] and that accordingly, in the presence of a gap, the inevitable course of action is to deploy general principles, rather than acknowledging that certain acts or facts are not governed by any norm.[32]

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[27] *Ibid.*, at 346 (emphasis in the original).

[28] This expression is used by Lord Phillimore, *ibid.*, 335, who provides an illustrative list: "certain principles of procedure, the principle of good faith, and the principle of *res judicata*".

[29] As Schwarzenberger puts it in his Foreword to Cheng's great work, the drafters of the Statute: "enabled the Court to replenish, without subterfuge, the rules of international law by principles of law tested within the shelter of more mature and closely integrated systems": Cheng, *supra* note 24, at xi.

[30] H. Lauterpacht, 'Private Law Sources and Analogies of International Law', in E. Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht* (CUP, 1975), Vol II, 173, at 206 (emphasis added). This work is a revision of the first chapter of Lauterpacht's earlier dissertation, *supra* note 18.

[31] Conclusions of the work of the Study Group on the Fragmentation of International Law, 2006/II(2) ILC *Ybk* (forthcoming), para. 1. Also published as M. Koskenniemi (ed), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission* (Erik Castrén Institute, 2007), at 263, para. 14(1).

[32] A discussion of this assumption is outside the scope of the present article, if only because it is argued here not that *lacunæ* need no filling, but that there is no lacuna for the *exceptio* to fill. But see H. Lauterpacht, 'Some Observations on the Prohibition of "*Non Liquet*" and the Completeness of the Legal Order', in E. Lauterpacht, *supra* note 30, at 213 (previously published in 1958) and J. Stone's rebuttal in 'Non Liquet and the Function of Law in the International Community', (1959) 35 *BYIL* 124. For a recent work, see J. Kammerhofer, 'Gaps, the *Nuclear Weapons* Advisory Opinion and the Structure of International Legal Argument between Theory and Practice', (2009) 80 *BYIL* 333.

The question then arises of whether the *exceptio* can be regarded as one of the general principles of law that, according to this intellectual framework, can be transposed to the international sphere. As it was noted above, the *exceptio* appears to find expression in the majority of domestic legal systems. However, in and of itself, the *exceptio* is a norm of contract law or, at best, a norm of the law of obligations. It cannot be said that it is a universal principle of law *per se*, though it certainly embodies the more fundamental principles of fairness, equity and good faith that are ingrained in every field of law. However, such broad norms operate in combination with other principles which are proper to each area: for example, in international law the principle *pacta sunt servanda* has a fundamental role as it ensures the stability and the maintenance of the system of international relations at large.

This tension surfaces even in Grotius' teaching. First, he notes that "*servanda[ ] autem fide[s] etiam perfidis*" (Faith is to be kept even with those that are perfidious),[33] but then he rushes to clarify that the strict connection between the mutual obligations of the same instrument can excuse the aggrieved party who refuses to perform.[34]

In fact, the question is otiose: far below the heaven of principles exist special rules—examined in the following paragraphs—that flesh out the *exceptio* and dispel the possibility of invoking its ethereal form in the field of interstate treaty relations.

4 The *leges speciales* of state responsibility and law of the treaties

Whether or not the *exceptio* may be regarded as a general principle of law, one should be mindful of the fact that the temptation to postulate principles of law elaborating on general values should be resisted at the international level:

[33] H. Grotius, *De Jure Belli ac Pacis* (1625, tr. J. Morrice 1738 : repr. Liberty Fund, 2005), bk. III, ch. XIX, para. xiii (at 1545), modeled upon a passage from St. Ambrose, *De Officiis* 1, 29. Along the same lines, see G. Del Vecchio, 'Truth and Untruth in Morals and Law', (1953) 39 *Iowa LR* 16, at 57: 'it is not just that the law always permit one to respond to unlawfulness with unlawfulness (because it would then cease to be such).' On the limits of reciprocity in international law, see A. Paulus, 'Reciprocity Revisited', in U. Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP, 2011), at 113.

[34] Grotius, *supra* note 33, bk. III, ch. XIX, para. xiv (at 1546–7). Another passage is quoted in *Application of the Interim Accord*, *supra* note 2, para. 15 (Judge Simma).

> Le travail théorique d'abstraction positive, par lequel, dans le droit privé, l'interprète parvient à remonter de la comparaison et du groupement des règles particulières à la construction des grandes catégories du droit et à la détermination des règles générales du système, n'est pas possible dans le droit international.[35]

In light of these remarks, the rule of thumb in the application of general principles is clear: they apply directly when there is no conventional or customary rule of international law governing on a matter. The characteristic pliability of such principles to an applicable *lex specialis* was confirmed by the International Law Commission's (ILC) Fragmentation Study:

> The parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms.[36]

The application of *lex specialis derogat legi generali* is especially appropriate when, like in the case of the exception of non-performance, a general principle would only be capable of application by analogy (between contractual and treaty obligations). The general values of good faith and fairness that the *exceptio* embodies at the domestic level are hardly such as to fill the gaps of the normative regimes of international law in fields like treaty law or state responsibility. In fact, one should not confuse the application of general principles with their use as an interpretive support[37]: whereas it is certainly appropriate and desirable that general principles be used to facilitate the interpretation[38] of the VCLT and

[35] Cavaglieri, (1929/I) 26 Hague *Recueil* 311, at 322, quoted in Strupp, (1930/III) 33 Hague *Recueil* 351, 454–5.

[36] ILC Conclusions, *supra* note 31, para. (19)(a); Koskenniemi, *supra* note 31, 270, para. 14(19)(a). See also the Full Report of the ILC Study Group, UN Doc. A/CN.4/L.682 (2006), paras. 462 ff; Koskenniemi, *supra* note 31, at 233ff, paras. 462ff.

[37] On this fundamental distinction, often overlooked in the literature and jurisprudence, see A. Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication', (2011) 2 *JIDS* 31.

[38] See *e.g. Amoco International Finance Corporation v Iran* (1987–II) 15 Iran–US CTR 189, at 222; in *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, ICJ Reports 2003, p. 161, the ICJ used the principle prohibiting the use of force to interpret the standard of necessity in the US/Iran Treaty of Amity. See J. Kurtz, 'Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis' (2008) *NYU IILJ Working Paper* 2008/06, at 35–7, and E. Jouannet, 'Le juge international face aux problèmes de l'incohérence et d'instabilité de droit international. Quelques réflexions à propos de l'arrêt CIJ du 6.11.2003', (2004) 108 *RGDIP* 917, at 933, 936.

of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), they normally cannot find direct application in these matters.[39]

At this point, a reference to the *dictum* of the Georges Pinson tribunal is almost mandatory:

> Toute convention internationale doit être réputée se référer tacitement aux principes généraux du droit international pour toutes les questions qu'elle ne résout pas elle-même en termes exprès ou autrement.[40]

In other words, the general principle of the exception (better, the general principle of fairness expressed therein) could only apply directly, as Greece contended, if there were a normative gap in the rules of international law applicable between the parties.[41] As noted above, the *exceptio* principle governs the powers of one party facing another party's default on his contractual duties. In the operative part, the principle justifies the first party's withholding of performance, as a lawful response to the other party's wrongdoing. The contract remains in force. The factual scenario engaging the application of the principle, therefore, is the non-performance of an obligation inscribed in a framework of reciprocal obligations. If no existing treaty or customary rule of international law could apply to a similar factual hypothesis, as transplanted in the area of treaty law, the *exceptio* principle could apply directly.

In fact, it appears that this matter is thoroughly regulated by rules of treaty law contained in the VCLT and rules of state responsibility codified by the ILC that are of recognized customary nature. In particular, VCLT Article 60 regulates the case of unilateral suspension of a bilateral treaty: if it is in response to a material breach, suspension is justified, otherwise it is wrongful. If the wrongful suspension results itself in a material breach of the treaty, it entitles the

[39] On general principles as the North Star in the interpretation of positive rules, see generally *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, p. 14, *passim* (Judge Cançado Trindade).

[40] *Georges Pinson (France/United Mexican States)*, (1928) 5 RIAA 327, at 422. More recently, see *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom)*, (2003) 126 ILR 334, at 364, para. 84.

[41] See Pellet, *supra* note 24, at 780: "[principles] are subsidiary in the sense that the Court will usually only resort to them for filling a gap in the treaty or customary rules available to settle a particular dispute, and, what is even more apparent, will decline to invoke them when such other rules exist". For a similar statement, see *Eastern Extension, Australasia and China Telegraph Company, Ltd (Great Britain v United States)*, (1923) 6 RIAA 112, at 114: "the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provisions of law, the corollaries of general principles".

other party to suspend or terminate a treaty in whole or in part. The ARSIWA also govern cases of breach of international obligations in Articles 22 and 49 to 53, providing that the injured state is entitled to take counter-measures, subject to certain conditions, and that those counter-measures are to be considered lawful, even if they would have otherwise constituted a wrongful act.

It is therefore difficult to understand why recourse to the general principle should be had at all, given that there are applicable rules governing the same factual hypotheses and attaching thereto an array of legal consequences (regarding the validity of the treaty, the modality of the reactions to a breach and the conditions for a party to take such reactions lawfully). Importantly, these rules are modeled precisely on the values that are at the basis of the *exceptio* (reciprocity; good faith; even-handedness; *ex iniuria ius non oritur*; non-wrongfulness of non-performance due to impossibility; and even self-defence, to an extent): it cannot be said that application of the rules of the VCLT or the ARSIWA frustrates the purpose of these general principles.[42]

5 The regimes of treaty obligations and state responsibility, considered separately

To examine the issue further, one might distinguish between the two regimes: one pertaining to the *operation of treaty obligations* (the VCLT) and the other to the *responsibility of states* (the ARSIWA). Since these two regimes are concerned with different matters, they might apply at the same time to the same set of facts/acts, as VCLT Article 73[43] and paragraph 8 of the Preamble thereof suggest, and as ARSIWA Article 56 expressly envisages.[44]

In the *Gabčíkovo-Nagymaros* case, the Court acknowledged the different functions of the two regimes:

[42] For an erudite account of good faith as a regulative element into the interpretation of consensual inter-state engagements, see Schwarzenberger, (1955/I) 87 Hague *Recueil* 191, at 290–326.

[43] According to which the Convention "shall not prejudge any question that may arise in regard to a treaty … from the international responsibility of a State".

[44] See Clarification (3) to ARSIWA Art. 56, ILC Commentary, *supra* note 8, at 141: "A second function served by article 56 is to make it clear that the present articles are not concerned with any legal effects of a breach of an international obligation which do not flow from the rules of State responsibility, but stem from the law of treaties or other areas of law. Examples include ... the termination of the international obligation violated in the case of a material breach of a bilateral treaty".

> A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a 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 [VCLT] confines itself to defining in a limitative manner the conditions in which a treaty may lawfully be denounced or suspended; while the effects of a denunciation or suspension seen as not meeting those conditions 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.[45]

In light of this division, it is necessary to inquire whether the general principle could apply directly to fill a regulatory gap of *either* regime (rather than of their combined normative coverage). As indicated above, the general principle of the *exceptio* is amenable to both regimes, although it has more to do with the legality of the non-performance of the 'reacting' party (an issue of responsibility) than with the fate of the contractual obligations (which, in principle, are still in place even after the non-performance by both parties, since suspension does not equal termination).

5.1 State responsibility

As a set of secondary rules in a particular field of international law, the ARSIWA are exhaustive, since they cover every instance of breach, clarify the courses of action available to the non-breaching party, and specify their conditions. They are not concerned with the destiny of the obligations involved. FYROM's alleged violations of the IA fall well within the ARSIWA regime, and if Greece

[45] *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7, at 38–9, paras. 47–8. The Court refers to the cases *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Second Phase, Advisory Opinion, ICJ Reports 1950, p. 221, at 228; and to Art. 17 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts provisionally adopted by the International Law Commission on first reading (preceding the ARSIWA): 1980/II(2) ILC *Ybk*, at 32.

wanted to invoke the regime so as not to incur responsibility for breaching Article 11 of the IA, it should have turned to ARSIWA Articles 22 and 49 precluding the wrongfulness of counter-measures.

In his Separate Opinion, Judge Simma was of the view that "State responsibility has nothing to do with the maxim *inadimplenti non est adimplendum*".[46] This position is based on a narrow focus on "the synallagma" between the respective obligations of the parties on which the *exceptio* is based (a requirement that is irrelevant in the regime of counter-measures), and on the assumption that for all purposes the withholding of one's performance under the *exceptio* is tantamount to the suspension of a treaty obligation (and therefore falls under the scope of the VCLT). To Judge Simma, counter-measures entailing a refusal to perform a bilateral treaty may look like suspension, but are not the same.

These reasons suffer from a form of *petitio principii*, as they assume that suspension is the international law avatar of the *exceptio*. This might well be the best reconstruction of the concept, but looking at how the principle operates domestically, two observations may be made. Firstly, it turns out that the *exceptio* is seldom dependant on the eluding link of the synallagma (are not all contracts with reciprocal obligations a form of *quid pro quo*, after all?), and is—ironically—more frequently reliant on a requirement of minimum gravity of the breach. Second, the exception of non-performance, in essence, relieves the aggrieved non-performing party from his or her otherwise inevitable contractual responsibility. It is therefore reasonable to accept that, *mutatis mutandis*, the international transubstantiation of the principle could also fall in the field of application of the circumstances precluding wrongfulness, within the realm of the law of state responsibility.

In this vein, the ILC contemplated the inclusion of the *exceptio* in the Articles at various stages.[47] In 1992, it considered that a distinct category of counter-measures based on the *exceptio* (designated "reciprocal measures") "did not deserve a special treatment".[48] In his Second Report, Special Rapporteur Crawford subscribed to this view and discarded the possibility of adding the *exceptio* to Part III of the Draft, that is, as a rule relating to the implementation of state responsibility. He cited the stability of international obligations as a prevailing concern:

> The underlying problem is that a broad view of the *exceptio* may

[46] *Application of the Interim Accord*, *supra* note 2, para. 20 (Judge Simma).

[47] For an exhaustive account of the ILC's debate on the *exceptio*, see Crawford and Olleson, *supra* note 17.

[48] Report of the ILC on the work of its forty-fourth session, 1992/II(2) ILC *Ybk*, at 23.

> produce escalating non-compliance, negating for practical purposes the continuing effect of the obligation. … [T]he justification for non-compliance with synallagmatic obligations should be resolved (a) by the law relating to the suspension or termination of those obligations (which is sufficient to deal with most problems of treaty obligations), and (b) by the law of countermeasures.[49]

Instead, the Rapporteur proposed to retain, as a measure precluding wrongfulness different from counter-measures, a "narrow" version of the *exceptio*, apparently adopted in *Gabčíkovo-Nagymaros*. In that judgment, the Court denied Hungary's right to terminate a treaty because Czechoslovakia's relevant breach had been committed "as a result of Hungary's own prior wrongful conduct".[50] The strict causal link between the prior non-performance and the subsequent (excused) one[51] made this construction of the *exceptio* a hybrid between a counter-measure and the excuse of *force majeure*—hence its suggested insertion into Part I of the Draft.[52] Discussion on this provision was initially postponed after the definition of the discipline on counter-measures,[53] and ultimately abandoned altogether. For the purpose of the present study, suffice it to say that the "narrow" version of the *exceptio*, the only one which arguably could still be floating somewhere outside the ARSIWA, would have provided no help to Greece, which was certainly not prevented from complying with Article 11 of the IA "as a direct result of a prior [FYROM's] breach".[54]

In sum, the exception of non-performance is banned from the field of application of the ARISWA. In particular, Greece's attempt to rely on a non-codified category of reciprocal measures in the framework of the IA is

[49] See J. Crawford, Second Report on State Responsibility, 1999/II(1) ILC *Ybk*, at 79–82.

[50] *Gabčíkovo-Nagymaros Project*, *supra* note 45, at 67, para. 110, building on the *dictum* of *Factory at Chorzów (Germany v Poland) (Jurisdiction)*, Judgment, PCIJ Report Series A No 9, at 31.

[51] Used for instance in the 1980 UNCITRAL Convention on Contracts for the International Sale of Goods, 1489 UNTS 3, Art. 80: "A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission."

[52] The proposed article 30 *bis* read: "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the State *has been prevented* from acting in conformity with the obligation *as a direct result* of a prior breach of the same or a related international obligation by another State" (emphasis added).

[53] See the ILC's debate on the Second Report, 1999/II(2) ILC *Ybk*, at 79–80.

[54] In his Separate Opinion, Simma leaves out this obvious aspect and strives to demonstrate the implausibility also of the "narrow" exception, living up to his declared intention to elaborate on the "*exceptio*'s whereabouts and 'right to life'", quite apart from its bearing on Greece's conduct: *Application of the Interim Accord*, *supra* note 2, para. 7 (Judge Simma). Bennouna instead stresses this aspect: *ibid.*, 1 (Judge Bennouna).

hard to square with the *travaux* of the ARISWA: the commissioners and the Special Rapporteur did not inadvertently leave a matter outside the regime; to the contrary, they considered the issue and expressly decided not to regulate this kind of act any differently than provided by the discipline of counter-measures. In light of this evidence, it seems unreasonable to claim that a gap exists in the law of state responsibility.

5.2 Law of treaties

In contrast to the ARISWA, the rules of the VCLT, which are concerned with the consequences of a breach on the treaty itself, only regulate the hypothesis of "material" breaches, in VCLT Article 60.[55] The hypothesis of non-material breaches is not expressly mentioned in the VCLT. However, this omission could hardly be seen as a gap: rather, it is an instance of the maxim *ubi lex voluit dixit, ubi noluit tacuit* (if the law wishes something, it states it; if the law does not wish something, it is silent upon it). The materiality of the breach is a threshold, implying that suspension (or termination) is simply not allowed for non-material breaches. It should be kept in mind that the subject matter of VCLT Article 60 is only the faculty to suspend (or terminate) the treaty. VCLT Article 42(2) for its part clearly states that suspension is not permitted, except when authorized by the Convention itself, and therefore discourages recourse to the default rule whereby "rules of customary international law will continue to govern questions not regulated by the [VCLT]".[56]

In other words, the VCLT does not prevent the application of rules on responsibility (even for minor breaches), but it clearly excludes the application of external rules justifying a treaty suspension that would not be justified under the Convention. Non-material breaches do trigger legal consequences as to the responsibility of the breaching state, but cannot entitle the other party to suspend the treaty.

This specification (no gap exists in the VCLT that corresponds with minor violations) is of paramount importance in the examination of Greece's *exceptio* argument. If a gap existed, the *exceptio* could seem applicable *ratione materiae*

[55] This does not prevent Simma and Tams, in their commentary of VCLT Art. 60 to note that "[t]he idea underlying Article 60 is the principle *inadimplenti non est adimplendum*": B. Simma and C. J. Tams, 'Article 60, Convention of 1969', in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP, 2011), Vol II, 1351, at 1353. The silence about non-material breaches is noted but is not sufficient to alter the equation: VCLT Art. 60 *is* the *exceptio*.

[56] VCLT Preamble, final sentence.

to minor breaches. Thus, it surely would not be enough (as Judge Simma cryptically indicates[57]) to rely on Greece's characterization of FYROM's breach as "material" to solve the issue and escape the *exceptio*. Emphatic statements by parties should not be relied upon uncritically, especially in the circumstances at hand, where FYROM's alleged violations, if anything, appeared to be less than material. If a gap in the law of treaties actually existed (*quod non*), Greece could in principle invoke the *exceptio* to react to minor breaches, and certainly would not lose this capacity merely for having overstressed FYROM's misconduct in its pleadings in an attempt to secure other remedies (i.e. counter-measures and suspension).

6 The *exceptio* general principle may exist, but could not assist Greece

Initially, Greece stated that is was uninterested in the suspension of the IA,[58] but then changed its mind at the hearings.[59] This hesitation was possibly due to the fact that FYROM's alleged breaches of the Accord seemed inconsequential, thus falling short of engaging VCLT Article 60. Revealingly, Greece also maintained that its non-performance was lawful not so much because that the IA had been suspended, but because a previous breach of the same instrument occurred. As noted above, however, the ARSIWA regulate this hypothesis thoroughly, and there is no need to or possibility of recourse to general principles of contractual law to displace their application.

The *exceptio* might still apply in cases where the ARSIWA provisions on counter-measures do not apply (e.g. in the implementation of contracts stipulated with a government or an international organization, when national rules are referred to by international law, for instance in certain bilateral investment treaties;[60] or when the ARSIWA are contracted out of by virtue of a *lex specialis* under ARSIWA Article 55). Theoretically, the *exceptio* could help in

[57] *Application of the Interim Accord*, *supra* note 2, para. 22.

[58] Counter-Memorial, para. 8.2, available at <http://www.icj-cij.org/docket/files/142/16356.pdf> [last accessed 1 May 2012]; Rejoinder, para. 8.3, available at <http://www.icj-cij.org/docket/files/142/16360.pdf> [last accessed 1 May 2012].

[59] *Application of the Interim Accord*, *supra* note 2, paras. 118–19.

[60] For an instance, see *Klöckner Industrie-Anlagen GmbH v Republic of Cameroon*, (1983) 2 ICSID Reports 9 (Award, 21 October 1983), and J. Paulsson, 'The ICSID *Klöckner v Cameroon* Award: The Duties of Partners in North-South Economic Development Agreements', (1984) 1 JIArb 145. See also *Klöckner Industrie-Anlagen GmbH v Republic of Cameroon*, (1986) 2 ICSID Reports 95 (Decision on Annulment, 3 May 1985).

identifying the conditions of suspension of a treaty to which the VCLT does not apply (for instance, treaties pre-dating the VCLT's entry into force), but most likely the materiality requirement for suspension has ripened into custom and applies regardless.[61] Nevertheless, as far as the IA is concerned, the *exceptio* could not apply directly, as other norms have priority regarding the possibility both to suspend the treaty and to withhold performance in response to a prior breach.

As noted above, the ICJ dismissed the *exceptio* because Greece's pleading had no merit *on the facts* (the defendant could not demonstrate that the factual requirements for its application existed). Consequently, the Court did not consider whether Greece's defence was faulty *on the law*. Reading the pleadings of the parties and the *compte-rendus* of the hearings, one has the impression that the central issue was the existence (*vel non*) of the principle: the excerpt from Anzilotti's 1937 Opinion[62] was alternately glorified or denigrated precisely to support or refute the existence and effectiveness of this principle. Even Judge Simma's concern, in his Opinion, seems to prove that the *exceptio* does not have "a right of place in international law".

Arguably, the controversy about the status of the principle would not have been an easy one to solve, and it is not surprising that the Court chose not to embark upon it. To establish or discard the *existence* of the principle requires considerable comparative effort and some judicial discretion, complicated by the inherent difficulty of transplanting a contract law principle, as is, into the regime of treaty obligations. By contrast, the question of the *applicability* of the principle was fairly easy to analyse (and discard), even *arguendo*, in the way proposed above: a few additional paragraphs would not curtail the Court's desire for judicial economy, but could have made a considerable contribution to the clarification of general principles' role in the system of international law sources. It would have sufficed to portray Greece's argument as an attempt to turn *lex specialis* on its head: whether the *exceptio* exists or not, it is arduous to contend convincingly that *lex generalis derogat legi speciali*. The Court could have

[61] A*pplication of the Interim Accord*, *supra* note 2, para. 29. Note that in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, at 46–7, para. 94, the Court simply noted that the rules on termination of VCLT Art. 60 "may in many respects be considered" of customary nature. On the customary content of VCLT Art. 60(1), see M. E. Villiger's *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009), at 749–50.

[62] Emphatically describing the *exceptio* as a general principle under Art. 38(3) of the PCIJ Statute, see *Diversion of Water from Meuse (Netherlands v Belgium)*, PCIJ Report Series A/B No 70, at 50 (Anzilotti, dissenting). See also *ibid.*, at 77 (Hudson).

addressed Greece's attempt to misuse the *exceptio* principle without abusing its judicial function, and, in the process, done a wider service to international law by emphasising that principles must be taken seriously. As noted by Judge Cançado Trindade:

> The Hague Court, also known as the World Court, is not simply the International Court of Law, it is the International Court of *Justice*, and, as such, it cannot overlook *principles*.[63]

[63] *Pulp Mills*, *supra* note 39, para. 220 (Judge Cançado Trindade) (emphasis in the original).

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The *Bangladesh/Myanmar* Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation

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Keywords
Bangladesh, Myanmar, India, International Tribunal for the Law of the Sea, UN Convention on the Law of the Sea, maritime delimitation, outer continental shelf, maritime boundaries, territorial sea boundaries, exclusive economic zones

1 Introduction

On 14 March 2012, the International Tribunal for the Law of the Sea (ITLOS) gave its judgment in the *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*.[1] Although this case is listed as No. 16 in the ITLOS List of Cases, it is only the second occasion on which the ITLOS has given a judgment on the merits of a dispute, the first being the *Saiga (No. 2)* case (decided in 1999),[2] and the first time that the ITLOS has dealt with maritime boundary delimitation. The latter subject has, however, been a popular one for litigation before other

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[1] *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar),* Judgment of 14 March 2012 (hereafter referred to simply as 'Judgment'), available on the website of the ITLOS at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14_02_2012.pdf> [last accessed 10 April 2012]. For early commentary on the case, see I. Papanicolopulu, 'From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea', *EJIL: Talk!*, 23 March 2012, available at <http://www.ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-the-sea/> [last accessed 2 April 2012].

[2] The other 14 cases in the ITLOS list have concerned either provisional measures (four cases) or the prompt release of vessels (nine cases), together with one substantive dispute (the *Swordfish* case) which was settled out of court.

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international tribunals: the International Court of Justice and arbitral tribunals have so far decided nearly 20 cases between them, and several more cases are currently pending.

In the *Bangladesh/Myanmar* case the ITLOS was asked to delimit three maritime boundaries between the two states: the territorial sea boundary; the single maritime boundary between the exclusive economic zones (EEZs) and continental shelves of the two states; and the boundary of the continental shelf beyond 200 miles from the parties' baselines.[3] The judgment is notable for maintaining what appears now to be the settled case law of international courts and tribunals regarding delimitation of single maritime boundaries, and for being the first occasion on which an international court or tribunal has delimited a continental shelf boundary beyond 200 miles and considered the issue of "grey zones" (*i.e.* zones on one side of a maritime boundary that are beyond the 200–mile limit of the state on that side of the boundary but that are within 200 miles of the state on the other side of the boundary). This note discusses in turn each of the three boundaries delimited by the ITLOS and the grey zone issue. It begins by briefly setting out the background to the case.

2 Background

Bangladesh is located in the northeast corner of the Bay of Bengal.[4] It has a markedly concave coastline—indeed, its two principal stretches of coast meet almost at right angles. Bangladesh therefore risks having the outer areas of its maritime zones cut off by its neighbours, India and Myanmar. Bangladesh began maritime boundary negotiations with India and Myanmar in the 1970s, but by 2009 it appeared that those negotiations were unlikely to lead to agreements on maritime boundaries in the near future. By that time an apparently pressing issue was the leasing by Bangladesh to US and Irish companies of three hydrocarbon–rich blocks in the Bay of Bengal, which in the view of India and Myanmar overlapped their maritime zones. The two states reportedly sent notices to the companies concerned advising them not to

[3] All references to "miles" in this note are to nautical miles.

[4] For fuller discussion of the background, see J. Bissinger, 'The Maritime Boundary Dispute between Bangladesh and Myanmar: Motivation, Potential Solutions, and Implications', (2010) 10 *Asia Policy* 103; and M. Shah Alam and A. Al Faruque, 'The Problem of Delimitation of Bangladesh's Maritime Boundaries with India and Myanmar: Prospects for a Solution', (2010) 25 *International Journal of Marine and Coastal Law* 405.

explore those blocks.[5] In the light of those developments, Bangladesh decided to resort to litigation in order to have definitive maritime boundaries with its neighbours established, utilising for this purpose the 1982 UN Convention on the Law of the Sea (UNCLOS),[6] which enables party states to initiate unilaterally proceedings leading to a binding third–party settlement where disputes relating to the Convention cannot be settled through agreed means. Although all three states were parties to the Convention in 2009, none had made a declaration under Article 287 selecting a preferred means for the settlement of disputes. Thus, Bangladesh had no choice but to go for arbitration under Annex VII of UNCLOS.[7] It instituted arbitral proceedings against India and Myanmar on 8 October 2009, in each case requesting the arbitral tribunal to delimit the territorial sea, EEZ and continental shelf boundaries between the two states concerned. On 4 November 2009, Myanmar proposed that the case between it and Bangladesh should be transferred to the ITLOS, and made a declaration under Article 287 accepting the jurisdiction of the ITLOS for this purpose. On 12 December, Bangladesh made a similar declaration, and the ITLOS thereby became the forum for the case.[8] The case between Bangladesh and India, however, is continuing before an Annex VII arbitral tribunal. The latter has worked at a much slower pace than the ITLOS, so that by the end of 2011 the first round of written proceedings had not been concluded. Thus, the tribunal is unlikely to deliver its award before 2013/2014. However, when it does so, it will have the benefit of knowing what the ITLOS decided in the *Bangladesh/Myanmar* case.

3 The territorial sea boundary

The macro–geographical situation described above is not directly relevant to the territorial sea boundary, although (as will be seen) it was of great relevance to the delimitation of the single maritime boundary. For delimitation of the territorial sea boundary, it was the geography in the immediate vicinity of the terminus of the Bangladesh–Myanmar land border that was relevant. The last part of the land border between Bangladesh and Myanmar follows the Naaf

[5] 'Dhaka to Seek UN Tribunal', *The Daily Star*, 9 October 2009, available at <http://www.thedailystar.net/newDesign/news-details.php?nid=108950> [last accessed 11 April 2012]. A further factor seems to have been a survey for hydrocarbons in 2008 undertaken under licence from Myanmar in an area claimed by Bangladesh: see Bissinger, *supra* note 4, at 109.

[6] 1833 UNTS 396.

[7] Art. 287(3)–(5), UNCLOS.

[8] Judgment, paras. 3, 4 and 47.

River and terminates at its mouth. The mainland coasts of Bangladesh and Myanmar on either side of the mouth of the Naaf River are relatively straight. Lying off the mouth of the Naaf River and extending south–eastwards roughly parallel to, and some five or six miles out from, the coast of Myanmar is St. Martin's Island, which belongs to Bangladesh (see Map 1 below). The island is about five miles long, has an area of 8 km^2 and a population of about 7,000.[9]

In considering the territorial sea boundary, the ITLOS had first to deal with Bangladesh's argument that the boundary had already been delimited in Agreed Minutes of 1974, signed by the two heads of delegation following their second round of negotiations over maritime boundaries. The ITLOS rejected this argument, holding that the Agreed Minutes were no more than a record of a conditional understanding. Furthermore, the Agreed Minutes were not intended to create legal obligations; the head of the Myanmar delegation did not have the authority to engage his State in accordance with Article 7 of the Vienna Convention on the Law of Treaties; and the Agreed Minutes had not been submitted to the procedure required by their respective constitutions for binding international agreements.[10] The ITLOS also rejected Bangladesh's argument that there was a tacit or *de facto* agreement on the territorial sea boundary resulting from the consistent conduct of the parties over three decades, finding that there was no convincing evidence to this effect.[11] Bangladesh's argument that Myanmar was estopped from denying that there was any territorial sea boundary other than that set out in the Agreed Minutes was also found unconvincing by the ITLOS. It was held that the conditions required for an estoppel in international law had not been met.[12]

In situations where, as was the case here, there is no agreement between the states concerned, Article 15 of UNCLOS provides that the territorial sea boundary is to be an equidistance line unless "it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith". Neither Bangladesh nor Myanmar had suggested that it had a historic title to any of the waters concerned, but Myanmar argued that St. Martin's Island was a special circumstance, in particular that it would be on the "wrong side" of an equidistance line drawn between the mainland coasts of Bangladesh and Myanmar. The ITLOS rejected that argument, observing that while it was not unprecedented in the case law of international courts and tribunals for islands to be given less than full effect in the

[9] Judgment, paras. 143–4 and 314.
[10] Judgment, paras. 92–8.
[11] Judgment, paras. 112–18.
[12] Judgment, paras. 124–5.

delimitation of the territorial sea, the islands subject to such treatment were usually "insignificant maritime features".[13] St. Martin's Island, however, was a significant maritime feature by virtue of its size and population and the extent of the economic and other activities connected with it, and there were therefore no compelling reasons that would justify treating the island as a special circumstance or preventing it from being given full effect in drawing the territorial sea boundary.[14] Accordingly, the ITLOS drew the boundary as an equidistance line, utilising as base points the base points used by the parties, which were the low–water lines along their coasts.[15] The boundary begins at the terminus of the land frontier in the mouth of the Naaf River, then proceeds south–westwards equidistant between the parties' mainland coasts for a short distance, before turning south–eastwards equidistant between the mainland coast of Myanmar and the coast of St. Martin's Island to a point 12 miles from both those coasts (see Map 1). According to Judges *ad hoc* Mensah and Oxman, this line is "essentially the same as that contemplated by" the parties in the 1974 Agreed Minutes.[16]

4 The single maritime boundary

Since the *Greenland/Jan Mayen* case (1993),[17] international courts and tribunals have, with the exception of the *Nicaragua/Honduras* case (2007)[18] (where the geographical circumstances were highly exceptional), adopted a fairly consistent methodology in delimiting the single maritime boundary between the overlapping EEZs and continental shelves of opposite or adjacent states, known as the "equidistance/relevant circumstances" method.[19] This involves a three–stage process.[20] First, a court or tribunal constructs an equidistance line as the provi-

[13] Judgment, para. 151, referring to the ICJ's judgment in the *Qatar/Bahrain* case: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Merits)*, ICJ Reports 2001, p. 40, at 104, para. 219.

[14] Judgment, paras. 151–2.

[15] Judgment, paras. 154–6.

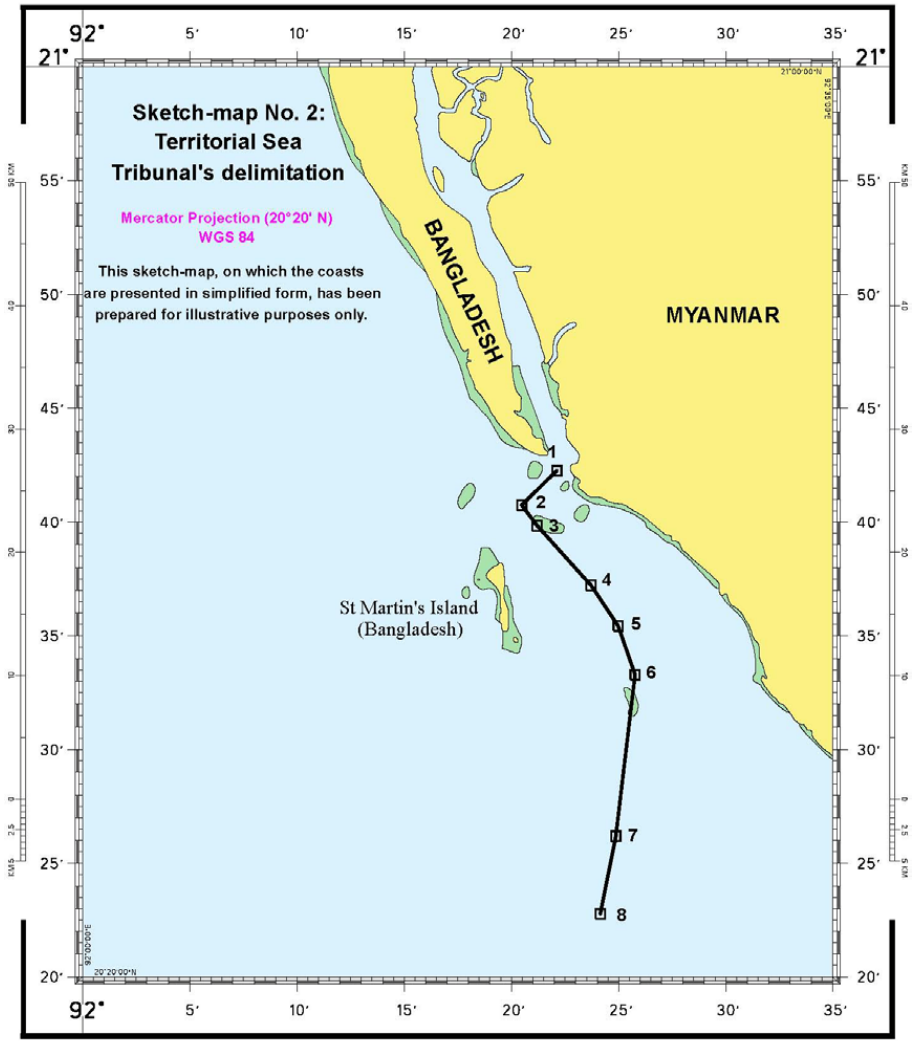
[16] Joint Declaration of Judges ad hoc Mensah and Oxman, para. 2.

[17] *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, Judgment, ICJ Reports 1993, p. 38, at 61, para. 51.

[18] *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment, ICJ Reports 2007, p. 659.

[19] Judgment, paras. 229–33 and 238.

[20] Only since the *Case concerning Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment, ICJ Reports 2009, p. 61, has the process been characterised as having three stages. In the cases before that, the third stage was subsumed in the second stage, giving what was described in those cases as a two–stage process.



Map 1: The territorial sea boundary delimited by the ITLOS (Judgment, p. 57)

sional boundary. It then examines that line in the light of any relevant circumstances to see whether it requires adjustment to produce an equitable result. Finally, it checks to see whether there is any significant disproportion between the areas allocated to each state as a result of the delimitation and the lengths of their respective relevant coasts. The ITLOS endorsed and used this methodology in the *Bangladesh/Myanmar* case.[21] It did, however, recognise, as other courts have done, that there might be circumstances where the methodology would not be appropriate,[22] but considered that the case before it was not such an exceptional situation, in spite of the fact that Bangladesh had argued strongly that it was and that the angle–bisector method should be used.[23]

In approaching the first stage and drawing an equidistance line, the ITLOS had first to select the base points for the construction of that line. The ITLOS noted that it was not obliged to follow the base points indicated by the parties but could select its own base points "on the basis of the geographical facts of the case".[24] The ITLOS decided not to use St. Martin's Island as a base point because the island was located immediately in front of Myanmar's mainland coast and so its use as a base point would result in a line that blocked the seaward projection from Myanmar's coast, resulting "in an unwarranted distortion of the delimitation line".[25] Instead the ITLOS chose two base points on Bangladesh's coast and four on the coast of Myanmar.[26] Beginning from a point midway in the mouth of the Naaf River, the ITLOS then constructed an equidistance line using its selected base points.[27]

The second stage was for the ITLOS to consider whether there were any relevant circumstances that would require an adjustment of the equidistance

[21] Judgment, paras. 239–40.

[22] Judgment, para. 235.

[23] The angle–bisector method is where the maritime boundary is drawn as the line bisecting the angle formed by the general direction of the coasts of the two states involved at the terminus of the land border. It is described by the ITLOS as "in effect an approximation of the equidistance method" (Judgment, para. 234). It was used in the *Nicaragua/Honduras* case (*supra* note 18) and some pre–1993 cases. See further the Judgment in the present case, paras. 213–17, 220 and 234–7.

[24] Judgment, para. 264. This approach, which follows that of courts and tribunals in earlier cases, meant that the ITLOS did not have to consider the validity of Bangladesh's controversial straight baseline system, whose base points are all located in the sea, most on the 10–fathom isobath. See further R. R. Churchill and A. V. Lowe, *The Law of the Sea* (Manchester University Press, 1999), at 40 and Shah Alam and Al Faruque, *supra* note 4, at 411–12.

[25] Judgment, para. 265. However, as will be seen below, St. Martin's Island was not totally ignored in delimiting the boundary.

[26] Judgment, para. 266.

[27] The line is portrayed in the Judgment, at 86.

line. Myanmar had argued that there were no such circumstances, Bangladesh that there were three—the concave shape of its coastline, St. Martin's Island and the Bengal depositional system. As to the first of these, the ITLOS observed that in the delimitation of EEZ and continental shelf boundaries:

> [C]oncavity per se is not necessarily a relevant circumstance. However, when an equidistance line drawn between two States produces a cut–off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result.[28]

That was the situation here. As to St. Martin's Island, the ITLOS, while accepting that in principle islands could be considered to be relevant circumstances depending on "on the geographic realities and the circumstances of the specific case",[29] held that St. Martin's Island was not a relevant circumstance in this case for the same reason that it was not used as a base point in constructing the equidistance line.[30] This seems a little confusing as it suggests that islands are a factor to be taken into account both in constructing the equidistance line as the provisional boundary and as a relevant circumstance for adjusting that line. One might have thought that they would be considered for only one of those exercises. Bangladesh's third suggested relevant circumstance, the Bengal depositional system, was summarily rejected by the ITLOS on the basis that a single maritime boundary within 200 miles was to be determined "on the basis of geography of the coasts of the Parties in relation to each other and not on the geology or geomorphology of the seabed of the delimitation area".[31] When it came to adjusting the line to take account of the concavity of Bangladesh's coast, it was noted that there was no single solution that was mandated but that various adjustments could be made that would produce an equitable result.[32] It decided that the adjustment would begin at point 11 shown on map 2, "where the equidistance line begins to cut off the southward projection of the coast of Bangladesh".[33] From this point the ITLOS decided, in a passage that is rather laconic in its reasoning, that the boundary should be the azimuth

[28] Judgment, para. 292.
[29] Judgment, para. 317.
[30] Judgment, para. 318.
[31] Judgment, para. 322.
[32] Judgment, para. 327.
[33] Judgment, para. 331.

of 215° (which, as it happens, is the same as the angle–bisector proposed by Bangladesh as the boundary), since this would cut off the seaward projection of the coasts of neither Bangladesh nor Myanmar.[34] This boundary line would continue until it reached a point that was located 200 miles from "the baselines from which the breadth of the territorial sea of Bangladesh is measured".[35] The ITLOS decided that the single maritime boundary would commence where the outer limit of the 12–mile territorial sea around St. Martin's Island intersected with the equidistance line drawn by the ITLOS.[36] Thus, the island was given a full 12–mile territorial sea at the expense of a small part of Myanmar's EEZ and continental shelf, and so turned out not to be wholly irrelevant to the construction of the single maritime boundary.

The ITLOS deferred carrying out the third stage of delimiting the single maritime boundary, the proportionality test (or, as the ITLOS dubbed it, the "disproportionality test")[37] until after it had delimited the boundary of the continental shelf beyond 200 miles. This test involves comparing the ratio of the areas accruing to each party from the provisional delimitation resulting from the first two stages of the process with the ratio of their respective relevant coasts. The areas accruing to each party are those areas located within the "relevant area", namely "the area of overlapping entitlements of the Parties that is relevant to this delimitation".[38] From the language of the judgment it is not clear whether the "relevant area" was limited to the area within 200 miles or included areas beyond, but the map of the relevant area on page 144 of the judgment clearly includes areas beyond 200 miles. One question was what account should be taken of the fact that the size of the area accruing to Bangladesh could be affected by the location of its eventual boundary with India. On this point the ITLOS decided simply that "the fact that a third party may claim the same maritime area does not prevent its inclusion in the relevant maritime area for the purposes of the disproportionality test".[39] The ITLOS determined that the "relevant area" was 283,471 km^2. This is considerably larger than any of the four figures suggested by the parties as the size of the relevant area. It is perhaps just as well that determining the size of the relevant area is

[34] Judgment, para. 334–5.

[35] Judgment, para. 340. As will be seen below, this point is less than 200 miles from the baselines of Myanmar. One must assume that the reference to "baselines" here is not to Bangladesh's controversial straight baseline system (see *supra* note 24).

[36] Judgment, para. 337; and see also paras. 168–9.

[37] Judgment, para. 477.

[38] *Ibid*.

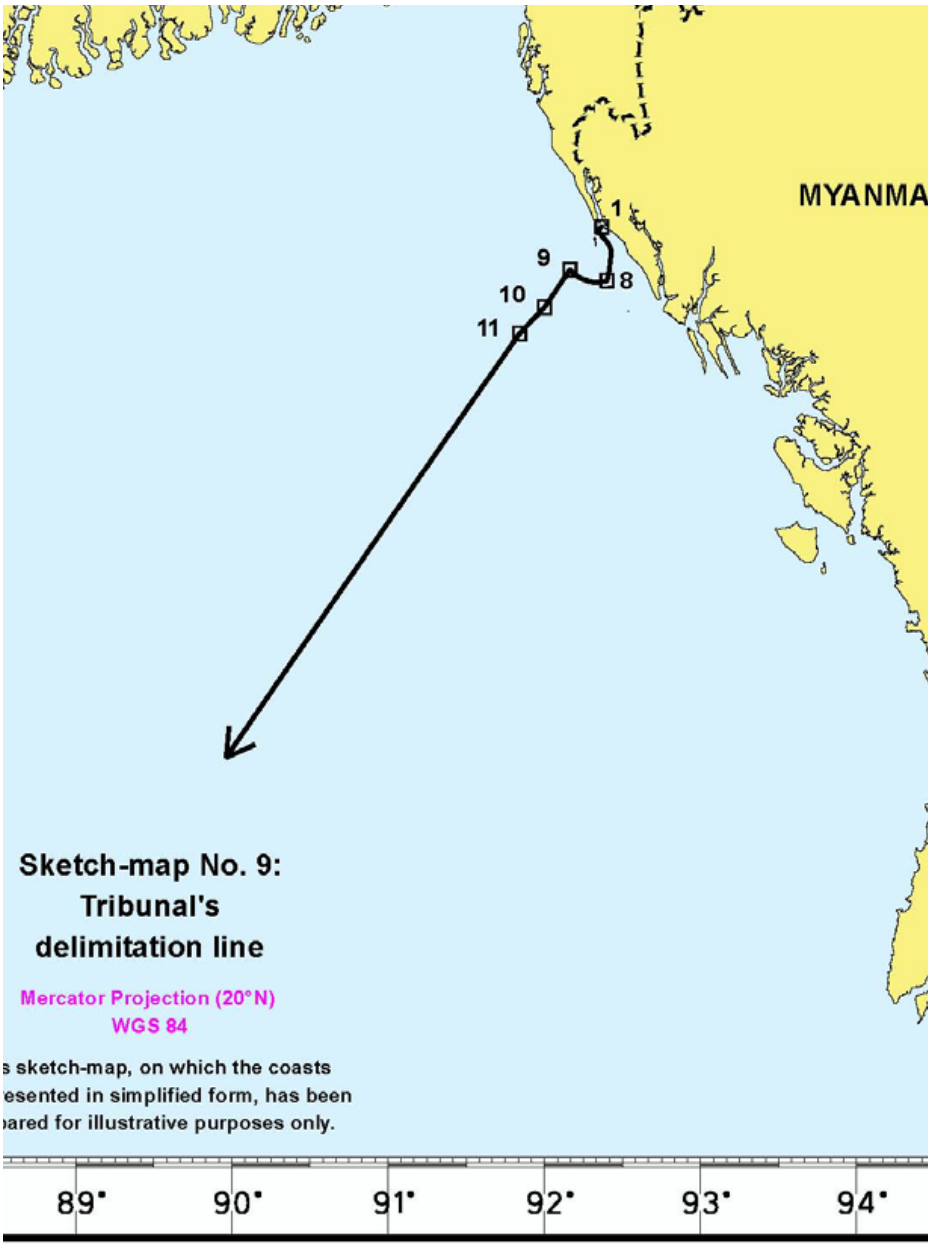
[39] Judgment, para. 494.

not, according to the ITLOS, an exercise requiring "mathematical precision".[40] Be that as it may, the ITLOS found that the relevant area was divided between the parties in the ratio of 1:1.54 in favour of Myanmar,[41] and that the ratio of the relevant coasts of the parties was 1:1.42, also in favour of Myanmar.[42] Thus, there was no "significant disproportion in the allocation of maritime area to the parties relative to the respective lengths of their coasts that would require the shifting of the adjusted equidistance line in order to ensure an equitable solution".[43]

5 The continental shelf boundary beyond 200 miles

The first issue for the ITLOS was whether it had jurisdiction to delimit the continental shelf boundary beyond 200 miles, and if it did, whether it was appropriate to exercise that jurisdiction. The ITLOS dealt fairly briefly with the first point, simply noting that because there was in law only a single continental shelf, whether within 200 miles or beyond, its jurisdiction to delimit the continental shelf applied to the shelf in its entirety.[44] However, the question of whether it should exercise that jurisdiction was much less straightforward. UNCLOS provides that a state's continental shelf may extend beyond 200 miles if certain geological and geomorphological criteria set out in Article 76 are fulfilled. A state that considers that its continental shelf extends beyond 200 miles must make a submission setting out its view as to the outer limit of its shelf to the Commission on the Limits of the Continental Shelf (CLCS), a body of independent experts in geology, geophysics and hydrography established by UNCLOS. The CLCS is to make recommendations to the coastal state regarding its submission. The outer limit of the shelf established on the basis of those recommendations is final and binding.[45] UNCLOS is less than clear on the relationship between the establishment of the outer limit of the continental shelf according to the procedure just described and the delimitation of the boundary between overlapping continental shelves beyond 200 miles. Article 76(10) states that the provisions of the preceding paragraphs of the article

[40] Judgment, para. 477.
[41] Judgment, para. 499.
[42] Judgment, para. 498. See also paras. 185–205.
[43] Judgment, para. 499.
[44] Judgment, paras. 360–3.
[45] Art. 76(8) and Ann. II, UNCLOS.



Map 2: The single maritime boundary delimited by the ITLOS (Judgment, p. 146.)

are "without prejudice to the question of delimitation of the continental shelf between states with opposite and adjacent coasts". Likewise, Article 9 of Annex II provides that the actions of the CLCS "shall not prejudice matters relating to the delimitation of boundaries between states with opposite and adjacent coasts". The Rules of Procedure of the CLCS provide that the CLCS shall not consider submissions relating to an area where there is a dispute unless both/all parties to such a dispute give their consent.[46] Both Bangladesh and Myanmar have made submissions to the CLCS. Bangladesh has not given its consent to consideration of Myanmar's submission by the CLCS.[47]

In the past international courts and tribunals have taken different views as to whether they may delimit the continental shelf beyond 200 miles in areas where the CLCS has not made a recommendation to the coastal states concerned. In the *Canada/France* and *Nicaragua/Honduras* cases the arbitral tribunal and ICJ, respectively, took the view that they could not delimit the continental shelf boundary beyond 200 miles;[48] whereas in the *Barbados/Trinidad and Tobago* case the arbitral tribunal decided that it could (although in practice it did not do so as there were no overlapping continental shelves beyond 200 miles).[49] In the present case the ITLOS decided that it was competent to, and should, delimit the continental shelf beyond 200 miles. It pointed out that such delimitation would not impede the CLCS in carrying out its functions,[50] and that without delimitation, the establishment of the outer limits of the continental shelves of Bangladesh and Myanmar might remain unresolved, given the lack of consent by the two states to the CLCS considering the matter.[51]

Before delimiting the boundary, the ITLOS had first to assure itself that the parties had overlapping entitlements to the continental shelf beyond 200 miles, otherwise there was no boundary to determine. It rejected Bangladesh's argument that natural prolongation was the primary criterion in establishing an entitlement to a continental shelf beyond 200 miles and that consequently Myanmar had no such entitlement because of a fundamental discontinuity

[46] Para. 5(a), Ann. I, Rules of Procedure, CLCS available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/309/23/PDF/N0830923.pdf?OpenElement> [last accessed 22 April 2012].

[47] Judgment, paras. 387–9.

[48] *Case concerning Delimitation of Maritime Areas between Canada and France*, (1992) 31 ILM 1145, at 1171–2, paras. 75–82; and *Nicaragua/Honduras* case, *supra* note 18, at 759, para. 319.

[49] *Arbitration between Barbados and Trinidad and Tobago*, RIAA, Vol. XXVII 147, at 209, paras. 217, 242 and 368.

[50] Judgment, paras. 378–90 and 393.

[51] Judgment, paras. 390–2.

between Myanmar's landmass and the seabed of the Bay of Bengal beyond 200 miles. Instead, the ITLOS held that entitlement to a continental shelf depended primarily on satisfying the criteria of Article 76(4) of UNCLOS.[52] It noted that the floor of the Bay of Bengal was covered by a thick layer of sediment some 14–22 km deep. Thus each state could claim a continental shelf beyond 200 miles based on the thickness of sedimentary rocks criterion in Article 76(4)(a)(i). The origin of such sediments (the Himalayas and Tibetan plateau) was irrelevant.[53] It was also clear that those entitlements overlapped.[54] As to how those entitlements should be delimited (an issue never previously considered by an international court), the ITLOS observed that Article 83 of UNCLOS (on delimitation of the continental shelf) does not distinguish between delimitation within 200 miles and delimitation beyond 200 miles. Thus, "the delimitation method to be employed in the present case for the continental shelf beyond 200 nautical miles should not differ from that within 200 nm. Accordingly, the equidistance/relevant circumstances method continues to apply for the delimitation of the continental shelf beyond 200 nm."[55] This view appears to take no account of the fact that the delimitation undertaken by the ITLOS within 200 miles was not solely of the continental shelf but was a single maritime boundary for both the continental shelf and the EEZ. As a consequence of its view, the ITLOS had little hesitation in rejecting Bangladesh's arguments that geological and geomorphological factors were relevant. On the other hand, the concavity of Bangladesh's coastline continued to be a relevant circumstance. The ITLOS therefore decided that the boundary between the parties' overlapping continental shelves beyond 200 miles should be a continuation of the single maritime boundary line until it reached the area where the rights of third States (i.e. India) might be affected.[56]

The ITLOS would appear to have been justified in delimiting the continental shelf beyond 200 miles in this case. Given the unique geological characteristics of the Bay of Bengal, there seems little doubt that Bangladesh and Myanmar both have entitlements to a continental shelf beyond 200 miles that overlap. However, in future cases it may be advisable for an international court to proceed more cautiously in deciding whether to delimit a continental shelf boundary beyond 200 miles. It may not be obvious that the states concerned have entitlements to a continental shelf beyond 200 miles and that such enti-

[52] Judgment, para. 437.
[53] Judgment, para. 444–8.
[54] Judgment, para. 449.
[55] Judgment, para. 455.
[56] Judgment, para. 462.

tlements overlap. To determine such matters may involve a court in having to make judgments about complex geological and geomorphological facts which it is ill–equipped to do. If a court does refrain from delimiting a continental shelf boundary, that may mean that the CLCS will not be able to consider the submissions of the states concerned because of a lack of consent. If that situation is not to turn into a "jurisdictional black hole", as Bangladesh memorably characterised it,[57] the parties will have to redouble their efforts to remove the impasse by diplomatic means. In the present case, however, the judgment of the ITLOS has resolved the impasse before the CLCS. Since there is no longer a dispute between Bangladesh and Myanmar, the CLCS can now go ahead and consider the submissions of each state.

As regards the methodology of the delimitation, the decision of the ITLOS to exclude geological and geomorphological factors as relevant to the determination of the boundary line would seem to be correct in this case. Once the ITLOS had decided that the origin of the sediments in the Bay of Bengal was irrelevant—which was surely right, otherwise Nepal and China might have as much claim to the seabed of the Bay of Bengal as the riparian states—and, perhaps arguably, that natural prolongation was not relevant, the geological and geomorphological factors at issue appear to apply equally to Bangladesh and Myanmar. However, the decision of the ITLOS in this case does not mean that in future cases geological and geomorphological factors may not be relevant circumstances that should be taken into account in delimiting a continental shelf boundary beyond 200 miles. The primary reason for excluding such factors when delimiting a single maritime boundary is because they have no relevance to the water column that is also being delimited.[58] That rationale does not apply beyond 200 miles.

6 The grey zone issue

A grey zone (or "grey area", as it is referred to in the judgment) in the context of maritime boundary delimitation refers to the situation where an area on one side of a maritime boundary is beyond 200 miles from the state on the same side of the boundary but within 200 miles of the state on the other side of the boundary. Grey zones are liable to occur whenever a single maritime boundary is not an equidistance line, and especially where such a line is extended to form

[57] Judgment, para. 358.

[58] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)*, Judgment, ICJ Reports 1984, p. 246, at 326–7, paras. 192–5.

the boundary of the continental shelf beyond 200 miles. The result of the delimitation of the boundary by ITLOS in this case was to create a grey zone on Bangladesh's side of the boundary.[59] The ITLOS noted that the boundary abutting the grey zone delimited the continental shelf only (since the EEZs of the parties in this area did not overlap), but did not "otherwise limit Myanmar's rights with respect to" the EEZ, notably as regards the superjacent waters.[60] Thus, the seabed of the grey zone is Bangladesh's continental shelf and the superjacent waters Myanmar's EEZ. It is up to each state, acting in accordance with UNCLOS (especially Articles 56, 58, 78 and 79) to "exercise its rights and perform its duties with due regard to the rights and duties of the other".[61] This is the first occasion on which an international court has pronounced on the status of grey zones. What the ITLOS says is therefore important. The logic of its position seems difficult to question, although it may pose challenges to states to act with the necessary due regard when exercising their rights in a grey zone.

7 Conclusions

Although this was its first case concerned with delimiting a maritime boundary, the ITLOS showed itself to be a competent tribunal for this purpose. In spite of its potentially unwieldy size, with 22 judges sitting in the case, the ITLOS managed to maintain an impressive degree of unity. Of the six points voted on in the operative paragraph of the judgment, the smallest majority was 19–3: on half the points the majority was 21–1. Notable is the fact that the two ad hoc judges voted with the majority on all points and made a joint declaration. The judgment was delivered with commendable speed, in two years and three months after referral. That is comparable to the time taken by the three most recent arbitral tribunals and substantially quicker than the ICJ. Compared with arbitration, the ITLOS is cheaper because the parties are not required to pay the costs of the arbitrators, the registrar or the hire of premises.

This case may therefore encourage states parties to UNCLOS wishing to litigate maritime boundary disputes to consider using the ITLOS for this purpose, especially since the ITLOS followed the now well–established case law (from which it quoted copiously) on the delimitation of single maritime boundaries.[62]

[59] Portrayed in the map at 138 of the Judgment.

[60] Judgment, paras. 471 and 474.

[61] Judgment, para. 475.

[62] A very different view is expressed by Judge Gao in his Separate Opinion, however. He considered that the ITLOS had definitely not followed the existing case law: see para. 53

Thus, fears that involving yet another tribunal in maritime boundary delimitation risks fragmenting the international jurisprudence should have been allayed by this case. The novel points in the case—delimitation of the continental shelf beyond 200 miles and the legal status of the grey zone – were dealt with by the ITLOS in a reasonable and equitable manner. As suggested above, the approach of the ITLOS to delimiting the continental shelf beyond 200 miles seems justifiable in the particular circumstances of this case, but may not be so in future cases. In spite of its considerable length (506 numbered paragraphs), there are places where the judgment would have benefitted from fuller reasoning. However, that criticism may also be made of a number of previous maritime boundary delimitation cases.

of his Separate Opinion. Although Judge Gao voted with the majority on the course of the single maritime boundary within 200 miles, he profoundly disagreed with the methodology employed by the ITLOS and thought that the angle–bisector method should have been used instead.

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Smooth Runs the Water where the Brook is Deep: The Obscured Complexities of *Germany v Italy*

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Keywords
State immunity, jurisdiction, state responsibility, International Court of Justice, territorial tort exception, ius cogens, substance/procedure distinction, counter-measures

1 Introduction

On 3 February 2012, the International Court of Justice (ICJ) handed down its much awaited decision in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*.[1] The dispute arose because Italian courts had (1) allowed civil claims based on violations of international humanitarian law by the German Third Reich during the Second World War to be brought against Germany; (2) declared Greek judgments holding Germany liable for damages in civil suits arising out of similar violations of humanitarian law to be enforceable in Italy; and (3) taken consequential measures of constraint against German state property used for government and non–commercial purposes. Germany claimed that Italy had violated its obligation to respect the immunity that Germany enjoys under international law, and Italy argued that international law had developed relevant exceptions to immunity. The Court found in favour of Germany on all counts, and by a clear majority. The decision was widely anticipated, and on first read the conclusions and reasoning of the Court appear

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[1] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, 3 February 2012 (not yet reported), available on the ICJ website at <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=143> [last accessed 14 May 2012].

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inevitable, obvious, and even banal. But the apparent simplicity of the issues presented to and analysed by the Court is deceptive.

Any number of points in the judgment would be worthy of detailed analysis. For instance, one may question the basic approach of the Court to the question of sources and methodology, in particular the appropriateness of determining the implications of norms of *ius cogens* as an ordinary question of customary international law identification. The (happy) dismissal (at paragraph 60) of the unsatisfactory argument (suggested by Lords Browne–Wilkinson, Hutton and Phillips in *Pinochet*,[2] and noted in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case[3]) that acts contrary to international law could not constitute official conduct, and therefore could not attract immunity—which would enhance *individual* responsibility but risk sacrificing *state* responsibility. The Court's unconvincing suggestion (at paragraph 82) that there would be a "logical problem" with considering the gravity of the offence as part of determining immunity—in the face of the well–accepted principle of *competence–competence*, reflected in the fact that courts already determine whether, for instance, conduct was official or unofficial as part of the preliminary immunity question. Or the somewhat clumsy sidestepping (at paragraph 127) of the *Monetary Gold* problem (Greece, although intervening, not being a party to proceedings)[4] in respect of the claim against Italy regarding recognition of the Greek *Distomo* judgment—'solved' by noting that immunity might be different for the Italian and Greek proceedings because of the purely hypothetical and unargued possibility of a territorially limited waiver.

The focus of this comment is on three further issues, which will each be examined in turn: first, the Court's analysis of the 'territorial tort' exception to immunity, and dismissal of its applicability to the conduct of armed forces in the context of an armed conflict; second, Italy's arguments based on the *ius cogens* status of the norms which had been violated by Germany and the lack of alternative means of enforcing those norms, rejected by the Court through its assertion of a decisive substance/procedure distinction; and third, the perhaps curious absence (in either the Court's judgment or Italian pleadings)

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[2] *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147, at 203–4, 262, and 292, respectively.

[3] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* Judgment, ICJ Reports 2002, p. 3, at 88–9 (Judges Higgins, Kooijmans and Buergenthal, Joint Separate Opinion).

[4] See *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United]States of America)*, Preliminary Question, Judgment, ICJ Reports 1954, p. 19, at 32.

of the argument that any violation of immunity might be justified as a lawful countermeasure.

2 The territorial tort exception

Some (but not all) of the claimants in the Italian civil proceedings in which Germany had been denied immunity were claiming in respect of torts under Italian law (amounting to war crimes under international humanitarian law) that were carried out in Italian territory by German soldiers. In respect of these claimants, Italy argued that the denial of immunity was a recognised exception to state immunity under international law. It is generally recognised that *some* kind of exception to immunity applies in respect of torts committed in the territory of the forum state—such an exception is, for instance, reflected in Article 12 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which provides that:

> Unless otherwise agreed between the states concerned, a state cannot invoke immunity from jurisdiction before a court of another state which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the state, if the act or omission occurred in whole or in part in the territory of that other state and if the author of the act or omission was present in that territory at the time of the act or omission.[5]

In its commentary on that passage, the International Law Commission (ILC) had suggested that the:

> physical injury … appears to be confined principally to insurable risks. The areas of damage envisaged in Article 12 are mainly concerned with accidental death or physical injuries to persons … involved in traffic accidents … Essentially, the rule of non–immunity will preclude the possibility of the insurance company hiding be-

[5] 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/Res/59/38 Annex, Art. 12 (not yet in force).

> hind the cloak of State immunity and evading its liability to the injured individuals.[6]

However, as the Court noted (at paragraph 64), state practice does not appear to support the limitation of the territorial tort exception to personal accidents in this way. No national statute providing for the exception limits its applicability to 'private' or insurable claims, although China and the United States[7] have criticised the inclusion of sovereign acts within the scope of Article 12, and the European Court of Human Rights was unconvinced that the exception was clearly established outside the context of such claims in *McElhinney v Ireland*.[8]

The ICJ (at paragraph 65) declined to deal with this exception as a matter of general principle, preferring to focus on the context of the specific claims at hand. As a result, the Court's conclusion on the immunity claim was deliberately narrow, finding only that there is no "territorial tort" exception to immunity in the context of claims arising out of the acts of armed forces during an armed conflict.

In reaching this conclusion, the Court relied on an analysis of state practice, and concluded that states have not generally recognised an exception to state immunity in respect of the conduct of armed forces. Although various national statutes provide for an exception to immunity in respect of territorial torts, most exclude at least some conduct of armed forces from that exception, or from the immunity regime in its entirety, as does Article 31 of the European Convention on State Immunity.[9] No such exclusion is provided for in the text of the UN Convention, but (as noted by the Court at paragraph 69) the ILC commentary[10] and statements by the Chairman of the *Ad Hoc* Committee[11] suggest that states in the negotiations had generally understood that Article 12 would not apply to "situations involving armed conflicts".

But on closer examination, it is not entirely clear that the evidence relied on by the Court provides sufficient foundation for its conclusions. Of the national statutes examined by the Court (at paragraph 71), only the UK and

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[6] ILC Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries, 1991/43 (II) ILC *Ybk*, at 45.

[7] Contradicted by *Letelier v Chile*, 488 F Supp 665, at 671 (DDC, 1980) (finding no such limitation with respect to US immunity law).

[8] *McElhinney v Ireland* (2002) 34 EHRR 13; see also *McElhinney v Williams* (1995) 104 ILR 691 (Ireland, Supreme Court).

[9] 1972 European Convention on State Immunity, CETS No. 074.

[10] ILC (1991), *supra* note 6, at 46.

[11] See *Official Records of the General Assembly, Fifty–ninth Session, Sixth Committee*, 13th meeting (A/C.6/59/SR.13), at 6, para. 36.

Singapore entirely exclude foreign armed forces. This does not necessarily mean that such forces are considered absolutely immune, only that they are not subject to the statutory immunity regime. This is even clearer from the national statutes of Canada, Australia and Israel, which exclude the conduct of armed forces, but only to the extent that they are covered by Status of Forces Agreements (SOFAs), which typically set out any immunity granted to foreign armed forces in the territory. The clear implication of this state practice is not that foreign armed forces are always immune, but that the immunity of foreign armed forces is governed by a more specific regime, where such a regime has been established. Indeed, it has long been accepted that foreign forces in the territory with permission of the local sovereign are granted immunity under something like an implied waiver of jurisdiction.[12]

But where foreign armed forces are not stationed in the territory with permission, there can be no such waiver and there is therefore no applicable alternative regime to deal with questions of state immunity. Where there is an international armed conflict, international humanitarian law would apply and provide for immunity from the territorial state's criminal jurisdiction for *individual* members of the armed forces, *insofar as their conduct was in compliance with international humanitarian law*, through the 'combatant's privilege'. But this has no effect on proceedings against the foreign *state* in respect of *torts* (also in breach of international humanitarian law) which are attributable to it.

The state practice examined by the Court (at paragraph 72), involving foreign troops stationed on or visiting the territory with permission, does not therefore justify a broader carve–out from the territorial tort exception for armed forces in general. And there is relatively little state practice concerning tort claims against members of foreign armed forces present in the territory of a state without its permission. The Court cited the Irish Supreme Court's *McElhinney* decision as one such case. In *McElhinney*, the Irish Supreme Court rejected the existence of a territorial tort exception to immunity generally, as a matter of customary international law. Doubt may be cast on the precedential value of the Irish Supreme Court's decision, however, because it did so having (quite wrongly) decided that domestic statutes "cannot be used as evidence of what international law is: statutes are evidence of the domestic law in the

[12] *The Schooner Exchange v McFadden*, 11 US 116, at 147 (1812): "[A] public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace ... must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country".

individual states and not evidence of international law generally."[13] In any event, the Supreme Court did not, in refusing to recognise a territorial tort exception to immunity, appear to consider the significance of the fact that although the Northern Irish military police officer had entered Irish territory without permission,[14] he had done so clinging to a vehicle driven through a border checkpoint by the claimant (who alleged a subsequent assault by the officer). It may therefore be doubted whether the decision really stands for the proposition that "international law required that a foreign state be accorded immunity in respect of acts *jure imperii* carried out by members of its armed forces even when on the territory of the forum State without the forum State's permission."[15]

In support of its conclusions, the Court also noted several judgments of national supreme courts in France, Slovenia and Poland, in which the immunity of German Second World War occupying forces has been recognised. However, these decisions offer little by way of analysis of the territorial tort exception.[16] Given the collective weakness of these cases in supporting the Court's conclusion, they may be countered by the well–known *Letelier* case,[17] in which a US court refused to recognise any immunity for agents of Chile who it determined had (admittedly *outside* the context of an armed conflict) assassinated a Chilean opposition leader and his assistant in Washington DC. The most that can be said here is that state practice is mixed—and that the Court's selectivity in its examination of that state practice is potentially misleading.

So what should be the approach to the immunity of armed forces for territorial torts? Examined analytically, the issue might be framed as a question of regime interaction. Where the armed forces are present in the territory with consent, immunity is likely to be shaped by the terms of that consent rather than

[13] *McElhinney v Williams*, *supra* note 8, at 701.

[14] Hamilton CJ, writing for the Irish Supreme Court, was "not satisfied that it is a principle of public international law that the immunity granted to sovereign States should be restricted by making them liable in respect of tortious acts committed on their behalf by their servant or agent causing personal injuries to the person affected by such act or omission when such act or omission is committed *jure imperii* and I would dismiss the appeal on this point." *McElhinney v Williams, supra* note 8, at 702–3.

[15] *Germany v Italy*, *supra* note 1, para. 72. The Court finds further support for this proposition in the European Court of Human Rights decision in *McElhinney v Ireland*, *supra* note 8. Again, however, the European Court limited itself to the existence of a territorial tort exception to immunity generally, rather than the more limited question the Court is considering, namely whether any such exception applies to the conduct of armed forces.

[16] See *Germany v Italy*, Dissenting Opinion of Judge *ad hoc* Gaja, at 6–7.

[17] *Letelier v Chile*, *supra* note 7.

general rules. Where armed forces are present without consent, outside of an armed conflict, it is not clear whether there is any basis for claiming immunity, particularly if the presence of the armed forces is a violation of territorial sovereignty (as in *Letelier*, but not in *McElhinney*). But where armed forces are present without consent in an armed conflict, their conduct is regulated by the regime of international humanitarian law, and therefore ought to be taken outside the realm of domestic tort law and national courts. All this suggests that the Court's conclusion that no territorial tort exception applied in this case (concerning armed forces in an armed conflict) may have been correct, but the reasoning and analysis which led the Court to that conclusion leaves something to be desired.

3 The substance/procedure distinction

Having rejected the applicability of the 'territorial tort' exception for claimants alleging torts in Italian territory, the Court went on to consider a broader argument presented by Italy, which purported to justify the non–application of immunity in respect of claims both within and outside Italian territory. The argument was essentially that (1) the gravity of the alleged violations, combined with (2) the *ius cogens* status of the norms, and (3) the lack of alternative means of redress, cumulatively established an exception to state immunity. The Court rejected these arguments individually and also rejected the idea that they might work in conjunction. In rejecting the argument relating to the *ius cogens* status of the norms, the Court drew a fundamental distinction between questions of substance and procedure, finding that the *ius cogens* status of the norm (as a substantive matter) could have no impact on the question of state immunity (as a procedural matter). It thus held that:

> The rules of state immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.[18]

This analysis is curiously phrased; the issue was not whether immunity would bear on questions of substance, but whether questions of substance might bear on immunity. But the conclusion of the Court, that the two questions are

[18] *Germany v Italy*, *supra* note 1, para. 93; see also paras. 58, 100.

unrelated, is clear. The Court's analysis here (at paragraph 95) drew expressly on its own previous jurisprudence—the finding in the *Arrest Warrant* case that the personal immunity of a Foreign Minister was not inconsistent with the *ius cogens* status of the norms he was alleged to have violated,[19] and the finding in *DRC v Rwanda* that the Court's own jurisdiction could not be established based on the *ius cogens* status of the norm which was alleged to have been violated.[20] Neither of these precedents is, however, particularly apposite to the Court's conclusions in this case. The *Arrest Warrant* case dealt with the absolute immunity afforded to such high level officials as Heads of State and Foreign Ministers. For such immunity to satisfy its function (allowing such officials total freedom to travel and thus conduct diplomatic business) no exception can in any case be allowed. In *DRC v Rwanda*, the Court was considering an argument that the *ius cogens* status of the norm was effective to confer jurisdiction on the ICJ by invalidating a reservation against the compromissory clause in the Genocide Convention, which it rightly dismissed because of the consensual nature of the Court's jurisdiction. In *Germany v Italy*, the Court was faced with the very different question of whether the *ius cogens* status of the norms violated would provide an exception to state immunity, which is itself an exception to the usual jurisdiction which states enjoy within their territory.

Setting aside these questions over precedent, the Court's conclusion was in any case a clear rejection of the arguments presented by Italy. The Italian pleadings had sought to persuade the Court that the effect of a *ius cogens* norm should extend beyond overriding *directly* inconsistent obligations under international law, to also overriding obligations under international law which would reduce the *effectiveness* of the norm—in this case, state immunity for claims arising out of its breach. The distinction drawn by the Court between questions of substance and questions of procedure eliminates this possibility—only "substantive" conflicts may be affected by the *ius cogens* status of a norm; immunity is "procedural" and thus unaffected.

The formalism and strictness of the Court's distinction between matters of substance and matters of procedure was probably unsurprising to most international lawyers, but nevertheless would likely bemuse any thoughtful student of jurisprudence. In domestic legal systems, this distinction has long been the subject of critique which recognises that 'procedural' rules may go to the heart of substantive justice, in facilitating or denying a remedy to a claimant.

[19] *Arrest Warrant* case, *supra* note 3, at 24.

[20] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Judgment, ICJ Reports 2006, p. 6, 31–2, 52.

In his 1911 book 'A Treatise on the Modern Law of Evidence', for example, Chamberlayne famously remarked that "[t]he distinction between substantive and procedural law is artificial and illusory. In essence, there is none."[21] It is therefore perhaps a little surprising that the Court should place such decisive weight on this distinction, without a hint of critical examination.

A more subtly reasoned approach had already been suggested in the Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans in the 2001 *Arrest Warrant* case, which argued that "[i]n view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint, in particular when there is reason to believe that crimes have been committed which have been universally condemned in international conventions."[22] Even before then, the House of Lords in *Pinochet* had concluded that, at least in the Torture Convention,[23] substance and procedure were linked. States had implicitly agreed that the substantive prohibition on torture entailed procedural consequences, including an exception to state immunity in respect of criminal prosecutions for torture.[24] It is obviously true that the ICJ need not link substance and procedure merely because states have done so in an international convention. But this does challenge the Court's insistence that the two are unconnected as a matter of *principle*. The Court dismissed (at paragraph 87) the relevance of the *Pinochet* decision because it dealt with questions of immunity in the context of criminal proceedings, but this dismissal rather begs the question. Both civil and criminal immunity are forms of state immunity; it may certainly be debated whether developments in the criminal context should or should not inform developments in the civil context, but it cannot be claimed or assumed that the two are conceptually independent. The reasoning in *Pinochet* was essentially based on a conflict between universal criminal jurisdiction in the Torture Convention and the availability of immunity. It is true that the Torture Convention is not considered by a number of states to establish universal *civil* jurisdiction[25] (although the Committee against Torture takes the opposite view[26]). But the mere idea of universal jurisdiction suggests that

[21] C.F. Chamberlayne, *A Treatise on the Modern Law of Evidence* (Bender, 1911), at 217.

[22] *Arrest Warrant* case, *supra* note 3, at 24.

[23] 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1465 UNTS 85.

[24] *Ex parte Pinochet Ugarte (No. 3), supra* note 2, per Lord Browne–Wilkinson; confirmed as the ratio of the decision in *Jones v Saudi Arabia* [2006] UKHL 26.

[25] See, *inter alia, Jones v Saudi Arabia, ibid.*, paras. 20–5.

[26] Committee against Torture, *Conclusions and recommendations*, 34th Session, 2–20 May 2005, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, paras. 4(g) and 5(f).

the substance of certain norms has procedural implications: the availability of national courts as fora for the enforcement of those norms. Again, it is true that universal jurisdiction is controversial as a matter of customary international law, and in treaties reflects particular positive law–making by states. But even in its narrowest accepted form, universal jurisdiction draws clear links between questions of substance and questions of procedure. To suggest that there is no "inherent" link between the concept of *ius cogens* and its procedural implications simply avoids the central issue—whether there *ought* to be such a link—by preconceiving the scope of the norm as a purely substantive question, divorced from any questions of its means of implementation or effectiveness.

In *Germany v Italy*, the Court's reassertion of the distinction between substance and procedure largely ignored a key argument made by Italy: the claim that an exception to immunity was the "last resort" for the Italian claimants. Although not presented in this form, the effect of this argument was to assert a link between substance and procedure—if the proceedings in Italian courts were indeed the last resort for the claimants, denial of procedure would mean denial of their substantive rights to compensation. The Court acknowledged this to some extent in noting (at paragraph 104) that it "is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress of the Italian nationals concerned", but offered only the meagre solace of expressing (at paragraph 99) "surprise—and regret—that Germany decided to deny compensation", and (at paragraph 104) encouraging "further negotiation between the two States concerned". Although calling for further negotiations might be viewed as an implicit rejection of the claim that the Italian proceedings were a "last resort", it may reasonably be argued that the Court failed to take full account of the cumulative nature of the Italian pleadings, namely the combination of the *ius cogens* status of the norm with the claim that the procedure was a last resort. A comparison might have been drawn here with the jurisdictional idea of a forum of necessity: the idea that, in the absence of any alternative forum, jurisdiction over civil proceedings may be asserted without a traditional basis for that claim, to give effect to the claimant's rights of 'access to justice'. Although this idea has not been widely adopted in the past, it has been included as part of proposals for a reformed Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in the EU.[27] Once again, this approach establishes

[27] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 14.12.2010, COM(2010) 748 final, p. 34 (proposed Art 26); available at <http://ec.europa.eu

a partial link between substance and procedure—the adaptation of procedural rules to ensure that substance is given effect.

As long ago as 1933, Walter Wheeler Cook demonstrated that the "substance/procedure" distinction has no "necessary" content—that there is no objective "line" which must be "discovered", and indeed that different lines are drawn in different contexts.[28] The problem, he argued, is to decide in each case where the line *should* be drawn—a question which requires consideration of the purpose and effects of a proposed distinction. This would suggest that the substance/procedure distinction presented by the ICJ in *Germany v Italy* as a *reason* for rejecting the Italian arguments is in reality a *conclusion* reached by the Court. This is not to suggest that the Court's decision is unjustifiable—various arguments might be and have been presented for preserving state immunity in this context. But to present the decision as the automatic consequence of a rigid *a priori* substance/procedure distinction, rather than the outcome of weighing competing values, seems to artificially obscure the normative dimensions of the Court's reasoning.

4 Counter–measures—the elephant in the room?

Following the initiation of proceedings by Germany, Italy filed a counter–claim regarding the existence and scope of Germany's obligation to make reparation to Italian victims of war crimes committed by the Third Reich between 1943 and 1945.[29] Germany disputed that the Court had jurisdiction *ratione temporis* over the counter–claim under the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 (the only basis of jurisdiction in the case).[30] In its Order of 6 July 2010, the Court upheld Germany's objection, qualifying the dispute as one regarding the effect of Italy's 1947 Peace Treaty waiver of "all claims against Germany and German nationals outstanding on May 8, 1945"

/justice/policies/civil/docs/com_2010_748_en.pdf> [last accessed 11 April 2012].

[28] W.W. Cook, '"Substance" and "Procedure" in the Conflict of Laws', (1933) 42 *Yale Law Journal* 333, at 335–6.

[29] In its Counter–Memorial, Italy argued that "the source or real cause of the disputes submitted to the Court in the present case is to be found in the reparation regime established by the two 1961 Agreements between Germany and Italy" (Counter–Memorial of Italy, 22 December 2009, para 7.4), but did not identify precisely the nature and scope of that dispute. See also *Jurisdictional Immunities of the State (Germany v Italy)*, Counter–Claim, Order of 6 July 2010, Joint Declaration of Judges Keith and Greenwood, para. 4.

[30] 1957 European Convention for the Peaceful Settlement of Disputes, CETS No. 023.

and therefore falling outside the temporal scope of the jurisdiction conferred on the Court by the European Convention.[31]

The Court's characterisation of the 1947 Peace Treaty waiver as the source of the reparations dispute between Italy and Germany, and the *ratione temporis* jurisdictional implications of that characterisation, are fairly straight forward and have invited relatively little academic comment. The real mystery lies in Italy's litigation strategy and its decision to frame the reparations dispute as a counter–claim, rather than a circumstance precluding wrongfulness on the merits. While the human rights community may well lament the Court's unwillingness to engage in progressive development in regard to state immunity, it seems that very few international law commentators were surprised by that unwillingness, and surely nor was Italy. Given this "certainty" of outcome,[32] why did Italy not expressly argue that Germany's breach of its reparations obligations engaged Italy's right to adopt counter–measures in the form of non–respect for state immunity?

At the merits phase, Italy argued that the substance of its counter–claim regarding Germany's alleged outstanding reparations obligations could be re–incarnated as a "defence" (noted by the Court at paragraph 47), on the basis that "lifting Germany's immunity was the only appropriate and proportionate remedy to the ongoing violation by Germany of its obligations to offer effective reparation to Italian war crimes victims".[33] This argument comes close to framing the reparations issue as a circumstance precluding wrongfulness. But Italy never relied on the language of Chapter V (Circumstances Precluding Wrongfulness) of the ILC Articles on State Responsibility,[34] focusing instead on a form of estoppel argument against Germany. Although noting Italy's contention that "Germany stands deprived of the *right to invoke* … immunity" (at paragraph 49, emphasis added), the Court subtly (re)framed the question for itself as whether the failure to perform a duty of reparation was capable of having "an effect, in law, on the *existence and scope* of that State's jurisdictional immunity before foreign courts" (at paragraph 50, emphasis added). In its presentation of the issue, the Court limited itself to the effect of the reparations

[31] *Jurisdictional Immunities of the State (Germany v Italy)*, Counter–claim, Order of 6 July 2010, paras. 27–30.

[32] See A. Bianchi, 'On Certainty', *EJIL: Talk!*, 16 February 2012, available at <http://www.ejiltalk.org/on-certainty/> [last accessed 11 April 2012].

[33] *Jurisdictional Immunities of the State (Germany v Italy)*, Counter–Memorial of Italy, 22 December 2009, para. 6.39.

[34] See ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001/53 (II, Part Two) ILC *Ybk*, at 26.

dispute on the primary rules regarding state immunity, and ignored Italy's (very) implicit reference to circumstances precluding wrongfulness. This is not entirely consistent with past practice, in which the Court has raised counter–measures as a potential defence of its own motion[35]—but is perhaps explained by the jurisdictional complications discussed below.

For good reason, counter–measures need not be "reciprocal", in the sense that they need not be related to the prior breach of international law which has occasioned their adoption.[36] But where counter–measures can be related to the internationally wrongful act to which they respond, necessity and proportionality (as conditions for the adoption of legitimate counter–measures) are more easily made out.[37] In this particular case, the catalyst internationally wrongful act would be the breach of international humanitarian law committed by the German Third Reich during the Second World War, and Italy's adoption of counter–measures would be to "induce the responsible State to comply with its obligations under Part Two [of the ILC Articles on State Responsibility], namely … to provide reparation to the injured State."[38] There is a certain symmetry where a counter–measure directly minimises the impact of the wrongdoing state's failure to meet its secondary obligations. In this case (so the argument would have gone), the Italian breach of Germany's state immunity by way of a counter–measure would have pressured Germany to meet its secondary obligations of reparation and given some effect to those obligations at the same time. Indeed, an Italian breach of state immunity in the form of a counter–measure aligns itself with one of Italy's arguments on the substantive claim—that immunity gives way when there is otherwise a lack of alternative means of redress. This argument accounts for the fact that counter–measures should be a response of "later (if not final) resort".[39] This idea of denying immunity as a form of counter–measure provides arguably the best explanation for the legality of the exceptions to immunity under US[40] and now Canadian[41]

[35] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, at 127, paras. 248–9; *Gabčíkovo–Nagymaros Project (Hungary v Slovakia)*, Judgment, ICJ Reports 1997, p. 7, at 55–7, paras. 82–7.

[36] See ILC (2001), *supra* note 34, Commentary to Part Two, para. 5, at 129.

[37] *Ibid*.

[38] *Ibid.*, Commentary to Article 49, para. 1, at 130.

[39] See J. Crawford, 'Overview of Part Three of the Articles on State Responsibility', in J. Crawford, A. Pellet *et al.* (eds), *The Law of International Responsibility* (Oxford University Press, 2010), at 932.

[40] See the 1976 Foreign Sovereign Immunities Act, Terrorism Exception to the Jurisdictional Immunity of a Foreign State, 28 USC §1605A.

[41] See the 2012 Justice for Victims of Terrorism Act, amending the 1985 State Immunity

law for claims against terrorist–sponsoring states.

Perhaps the reason Italy did not frame the reparations dispute as a circumstance precluding wrongfulness is the uncertainty as to whether the conditions for a legitimate counter–measure would have been met on the facts. States adopt counter–measures at their own risk. If the precipitating act is not in law wrongful (which is not the case on these facts, as Germany conceded the breaches of international humanitarian law during the Second World War), *or* if the secondary obligations that flow from the precipitating breach have been met (for instance if treaty waivers by Italy[42] were determinative and fully extinguished any such obligations), then the responsive measure does not benefit from wrongfulness preclusion and is itself wrongful. It is also unclear whether Italy could have satisfied the procedural requirements of Article 52 of the ILC Articles on State Responsibility for the adoption of legitimate counter–measures. In particular, Italy would have had to call upon Germany to comply with its obligation of reparation and to notify Germany of its decision to take counter–measures.[43] Given that the denial of immunity was a judicial decision, and given Italy's failure to clearly articulate the nature of its dispute with Germany regarding reparations, it is unlikely that either requirement was met.[44] There is equally an interesting issue as to whether a breach of state immunity by way of counter–measure is of a sufficiently temporary or provisional character. State immunity is intended to protect states not only from final judgments by the domestic courts of foreign states, but equally (as noted by the Court) "from being subjected to the trial process" at all.[45] Subjecting a state to such proceedings in breach of its immunity is a bell that cannot be entirely un–rung. That said, the consequences of breaching state immunity (for instance damages judgments and attachment) could be limited following the wrongdoing state's compliance with its secondary obligation of reparation, and might on that basis be sufficiently reversible.[46] Nevertheless, given that Italy did not legislatively reverse the *fait accompli* presented by decisions of the Italian courts, and the

Act, RSC, 1985, c. S–18; see also J. Harrington, 'If not torture, then how about terrorism—Canada amends its State Immunity Act', *EJIL: Talk!*, 28 March 2012, available at <http://www.ejiltalk.org/if-not-torture-then-how-about-terrorism-canada-amends-its-state-immunity-act/> [last accessed 11 April 2012].

[42] *Germany v Italy, supra* note 1, paras. 24–5.

[43] See ILC (2001), *supra* note 34, Art 52.

[44] See *Germany v Italy,* Joint Declaration of Judges Keith and Greenwood, *supra* note 29, para. 6.

[45] *Germany v Italy, supra* note 1, para. 82.

[46] The requirement under Art 49(3) of the ILC Articles on State Responsibility that a counter–measure be reversible is not absolute, as indicated by the phrase "as far as possible". See ILC (2001), *supra* note 34, Commentary to Article 49, para. 9, at 131.

virtual certainty of the Court's decision that there is (currently) no exception to immunity for claims arising out of breaches of *ius cogens* norms, Italy's failure to frame its breach of Germany's state immunity as a responsive and legitimate counter–measure is surprising.

It is, however, possible that such a counter–measure argument would have been as jurisdictionally doomed as Italy's counter–claim. Italy had argued (as noted by the Court at paragraph 47) that the jurisdictional limitations which prevented it from pursuing its counter–claim did not prevent it "from using the arguments on which it based that counter–claim in its defence against Germany's claims" and that the "Court's jurisdiction to take cognizance of it incidentally is thus indisputable." Germany argued in response (as noted by the Court at paragraph 46) that the *ratione temporis* jurisdictional limitations which applied to the counter–claim would apply to any other form which the reparations dispute might take.

Unlike in specialist dispute settlement mechanisms (like the WTO[47]), there would have been no inherent subject matter restrictions which would have limited the ability of the Court to address Germany's breach of its secondary obligation to make reparation for violations of international humanitarian law. The Court has, in past cases, exercised jurisdiction over a breach of international law that did not form the subject matter of the dispute before it, in order to decide whether that breach justified the adoption of counter–measures. It thereby recognised the possibility that such a breach might preclude the wrongfulness of the internationally wrongful act that did form the subject matter of the dispute. In those cases, however, the Court's jurisdiction was either unrestricted with regard to questions of customary international law (in reliance on Article 36(2) of the ICJ Statute)[48] or the counter–measure was precisely reciprocal (in that it breached the same treaty which formed the subject matter of the dispute and over which the Court exercised jurisdiction).[49] Whether the Court would examine conduct that fell *outside* its temporally restricted jurisdiction, in order to decide whether breach of the obligation over which it *did* exercise jurisdiction was a legitimate counter–measure, is a separate issue, and not one which the Court has encountered.

There is of course the concern that wrongdoing states might rely on any such incidental jurisdiction over a prior breach (for the purposes of establishing

[47] See K. Trapp, *State Responsibility for International Terrorism* (Oxford University Press, 2011), Chapter 5.

[48] *Nicaragua* case, *supra* note 35, at 127, paras. 248–9.

[49] *Gabčíkovo–Nagymaros* case, *supra* note 35, at 55–7, paras. 82–7.

the legitimacy of a counter–measure) to enlarge the scope of the Court's jurisdiction. But where the prior breach is genuinely being raised as the catalyst for responsive measures that form the subject matter of a dispute over which the Court has jurisdiction, incidental jurisdiction could be the vehicle for stemming fragmentation and giving the Court the opportunity to make its orders effective. An inability to address a circumstance precluding wrongfulness for lack of jurisdiction over the prior breach would result in a judgment that makes a finding of unlawfulness that is divorced from the legal complexities of the relationship between the disputants and invites non–compliance with any Court order by the measure adopting state. Had a good case been made that Italian non–respect for Germany's state immunity constituted a counter–measure, a conservative approach to its own jurisdiction would not have served well the Court's cause of comprehensive dispute settlement. As Italy did not raise the reparations dispute in terms of a circumstance precluding wrongfulness, and the Court did not do so of its own motion, this interesting jurisdictional question remains open.

5 Conclusions

It is hard not to feel a certain sympathy for the judges of the International Court of Justice in this case. Confronted with what has been a greatly contested issue of law and policy, they faced the dilemma of choosing between judicial activism, perilous to the Court's consensual jurisdiction, or conservative positivism, risking reinforcing the *status quo* and stultifying development of the law. The fact that the Court so overwhelmingly chose the latter should not itself be a cause of surprise, or even necessarily regret. But the fact that the Court did so through reasoning which obscured the complexity of so many of the issues with which it was faced is indeed disappointing. The International Court of Justice hears cases on state immunity so rarely, it might have been hoped that the Court would take this opportunity to shed new light on the development of this area of the law. Instead, the Court's judgment sails over the smooth surface of the issues, leaving the depths unexplored.

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Maps of Ephemeral Empires: The ICJ and the Macedonian Name Dispute

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1 Lost empires, modern maps and name disputes

In Rome, on one side of the Via dei Fori Imperiali (the road connecting the Coliseum and the Piazza Venezia cutting through the archaeological excavations of the Imperial Fora) one can find some maps displaying the successive phases of expansion of the Roman Empire. These were carved in stone during Mussolini's dictatorship: 'The Empire at the Age of Trajan' is the crucial one, as it shows Rome at its maximum territorial expansion in the 1st and 2nd century CE.[1] For its 1933 audience, the message was clear: the Italians were now reclaiming that legacy and heritage, as if 476 CE had never happened.[2]

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[1] A picture thereof may be seen at <http://commons.wikimedia.org/wiki/File:Roma-Via_dei_fori_imperiali.jpg> (by Dan Kamminga) [last accessed 22 April 2012]. Interestingly for our present purposes, the map includes 'Macedonia' as a large area from Albania to the Aegean Sea, in a manner which seems to include all of Northern Greece, while Acaia (Achaea) is the name given to the Southern part of Greece, but there are no borders between provinces of the *pax romana*.

[2] On the legacy of 'imperial Rome' as a crucial element in the construction of Fascist national identity, see *e.g.* P. Costa, *Civitas: Storia della cittadinanza in Europa—vol. 4, L'età dei totalitarismi e della democrazia* (Laterza, 2008), at 283 (esp. note 196 and accompanying text).

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For a state which was only about 70 years old in 1933, this was a ludicrous claim—and yet much pain was caused in many places, including the Balkans, by the disastrous nationalist ideology underpinning that assertion. How that story ended is an apt reminder that arguments based on the geographical boundaries of some past historical entity are seldom a good idea, whichever side they come from.

Ancient maps of lost empires feature prominently in the on-going 'denominational conflict' between the Hellenic Republic ('Greece' hereinafter) and the country referred to within the United Nations and other international organizations as 'the former Yugoslav Republic of Macedonia' ('Makedonija' hereinafter).[3] Ever since the independence of Makedonija from Yugoslavia more than twenty years ago, Greece has continuously objected to the name 'Republic of Macedonia'. Among other reasons, this is because 'Makedonia / Μακεδονία' has been the name of a large territorial unit of Northern Greece since 1914.[4] The difference is still unresolved, but a discrete issue connected to it was adjudicated upon by the International Court of Justice on 5 December 2011. The Court held that Greece had breached one of its obligations under the 1995 bilateral Interim Accord by objecting to the admission of Makedonija to NATO in the run up to the Bucharest Summit of 2008.[5]

This article reviews the ICJ judgment and discusses its impact on the name dispute. The aim here is not to provide a detailed analysis of all the many interesting legal issues raised by the case.[6] Rather, I intend to show that, despite

[3] See SC Res. 817, 7 April 1993 and 1995 Interim Accord, 1891 UNTS 3. The present author will use the transliteration of the constitutional name of the *Republika Makedonija* (Република Македонија) without any translation in order to distinguish it from the Northern Greek region of Makedonia / Μακεδονία (and avoid the equally contested acronym FYROM). This should be seen as a purely pragmatic compromise, not an expression of a view (let alone a proposal) on the final solution of the 'name issue' discussed here.

[4] "Greece was the first to use the term 'Macedonia', as early as 1914, to designate a large administrative unit of its new territories", as the Agent of Greece put it before the Court: Translation of Verbatim Record of Oral Proceedings, CR 2011/8, 24 March 2011 (3 pm), available at <http://www.icj-cij.org/docket/files/142/16378.pdf> [last accessed 22 April 2012], at 8. What the Agent meant is that, as between Greece and Makedonija, Greece was the first to use the name—the term 'Macedonia' had obviously been used before.

[5] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)*, Judgment (not yet published), 5 December 2011, available at <http://www.icj-cij.org/docket/files/142/16827.pdf> [last accessed 22 April 2012].

[6] In that regard see *e.g.* A. Tzanakopoulos, 'Legality of Veto to NATO Accession: Comment on the ICJ's Decision in the Dispute between fYR Macedonia and Greece', *EJIL: Talk!*, 7 December 2011, available at <http://www.ejiltalk.org/legality-of-veto-to-nato-accession> [last accessed 22 April 2012].

the formal separation between the name dispute and the object of the legal dispute before the ICJ, the Court's judgment can in fact be construed as an intervention in the name dispute. As such, it was perhaps at the limits of the Court's jurisdiction under the terms of Article 21(2) of the Interim Accord. However, irrespective of the jurisdictional question, and notwithstanding the dismissive remarks of NATO officials as to its immediate practical impact,[7] the judgment might perform a useful function towards the long-awaited final resolution of the name dispute, because it clarified some of the respective legal positions of the parties.

Before proceeding any further, one might wonder why the name question is so important. On one level, this is a dispute about ownership of cultural heritage: who has the best claim to be the 'real inheritor' of 'historical' Macedonia, the land of Philip II and Alexander the Great, which at some point became an empire spanning from Egypt to India? On both sides, the arguments are often the modern-day equivalent of those carved stone maps of 1933. Yet, even the most biased historical accounts recognize at least some shared heritage: at some point in history, there was indeed a geographical entity called 'Macedonia' covering both the current Greek region of Makedonia/Μακεδονία and (at least parts of) Makedonija and other neighbouring countries.[8] However, the boundaries of this 'historic' Macedonia (and its exclusively Hellenic characterization) are still a matter of dispute, with both parties to the conflict often making claims as to the 'percentage' of that ancient land that 'belongs' to them.[9] This is not a trivial disagreement: for both Makedonija and Greece, it runs deep into matters of national identity.[10] It is thus not surprising that maps included in primary school textbooks featured prominently in the pleadings of the parties before the ICJ,[11] alongside

[7] See NATO's Secretary General statement, 5 December 2011, available at <http://www.nato.int/cps/en/SID-50672CA8-1A1DD013/natolive/news_81678.htm> [last accessed 22 April 2012].

[8] See *e.g.* G. C. Papavizas, *Claiming Macedonia: The Struggle for the Heritage, Territory and Name of the Historic Hellenic Land* (McFarland, 2006), at 221 (the author, who seeks to discuss the history of "the Macedonian question from a Greek perspective", *a contrario* concedes that "part" of Makedonija "belonged to historic Macedonia").

[9] See *e.g. supra,* note 5, at 8.

[10] It also raises questions as to the exploitation of these issues by the educational and political elites of both countries, now and at some very complex turning points during the Twentieth Century.

[11] In the Counter-Memorial of Greece there are no less than 56 references to textbooks in use in the elementary schools of the Republika Makedonija, which Greece deems in breach of Makedonija's obligations under the Interim Accord on various grounds. See Counter-Memorial

gastronomic detours on the 'real' ownership of *moussaka*.[12]

In terms of cultural heritage, the question is obviously not for international lawyers to solve—archaeologists, historians and anthropologists are much better placed to reach some conclusions (or at least explain why a conclusion cannot be reached).[13] Yet, very practical concerns underlie the cultural aspects of the dispute.[14] In Greek eyes, the name 'Republic of Macedonia' is unacceptable because it is an "historical injustice"[15] which may imply "irredentist" territorial claims over its Northern territorial unit named Makedonia/Μακεδονία—especially in light of the complex relationship between Tito's Yugoslavia and Greece (a situation not helped by certain declarations made by authorities and politicians in Makedonija in the early 1990s).[16] Initially, Greece opposed *any* use of the term 'Macedonia' in the name of its neighbour, but its current position is that a compound name distinguishing it from Greek Makedonia/Μακεδονία would be acceptable.[17] On the other hand, in Makedonija's eyes this is an "entirely absurd" dispute.[18] Makedonija insists that it has a right to choose its own name; that there are no territorial claims implied in calling itself 'Macedonia' (as recognized inter alia by the Badinter Commission in 1992);[19] and that both

of Greece, 19 January 2010, available at <http://www.icj-cij.org/docket/files/142/16356.pdf> [last accessed 22 April 2012], *passim*. Further references may be found both in the Rejoinder and in the oral proceedings.

[12] Verbatim Record of Oral Proceedings, CR 2011/5, 21 March 2011 (3 pm), available at <http://www.icj-cij.org/docket/files/142/16362.pdf> [last accessed 22 April 2012], at 34. This was perhaps a more serious issue than counsel for Makedonija characterized it to be, if one is reminded, for instance, of analogous disputes in the Middle East about the 'ownership' of falafel; anthropologists rightly insist that food and identity are inextricably linked, especially in post-independence contexts: see *e.g.* M. K. Janeja, *Transactions in Taste* (Routledge, 2010).

[13] Some of the cultural terms of the dispute are well summarized by J. Romm, 'Who was in Tomb II?', *London Review of Books*, vol. 33, issue 19, 6 October 2011, at 27–28, who clarifies that those scholars are obviously not exempt from bias either. For an anthropological perspective, see J.K. Cowan, *Macedonia: The Politics of Identity and Difference* (Pluto Press, 2000). On the possible international legal implications of the cultural dispute, see L. Reimer, 'Macedonia: Cultural Right or Cultural Appropriation?', (1995) 53 *U. Toronto Fac. L. Rev.* 359.

[14] The political dimension of the dispute and Makedonija's international relations from independence up to the early 2000s are well described by the former head of the UN Preventive Deployment Force in H.J. Sokalski, *An Ounce of Prevention: Macedonia and the UN Experience in Preventive Diplomacy* (US Institute of Peace Press, 2003).

[15] Counter-Memorial of Greece, *supra,* note 11, at 15.

[16] See *ibid.*, paras. 2.9–2.13.

[17] *Ibid.*, para. 2.34.

[18] See Application instituting proceedings, available at <http://www.icj-cij.org/docket/files/142/14879.pdf> [last accessed 22 April 2012], at 166.

[19] Arbitration Commission of the Conference on Yugoslavia, 'Opinion No. 6 on the Recognition

the constitution and the flag of the country have been amended precisely to assuage such fears.[20] The internal situation in Makedonija is also complicated by its relationship with its other neighbours Bulgaria, Albania and, to a lesser extent, Serbia. Claiming the 'Macedonian' heritage of a 'Macedonian' nation is an essential element in that picture.[21]

2 The obligation to negotiate and its deflection

Despite this overall complexity, mutual relations between Greece and Makedonija are much better now than they were in the early 1990s, when the conflict threatened to become much more serious. Greece initially refused to recognize Makedonija as a state and was quite successful in its diplomatic efforts to make sure that other European countries delayed their recognition despite the favourable Badinter Commission's report.[22] In 1993, Makedonija succeeded in gaining admission to the United Nations, but Greek opposition led to the terms of resolution 817 (1993), according to which the country would be "provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that [had] arisen over the name of the State".[23] Negotiations continued. The Interim Accord of 1995 accomplished the objective of normalizing day-to-day relations with Greece, although the parties could only agree in writing to refer to each other as 'The Party of the First Part' (Greece) and 'The Party of the Second Part' (Makedonija). They assumed the obligation to continue the negotiations, although explicitly reserving their positions. This was meant to 'cool down' the conflict. According to Article 5:

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of the Socialist Republic of Macedonia by the European Community and Its Member States', 11 January 1992, Annex III to *supra,* note 18, at 46.

[20] The first flag of Makedonija included, with a different background colour, the Star of Vergina, a symbol which can also be found in the flag of the Greek region of Makedonia / Μακεδονία. The significance of that is explained by Romm, *supra,* note 13. Makedonija subsequently renounced all official use of the Star in Article 7 of the Interim Accord (*supra,* note 3).

[21] See generally J. Engström, 'The Power of Perception: The Impact of the Macedonian Question on Inter-ethnic Relations in the Republic of Macedonia', (2002) 1 *Global Review of Ethnopolitics* 3 ("At the heart of the Macedonian Question are conflicting perceptions and dogmas of the ethnic origin of the Macedonian nation, and the specific question of whether a distinct Macedonian nation actually exists.").

[22] See C. Warbrick, 'Recognition of states: Part 2', (1993) 42 ICLQ 433, at 437–8.

[23] *Supra,* note 3.

> 1. The Parties agree to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845 (1993) with a view to reaching agreement on the difference described in that resolution and in Security Council resolution 817 (1993)
>
> 2. Recognizing the difference between them with respect to the name of the Party of the Second Part, each Party reserves all of its rights consistent with the specific obligations undertaken in this Interim Accord. The Parties shall co-operate with a view to facilitating their mutual relations notwithstanding their respective positions as to the name of the Party of the Second Part. In this context, the Parties shall take practical measures, including dealing with the matter of documents, to carry out normal trade and commerce between them in a manner consistent with their respective positions in regard to the name of the Party of the Second Part. The Parties shall take practical measures so that the difference about the name of the Party of the Second Part will not obstruct or interfere with normal trade and commerce between the Party of the Second Part and third parties.[24]

In the Accord, Greece finally recognized Makedonija as a state and agreed to cooperate with it in various ways. Crucially, Greece also undertook the obligation not to object to Makedonija's admission to international organizations, so long as the provisional name would be used. Article 11(1), which was to become central to the dispute before the ICJ, provided:

> Upon entry into force of this Interim Accord, the Party of the First Part agrees not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organizations and institutions of which the Party of the First Part is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent the Party of the Second Part is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993).[25]

[24] Interim Accord, *supra,* note 3.
[25] *Ibid.*

In exchange, Makedonija modified its flag and accepted other important "confidence-building" obligations.[26]

This was perhaps not such a good deal for Makedonija—albeit a necessary one at the time. In its successful struggle to seek a swift integration in the international community, Makedonija chose to pay a considerable price in terms of its legal rights. Without the Interim Agreement of 1995, the basic position in international law as to the name dispute would have been clearly in favour of Makedonija. Countries have a sovereign right to call themselves by a name of their choosing. This may be construed either a simple corollary of sovereignty, or as part of basic self-determination principles. In the case of Makedonija, this is all the more so given that the name 'Macedonia' was already in use before its 1991 independence as the name of the corresponding Yugoslavian territorial unit (the 'Socialist Republic of Macedonia'). The concept of *uti possidetis iuris* is meant to avoid unnecessary 'fratricidal struggles' on the position of borders once independence is gained through self-determination.[27] It may perhaps be extended by analogy to the question of the name of a state—the point would be that Makedonija already *had* a right to call itself Macedonia, because that was its name, and that right persisted, insofar as it already existed, even after gaining independence and dropping the word 'Socialist' therefrom. With the exception of some biased voices to the contrary,[28] the best academic opinion at the time supported Makedonija's right to call itself the 'Republic of Macedonia'.[29] In the case before the ICJ examined here, even the Respondent, Greece, accepted that it would in the abstract be Makedonija's 'prerogative' to call itself whatever it wants. As Professor Crawford put it:

> The key point about Article 5 is that it entails an agreement by the Applicant not to exercise its prerogative of determining its name

[26] See *supra,* note 20.

[27] See *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, ICJ Reports 1986, p. 554, at 565, para. 20.

[28] See *e.g.* M.D. Poulakidas, 'Macedonia: Far More Than a Name to Greece', (1994–1995) 18 *Hastings Int'l & Comp. L. Rev.* 397.

[29] See *e.g.* M.C.R. Craven, 'What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood', (1995) 16 *Aust. YBIL* 199, at 234–5. *Contra*, see I. Bantekas, 'The Authority of States to Use Names in International Law and the Macedonian Affair: Unilateral Entitlements, Historic Title, and Trademark Analogies', (2009) 22 *LJIL* 563 (the author advocates the relevance of the maxim *prior in tempore, potior in iure*, and draws an analogy with the law on trademarks, to reach the conclusion that Makedonija is not entitled to the use of the term 'Macedonia').

> for itself. […] The only rule of general international law is that *it is for each State to determine its own name, just as it is to determine its own flag, or its national anthem*. The national song of Poland, I might say, begins with the words 'O, Lithuania', but no one has ever complained![30]

Indeed, in Greece's view, the Interim Accord changed everything, as it imposed on Makedonija an obligation to negotiate with another country its own name. Or did it?

A cunning deflection strategy soon emerged in Makedonija. First, the country would seek to be recognized with its 'constitutional' name by as many other states as possible. Second, authorities would insist on always using only the name 'Republic of Macedonia' in every international setting—even when referred to by other states and international organizations as 'the former Yugoslav Republic of Macedonia'. The consistency in this regard was particularly irritating to Greece, whose counsel resorted to describing some of Makedonija's acts as "childish".[31] Third, the negotiations with Greece mandated by Article 5(1) of the Interim Accord were approached on the basis that the international use of the name 'Republic of Macedonia' was not negotiable: Makedonija was only prepared to discuss a suitable name to be employed in *bilateral* relations between Makedonija and Greece. This position, known as the 'dual formula', was seen by Greece as an unlawful strategy aimed at avoiding meaningful negotiations on the name issue despite the precise commitment to engage therein under Article 5(1) of the Interim Accord.[32] In summary, the parties could no longer even agree on what their disagreement exactly consisted in. Negotiations all but froze, while recognition of the name 'Republic of Macedonia' by third countries was on the rise.

Irrespective of its legality or good faith, this was an excellent strategy from Makedonija's perspective. Makedonija gained admittance to many international organizations,[33] and many states recognized it under its constitutional name. All was well until it all worked too well. In the mid-2000s, the United

[30] Verbatim Record of Oral Proceedings, CR 2011/12, 30 March 2011 (3 pm), available at <http://www.icj-cij.org/docket/files/142/16390.pdf> [last accessed 22 April 2012], at 32.

[31] Rejoinder of Greece, 27 October 2010, available at <http://www.icj-cij.org/docket/files/142/16360.pdf> [last accessed 22 April 2012], para. 7.32.

[32] See the 2008 remarks by Makedonija's President in his Parliament reported in the Greek Counter-Memorial, *supra,* note 11, para. 3.47, and the Greek position thereupon, paras. 3.48, 4.9, and 8.39.

[33] Judgment, *supra,* note 5, para. 22.

States of America and a series of other powerful countries joined the ranks of those recognizing Makedonija's constitutional name.[34] Understandably worried that it might be put before an irreversible series of *faits accomplis*, Greece hardened its position and made it clear to everyone in intergovernmental, diplomatic, and media circles that it intended to put some pressure back on Makedonija at the negotiation table by objecting to its admission to NATO, which was due to be decided upon at the Bucharest Summit of 2008.[35] Because of its consensus-based decision-making process, NATO ended up unanimously deciding not to extend an invitation to Makedonija until the name dispute was solved.[36] Makedonija's reaction was to bring a case against Greece before the International Court of Justice (ICJ), lamenting a breach of Article 11(1) of the Accord.

3 Greece's breach of Article 11(1)

3.1 The ostensibly simple case of Makedonija vs. the complex reply of Greece

Against this background, the first thing to note about the judgment is that the Court was prevented from deciding the crucial underlying question—whether Makedonija had the right, under international law, to choose for itself the name 'Republic of Macedonia'. By virtue of Article 21(2) of the Interim Accord, the International Court of Justice could be seized of "any difference or dispute" arising between Greece and Makedonija concerning "the interpretation or implementation" of the Accord, *except* "the difference referred to in Article 5, paragraph 1", that is the "difference described in [Security Council] resolution [845 (1993)] and in Security Council resolution 817 (1993)". In other words, the Court had no jurisdiction over the "difference … arisen over the name of the State" mentioned in resolution 817 (1993) and, according to Greece, neither had it as to the "remaining issues between them" mentioned in SC resolution 845 (1993).

Counsel for Makedonija was very successful in convincing the Court that the dispute before it had, strictly speaking, nothing to do with the name issue. Makedonija sought a declaration that Greece had breached its obligation under Article 11(1) not to object to Makedonija's membership of NATO. Greece had

[34] See Counter-Memorial of Greece, *supra,* note 11, para. 2.31.
[35] Judgment, *supra,* note 5, para. 21.
[36] *Ibid.*

indeed objected, and it had not done so for the only reason it would have been allowed to do so under Article 11(1). It was, as Professor Sands put it before the Court, a "simple and narrow case of *pacta sunt servanda*":[37] the Court did not need to enmesh itself with NATO's decisions or procedures, nor with the name dispute. Indeed, the Court was not asked to decide whether the Party of the Second Part should be called FYROM, Macedonia, or, for that matter, "the Republic of South Australia".[38] It was, on Makedonija's terms, an easy case. Not so for Greece.

For reasons that, with the benefit of hindsight, appear perhaps strategically unwise, Greece decided that it would not seek a separate judgment on preliminary objections, but that it would be prepared to join its arguments on the question of jurisdiction with those on the merits of the case. The resulting written and oral proceedings by Greece are very complex. In its most simplified form, Greece's line of defence can be understood as a series of no less than *nine* hierarchical propositions, each subsidiary to *all* the preceding ones in the following order:

1. The Court lacked jurisdiction under Article 21(2) of the Interim Accord because the dispute was inextricably connected to the name issue which was reserved for settlement through negotiation between the parties.

2. Even if the Court found that the dispute could be understood separately from the name issue, the Court lacked jurisdiction because it was not Greece which had objected to Makedonija's admission to NATO: the relevant act was attributable to NATO, not Greece.

3. Even if the act was also attributable to Greece, NATO and/or its members would have had to be necessary parties to the dispute, and the *Monetary Gold* principle prevented the Court from exercising jurisdiction.[39]

4. Even if the *Monetary Gold* principle did not apply, the Court should refrain from exercising jurisdiction to protect its judicial function, as the decision would not be susceptible of any practical effect: the Court could not order NATO to admit Makedonija.[40]

[37] Verbatim Record of Oral Proceedings, *supra,* note 12, at 21.

[38] *Ibid.*, at 28.

[39] See *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (Preliminary Question), ICJ Reports 1954, p. 19.

[40] Note how this point potentially contradicts the assertion sub (1) that any decision on the issue would necessarily impact upon the name issue.

5. The term "not to object" in Article 11(1) must be interpreted narrowly. The conduct of Greece should not be seen as an objection *strictu sensu*, but as an exercise of its duty of participation to the consensus-forming under NATO rules and procedures, which prevailed over the Interim Accord by virtue of Article 22 of the Accord.

6. Even if the conduct by Greece was deemed an objection, it was an objection permitted by the second clause of Article 11(1), because Makedonija would be referred to in NATO differently than "the former Yugoslav Republic of Macedonia": Makedonija itself would carry on its practice of calling itself "the Republic of Macedonia".

7. Even if Greek conduct was not permitted under either Article 22 or Article 11(1), it was permitted because Makedonija had breached many of its correlative obligations under the Accord, including eschewing meaningful negotiations through the "dual formula", and Greece was therefore entitled to invoke the exception of non-performance (*exceptio non adimpleti contractus*).

8. Even if the *exceptio non adimpleti contractus* were not a recognized rule under international law, the treaty obligation under Article 11(1) was suspended under the terms of the Vienna Convention of the Law of Treaties because Makedonija's breaches amounted to 'material breaches' and Greece relied on the "defence" mechanism of Article 65.

9. Failing all of the above, this was a case of legitimate countermeasures under the law of state responsibility.

The more persuasive the subsidiary arguments are, the more the arguments just heard by the Court on the points immediately before are undermined—even if they would not need to be as a matter of formal logic. As all uncles and aunts know, the arguments 'You are not my mum', followed by 'It was not me, uncle/auntie', followed by 'I actually did it because she hit me first' end up being all mutually exclusive even if one of them may be, on close analysis, correct. So Greece had to plead at the same time that the Court had no jurisdiction to hear the case, that there was no breach, and that the breach was excusable because Makedonija had also breached the rules, including some over which the Court supposedly had no jurisdiction. Another contradiction was that Greece pleaded that the judgment was not going to be capable of having any legal effect, while also arguing that it would actually adversely prejudice the negotiations—over

which the Court had no jurisdiction—by creating irreversible legal effects. As Judge Simma put it in his separate opinion, counsel for Greece did an excellent job in very difficult circumstances—but "*ad impossibilia nemo tenetur*".[41]

3.2 The Court's decision on jurisdiction

The Court proceeded to tear Greece's arguments apart one by one. As to the argument that the Court's decision would fall under the exclusion in Article 21(2), the Court held the question of "which name should be agreed upon at the end of the negotiations between the Parties under the auspices of the United Nations" was the only one that the Court could not adjudicate upon, while the question of the violation of Article 11(1) was a separate one:

> The fact that there is a relationship between the dispute submitted to the Court and the name difference does not suffice to remove that dispute from the Court's jurisdiction. […] Only if the Court were called upon to resolve specifically the name difference, or to express any views on this particular matter, would the exception under Article 21, paragraph 2, come into play. This is not the situation facing the Court in the present case.[42]

As to Greece's argument that the relevant conduct under dispute was to be attributed to NATO rather than Greece, the Court agreed with Makedonija that this was a misrepresentation of the object of the dispute. It was Greek conduct in the run up to the Bucharest summit that came into consideration, not the Summit decision itself:

> The Court notes that the Applicant is challenging the Respondent's conduct in the period prior to the taking of the decision at the end of the Bucharest Summit and not the decision itself. The issue before the Court is thus not whether NATO's decision may be attributed to the Respondent, but rather whether the Respondent violated the Interim Accord as a result of its own conduct. Nothing in the Application before the Court can be interpreted as requesting the Court to pronounce on whether

[41] Judge Simma, Separate Opinion, available at <http://www.icj-cij.org/docket/files/142/16829.pdf> [last accessed 22 April 2012], para. 3. Some self-contradiction by Greece was also hinted at in the Court's judgment, *supra,* note 5, para. 107.

[42] Judgment, *supra,* note 5, para. 37.

> NATO acted legally in deferring the Applicant's invitation for membership in NATO. Therefore, the dispute does not concern, as contended by the Respondent, the conduct of NATO or the member States of NATO, but rather solely the conduct of the Respondent.[43]

This made the question of the *Monetary Gold* principle irrelevant, because Greece's "conduct [could] be assessed independently of NATO's decision, and the rights and obligations of NATO and its member States other than Greece [did] not form the subject-matter of the decision of the Court".[44]

Furthermore, the Court was not persuaded that its judgment would have no practical result:

> While the Respondent is correct that a ruling from the Court could not modify NATO's decision in the Bucharest Summit or create any rights for the Applicant vis-à-vis NATO, such are not the requests of the Applicant. […] The Applicant is not requesting the Court to reverse NATO's decision in the Bucharest Summit or to modify the conditions for membership in the Alliance. Therefore, the Respondent's argument that the Court's Judgment in the present case would not have any practical effect because the Court cannot reverse NATO's decision or change the conditions of admission to NATO is not persuasive.[45]

And finally, as to the argument that the judgment would intervene in political issues and the Court should thus refrain to adjudicate for judicial propriety, the Court predictably used its classic arguments on the nature of the dispute: there was a legal dispute between the parties over which the Court had jurisdiction, and there was no reason to refrain from exercising it just because there would be some political implications to that legal decision.[46]

3.3 The obligation 'not to object' to NATO membership

Once the Court established that it had jurisdiction, it went on to consider what the obligation 'not to object' to Makedonija's entry to international

[43] *Ibid.*, para. 42.
[44] *Ibid.*, para. 43.
[45] *Ibid.*, para. 50.
[46] *Ibid.*, paras. 57–60.

organizations meant. The Court was not persuaded by Greece's argument that the consensus procedures employed by NATO implied that no formal 'veto' could be exercised by Greece, thus relieving Greece of responsibility:

> [N]othing in the text of [Article 11(1)] limits the Respondent's obligation not to object to organizations that use a voting procedure to decide on the admission of new members. There is no indication that the Parties intended to exclude from Article 11, paragraph 1, organizations like NATO that follow procedures that do not require a vote. Moreover, the question before the Court is not whether the decision taken by NATO at the Bucharest Summit with respect to the Applicant's candidacy was due exclusively, principally, or marginally to the Respondent's objection. As the Parties agree, the obligation under the first clause of Article 11, paragraph 1, is one of conduct, not of result.[47]

It was also accepted by Greece that the grounds for its objection lay in the difference over the name, not on other grounds.[48] This was fatal to Greece's claim. Greece had indeed objected because the name dispute had not yet been resolved:

> In the view of the Court, the evidence submitted to it demonstrates that through formal diplomatic correspondence and through statements of its senior officials, the Respondent made clear before, during and after the Bucharest Summit that the resolution of the difference over the name was the "decisive criterion" for the Respondent to accept the Applicant's admission to NATO. The Respondent manifested its objection to the Applicant's admission to NATO at the Bucharest Summit, citing the fact that the difference regarding the Applicant's name remained unresolved.[49]

Contrary to what was pleaded by Greece, such objection was not permitted under the second clause of 11(1). Greece had argued that because Makedonija would refer to itself as the 'Republic of Macedonia' rather than 'the former Yugoslav Republic of Macedonia' in NATO, the country was indeed going 'to be referred to in [NATO] differently than in paragraph 2 of United

[47] *Ibid.*, para. 70.
[48] *Ibid.*, para. 71.
[49] *Ibid.*, para. 81. See also para. 82.

Nations Security Council resolution 817 (1993)'. Because of this language in the second clause of Article 11(1), Greece had no obligation not to object to Makedonija's membership of NATO. So the question before the Court was whether Makedonija's use of its constitutional name indeed triggered the exception or not.[50] The Court found that the use of passive voice ('to be referred to') was relevant against Greece's construction.[51] Crucially, the Court found that the Interim Accord "nowhere" required Makedonija to use "the provisional designation in its dealings with Greece".[52] This had fundamental consequences—if the parties had wanted Makedonija to change its practice, they would have agreed as much:

> [A]lthough the Parties were aware of the Applicant's consistent use of its constitutional name in the United Nations, the Parties drafted the second clause of Article 11, paragraph 1, without using language that calls for a change in the Applicant's conduct.[53]

Such an important commitment for Makedonija would not have been introduced just by implication.[54] In summary, the text of Article 11(1), together with the object and purpose of the Accord, did not "permit the Respondent to object to the Applicant's admission to or membership in an organization because of the prospect that the Applicant would refer to itself in that organization using its constitutional name".[55] The practice of both parties in the application of the Accord confirmed this.[56]

Furthermore, Greece's obligation not to object to Makedonija's membership of NATO was not qualified by Article 22 of the Interim Accord. Article 22 provided as follows:

> This Interim Accord is not directed against any other State or entity and it does not infringe on the rights and duties resulting from bilateral and multilateral agreements already in force that

[50] *Ibid.*, at para. 90.
[51] *Ibid.*, para. 92.
[52] *Ibid.*, para. 95. The Court also noted that the practice in bilateral relations was relevant: by virtue of Article 5, the Parties had found a *modus vivendi* whereby each would be using their preferred name in diplomatic correspondence with the other party, and affix seals with the other name on inbound correspondence.
[53] *Ibid.*, para. 96.
[54] *Ibid.*, para. 97.
[55] *Ibid.*, at para. 98.
[56] *Ibid.*, at para. 100.

> the Parties have concluded with other States or international organizations.

According to Greece, this meant that if its duty to participate in NATO decision procedures conflicted with the Accord, the NATO treaty obligation would prevail. The Court noted that even if this interpretation of Article 22 had been correct, it would still be necessary for Greece to show that it indeed had 'a duty' under the NATO treaty to object to Makedonija's membership. In the Court's opinion there was no such duty:

> The Respondent offers no persuasive argument that any provision of the North Atlantic Treaty required it to object to the Applicant's membership. Instead the Respondent attempts to convert a general "right" to take a position on membership decisions into a "duty" by asserting a "duty" to exercise judgment as to membership decisions that frees the Respondent from its obligation not to object to the Applicant's admission to an organization. This argument suffers from the same deficiency as the broader interpretation of Article 22 initially advanced by the Respondent, namely, that it would erase the value of the first clause of Article 11, paragraph 1. Thus, the Court concludes that the Respondent has not demonstrated that a requirement under the North Atlantic Treaty compelled it to object to the admission of the Applicant to NATO.[57]

In summary, Greece had breached its obligation under Article 11 of the Interim Accord. This was, however, not the end of the matter. Could the conduct of Greece be somehow otherwise justified?

In this regard, counsel for Greece did not spare any conceivable line of defence, but, in essence, its three-pronged argument boiled down to a *tu quoque*. Because in its view Makedonija had also repeatedly breached the Interim Accord, Greece was entitled to invoke the *exceptio non adimpleti contractus*, or the rules on treaty suspension in the law of treaties, or the rules on countermeasures in the law of state responsibility. However, conscious of its arguments on jurisdiction, counsel for Greece chose not to file a counter-claim for the alleged breaches. In other words, Greece did not seek a declaration that Makedonija had breached the Accord: it only wished the Court to reject Makedonija's claim.

The Court did not find that Greece had sufficiently proven that Makedonija had been in breach of the Accord, except for one relatively minor breach

[57] *Ibid.*, para. 111.

occurred in 2004 which was, in the Court's view, entirely unrelated to the objection by Greece to Makedonija's membership of NATO.[58] Even if a rule on the *exceptio non adimpleti contractus* existed as Greece had envisaged it, its conditions would not have been met (so the Court need not even consider if the *exceptio* existed or not).[59] Furthermore, Makedonija's breach did not constitute a 'material' breach for the purposes of Article 60 of the Vienna Convention on the Law of Treaties,[60] nor was Greece's objection to Makedonija's membership of NATO a countermeasure taken 'for the purposes of achieving a cessation' of that breach by Makedonija.[61]

In sum, in its *dispositif* the Court reached the conclusion that 'the Hellenic Republic, by objecting to the admission of the former Yugoslav Republic of Macedonia to NATO, [had] breached its obligation under Article 11, paragraph 1, of the Interim Accord of 13 September 1995'. The Court refused to also declare that Greece should avoid repeating such violation in the future because its 'good faith must be presumed'.[62]

4 The judgment as an intervention in the name dispute

In finding that Greece had breached Article 11(1) of the Interim Accord, the Court insisted that it did not, as such, express a view on the name dispute.[63] Under Article 21(2), the Court decided it had jurisdiction over anything except choosing a name for Makedonija.[64] Judge Xue and Judge *ad hoc* Roucounas disagreed: in their view, the Court did not have jurisdiction to hear the case *inter alia* because the question before the Court was inextricably connected with the

[58] *Ibid.*, paras. 160–1.

[59] *Ibid.*, para. 161. In his Separate Opinion, Judge Simma filled the gap which the Court left open as to the *exceptio non adimpleti contractus* and clarified that, as a matter of contemporary international law, there is no space left for the concept of *exceptio non adimpleti contractus* beyond what has been codified in Article 60 of the Vienna Convention of the Law of Treaties (See *supra,*, note 41). Indeed, any suggestion to the contrary would create much instability in the law and practice of international treaties, as states could unilaterally choose to forego the application of certain of their obligations in presence of non-material breaches.

[60] *Ibid.*, para. 163.

[61] *Ibid.*, para. 164.

[62] *Ibid.*, para. 168.

[63] *Ibid.*, para. 37. See also para. 130.

[64] *Ibid.*

name issue.[65] In this regard, the present author does not dispute that, as a matter of technical legal construction, it was perfectly reasonable for the Court to reach the conclusion it did as to jurisdiction. Incidentally, the judgment on the merits was eminently sensible: this was indeed a simple case of *pacta sunt servanda*, Greece having clearly breached its obligation under Article 11. However, the implications of the decision for the broader name dispute are so crucial that one wonders whether a more expansive interpretation of the exception to the Court's jurisdiction in Article 21(2) would have been warranted in view of the parties' initial wish to keep the name dispute outside the purview of the Court's jurisdiction. This is because, in order to reach its conclusion, the Court had to consider the negotiation technique employed by Makedonija—including the so called 'dual formula'—and to adjudicate, albeit incidentally, on its legality.

First, we saw that the Court found that, in the Interim Accord, Makedonija had not undertaken any obligation to call itself 'the former Yugoslav Republic of Macedonia'.[66] Although this is probably correct, it must be noted that this was one of the key differences between the parties and a crucial divisive element during the negotiations. Second, the Court found that Makedonija had not breached its obligation under Article 5 to negotiate in good faith with Greece. The Court first recalled its previous jurisprudence on the concept of good faith negotiations,[67] and then went on to consider the evidence before it, concluding that since Makedonija had in fact declared itself open also to solutions that *differed* from the 'dual formula',[68] there was no proof that it had not negotiated in good faith so far.[69]

However, the Court crucially stopped short of saying that the 'dual formula' was in itself not a legitimate negotiation position under Article 5. In Judge Xue's view, the disagreement between the parties on the 'dual formula' was at the heart of the legal dispute before the parties—and it was this that put the case outside the Court's jurisdiction:

> The so-called "dual formula", as revealed in the proceedings, refers to the formula whereby, ultimately, the provisional name

[65] See Judge Xue, Dissenting Opinion, available at <http://www.icj-cij.org/docket/files/142/16833.pdf> [last accessed 22 April 2012], at 1–4 and Judge *ad hoc* Roucounas, Dissenting Opinion, available at <http://www.icj-cij.org/docket/ files/142/16835.pdf> [last accessed 22 April 2012], at 6–8.

[66] Judgment, *supra,* note 5, paras. 95–7.

[67] *Ibid.*, para. 132.

[68] *Ibid.*, para. 135.

[69] See *ibid.*, paras. 133–8. It is worth noting that the burden of proof of Makedonija's 'bad faith' was on Greece.

> will be used only between the Respondent and the Applicant, while the Applicant's constitutional name is used with all other States. Although the Court rightly concludes that, by virtue of Article 11, paragraph 1, the Applicant is not precluded from using its constitutional name when referring to itself in international organizations under resolution 817 and the Interim Accord, such a "dual formula", whose implication for the pending negotiations does not seem immaterial, was obviously not contemplated by the Parties when they concluded the Interim Accord. Furthermore, when such a formula is allegedly pursued intentionally, the matter clearly has a bearing on the final settlement of the name issue. The question in the present case, therefore, is in essence not about the Respondent's position regarding the Applicant's membership in NATO under Article 11, paragraph 1, but about the difference in the negotiation process.[70]

As a matter of fact, it cannot be denied that the judgment had a clear impact on the negotiating positions.

In its written pleadings, Greece had predicted that this might happen. In its arguments on jurisdiction, it declared that "a Judgment in favour of the FYROM would judicially seal a unilateral practice of imposing a disputed name and would thus run contrary to Security Council resolutions 817 (1993) and 845 (1993), requiring the Parties to reach a negotiated solution on this difference".[71] And seal it it did. Indeed, the practice of calling *itself* 'the Republic of Macedonia' has been declared lawful by the judgment, and the 'dual formula' was not explicitly deemed a breach of the obligation to negotiate in good faith. These were both clear interventions on the name dispute.

5 On the protection of the common heritage of humanity

In his closing oral statement before the Court, the Agent for Makedonija remarked once again why this case was important to his country. The Macedonian identity, he said, was no longer a question of choice for his people, because history had run its course:

[70] Judge Xue, Dissenting Opinion, *supra,* note 65, para. 3.

[71] Rejoinder of Greece, available at <http://www.icj-cij.org/docket/files/142/16360.pdf> [last accessed 22 April 2012], para. 76.

> Although it is not a matter before this Court for resolution, the principal difference that divides us concerns the name of my country, with all that implies to our nationality, our language and our identity. Due to the Respondent's opposition, we have suffered delays and setbacks in our quest for international recognition and legitimacy, often compromising the interests for stability in the region. Several learned counsel on behalf of the Respondent referred to the purported "choice" of our name as our crime. *Yet for us, it was not a choice*. Our name was the result of a long historic process; indeed, born as Macedonians, speaking the Macedonian language, *it is not as if we had alternative identities to choose from*.[72]

The response of the Agent for Greece reiterated her country's concerns for the implications of what was perceived by Greece as a cultural misappropriation—once again by reference to maps and school textbooks:

> [I]n speaking of its disinterest in monopolizing the contested name, the Applicant trivializes an issue of grave and genuine concern to my country. This is an attempt to mislead the international community about the Applicant's real intentions in this regard which are far from innocent. Those real intentions can be gained from textbooks, maps, encyclopaedias, statements of its officials, all alleging historical injustice and asserting, as Greece showed in its pleadings, that the Applicant's "geographical and ethnic boundaries" extend beyond its present day borders and cover territories that are under "Greek" or "Bulgarian" "rule". This, Mr. President, is a real threat to regional peace and stability.[73]

Even if the Greek perspective on the history of the region were the right one, the question of Makedonija's identity cannot be brushed off as a deliberate series of scholarly mistakes by its school teachers and University professors. National identity is always socially and politically constructed—and a Macedonian state in the Balkans is nowadays an unavoidable fact, a *fait accompli*. In that

[72] Verbatim Record of Oral Proceedings, CR 2011/11, 28 March 2011 (10 am), available at <http://www.icj-cij.org/docket/files/142/16386.pdf> [last accessed 22 April 2012], paras. 56–7 (emphasis added).

[73] Verbatim Record of Oral Proceedings, CR 2011/12, 30 March 2011 (3 pm), available at <http://www.icj-cij.org/docket/files/142/16390.pdf> [last accessed 22 April 2012], para. 14 (emphasis added).

regard, although international lawyers cannot offer solutions, they can propose methods of settlement of disputes. As we saw earlier, even in the most skewed accounts there is a recognition that some heritage is in fact shared between the two countries.[74] Although this may sound naïve, a medium-term objective in furtherance of the Interim Agreement may be that of fostering academic and cultural dialogue across the borders of the two countries—perhaps starting precisely from a joint study of this shared heritage. As the general principles on the protection of cultural property show, and as UNESCO constantly advises, certain elements of world culture (such as Alexander the Great's empire and the literature that came therewith) are the common heritage of the whole of humanity, not of a specific country.[75] It is the responsibility of Makedonija and Greece to find an intelligible way to share and preserve their collective heritage rather than attempt to litigate it before international courts.

The Court concluded its reasoning by "emphasiz[ing] that the 1995 Interim Accord places the Parties under a duty to negotiate in good faith under the auspices of the Secretary-General of the United Nations pursuant to the pertinent Security Council resolutions with a view to reaching agreement on the difference described in those resolutions".[76] The collective future of Makedonija and Greece is as partners in the European Union and NATO, not as opposing sides in a never-ending conflict over Makedonija's name. While there is no denial that this a serious dispute over matters which touch upon the identity of both countries, it is equally obvious that these are no longer times for such disagreements. In times when the principle of self-determination of peoples has become a peremptory norm of international law, and foreign domination through colonization is no longer acceptable let alone something to be proud of, one wonders whether the 'real' heritage of past historical pan-Asian conquests is a legitimate point of international dispute. As Scipio Aemilianus allegedly acknowledged just after having destroyed Carthage on behalf of Rome, human glory is forever ephemeral.[77] Whomever Alexander the Great 'belongs' to, at some point his empire fell, as all empires (and their subsequent shadows)

[74] *Supra,* note 8 and accompanying text.

[75] See Article 6(1), Convention concerning the Protection of the World Cultural and Natural Heritage 1972, 1037 UNTS 151 (both Makedonija and Greece are parties thereto); see also Convention for the Safeguarding of the Intangible Cultural Heritage 2003, available at <http://unesdoc.unesco.org/images/0018/001897/189761e.pdf> [last accessed 22 April 2012].

[76] Judgment, *supra,* note 5, para. 166.

[77] Polybius (208–118 BCE) tells us of the tears shed by the Roman general after having accomplished the destruction of Carthage in 146 BCE: *Histories*, XXXVIII, 22, English translation at <http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Polybius/38*.html> [last accessed 22 April 2012].

are thankfully bound to do.

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The *Lubanga* Judgment of the ICC: More than just the First Step?

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Keywords
International criminal law, International Criminal Court, child soldiers, Thomas Lubanga

On 14 March 2012, Trial Chamber (TC) I of the International Criminal Court (ICC) issued its judgment in the case against Thomas Lubanga Dyilo, finding him guilty of co-perpetrating the crimes of enlisting and conscripting child soldiers and using them to participate actively in hostilities under Article 8(2)(e)(vii) of the Rome Statute.[1] The Chamber found that Thomas Lubanga, leader of the *Union des Patriotes Congolais* (UPC) and its military arm, the *Forces patriotiques pour la libération du Congo* (FPLC), and others came together with the intent of "build[ing] an army for the purpose of establishing and maintaining political and military control over Ituri", which "resulted, in the ordinary course of events, in the conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities".[2] Lubanga was further found to have made an essential contribution to implementing the common plan and to have done so with the requisite *mens rea*.[3]

The judgment is the first trial judgment issued by the ICC and marks a historical moment. Undoubtedly, this is a cause for celebration: more than 13 years after the adoption of the Rome Statute[4] and almost 10 years after the ICC came to life, the first trial has finally been concluded. In this brief case note, however, I do not intend to celebrate the historical importance of the *Lubanga* judgment. I will also not devote much attention to the process that led up to the judgment and the various procedural obstacles that had to be overcome along

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[1] *Prosecutor v Thomas Lubanga Dyilo,* Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, ICC-01/04-01/06, 2012 (hereinafter 'Judgment'), para. 1358.

[2] *Ibid.*, para. 1351.

[3] *Ibid.*, paras. 1356–7.

[4] 1998 Statute of the International Criminal Court, 2187 UNTS 90 (hereinafter 'Rome Statute').

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the way, having threatened to stall the entire trial twice.[5] What I am more interested in doing is exploring the judgment's jurisprudential significance. Introducing a symposium on Pre-Trial Chamber (PTC) I's confirmation of charges decision, William Schabas and Carsten Stahn wrote that "in a few years, hardly anyone will recall the precise facts and counts brought forward against [Lubanga]", predicting that the case's jurisprudential impact would result more from the legal pronouncements.[6]

The *Lubanga* case has, unsurprisingly, been compared with the *Tadic* case before the International Criminal Tribunal for the former Yugoslavia (ICTY), which gave rise to some of the most widely-cited *dicta* in the field of international criminal law. Whether the *Lubanga* judgment will gain similar prominence remains to be seen. On the one hand, this will certainly depend on the legal findings made by the TC and how central these prove to be in future cases. As I will analyze below, the TC did make some important contributions to the clarification of many of the Rome Statute's provisions; however, overall these contributions appear rather modest. On the other hand, major contributions were perhaps never to be expected of this judgment.

This may be so for two reasons. First, while the *Lubanga* judgment is the first trial judgment of the ICC, it is certainly not the first judicial pronouncement on several of the legal issues arising in the case. The last years have shown that in issuing confirmation of charges decisions, the ICC PTCs have taken it upon themselves to elaborate on the relevant law in great depth.[7] This certainly holds true for the *Lubanga* case itself, where PTC I covered the relevant legal questions in detail.[8] In this light, the PTC had already stolen the TC's thunder, to some degree, before the latter even started hearing the case.[9] The second reason for not expecting too much of this case is that the charges brought against Thomas Lubanga were so narrow that they simply did not give the judges much of a chance to pronounce themselves on the law more broadly.

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[5] See Judgment, para. 10.

[6] W. Schabas & C. Stahn, 'Introductory Note: Legal Aspects of the Lubanga Case', (2008) 19 *Criminal Law Forum* 431, at 431.

[7] Cf. R. Cryer *et al*., *An Introduction to International Criminal Law and Procedure* (CUP, 2010), at 461.

[8] See *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, Pre-Trial Chamber I, ICC-01/04-01/06, 2007 (hereinafter '*Lubanga* Confirmation Decision').

[9] Thomas Weigend even speculated that Judge Jorda, who sat on the PTC and resigned shortly after issuing the confirmation of charges decision, wanted to use that decision to leave his mark on the ICC's case-law. T. Weigend, 'Intent, Mistake of Law and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges', (2008) 6 *Journal of International Criminal Justice* 471, at 472.

All this being said, the TC did express views on a number of important questions. I will comment on five particular subject areas: the classification of armed conflicts (1); the definition of the crime of enlisting, conscripting and using child soldiers (2); the mental element of criminal liability (3); the status of victim-witnesses that have been found to provide unreliable evidence (4); and the review of statements of law made by the PTC (5).

1 The classification of armed conflicts

The Rome Statute contains two almost identical provisions prohibiting "[c]onscripting or enlisting children under the age of fifteen years into the [national armed forces/armed forces or groups] or using them to participate actively in hostilities",[10] one applicable to international armed conflicts and one applying in armed conflicts of a non-international character. The Prosecution had only charged Lubanga with the crime applicable to non-international armed conflicts.[11] The PTC, however, assumed that it had the power under Article 61(7)(c)(ii) to single-handedly re-characterize the facts (rather than to ask the Prosecutor to do so), and decided that for the most part the armed conflict in question (between July 2002 and 2 June 2003) was one of an international character, due to the presence of the Ugandan army as an occupying power in parts of Ituri.[12] The TC chose a different path. While the PTC had taken the view that the occupation by Uganda rendered the *entire* conflict in Ituri international, the TC relied on a relational concept of armed conflict by focusing on the status of the two parties to the conflict. In this connection, it accepted that "international and non-international conflicts may coexist".[13] For the purpose of determining the law that should apply to any given act, the Chamber stated that "[in] situations where conflicts of a different nature take place on a single territory, it is necessary to consider whether criminal acts under consideration were commit-

[10] Art. 8(2)(b)(xxvi) and 8(2)(e)(vii), Rome Statute, *supra*, note 4.

[11] *Prosecutor v Thomas Lubanga Dyilo*, Document Containing the Charges, Article 61(3)(a), Pre-Trial Chamber I, ICC-01/04-01/06, 2006, at 24.

[12] *Lubanga* Confirmation Decision, para. 220. According to Article 61(7)(c)(ii) of the Rome Statute, the PTC may "[adjourn] the hearing and request the Prosecutor to consider … [amending] a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court". For the PTC's reasoning with respect to its decision not to follow the procedure prescribed in this provision, see *Lubanga* Confirmation Decision, paras. 203–4.

[13] Judgment, para. 540.

ted as part of an international or a non-international conflict".[14] On this basis, the TC had to determine whether the particular armed conflict in which the UPC was engaged was of an international or of a non-international character.

In considering when an armed conflict involving non-governmental groups could be considered international in nature, the TC held that:

> [i]t is widely accepted that when a State enters into conflict with a non-governmental armed group located in the territory of a neighboring State and the armed group is acting under the control of its own State, 'the fighting falls within the definition of an international armed conflict between two States'.[15] However, if the armed group is not acting on behalf of a government, in the absence of two States opposing each other, there is no international armed conflict. … As regards the necessary degree of control of another State over an armed group acting on its behalf, the Trial Chamber has concluded that the 'overall control' test is the correct approach.[16]

It furthermore held, in line with the PTC, that "'international armed conflict' includes military occupation".[17] The TC's statements call for two comments, one on the relevant test for establishing that an armed conflict has been 'internationalized' through indirect intervention by a state, and the other on the uneasy fit between the relational model of characterization and situations of occupation.

I will start with the former. The TC, just like the PTC, borrowed the "overall control" test from the *Tadic* Appeals Judgment, in which the ICTY Appeals Chamber famously parted ways with the International Court of Justice (ICJ). In the *Nicaragua* case, the ICJ had elaborated that for the purposes of attributing violations of international humanitarian law by the contras to the United States, the US would have had to exercise "effective control" over the operations of the contras. In other words, to establish US responsibility for the acts of private actors Nicaragua would have had to demonstrate "that the

[14] *Ibid.*, para. 551.

[15] Quoting S. Vité, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations', (2009) 91 *International Review of the Red Cross* 69, at 70–1, 90.

[16] Judgment, para. 541. Regarding the "overall control" test, the Trial Chamber relied on the Tadic jurisprudence, referring to *Prosecutor v Dusko Tadic*, Judgment, Appeals Chamber, IT-94-1-A, 1999, para. 137.

[17] Judgment, para. 542.

United States directed or enforced the perpetration of the acts" in question.[18] Considering this test to be incorrect, the *Tadic* Appeals Chamber opted for the looser "overall control" test, denying that specific control over the acts in question was necessary.[19] The TC's decision would not have been surprising had the ICJ not rejected the ICTY's approach in its 2007 judgment in the *Genocide* case.[20] This judgment was issued after the PTC had decided on the confirmation of charges in the *Lubanga* case[21] and after all the ICTY judgments that the TC relied on in support of its conclusion had been issued.[22] One could have expected the TC to at least consider the ICJ's opinion before blindly following the *Tadic* precedent.

To be sure, the ICJ did not reject the *Tadic* approach outright. Rather, the Court held that the "overall control" test "may well be applicable and suitable" when it comes to the distinction between international and non-international armed conflicts and merely rejected it for the purpose of attributing responsibility for internationally wrongful acts committed by non-governmental forces.[23] Nevertheless, by emphasizing that the non-governmental forces need to act "on behalf of a State", the *Lubanga* TC did not engage with this distinction, thereby again conflating the two questions. Even if the distinction had been made, it would still have been necessary to show that the "overall control" test is indeed the correct test as regards the qualification of a conflict.[24] In this context, opinions are divided as to whether issues of responsibility and the determination

[18] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, at p. 63–4, para. 115.

[19] See generally *Tadic* Appeals Judgment, *supra* note 16, paras. 115–45. The Appeals Chamber described the content of the "overall control" test in para. 137: "[t]he control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts."

[20] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, ICJ Reports 2007, p.43, at 209–10, paras. 402–4.

[21] An attentive PTC might have noticed that the ICJ implicitly upheld the *Nicaragua* test in the context of the conflict in the Congo before the PTC issued its decision. See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Merits, Judgment, ICJ Reports 2005, p. 168, at 226, para. 160.

[22] See Judgment, note 1649.

[23] *Genocide* Case, *supra* note 20, para. 404.

[24] The ICJ left this question open; see *ibid.*

of the character of the conflict can be distinguished at all[25] and—if so—what the correct test for the latter question would be.[26] Irrespective of what answer the TC would have given, considering that all cited authorities predate the ICJ's *Genocide* judgment, one would have expected the TC to show a minimum degree of awareness of this debate.

Moving on to the second question, the TC's relational theory may give rise to some unforeseen theoretical and practical problems. This stems from the fact that it is doubtful whether the TC's determination of the applicable law in a situation of occupation is (i) consistent and (ii) correct. With respect to consistency, the TC claimed that foreign occupation gives rise to an international armed conflict. At the same time, the TC seems to have suggested that in cases of occupation the relationship between an occupying state and resisting non-governmental forces will be governed by the law of non-international armed conflict. It stated that "[focusing] solely on the parties and the conflict relevant to the charges in this case, the Ugandan military occupation of Bunia airport does not change the legal nature of the conflict between the UPC/FPLC [and opposing] rebel groups since this conflict … did not result in two States opposing each other, whether directly or indirectly".[27] Thus, the TC appears to have contemplated that an occupation can in fact give rise either to an international armed conflict (when two state oppose each other) or to an armed conflict of a non-international character (where one of the warring party is a non-governmental group). The Trial Chamber should have made this clear—if this is indeed what it meant—rather than unequivocally stating that under occupation the law of international armed conflicts applies

[25] The ICJ was of the opinion that "logic does not require the same test to be adopted in resolving the two issues, which are very different in nature" (*ibid.*, para. 405). For a skeptical comment, see E. La Haye, *War Crimes in Internal Armed Conflict* (CUP, 2008), at 17: "[i]f at first, the laws on state responsibility do not seem to be the adequate tool to determine the nature of an armed conflict, they nonetheless allow for a determination of the international status of the entities party to an armed conflict. If the acts of an armed group can be imputed to a foreign state, the latter should surely be seen as a de facto organ of that foreign state and the conflict would therefore be an international one. The international legal status of each party to the conflict, state officials, de facto organ of a state or armed group acting independently of the orders of a state for example, constitutes the correct criteria establishing the character of an armed conflict." See also G. Werle, *Principles of International Criminal Law* (TMC Asser Press, 2009), at 371: "[i]f acts by non-state organizations or even individuals cannot be imputed to a state, there is no international armed conflict".

[26] Cf. D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, 2012) (forthcoming; advance copy on file with the author, final page numbering may differ), at 38–40.

[27] Judgment, para. 565.

and then implicitly correcting itself.

Whether the TC's approach is correct as a matter of law is a different matter. As Dapo Akande points out, there are good reasons for holding that the relations between a non-governmental armed group and an occupying state should be governed by the law of international armed conflict.[28] This approach, even though well-founded, sits uneasily with the TC's general relational theory. To illustrate this, recall the TC's statement that an armed conflict between a state and a non-governmental group in a neighboring state not acting on behalf of that state is non-international in character. The logical consequence of combining this general relational approach with Dapo Akande's proposal regarding situations of occupation would be that forces of an invading state that come to be opposed by a non-governmental group are bound by the law of non-international armed conflict only until they have established sufficient control to be considered an occupying power. Once such control is established, the nature of the conflict would change and become regulated by the law of international armed conflict. However, under a relational model of conflict characterization, it makes little sense to condition the applicable legal regime on factors that are unrelated to the actual relationship of the warring parties. The logical solution would thus appear altogether to abandon the relational approach in cases of hostilities between an invading/occupying state and non-governmental forces.

Such a solution is indeed proposed by Dapo Akande, who suggests that every case of invasion by one state of the territory of another state should be governed by the law of international armed conflict, even if the sole objective of the invasion is to fight non-governmental forces.[29] The non-governmental fighters would, under this construction, be treated as civilians directly participating in hostilities.[30] As a consequence, this approach would seem to dispense with the requirement that armed groups must reach a certain degree of organization in order to be considered a party to an armed conflict. While this approach may not be problematic from a legal perspective, it would seem to factually mischaracterize the actual armed conflict between a state and a non-governmental group. But more importantly, it would call the TC's more general relational theory of conflict characterization into question.

In the end, the TC decided that the relevant acts in the *Lubanga* case had all been committed in the context of a conflict between non-governmental armed

[28] Cf. Akande, *supra* note 26, at 19–21.
[29] *Ibid.*, at 55–60.
[30] *Ibid.*, at 60–1.

groups and that the indirect involvement of Uganda, Rwanda and the DRC was either insufficiently substantial or irrelevant.[31] On this basis, the Chamber invoked its power under Regulation 55 of the Regulations of the Court[32] and re-characterized the facts charged by the Prosecutor as relating only to Article 8(2)(e)(vii), thereby reversing the PTC's decision in this respect. Given this back-and-forth, existing concerns about the propriety of allowing the PTCs and TCs to unilaterally change the legal characterization of facts, stemming from the doubtful legality of this practice under the Statute and the shift of power from the Prosecutor to the Chambers that it implies, will not be muted.[33]

2 The crimes of enlisting, conscripting and using child soldiers

With respect to substantive crimes, the *Lubanga* TC only had to deal with the war crimes of enlisting, conscripting and using child soldiers. In interpreting the Rome Statute's provisions, the TC in *Lubanga* found that "[a]lthough the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute", the similarity between the provisions of the ICC's and the Special Court for Sierra Leone's (SCSL) Statutes regarding child soldiers meant that "[t]he SCSL's case law … potentially assists in the interpretation of the relevant provisions of the Rome Statute".[34] However, in setting out the elements of the crime, the TC eventually went beyond the SCSL's—and for that matter, the PTC's—jurisprudence. Before the TC's novel interpretation is discussed, however, some attention must be paid to its decision not to address the (i) differences between the provisions applying in international and non-international armed conflicts and (ii) the controversial issue of sexual violence.

[31] Judgment, paras. 553–567.

[32] Regulations of the Court, ICC Doc. ICC-DB/01-02-07, 18 December 2007. Paragraph 1 of Regulation 55 provides that "[i]n its decision under Article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under Articles 6, 7 or 8, or to accord with the form of participation of the accused under Articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges."

[33] See in particular D. Jacobs, 'A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court?', in W. Schabas *et al.* (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2012) (forthcoming) (available at SSRN, ID: 1971821).

[34] Judgment, para. 603.

With respect to the first point, the PTC's decision that some of the acts charged had been committed in the context of an international armed conflict[35] forced it to interpret the difference between the two provisions in question, one prohibiting the enlistment or conscription of child soldiers into the "national armed forces", the other referring to "armed forces or groups" in general.[36] The PTC eventually decided, on the basis of some strongly teleological reasoning, that "the term 'national armed forces' is not limited to the armed forces of a State",[37] an interpretation that effectively erases the difference in the wording of the two provisions. The TC, by contrast, having arrived at the conclusion that all relevant acts took place in the context of a non-international armed conflict, considered it "unnecessary to interpret or discuss Article 8(2)(b)(xxvi)," whilst noting the "significant difference in wording".[38] The TC's emphasis on the "significant difference in wording" may be seen as subtle criticism of the PTC's interpretation, which amounted to an outright denial that any real difference existed between the two provisions.

The TC's decision not to address this question leaves the issue open, a fact that is severely criticized by Judge Odio Benito in her separate and dissenting opinion.[39] She argues that "the discussion on the concept of 'national armed forces' is required as this is a live issue in the present case".[40] She leaves no doubt that, in her opinion, the difference in wording should be ignored.[41]

Whether the liberal interpretation promoted by the PTC and Judge Odio Benito will eventually prevail remains to be seen. The TC's hesitation in this regard can, however, be read to indicate that the issue is not as simple as the PTC and Judge Odio Benito portrayed it. The rules on effective treaty interpretation[42] would appear to require that *some* meaning be attached to the different wording. One possible solution might emerge from the TC's approach as regards the characterization of armed conflicts. Given the TC's endorsement of a relational model of armed conflict characterization and the acceptance that

[35] *Lubanga* Confirmation Decision, para. 220.

[36] Art. 8(2)(b)(xxvi) and 8(2)(e)(vii), Rome Statute, *supra*, note 4.

[37] *Lubanga* Confirmation Decision, para. 285. See generally *ibid*., paras. 268–84.

[38] Judgment, para. 568.

[39] *Prosecutor v Thomas Lubanga Dyilo,* Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, ICC-01/04-01/06, 2012 (Judge Odio Benito, Separate and Dissenting Opinion) (hereinafter 'Opinion Odio Benito').

[40] *Ibid.*, para. 12.

[41] *Ibid.*, para. 14.

[42] The ICC Appeals Chamber has held that the Rome Statute should be interpreted according to the Vienna Convention on the Law of Treaties. See references to the relevant Appeals Chamber jurisprudence in Judgment, para. 601 and fn. 1766.

an international armed conflict requires a confrontation between two states (including via groups fighting on their "behalf"), it is doubtful whether the ICC will ever find a non-governmental group to be involved in an international armed conflict. However, once the TC establishes that such a group is under the "overall control" of a state (provided that this test remains applicable), likening this group to "national armed forces" is more easily done—especially given that the TC appears to have endorsed the "overall control" test as a test of attribution, rather than as one only relating to the character of the conflict—and does not require negating the difference between the wording of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) altogether.

The second issue that the Chamber chose not to address is whether acts of sexual violence can be counted as "using [children] to participate actively in hostilities", as some of the victims had argued during the trial.[43] Basing its arguments on the fact that the Prosecution had not pleaded acts of sexual violence and that they were not included in the confirmation of charges decision, the Chamber decided not to pronounce on the question of whether they fall under the definition of the crime.[44] Judge Odio Benito again strongly dissented and argued that the Chamber should have clarified the law; in her opinion, by not doing so "the Majority of the Chamber is making this critical aspect of the crime invisible."[45] Whatever the merits of the claim that sexual violence can constitute "using [children] to participate actively in hostilities", the disagreement between Judge Odio Benito and the majority appears to express a more profound divergence with respect to the judicial function of the TC. Indeed, Judge Odio Benito stated openly that she "deem[s] that the Majority of the Chamber addresses only one purpose of the ICC trial proceedings: to decide on the guilt or innocence of an accused person", while in her opinion "ICC trial proceedings should also attend to the harm suffered by the victims as a result of the crimes within the jurisdiction of the Court".[46] One might add to this a third function, which is implicit in Judge Odio Benito's criticism regarding sexual violence, namely that the Court should state the law where there are policy reasons to do so, even if this is unnecessary to decide the case at hand. Regardless of which position one prefers in this debate, the disagreement suggests that the ICC has yet to settle on a firm conception of its own judicial function.

Moving on to what the Chamber *did* pronounce itself upon, the most

[43] Judgment, paras. 629–30.
[44] *Ibid.*, para 629.
[45] Opinion Odio Benito, para. 16.
[46] *Ibid.*, para. 8.

interesting—and likely controversial—section of the judgment deals with the definition of "using [children] to participate actively in hostilities". In a first step, the Chamber distinguished the notion of active participation in hostilities from the more common international humanitarian law notion of direct participation, a move that has already given rise to criticism.[47] The Chamber stated that:

> Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an 'indirect' role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors—the child's support and this level of consequential risk—mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Given the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes 'active participation' can only be made on a case-by-case basis.[48]

The determination that a wide variety of activities can constitute active participation is not particularly innovative. The Preparatory Committee, the PTC and the SCSL had all reached similar conclusions.[49] However, the TC departed from these precedents in two ways. First, the Preparatory Committee

[47] N. Urban, 'Direct and Active Participation in Hostilities: The Unintended Consequences of the ICC's decision in Lubanga', 2012, *EJIL: Talk* (11 April 2012); see also C. Aptel, 'Lubanga Decision Roundtable: The Participation of Children in Hostilities', 2012, *Opinio Juris* (18 March 2012).

[48] Judgment, para. 628, footnotes omitted.

[49] Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/Conf.183/2/Add.1, at 21, fn. 12; *Lubanga* Confirmation Decision, para. 261; *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, Judgment, SCSL-04-16-T, 2007, (hereinafter 'AFRC Judgment'), para. 737.

and the PTC had both made clear that the provision excludes activities that are "clearly unrelated to hostilities" and named as examples of such activities "food deliveries to an airbase or the use as domestic staff in married officers' quarters".[50] The TC failed to endorse these limitations, thereby casting some doubt on whether there exists any minimum degree to which a particular activity needs to be connected to the conduct of hostilities. This move appears to be the consequence of a more profound departure from existing precedent. In effect, the TC seems to have altogether abandoned the idea that some connection to the conduct of hostilities is required, at least as regards forms of "indirect participation" (i.e. not fighting on the front line). Instead, the idea of contribution, at the root of both the concepts of direct and active participation as they had been hitherto understood,[51] was replaced with that of risk.[52] While the Chamber, in the above quoted passage, first held that a combination of the child's contribution and the consequential risk is decisive, it later more blatantly stated that "[t]he decisive factor in deciding whether an indirect role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger by becoming a target".[53] In effect, the TC replaced the notion of "participation in hostilities" with the notion of "exposure to danger".[54]

In light of its wide interpretation of the phrase "participating actively in hostilities", it is not surprising that the TC did not endorse the Preparatory Committee's view that Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) would exclude "activities clearly unrelated to hostilities". As we saw, the TC considered the connection of an activity to the hostilities to be irrelevant, and focused only on

[50] *Lubanga* Confirmation Decision, para. 262; Prepcom, *ibid.*, at 21, note 12.

[51] J. Pictet *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Nijhoff, 1987), para. 1944; N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009), at 46 *et seq.*; *Lubanga* Confirmation Decision, para. 262, Prepcom, *supra* note 49, at 21, note 12; AFRC Judgment, *supra* note 49, paras. 736–7; A. Smith, 'Child Soldiers (Recruitment and Use in Armed Conflict)', in A. Cassese (ed), *Oxford Companion to International Criminal Law* (OUP, 2009), at 262. Note that the SCSL already mentions the issue of risk faced by the children, but does not seem to attach much weight to it.

[52] In support, the Chamber cites a single piece of German doctrine (at note 1804): G. Palomino Suárez, *Kindersoldaten im Völkerstrafrecht* (BWV, 2009), at 166–8.

[53] Judgment, para. 820.

[54] In her separate opinion, Judge Odio Benito went even further by apparently pleading to also include the risk that arises from the conduct of the armed groups that use the children in the first place (Opinion Odio Bentio, paras. 18–19). Thus, the relevant category would be exposure to danger either from attack by the opposing armed forces or from the conduct of the "own" armed forces.

exposure to risk. Clearly, delivering food to an airbase may expose a child to danger of attack (considering that an air base would likely constitute a military target), and the incorporation of children to the domestic staff in married officers' quarters may expose them to some form of abuse or risk. Such a wide interpretation, relying heavily on teleological reasoning, is not unsustainable, but sits uneasily with the actual wording of the provision: "using [children] to participate actively in hostilities". It does not take much foresight to predict that the last word on this matter has not yet been spoken.

3 The mental element of criminal liability

After establishing that the crimes of enlisting, conscripting and using child soldiers had been committed, the TC went on to consider Lubanga's individual criminal responsibility. The Prosecution had charged Lubanga under Article 25(3)(a) of the Statute as a co-perpetrator.[55] In its confirmation of charges decision, the PTC had found that co-perpetration under this provision corresponded to Claus Roxin's "control theory", rather than the ICTY's Joint Criminal Enterprise (JCE) concept.[56] The most significant distinction between the two lies in the fact that under the JCE doctrine, any contribution to the common plan satisfies the *actus reus* requirement,[57] while the control theory demands an essential contribution, i.e. one without which the crime would not have been committed.[58] The majority of the TC accepted the PTC's approach and embraced the control theory.[59] Judge Fulford dissented, arguing that an essential contribution is not required under the Rome Statute.[60] While the TC's endorse-

[55] Under Article 25(3)(a), a person is criminally responsible if he or she "[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible".

[56] See *Lubanga* Confirmation Decision, paras. 326–341.

[57] See *Prosecutor v Miroslav Kvocka et al.*, Judgment, Appeals Chamber, IT-98-30/1-A, 2005, paras. 97, 421.

[58] *Lubanga* Confirmation Decision, paras. 334–5, 346–7. See also Judgment, paras. 921–2.

[59] Judgment, paras. 996–9.

[60] *Prosecutor v Thomas Lubanga Dyilo,* Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, ICC-01/04-01/06, 2012 (Judge Fulford, Separate and Dissenting Opinion) (hereinafter "Opinion Fulford"), paras. 9–18. The disagreement between the majority and Judge Fulford also reveals that uncertainty exists not only as to the correct construction of Article 25(3)(a), but also as regards the overall scheme of Article 25(3), particularly with respect to the delineation between the various modes of responsibility. On the topic, see J. Ohlin, 'Lubanga Decision Roundtable: Lubanga and the Control Theory', 2012, *Opinio Juris* (15 March 2012); K.-J. Heller, 'Lubanga Decision Roundtable: More on Co-Perpetration', 2012, *Opinio*

ment of the control theory and Judge Fulford's dissent are certainly important, I will focus on another development, namely the TC's analysis of the *mens rea* requirement in cases of co-perpetration and possibly beyond.

The starting point regarding the *mens rea* for co-perpetration is an objective element of this concept, namely the requirement of "the existence of an agreement or common plan between two or more persons that, if implemented, will result in the commission of a crime".[61] The common plan need not, in itself, be criminal, but must involve a "critical element of criminality".[62] The PTC and the TC disagreed as to how this element of criminality would be satisfied. The PTC was of the opinion that *dolus eventualis* would suffice to supply the element of criminality, distinguishing between cases of substantial risk and those of low risk.[63] The TC, on the other hand, held that the element of criminality is present where the common plan's "implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed."[64] In translating this standard into a general *mens rea* requirement under Article 30 of the Statute, the TC first rejected the PTC's endorsement of *dolus eventualis*, thereby following PTC II's confirmation of charges decision in the *Bemba* case.[65]

Juris (16 March 2012). See generally on this issue: J. Ohlin, 'Joint Criminal Confusion', (2009) 12 *New Criminal Law Review* 406; K. Ambos, 'Article 25—Individual Criminal Responsibility', in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck/Hart, 2008).

[61] Judgment, para. 1006.

[62] *Ibid.*, para. 984. The PTC spoke only of an "element of criminality" (*Lubanga* Confirmation Decision, para. 344). Holding that the common plan must not, in itself, be criminal might mark a further difference between the ICC's notion of co-perpetration and the customary concept of JCE. In the AFRC Judgment, *supra* note 49, the SCSL TC held that "[e]ven though the contribution to a joint criminal enterprise need not be criminal in nature, the purpose must be inherently criminal and the perpetrators, including the accused, must have a common state of mind, namely the state of mind that the *statutory crime(s)* forming part of the objective should be carried out" (para. 73, footnotes omitted). The ICTY jurisprudence is not entirely clear on this matter, requiring only that "[t]he existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute" (*Tadic* Appeals Judgment, *supra* note 16, para. 227). Nevertheless, when discussing the required *mens rea* for JCE III liability, the *Tadic* Appeals Chamber required the accused to have "the intention to take part in a joint criminal enterprise and to further—individually and jointly—the *criminal purposes* of that enterprise" (*ibid.*, para. 220, emphasis added). See also K. Gustafson, 'Joint Criminal Enterprise', in A. Cassese (ed), *Oxford Companion to International Criminal Law* (OUP, 2009), at 394, who interprets the *Tadic* pronouncement to mean that "the plan must be inherently criminal".

[63] *Lubanga* Confirmation Decision, paras. 344, 352–3.

[64] Judgment, para. 984.

[65] *Ibid.*, para. 1011, referring to *Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article

However, in the very next paragraph of the judgment, some form of *dolus eventualis* or recklessness seems to slip back in:

> In the view of the Majority of the Chamber, the 'awareness that a consequence will occur in the ordinary course of events' means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of 'possibility' and 'probability', which are inherent to the notions of 'risk' and 'danger'. Risk is defined as 'danger, (exposure to) the possibility of loss, injury or other adverse circumstance.' The co-perpetrators only 'know' the consequences of their conduct once they have occurred. At the time the co-perpetrators agree on a common plan and throughout its implementation, they must know the existence of a risk that the consequence will occur. As to the degree of risk, and pursuant to the wording of Article 30, it must be no less than awareness on the part of the co-perpetrator that the consequence 'will occur in the ordinary course of events'. A low risk will not be sufficient.[66]

This elaboration of risk, criticized by Judge Fulford as "unhelpful",[67] relates to the often fluid border between *dolus directus* of the second degree[68] and *dolus eventualis*. Whether an accused is aware that a consequence "will occur in the ordinary course of events" is difficult to assess. As a matter of fact, there are two separate probabilities (and the accused's knowledge thereof) at play here: the first relates to the probability with which the "ordinary" course of events takes place. The second one relates to the probability with which the crime actually follows from that ordinary course of events. The probability that the crime will occur is then the product of these two separate probabilities.

61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, ICC-01/05-01/08, 2009, paras. 364–9. Academic opinion is divided as to whether Art. 30 includes *dolus eventualis* (cf. M. Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective', (2008) 19 *Criminal Law Forum* 473, at 487). For explicit support of the PTC's approach see Werle, *supra* note 25, at 153–5.

[66] Judgment, para. 1012, footnotes omitted.

[67] Opinion Fulford, para. 15.

[68] The PTC defined this type of intent being present in "situations in which the suspect, without having the concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary outcome of his or her actions or omissions" (*Lubanga* Confirmation Decision, para. 352).

It is this overall probability that the TC seems to be concerned with. But what level of probability is required, what degree of risk is "sufficient"?[69] The only guidance the majority provides is to repeat that the suspect must be aware that the "consequence will occur in the ordinary course of events" and that low risk does not suffice. In the end, the majority comes full circle, having set out to illuminate what "awareness that a consequence will occur in the ordinary course of events" means and concluding that it means being aware that a crime "will occur in the ordinary course of events". That being so, Judge Fulford is correct in stating that this discussion eventually turned out to be unhelpful, if not exactly for the reasons he mentioned.[70]

What is more, the TC seems to have departed from the previously endorsed PTC II decision in *Bemba*, thereby creating further uncertainty as to the correct legal standard that applies in these situations. In *Bemba* the PTC held that "the suspect could not be said to have intended to commit any of the crimes charged, unless the evidence shows that he was at least aware that, in the ordinary course of events, the occurrence of such crimes was *a virtually certain consequence* of the implementation of the common plan".[71] Thus, the *Bemba* PTC separates the two probabilities, stating that the second one needs to amount to "virtual certainty", yet not providing any guidance on the first one. While the *Bemba* PTC was thus not much more precise than the TC in *Lubanga* with respect to the overall probability requirement, it at least simplified the equation by fixing one of the two variables. By not following this approach, the *Lubanga* TC cast some doubt on it.

Another point that deserves some attention is how this conception of co-perpetration relates to JCE III liability under the jurisprudence of the ICTY. JCE III liability attaches criminal responsibility to persons who share a common purpose where a crime committed fell outside the common purpose but was

[69] A. Eser, 'Individual Criminal Responsibility', in A. Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court* (OUP, 2002), at 792: "in Article 30 requiring 'intent and knowledge' for the commission of a crime (paragraph 1), and in its definition of knowledge as awareness of the occurrence of a consequence 'in the ordinary course of events' (paragraph 3), it is at least a question of fact, if not of law, as to when an 'excessive' act can be considered part of the 'ordinary course' of events." Badar, *supra* note 65, at 485: "the phrase 'aware that it will occur in the ordinary course of events' is subject to different interpretations. Does it require that the perpetrator foresees the occurrence of the consequence as certain? Or whether mere awareness of the probable occurrence of the consequence is sufficient?" See also Weigend, *supra* note 9, at 482, referring to the required degree of risk as "an open question".

[70] Judge Fulford held that no particular clarification of the mental requirement is necessary, as he considered the words used to be sufficiently clear (Opinion Fulford, para. 15).

[71] *Bemba* Confirmation Decision, *supra* note 65, para. 369 (emphasis added).

the "natural and foreseeable" consequence of its implementation.[72] How is a consequence "occurring in the ordinary course of events" different from a "natural and foreseeable" consequence? As regards the precise degree to which the accused must have foreseen the occurrence of such a crime, the ICTY Appeals Chamber held that "[p]lotted on a spectrum of likelihood, the JCE III *mens rea* standard does not require an understanding that a deviatory crime would probably be committed; it does, however, require that the possibility a crime could be committed is sufficiently substantial as to be foreseeable to an accused" and added that "implausibly remote scenarios" do not suffice.[73] As indicated above, the *Lubanga* TC required a "sufficient risk" and held that "low risk will not be sufficient".[74] The question then arises of whether these standards are similar or whether they require different probabilities. Is the difference, if any, one of degree or one of kind?

These questions matter for two reasons: first, the concept of JCE III has often been criticized for "overreaching" the principle of personal guilt.[75] The same criticism might be leveled against the TC's interpretation of Article 25(3)(a). Secondly, and more importantly, this latter reading of co-perpetration might even go significantly further than JCE III liability. JCE III liability presupposes intent to commit the crimes falling within the common purpose.[76] Co-perpetration, on the other hand, does not demand a criminal purpose at all, meaning that a person might be held to be a co-perpetrator even if she or he pursued an entirely innocent purpose that carried a "sufficient risk" that a crime would occur as a consequence. Granted, co-perpetration, as defined by the majority, requires a higher degree of contribution than JCE liability. However, the TC held that "the accused [must provide] an essential contribution to the

[72] See *Kvocka* Appeals Judgment, *supra* note 56, para. 83.

[73] *Prosecutor v Radovan Karadzic*, Decision on Prosecution Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, Appeals Chamber, IT-95-5/18-AR72.4, 2009, para. 18.

[74] Judgment, para. 1012.

[75] Cf. Cryer, *supra* note 7, at 373.

[76] See *Tadic* Appeal Judgment, *supra* note 16, para. 228: "[w]ith regard to the third category, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk.*" The same is true if the direct perpetrator of the deviatory crime was not himself a member of the JCE, but where his commission of deviatory crime was foreseeable to the accused JCE member (see *Prosecutor v Radoslav Brdanin*, Judgment, Appeal Chamber, IT-99-36-A, 2007, para. 411).

common plan that resulted in the commission of the relevant crime",[77] that is, the contribution is not measured against the crime but against the potentially innocent purpose. The "essential contribution" requirement therefore does not cure the potential overreach. Taken to the extreme, the combination of not requiring an inherently criminal purpose and having a rather unclear conception of the required risk might result in the adoption of a very broad doctrine of co-perpetration.

4 The participation of victims as witnesses

Being the first trial to have been concluded, the Lubanga trial was also the first chance to see how the ICC's provisions on victims' participation would work in practice. While most of these matters were the subject of decisions in the preliminary stages of the trial,[78] one complex question has surfaced only recently. During the trial, it emerged that a number of persons who had been granted the right to participate in the proceedings as victims and who had also testified as witnesses had given unreliable evidence.

The TC thus faced the question of how to deal with victims that had been allowed to participate on the basis of *prima facie* evidence that did not withstand closer scrutiny. The majority, without much explanation, considered that "if the Chamber, on investigation, concludes that its original *prima facie* evaluation was incorrect, it should amend any earlier order as to participation, to the extent necessary" and that "[i]t would be unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated they no longer meet the relevant criteria".[79] On this basis, the majority decided to withdraw the right to participate from five witnesses that had proved unreliable and from the father of one of these witnesses.[80]

While the majority's approach appears reasonable at first sight, Judge Odio Benito raised some important points that put the propriety of the majority's decision into question. Judge Odio Bentio criticized the majority both on the basis of its conclusions as regards the individual victims concerned and with respect to the general approach it adopted. As far as the latter is concerned, she pointed out that "it is unfair and discriminatory to impose upon individuals with dual status a higher evidentiary threshold (beyond reasonable doubt)

[77] Judgment, para. 1006.
[78] See the summary at Judgment, para. 14.
[79] Judgment, para. 484.
[80] *Ibid*.

as regards their victim's status, while all other victims participating in the proceedings have not been subject to thorough examination by the parties and the Chamber".[81]

This is a valid point that highlights an underlying dilemma: it does not seem fair to allow dual status witnesses to maintain their victims' rights if they have proved to be unreliable; yet it is also not fair to apply different evidentiary standards to victims that testify and to those that do not. On the one hand, the latter approach may lead to reluctance of recognized victims to testify in the trial. It may also cause problems when the Prosecution must choose among many victim-witnesses which ones to call to testify. On the other hand, allowing even victims whose credibility has been undermined to continue to participate is clearly problematic, particularly at the reparations stage. As Judge Odio Benito pointed out, in this context "the Trial Chamber [will have] to determine the criteria utilized in determining [the excluded victims'] final status".[82] It will be very interesting to see if and how the TC tackles this problem at the reparations stage. Simply excluding the incredible victims from that stage from the outset would not be a convincing solution. However, given the majority's present decision, this is how the TC is likely to proceed.

5 Review of the pre-trial chamber's legal findings

The final issue I want to comment on is the question of the review by the TC of legal determinations made by the PTC, raised by Judge Fulford in his individual opinion. Arguably, this issue only arises because the PTCs have taken it upon themselves to issue lengthy confirmation of charges decisions that contain elaborate reasoning on the law. There is room to argue that in fulfilling its function, namely to "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged",[83] the PTC does not need to settle on a definite interpretation of a law if the presented evidence would suffice under multiple possible interpretations. However this may be, the question of the extent to which the TC is competent to revisit issues of law decided by the PTC in the confirmation of charges decision is relevant.

[81] Opinion Odio Benito, para. 13.
[82] *Ibid.*, para. 35.
[83] Art. 61(7), Rome Statute, *supra*, note 4.

Judge Fulford suggested that the TC may be bound to stick to the law set out by the PTC if departing from it could prejudice the accused. In his dissent regarding the contours of co-perpetration, he wrote that:

> I wish to make clear at the outset that I agree with my colleagues that the tests described in paragraphs 1013 and 1018 of the Judgment are to be applied at this stage of this case. Focusing on the requirements of Article 25(3)(a) of the Statute, with minor modifications to ensure compliance with the Statute, the test described at paragraph 1018 mirrors the approach of the Pre-Trial Chamber in the Decision on the Confirmation of Charges, which established (certainly in this context) the principles of law on which the trial has been prosecuted and defended. No substantive warning has been given to the parties that the Chamber may apply a different test, and as a matter of fairness it would be wrong at this late stage to modify the legal framework of the case. In short, it would be unjust to the present accused to apply a different, and arguably lesser, test.[84]

One can only speculate what would have happened if the majority had shared Judge Fulford's criticism of the co-perpetration doctrine as set out by the PTC. Following Judge Fulford's logic, the Chamber would have had to apply the PTC's law even if it had found this to be erroneous. This raises a host of further questions:[85] would there be some form of safeguard against upholding even manifest or gross errors of law or some rule allowing minor changes?[86] Would the reasoning apply with the same force if the Prosecution were at a disadvantage by virtue of a decision of the TC overruling the PTC? Would this approach apply to *all* questions of law decided by the PTC or would some be excluded?[87]

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[84] Opinion Fulford, para. 2.

[85] Cf. also Ohlin (2012), *supra* note 60.

[86] Judge Fulford does not seem to object to "minor modifications to ensure compliance with the Statute", Opinion Fulford, para. 2.

[87] That the latter may be the case is suggested by the fact that the TC apparently had no problem with overturning the PTC's re-characterization of facts as regards the character of the armed conflict. As Judge Odio Benito pointed out, "the defense has from start to finish argued that the armed conflict in question is an international armed conflict" (Opinion Odio Benito, para. 12). Did not the decision of the TC to reverse the PTC's re-characterization of facts negatively impact upon the defense in exactly the way that Judge Fulford feared? It might be argued that this particular case was different for two reasons: first, the existence of Regulation 55 may

Another area that would be affected by Judge Fulford's approach is that of appeals against confirmation of charges decisions. First, if it were accepted that that TC cannot change the "law of the case" as set out by the PTC, this would mean that most appeals against a question of law in the confirmation of charges decision would appear to satisfy the standard required for leave to appeal to be granted. As confirmation of charges decisions cannot be appealed automatically, a particular issue under appeal must be such that "a. it would significantly affect (i) both the fair and expeditious conduct of the proceedings or (ii) the outcome of the trial, and b. in the opinion of the Pre-Trial or Trial Chamber, its immediate resolution by the Appeals Chamber may materially advance the proceedings".[88] If the TC is stripped of the power to depart from the PTC's statements of the law, most appeals against such statements are likely to fulfill the above conditions.

Finally, what effect would this reasoning have in the context of an appeal against a judgment? The Appeals Chamber, of course, has the power to consider errors of law and can either reverse, amend or remand the appealed judgment.[89] Clearly, the Appeals Chamber would not be bound to uphold the PTC's law. However, if reversing an error of law on appeal and amending the conviction is not considered to violate the rights of the accused to a fair trial, why would doing so at the trial stage have a different effect? When taken to the extreme, Judge Fulford's approach would seriously curtail the TC's power to consider questions of law, a rather fundamental task of a TC. It is interesting to note that the Chamber—including Judge Fulford—did not seem to have had any problems in widening the definition of active participation in hostilities beyond that set out by the PTC, even if this move does not appear to have had a significant impact in this particular case. Whether Judge Fulford's concerns will be heeded in the ICC's future practice remains to be seen.

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be taken as sufficient warning to both parties that a re-characterization could occur, so that neither party could claim reliance on the PTC's pronouncement. Secondly, in rejecting both the Defense and the Prosecution's request to appeal against this ruling, the PTC pointed out that "there is nothing to prevent the Prosecution or the Defence from requesting that the Trial Chamber reconsider the legal characterisation of the facts described in the charges against Thomas Lubanga Dyilo and as confirmed by the Chamber" (*Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, Pre-Trial Chamber I, IT-01/04-01/06, 2007, para. 44). This may be taken to constitute additional notice that a further change could occur.

[88] *Lubanga* Decision on Leave to Appeal Confirmation Decision, *supra* note 87, para. 21.

[89] Art. 81(1) and 83(2), Rome Statute, *supra*, note 4.

6 Concluding remarks

Apart from the joy of finally having a trial judgment delivered by an ICC Trial Chamber, what are we to make of the *Lubanga* judgment? Having considered some of the legal issues and the controversies surrounding them, two conclusions may be drawn.

First, the TC certainly made some important contributions to the clarification and development of the law under the Rome Statute, out of which the expansion of the notion of 'active participation' may be the most significant one. The pronouncements on the characterization of armed conflicts show that this area will deserve sustained attention from the Court. The problems with constructing a convincing concept of co-perpetration and with making sense of Article 25(3), manifested in the disagreement between the majority and Judge Fulford as well as in the *mens rea* issue, will certainly resurface in the future practice of the Court and the last word has hardly been spoken. Finally, the TC's decisions on unreliable dual-status witnesses and Judge Fulford's approach to reviewing errors of law committed by the PTCs have highlighted problems, rather than presented solutions; both issues have the potential of impacting heavily on the way in which trials are run at the ICC—one by creating an incentive for victims not to testify in court, one by curtailing the TC's power to rule on questions of law.

All these contributions are important, but they are not revolutionary. Rather then propelling International Criminal Law or the ICC into a new era, the TC engaged in an incremental development of the law. We have to await the outcome of a possible appeal before drawing any final conclusions on the *Lubanga* case as a whole, but so far it seems safe to say that *Lubanga* is no *Tadic*, at least not as far as its impact on the law is concerned. But this should really have been clear from the start.

The second observation concerns how the Court perceives its own judicial function. The disagreements between the majority and Judge Odio Benito show that the TC was divided as to whether its function is limited to adjudicating upon the guilt *vel non* of the accused or whether it should seek to fulfill other functions as well. Should it cater to victims by pronouncing itself even on issues that are not directly relevant for the trial? Should the Chamber embark on stating the law even if such statements would be unnecessary *obiter dicta*? The Court is clearly still searching for a proper conception of the purpose of a trial judgment.

In many ways, *Lubanga* is only the beginning, the first step. No more and no less.

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A New Watershed? Re-evaluating *Banković* in Light of *Al-Skeini*

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1 Introduction

Issues surrounding the extraterritorial reach of human rights treaties, particularly the European Convention on Human Rights (ECHR), have become highly pertinent in the context of military operations abroad, such as the UK occupation and military action in Iraq.[1] Until recently, the major authority on the extraterritorial application of the ECHR was the controversial decision of the European Court of Human Rights in *Banković v Belgium* in 2001.[2] The Court dismissed a claim against 17 NATO states for deaths and injuries caused by a NATO airstrike in Belgrade during the Kosovo crisis, on the basis that the jurisdictional threshold in ECHR Article 1 was not met.

Article 1 requires that states parties secure the rights and freedoms in the Convention to "everyone within their jurisdiction". This is a necessary condition for the application of the Convention: either the Convention applies or it does not. It is established that the notion of jurisdiction in Article 1 is

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[1] 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 2137 UNTS 171. See generally: F. Coomans & M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004); M. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', (2005) 99 *AJIL* 119; R. Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights', (2005) 26 *Mich JIL* 639; M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009); M. Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, 2011).

[2] (2001) 123 ILR 94.

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primarily territorial[3] but the exceptions to that general rule are not entirely settled. The question is, in what circumstances do persons affected by the act of a state that takes place or has effects outside that state's national borders fall within the state's jurisdiction under Article 1?

Lord Brown described *Banković* as a "watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated".[4] However, on 7 July 2011 the European Court released its landmark judgment in *Al-Skeini and Others v UK*,[5] finding that six Iraqi civilians killed in Iraq during incidents involving British soldiers were within the jurisdiction of the UK for the purposes of ECHR Article 1, and that the UK had breached the ECHR in five of the six cases. The judgment in *Al-Skeini* casts the findings in *Banković* in a new light, and now *Banković* itself falls to be re-evaluated.

This note analyses the reasoning in the two cases and concludes that although at first glance they may appear to be inconsistent, the decisions are not irreconcilable. It seems doubtful that the Court would reach a different result if given a chance to revisit the facts of *Banković* in the wake of *Al-Skeini*. Nonetheless, *Al-Skeini* provides some useful clarification of this murky area of law and, although not perfect, the decision will likely impact significantly on the interpretation of Article 1 jurisdiction in future cases. Space does not permit an in-depth review of the vast literature and jurisprudence in this area, so the analysis is confined primarily to these two cases alone.

2 *Banković*

The NATO airstrike on the Radio Televizija Srbije building in Belgrade during the Kosovo crisis in 1999 killed 16 people and injured 16 others. Claims were brought against 17 respondent states, all members of NATO and parties to the ECHR, alleging violations of Articles 2 (the right to life), 10 (freedom of expression) and 13 (right to an effective remedy).

The Court found that the case fell beyond the scope of Article 1 and was inadmissible. For the Convention to apply, the victims and/or the applicants needed to have been within the jurisdiction of the respondents when the incident occurred. The fact that an individual had been affected by an act committed by a state party or its agents was insufficient to establish the jurisdictional link. In concluding that the threshold condition of jurisdiction

[3] *Ibid.*, paras. 59–61.

[4] *R (Al-Skeini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin), para. 267.

[5] [2011] ECHR 55721/07.

had not been met, the Court made three major findings on the meaning of jurisdiction under Article 1 as applicable in extraterritorial cases.

First, the concept of jurisdiction under Article 1 had to be interpreted consistently with the ordinary meaning of jurisdiction under international law, which is essentially a territorial notion.[6] At the time of the attack, the victims and the applicants were in the Federal Republic of Yugoslavia (FRY), outside the territory of any of the respondent states. The Court observed that it had accepted "only in exceptional cases" that acts of the parties performed or producing effects outside their territory could constitute an exercise of their jurisdiction for Article 1 purposes.[7] Each case alleging extraterritorial jurisdiction would require special justification.

One recognised justification is when acts of the authorities of a state are performed or produce effects outside the territory of that state ("the state agent authority exception").[8] A second recognised justification arises where a state exercises effective control over an area outside its national territory as a result of military action ("the effective control exception").[9] After discussing these exceptions (and others not mentioned here), the Court in *Banković* summarised the exceptional recognition of extraterritorial jurisdiction as having occurred in cases when the state exercised all or some of the public powers normally exercised by the government of the territory.[10] It held that neither recognised exception applied on the facts.

The second important finding in *Banković* was that Convention rights could not be "divided and tailored" according to the particular circumstances of the extraterritorial act in question.[11] The applicants had argued that the respondents had effective control over FRY airspace and, as a special application of the effective control exception, they were bound to secure ECHR rights in the territory to an extent proportionate to the degree of control over the airspace. The Court rejected this argument, holding that the positive obligation in Article 1 required each state party to secure the entire range of substantive rights to those within its jurisdiction.

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[6] *Banković*, *supra* note 2, paras. 59–61.

[7] These are the Court's words (*ibid.*, para. 67), but the question under Article 1 is not whether a certain act amounted to an "exercise of jurisdiction" by the state. The question is whether the applicants were "within the jurisdiction" of the state at the time—"jurisdiction" has more than one meaning. See M. Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', (2008) 8 *HRLR* 411.

[8] *Banković*, *supra* note 2, para. 69.

[9] *Ibid.*, para. 70.

[10] *Ibid.*, para. 71.

[11] *Ibid.*, para. 75.

Thirdly, the Court rejected an argument that denying the application of the ECHR in *Banković* would defeat the Convention's *ordre public* mission and leave a vacuum in its protection.[12] In previous extraterritorial cases involving the actions of the Turkish army in Northern Cyprus, the Court had held that an inadmissibility ruling would deny the applicants the protections of the Convention to which they would otherwise have been entitled.[13] However, those cases were distinguishable because Cyprus, a party to the Convention, had been unable to fulfil its obligations while Turkey (also a party) was in control of the area. The same problem did not arise in *Banković* because the FRY was not a party to the Convention. The Court observed that the Convention operated in an essentially regional context, and was not designed to be applied throughout the world. In this way the Court appeared to limit the Convention's extraterritorial application to those areas within the regional legal space ("*espace juridique*") of the Convention, this being the territories of the member states of the Council of Europe.

Banković has been the cause of some confusion in the case law and the subject of considerable criticism.[14] Following the Strasbourg judgment in *Al-Skeini*, it is timely to re-assess the Court's position on the three central issues in *Banković* in relation to extraterritoriality: the exceptions to territorial jurisdiction, the indivisibility point, and the Convention's regional scope. But first, a brief introduction to the background to the *Al-Skeini* judgment is in order.

3 *Al-Skeini*

Al-Skeini was brought before the European Court in 2007 by relatives of six Iraqi civilians killed in incidents involving British soldiers in south-east Iraq. The deaths occurred between May and November 2003, while the UK was an occupying power in that region. The relatives of the first, second and fourth applicants were shot by British soldiers whose identities were known. The

[12] *Ibid.*, paras. 79–80.

[13] See *e.g. Loizidou v Turkey* (1996) 108 ILR 443 (merits); *Cyprus v Turkey* (2001) 120 ILR 10, para. 78.

[14] See *e.g.* R. Lawson, 'Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights', in Coomans & Kamminga, *supra* note 2, at 83; K. Altiparmak, 'Banković: An Obstacle to the Application of the European Convention on Human Rights in Iraq?', (2004) 9 *JCSL* 213; E. Roxstrom, M. Gibney & T. Einarsen, 'The NATO Bombing Case (*Banković et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection', (2005) 23 Boston *UILJ* 55; M. Milanović, *supra* note 7.

third applicant's wife was shot and fatally wounded during an exchange of fire between a British patrol and a group of unknown gunmen, outside a building where the victim and her family were having dinner. The fifth applicant's son drowned, after allegedly being arrested by British soldiers, beaten and forced into a river. The sixth applicant's son, Baha Mousa, died as a result of ill-treatment while in British custody at a military base in Basrah.

3.1 Procedural Background

On 26 March 2004 the UK Secretary of State for Defence decided not to conduct independent inquiries into the deaths of the applicants' relatives (and of seven other Iraqi civilians), not to accept liability for the deaths, and not to pay just satisfaction. The 13 claimants applied for judicial review of this decision, and the matter proceeded through the domestic courts.

The judicial review application alleged violations of the procedural and substantive obligations of ECHR Article 2 (right to life) and, in Mr Mousa's case, violations of Article 3 (prohibition of torture). The Divisional Court proceeded with six test cases, and stayed the other seven (including that of the fifth applicant) pending resolution of the preliminary cases.[15] Citing *Banković*, the Court found that the effective control exception to the essentially territorial jurisdiction in Article 1 did not apply in Iraq because the Convention operated essentially within its own regional space. Accordingly, it rejected the claims of the first four applicants on the grounds that the UK did not have jurisdiction over the relatives of those applicants at the time of their deaths. However, the Court held that if it was wrong on the jurisdictional question, and the claims did come within the scope of Article 1, then the investigative duty under Article 2 had been violated. In Baha Mousa's case, the Divisional Court held that the operation of a military prison outside UK territory with the consent of the Iraqi authorities came within the narrow state agent authority exception to territorial jurisdiction, and found a breach of the investigative duty under Articles 2 and 3 of the Convention.

The first four applicants appealed the finding that their relatives were not within UK jurisdiction when they died, and the Secretary of State cross-appealed the finding in relation to Mr Mousa. In December 2005 the Court of Appeal dismissed both the appeals and the cross-appeal, upholding the decision of the Divisional Court in respect of the first four applicants.[16] It remitted

[15] [2004] EWHC 2911 (Admin).
[16] [2005] EWCA Civ 1609.

Mr Mousa's case back to the Divisional Court to be reconsidered after the conclusion of court-martial proceedings against a number of soldiers connected to his death. Brooke LJ reviewed the Strasbourg jurisprudence on extraterritorial jurisdiction and concluded that a state could exercise jurisdiction outside its territory in circumstances of "state agent authority", and when it had effective control of an area beyond its borders. He said that the first exception could apply outside the *espace juridique* of the Council of Europe and regardless of whether or not the host state consented. Mr Mousa was under the control and authority of UK agents in Iraq when he died, but the other victims were not, and it was "quite impossible" to hold that the UK had effective control over the area at the relevant time.

The matter proceeded to the House of Lords in 2007.[17] Again, a majority held that the UK did not have jurisdiction in the cases of the first four applicants. Lord Brown relied on *Banković* to reject a wide view of jurisdiction put forward by the applicants on the basis of a later ECHR decision, *Issa v Turkey*.[18] He stated that the applicants' interpretation would either extend the effective control principle beyond the Convention's regional space, contrary to Strasbourg precedent, or would stretch the state agent authority exception to breaking point and make the principle of effective control redundant. He emphasised the *dicta* in *Banković* that the jurisdiction in Article 1 cannot be "divided and tailored", and observed that:

> except where a state really does have effective control of territory, it cannot hope to secure Convention rights within that territory and, unless it is within the area of the Council of Europe, it is unlikely in any event to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population.[19]

The House of Lords did not need to consider the jurisdictional issue in relation to Mr Mousa's death, because the parties had agreed that his case should be remitted to the Divisional Court as ordered by the Court of Appeal, but Lord Brown (with whom the majority agreed) observed that he would recognise the UK's jurisdiction over Mr Mousa on the narrow basis relied upon by the

[17] *Al-Skeini and Others v Secretary of State for Defence* [2007] UKHL 26.
[18] [2004] ECHR 31821/96.
[19] *Al-Skeini v Secretary of State for Defence*, *supra* note 17, para. 129.

Divisional Court: "essentially by analogy with the extra-territorial exception made for embassies".[20]

3.2 The European Court's Decision

In Strasbourg, the six applicants argued that their relatives had been within UK jurisdiction when they were killed, and that there had been no effective investigation into the deaths, in violation of Article 2 of the Convention. Unlike the UK courts, the European Court unanimously held that there was a sufficient jurisdictional link for the purposes of Article 1, in all six cases. It ultimately found a violation of the procedural duty to carry out an effective investigation into the deaths, in accordance with Article 2, in all cases except that of Mr Mousa. In Mr Mousa's case the Court noted that a full public inquiry has been undertaken.[21]

The *Al-Skeini* judgment is significant for its treatment of the three major issues in *Banković*: exceptions to territoriality, the indivisibility of Convention rights, and the relevance of the Convention's regional *espace juridique*. To deal with these in reverse order, *Al-Skeini* makes it clear that jurisdiction under Article 1 is not necessarily restricted to the regional "legal space" of the Convention.[22] This finding contrasts strongly with the manner in which *Banković* was interpreted and applied by the UK courts.

Secondly, addressing the indivisibility issue, the Court clarified that when a state has jurisdiction over an individual, it has an obligation to secure the rights and freedoms that are relevant to that individual's particular situation. In that sense, the rights and obligations in the Convention can be "divided and tailored" to individual circumstances,[23] despite the finding in *Banković*.

Finally, and crucially for the outcome of the case, the Court developed the state agent authority exception to territorial jurisdiction. The Court started by reiterating the *Banković* position that jurisdiction in Article 1 is essentially territorial, and acts performed or with effects outside national territory will come within Article 1 jurisdiction only in exceptional cases. The Court emphasised that each case must be determined on its particular facts, and stated that the principle of state agent authority as it appeared in previous cases (including *Banković*) is very broad, requiring an examination of the case-law to

[20] *Ibid.*, para. 132. An interesting analogy between a military detention centre and an embassy.

[21] The final report of the inquiry was published on 8 September 2011 and is available at <http://www.bahamousainquiry.org/report/index.htm> [last accessed 2 May 2012].

[22] *Al-Skeini v UK*, *supra* note 5, paras. 141–2.

[23] *Ibid.*, para. 137.

identify the defining principles. It referred to *Banković* for the proposition that jurisdiction may arise if a state is exercising all or some of the public powers normally to be exercised by the government of the territory in question, through the consent, invitation or acquiescence of that government, and if the acts giving rise to Convention liability are attributable to the former state rather than the latter. Then, citing examples from its own jurisprudence, the Court held that in certain circumstances, the use of force against an individual by a state's agents operating outside its territory may bring that individual within the control of the state's authorities and into the state's Article 1 jurisdiction. The decisive element was said to be the exercise by state agents of physical power and control over the person in question.[24]

The Court concluded that at the time the applicants' relatives died, the UK had assumed in South East Iraq the exercise of some of the public powers that would normally be exercised by the sovereign government, particularly responsibility for the maintenance of security as well as civil law and order.[25] In these exceptional circumstances, the Court considered that the UK (through its soldiers) exercised authority and control over individuals killed in the course of its security operations, and that this authority and control established the necessary jurisdictional link required by Article 1 of the Convention.[26]

This was an application of the "physical power and control" form of the state agent authority exception that the Court had articulated earlier in its judgment. The Court did not expressly rule on whether or not the UK was in effective control of the territory at the relevant time, beyond observing that the applicability of the effective control exception will be a question of fact in each case. After finding that the requisite jurisdictional link was established, the Court found that the UK had violated its Convention obligation to conduct effective and independent investigations, as the corollary of the right to life in ECHR Article 2, in all but Mr Mousa's case.[27]

4 Reconciling *Al-Skeini* with *Banković*

As summarised, *Al-Skeini* and *Banković* appear to diverge sharply on three central issues of extraterritoriality: the relevance of the Convention's legal space, the question of indivisibility, and the extent and application of the

[24] *Ibid.*, paras. 133–6.
[25] *Ibid.*, paras. 143–8.
[26] *Ibid.*, para. 149.
[27] *Ibid.*, paras. 168–77.

exceptions to territoriality. It is striking that the Strasbourg decision and those of the UK courts in *Al-Skeini* show such different conclusions when each purported to rely heavily on *Banković*. Can the differences between the decisions be reconciled, or is one (or both) of them wrong? In my view, both cases were correctly decided on their facts, and their differences are not as extreme as appearances suggest, but the lack of clarity and consistency in the legal reasoning will continue to be problematic for the future development of the law.

4.1 *Espace Juridique*

The apparently opposite views on the significance of the Convention's regional legal space can be resolved relatively simply. The UK courts read *Banković* as confining the extraterritorial reach of the ECHR to European states, and barring its application in states outside the combined territory of the parties. The decision undoubtedly emphasised the essentially regional context and design of the Convention, but the UK courts' interpretation goes further than the language of *Banković*. The finding about the regional context of the ECHR in that case was made in response to an argument that a ruling of inadmissibility would create a vacuum in the legal protection of the Convention. By the time it addressed this argument in its judgment, the Court had already decided that there was no support for applying one of the recognised exceptions to territorial jurisdiction on the facts of the case.

Thus, the Court in *Banković* did not use the regional scope of the ECHR as a ground for denying a finding that the state had jurisdiction, as the UK courts did. It made the point about *espace juridique* in order to confirm that its decision would not create an unacceptable result, by denying protection that would otherwise have been available to the applicants. As *Al-Skeini* pointed out, the Court in *Banković* did not say the Convention could never apply outside the region; it simply said that the desirability of avoiding a vacuum in protection had so far been relied upon only where the territory in question would otherwise be covered. In other cases decided since *Banković* the European Court has recognised the possibility of jurisdiction outside the European states.[28] Textually there is no necessary inconsistency between *Banković* and *Al-Skeini*; it is the interpretation of *Banković* by the UK courts that

[28] See *e.g. Issa v Turkey*, *supra* note 18, para. 74; *Al-Saadoon and Mufdhi v UK* [2009] ECHR 61498/08 (admissibility decision), paras. 84–9; *Medvedyev v France* [2010] ECHR 3394/03, paras. 62–7.

has contributed to the confusion.[29]

4.2 Indivisibility

As noted above, *Banković* said that Convention rights cannot be divided and tailored to match the circumstances of individual cases, and that if somebody is within a state party's jurisdiction, that state party must secure the full range of substantive Convention rights to that person. *Al-Skeini* qualified this by finding that states are obliged to secure the rights that are relevant to the individual circumstances, and that, in that sense, the rights can be divided and tailored.

The significance of this qualification should not be exaggerated. The Court in *Al-Skeini* was not advocating a "cherry-picking" approach to rights protection; a state could not rely on this finding to justify choosing to protect the right to freedom of expression while ignoring its obligations to respect family life. The point is simply that, for example, if a person is not subject to any judicial proceedings while within the state's jurisdiction, then his right to a fair trial in ECHR Article 6 is not relevant and does not need to be "secured" by the state. As Judge Bonello observed:

> Extraterritorially, a Contracting State is obliged to ensure the observance of all those human rights which *it is in a position to ensure*. ... [i]t ill suits the respondent Government to argue, as they have, that their inability to secure respect for all fundamental rights in Basrah, gave them the right not to respect any at all.[30]

It is unlikely that the argument of the applicants in *Banković* about the obligation to secure rights being proportionate to the degree of control over the territory (in that case just the airspace)[31] would succeed after *Al-Skeini*. As such, it could not be said that the *Al-Skeini* decision overrules or is inconsistent with *Banković* on the question of indivisibility.

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[29] For criticism of the UK courts' interpretation of *Banković*, see J. Williams, '*Al-Skeini*: A Flawed Interpretation of Banković', (2005) 23 *Wisconsin ILJ* 687; T. Thienel, 'The ECHR in Iraq: The Judgment of the House of Lords in *R (Al-Skeini) v. Secretary of State for Defence*', (2008) 6 *JICJ* 115.

[30] *Al-Skeini v UK*, *supra* note 5, concurring opinion of Judge Bonello, paras. 32–3 (original emphasis).

[31] *Banković*, *supra* note 2, paras. 75–6.

4.3 Exceptions to Territoriality

Reconciling the findings on the exceptions to territoriality is less straightforward. The arguments in *Banković* centred on the effective control principle, whereas in *Al-Skeini* the main focus was the state agent authority exception. The decisions can be linked by their reliance on the exercise of public powers by a state in another state's territory as an influential factor, but the difficulty is working out where the exercise of public powers sits n relation to the two recognised exceptions to territoriality.

In *Banković* the reference to the exercise of public powers was made in summarising the case-law of the Court in which it had recognised the exercise of extraterritorial jurisdiction:

> when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government.[32]

There is an ambiguity in this passage that could have been fixed with simple punctuation—but should the comma be inserted after "occupation" or after "abroad"? If the comma is read in after "abroad", the exercise of public powers could be equated to the effective control exception, but I do not think that was what the *Banković* Court intended. If the comma is placed after "occupation", it reads as if the Court is maintaining the typical distinction between effective control of territory (or the spatial model of jurisdiction) and a situation where the state's authorities are exercising public powers with the local government's consent/invitation/acquiescence, which can be interpreted as a formulation of the state agent authority exception (or the personal model of jurisdiction). I would argue that this latter interpretation makes more sense, and is more convincingly reconcilable with *Al-Skeini*.[33] It would also be more consistent with the surrounding context of the judgment, in which the Court was summarising previous instances of extraterritorial jurisdiction that had included both effective control and state agent authority. The lack of clarity in this crucial section of *Banković* is regrettable.

[32] *Ibid.*, para. 71.

[33] Compare *Al-Skeini v UK*, *supra* note 5, para. 135.

In *Al-Skeini* the exercise of public powers by the UK in Iraq served as the background context for applying the newly articulated state agent authority exception, based on physical power and control over an individual.[34] Interestingly, the Court did not state any conclusion on whether the UK had effective control over the area. But the UK's responsibility for the exercise of public powers in the region clearly played a significant role in the decision that the applicants' relatives were within UK jurisdiction.

To approach this from a different angle, how would *Banković* be decided after *Al-Skeini*? In *Al-Skeini* the jurisdictional link came from the state agents' authority and control "over individuals killed in the course of its security operations" in circumstances where the UK was found to be responsible for the maintenance of security in the area. The decisive element for applying the *Al-Skeini* state agent authority formulation to the *Banković* circumstances is whether it could be said that the NATO pilots exercised physical power and control over the victims.[35] The victims happened to be in or near the building when it was targeted from the air during what the European Court has described in *Medvedyev* as an "instantaneous extraterritorial act".[36] The complexities of the relationship between human rights law and international humanitarian law, and whether or not the strike complied with targeting requirements, are beyond the scope of this note; nonetheless, it seems legally arguable that dropping a bomb on a building during an armed conflict after the requisite precautions have been taken (warnings, proportionality assessments etc) is not an exercise of physical power and control over persons who happen to be on the ground triggering 'jurisdiction' in the ECHR sense.

But is it valid then to distinguish the airstrikes in *Banković* from the ground operations that killed the first five victims in *Al-Skeini*? Once again, the difference appears to be the background context of the UK's responsibility for the exercise of certain public powers in the area—it was the killing in the course of security operations that brought those five individuals into UK jurisdiction.

This brings us back to effective control. The exercise of public powers was identified in *Banković* as the common thread in cases where the Court has recognised extraterritorial jurisdiction. Does the *Al-Skeini* formula of physical power and control over an individual, coupled with the exercise of public powers in the area, act as some form of halfway house falling short of effective

[34] *Ibid.*, paras. 135–6.

[35] *Al-Skeini v UK*, *supra* note 5, para. 136.

[36] This was to distinguish the circumstances in *Medvedyev*, *supra* note 28, from *Banković* limitations.

control? Does this stretch state agent authority to breaking point in a manner that renders the effective control exception redundant, as the Lords feared? Or is it a new category altogether? It is difficult to conclude on this point without knowing the Court's views on effective control in *Al-Skeini*.

We will have to await further clarification from the Court to answer these questions. For present purposes, suffice to say that the two cases were decided on quite different arguments arising from quite different factual circumstances, but the differences in legal reasoning between them are not irreconcilable. It cannot be said that *Al-Skeini* overrules *Banković* because it appears unlikely the Court would come to a different result deciding *Banković* now.

5 Evaluation and Concluding Remarks

Critics of the jurisprudence on extraterritorial application of human rights treaties, and the ECHR in particular, lament the lack of coherently stated and developed principles, and the repeated preference for a case-by-case, piecemeal approach. As Lord Rodger put it, "the judgments and decisions of the European Court do not speak with one voice".[37] *Al-Skeini* presented a much-anticipated opportunity to clarify some of those principles. As the concurring opinion of Judge Bonello indicates, it may have fallen short of expectations in that regard. It cannot be denied that it has clarified (at least to some extent) the Court's position on indivisibility and the fact that the Convention will be held to apply beyond the *espace juridique* of its parties in appropriate and exceptional circumstances. It has stated more clearly than in the past what it considers to be covered by the state agent authority exception, purportedly identifying the defining principles of that exception from an examination of the Court's case law, rather than formulating novel exceptions.

However, the decision leaves unanswered some key questions on the interrelationship between the effective control exception and the state agent authority exception, and the relevance of the "exercise of public powers" in relation to those exceptions. Could the Court not have said that a situation of belligerent occupation raises a presumption of effective control by the occupying power? Should it have adopted Judge Bonello's functional approach, by which the test for jurisdiction (in all cases, not just extraterritorially) boils down to whether the commission or otherwise of the alleged violation depended on the agents of the state; the question would then arise of whether

[37] *Al-Skeini v Secretary of State for Defence*, *supra* note 17, para. 67.

it was within the power of the state to punish the perpetrators and compensate the victims.[38] This bright line approach would perhaps be preferable.[39]

European states might fear that *Al-Skeini*[40] will open the floodgates to claims of ECHR violations arising from their involvement in military operations outside Europe and around the world, but this would be an overreaction. *Al-Skeini* confirms that *Banković* did not close the door on the possibility of applying the Convention outside the territories of the Council of Europe member states, but it stops well short of throwing that door wide open. The decision emphasises the exceptional circumstances that underpinned *Al-Skeini* (the UK's responsibility for exercising public powers in another state) and reiterates that each case must be decided on its particular facts. Other cases since *Banković* have also recognised the possibility of jurisdiction arising outside the regional space of the Convention without causing any great rush of litigation or massive expansion of the basically territorial notion of jurisdiction.[41]

Standing back from the legal intricacies of the jurisdictional question, it would be difficult to disagree with the principle emphasised by the applicants and the interveners in *Al-Skeini* that double standards must not be allowed: states must not be allowed to perpetrate violations on foreign territory which they could not do at home.[42] In the course of argument the UK had put forward submissions to the effect that imposing the "culturally alien human rights standards" of the ECHR in states outside Europe might breach the principle of self-determination and lead to accusations of human rights imperialism.[43] It even suggested that applying the ECHR in Iraq would require amendments to the Iraqi Constitution, in breach of the UK's obligations as an occupying power to respect the laws in force there.[44]

It is troubling that arguments like these had found some favour in the House of Lords, with Lord Rodger proclaiming that it would be "manifestly absurd" to expect the UK to apply the ECHR in the "utterly different society

[38] *Al-Skeini v UK*, *supra* note 5, concurring opinion of Judge Bonello.

[39] See further *Assanidze v Georgia* [2004] ECHR 71503/01, concurring opinion of Judge Loucaides; *Ilaşcu v Moldova and Russia* [2004] ECHR 48787/99, dissenting opinion of Judge Kovler.

[40] Together with *Al-Jedda v UK* [2011] ECHR 27021/08, which was issued on the same day and also found a jurisdictional link between the UK and an Iraqi detainee, such that the ECHR applied extraterritorially.

[41] See *e.g.* cases mentioned *supra* note 28.

[42] See also *Issa v Turkey*, *supra* note 18, para. 71.

[43] *Al-Skeini v UK*, *supra* note 5, para. 110.

[44] *Ibid.*, para. 114.

of southern Iraq".[45] With respect, it seems far more absurd to entertain an argument that the UK's international obligations as an occupying power would require it to refrain from upholding such fundamental rights as those at issue in the case, the right to life and freedom from torture—and particularly when the Iraqi applicants themselves sought the enforcement of those rights. Thankfully, Strasbourg rejected this line of argument. Its inherent hypocrisy was sharply and eloquently exposed by Judge Bonello:

> Being bountiful with military imperialism but bashful of the stigma of human rights imperialism, sounds to me like not resisting sufficiently the urge to frequent the lower neighbourhoods of political inconstancy. For my part, I believe that those who export war ought to see to the parallel export of guarantees against the atrocities of war. And then, if necessary, bear with some fortitude the opprobrium of being labelled human rights imperialists.[46]

Only time will tell whether *Al-Skeini* will overtake *Banković* as a new watershed authority in the Strasbourg jurisprudence, in terms of the interpretation of Article 1. At the very least, however, supported by *Al-Jedda*, it stands as a strong statement that members of the armed forces involved in military operations abroad, and the states parties to ECHR that send them, cannot necessarily shelter behind Article 1 and *Banković* to avoid being held responsible for human rights violations outside national territory. Each case will inevitably continue to turn on its own facts, but it can be hoped that the outcome in *Al-Skeini* will impact upon domestic decision-making and undo some of the residual confusion left behind after *Banković*.

[45] *Al-Skeini v Secretary of State for Defence*, *supra* note 17, para. 78.
[46] *Al-Skeini v UK*, *supra* note 5, concurring opinion of Judge Bonello, paras. 37–8.