THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, President
Judge Emmanuel Ayoola
Judge George Gelaga King
Judge Renate Winter
Fifth Judge to be determined

Registrar: Mr. Robin Vincent

Date: 31 October 2003

THE PROSECUTOR

v.

MORRIS KALLON

CASE NO. SCSL-2003-07-PT

MOININA FOFANA intervening

REPLY TO THE PROSECUTION RESPONSE TO THE MOTION ON BEHALF OF MOININA FOFANA FOR LEAVE TO INTERVENE AS AN INTERESTED PARTY IN THE PRELIMINARY MOTION FILED BY MR. KALLON BASED ON A LACK OF JURISDICTION: AMNESTY PROVIDED BY LOME ACCORD

&

SUBSTANTIVE SUBMISSIONS

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For Mr. Fofana, intervening:
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Mr. Victor Koppe
Mr. Arrow John Bockarie
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ANNEX 1

T. Meron, *Human Rights in Internal Strife: their International Protections*, Cambridge: Grotius Publications Ltd., 1987, pp. 29-43.

Titles published in the Hersch Lauterpacht Memorial Lecture Series

I. S. Rosenne, *Breach of Treaty*
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UNIVERSITY OF CAMBRIDGE
RESEARCH CENTRE FOR INTERNATIONAL LAW

HERSCH LAUTERPACHT MEMORIAL LECTURES

HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION

by

THEODOR MERON

CAMBRIDGE
GROTIUS PUBLICATIONS LIMITED
1987

SALES &
ADMINISTRATION

GROTIUS PUBLICATIONS LTD.
PO BOX 115, CAMBRIDGE CB3 9BP, UK

International Standard Book Number: 0 949009 04 0

Typeset by Afal, Cardiff
Printed in Great Britain by
Gomer Press, Llandysul, Dyfed

To Judge Richard R. Baxter,
my friend and mentor, to whom
humanitarian law meant so much.

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PREFACE

I am most grateful to Mr. Lauterpacht, Q.C., the Director of the University of Cambridge Research Centre for International Law, for inviting me to deliver, in March 1986, the Hersch Lauterpacht Memorial Lectures on Human Rights in Internal Strife, of which this book is an expanded version. I am greatly honored by this opportunity to make a modest contribution to the memory of one of the greatest international lawyers of this century, Whewell Professor of International Law and, later, Judge of the International Court of Justice. The dedication of this book to Judge Richard R. Baxter, Judge of the International Court of Justice and Professor at Harvard Law School, in no way detracts from the tribute it pays to Sir Hersch. He would have heartily approved of this tribute to his favorite student, for whom he had the highest regard and warmest affection.

I was particularly happy to return to Cambridge for the Lauterpacht Lectures nearly thirty years after my stay there as a Humanitarian Trust Student and as a pupil of that superb jurist and teacher Sir Robert Jennings.

Sir Hersch made invaluable and lasting contributions to many fields of public international law, but the subject of the protection of human dignity and human rights in time of peace, as well as in time of armed conflict, was particularly close to his heart. His deep commitment to the development of the law of human rights is demonstrated by his landmark works, *An International Bill of the Rights of Man,* published in 1945, which preceded by three years the adoption of the Universal Declaration of Human Rights, and *International Law and Human Rights,* published in 1950; and by his revision of the *Law of War on Land being Part III of the* [*British*] *Manual of Military Law* (1958).

The last item reflected Sir Hersch's concern for the advancement of human rights in armed conflicts, when cruel abuses are particularly frequent. Sir Hersch's deep interest in human rights has guided my choice of the subject for these Lectures.

Ours is a world torn by violence and strife, characterized by cruelty of one human being to another. We observe around us an ever changing mosaic of confrontations, often defying simple or simplistic characterizations; ranging from situations of internal repression and tension to violent internal strife, internal armed conflict, civil war, internationalized-internal conflicts or international armed conflicts,

despite the salutary efforts of the ICRC to assure observance of humanitarian law.[71] Account should also be taken of the judicial role of the International Court of Justice with regard to humanitarian law, as demonstrated in the case of *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (Merits).[72]

The convergence between humanitarian and human rights law is progressing rapidly. Although these systems of protection continue to have different institutional "umbrellas" (for the humanitarian law, the ICRC and the Red Cross movement; for human rights, the United Nations and various specialized and regional organizations), a strict separation between the two is artificial and hinders efforts to maximize the effective protection of the human person.

[71] The role of the ICRC is discussed in Chapter IV, below.

[72] *Supra* note 18. *See also* below Chapter II, Section IV; Chapter VI, Section VII.

CHAPTER II

HUMAN RIGHTS AND HUMANITARIAN LAW: APPLICABILITY

I. INTRODUCTION

The discussion in Chapter I of the jurisprudential connection between human rights and humanitarian law and of the growing parallelism of norms belonging to these systems of protection did not reach the crucial questions of the thresholds and scope of their applicability. The object of the present Chapter is, therefore, to discuss the thresholds and the reach of the personal, territorial and material applicability of human rights and of humanitarian law and to describe some of the principal weaknesses which are of special relevance to situations of internal strife.

II. APPLICABILITY *RATIONE PERSONAE*

A. *Nationality*

The question of the applicability *ratione personae* of human rights stated in the international human rights instruments and in instruments on international humanitarian law has not been adequately explored in scholarly writings. This is a complex and nuanced area, in which there are important convergences and significant differences in the applicability of the human rights stated in the two types of instruments.

It has been correctly suggested that human rights instruments apply subject to *ratione personae* qualifications less restrictive than those provided under some of the Geneva Conventions, which may make applicability dependent on nationality or other status,[1] and incorrectly, that guarantees under the human rights instruments "apply always and everywhere."[2] Certainly, it is true that the human rights stated in the international human rights instruments apply, in principle, to the relations between the government and the governed

[1] 1970 Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, UN Doc. A/8052 at 13 (1970) [hereinafter cited as 1970 Report].

[2] *Id.* at 101.

and protect the latter against the former regardless of their nationality. Careful consideration shows that this principle is not always followed, however, as the following examples illustrate.

Article 2(3) of the Economic Covenant permits developing States, "with due regard to human rights," to determine the extent to which they would guarantee to non-nationals the economic rights recognized in that Covenant. Article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination introduces a nationality criterion in providing that distinctions, exclusions, restrictions, or preferences made by a State Party between citizens and non-citizens are not governed.

Limitations upon the applicability of human rights instruments may also exist in their pre-emption by a different and, on the whole, less generous *lex specialis*, as in the case of prisoners of war.

Frequently, it is assumed that human rights stated in the humanitarian law instruments protect only nationals of certain States or persons having a particular status. This is not always accurate. As regards international armed conflicts, Article 12 of Geneva Conventions I and II clearly establishes the applicability of these Conventions to certain wounded, sick, or shipwrecked persons without distinction of nationality. A Party's own nationals are thus protected persons under these Conventions.[3] This elimination of the nationality test dates back to the (first Geneva) Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field of August 22, 1864.[4] In contrast, Article 4 of Geneva Convention III limits the applicability of the Convention to certain categories of combatants. Although Article 4 does not address the question of nationality, Articles 87 and 100 make it clear that the detaining power's nationals are not and cannot be prisoners of war under the Convention.

The *ratione personae* provisions of Protocol I are more complicated. According to Article 1(4), Protocol I applies not only to the situations governed by the 1949 Conventions, but also to certain armed conflicts in which peoples are fighting against colonial or racist regimes and alien occupation. Thus, the provisions of the Protocol may be applicable, subject to Article 1, to certain "wars of liberation" taking place within the territory of a single State between the government and insurgents of the same nationality.[5]

[3] *See* Solf, *Human Rights in Armed Conflict: Some Observations on the Relationship of Human Rights Law to the Law of Armed Conflict*, in World in Transition 41, 44 (H. Han ed. 1979); Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 138 (J. Pictet ed. 1952).

[4] Art. 6, 1 Bevans 7, 10; *see* Solf, *supra* note 3, at 43.

Apparently, the majority at Geneva in 1977 had intended to grant prisoner-of-war status to combatants in a national liberation war taking place within a single country against a colonial or racist government. Such status could be claimed for citizens of a colonial or racist State in the struggle against their own government,[6] which would thus be regarded as an "adverse Party" in the context of Article 44 of Protocol I.

Pursuant to its Article 4, Geneva Convention IV applies only to protected persons, *i.e.*, persons who find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals. Only nationals of a State that is bound by the Convention are protected. Nationals of a neutral State who find themselves in the territory of a belligerent State and nationals of a cobelligerent State are not protected persons while their State of nationality has normal diplomatic representation in the State where they are found. Nevertheless, part II of Geneva Convention IV, which concerns the general protection of populations against certain consequences of war, applies without

[5] *See generally* Aldrich, *New Life for the Laws of War*, 75 AJIL 764, 770-71 (1981); Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977*, 8 Neth. Y.B. Int'l L. 107, 122 (1977). For the view that, despite the silence of Article 4 of Geneva Convention III, nationals of the detaining power do not qualify for protection as prisoners of war, *see* Baxter, *The Privy Council on the Qualifications of Belligerents*, 63 AJIL 290 (1969).

[6] *See generally* Kalshoven, *supra* note 5, at 121-33; Aldrich, *supra* note 5, at 771; Cassese, *A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict*, in The New Humanitarian Law of Armed Conflict 461, 469 (A. Cassese ed. 1979). It has been observed that the duty to accord prisoner-of-war status to captured members of the armed forces of an adversary applies to the armed forces of a people:

> engaged against a High Contracting Party in an armed struggle for self determination within the meaning of Art. 1(4), *provided*, however, that the struggle qualifies under Art. 1(4) as an international armed conflict, and *provided also* that the authorities of the movement have made the declaration required by Art. 96(3).

M. Bothe, K. Partsch & W. Solf, New Rules For Victims of Armed Conflicts 237-38 (1982).

regard to nationality in accordance with Article 13 thereof. Thus, nationals are protected from certain acts of their own governments. Article 70 of Geneva Convention IV grants certain rights to nationals of the occupying power vis-à-vis that occupying power.

Article 75 of Protocol I dispenses with a nationality test. That Article applies to persons, "[i]n so far as they are affected by a situation referred to in Article 1" of the Protocol, who are in the power of a party to the conflict and who do not benefit from more favorable treatment. Article 75(1) prohibits a wide range of adverse distinctions. Protection is extended to persons in the power of a party of which they are nationals.[7]

The scope of the phrase "[i]n so far as they are affected by a situation referred to in Article 1" presents an interesting question. Although an argument could be made that this language encompasses the entire population of a country involved in a conflict as defined in Article 1, the object of the Diplomatic Conference that drew up Protocol I apparently was not to revise the entire range of human rights otherwise obtained between a government and its people. According to this view, which is supported by the legislative history, the guarantees of Article 75 apply primarily to certain categories of persons especially affected by the conflict, such as collaborators, deserters, and all the nationals of State A who serve in the forces of adverse State B.[8] As has been observed, this interpretation "respects the jurisdiction of the Parties to the conflict for matters of their internal competence" and suggests that "the purpose of the Conference was not to draft a Convention on Human Rights."[9]

Regarding non-international armed conflicts, common Article 3 of the four Geneva Conventions protects all persons taking no active part in the hostilities, even members of armed forces who have laid down their arms and those placed *hors de combat.* Although nationality is not mentioned in Article 3, that Article must be read to

[7] *See* Solf, *supra* note 3, at 44. It has been observed that although the words "national origin" in Article 75 do not refer to nationality but to ethnic group, nationality should be regarded as "an 'other status' or as a status based 'on any similar criteria.' This would mean that the list of banned criteria would not exclude the Parties' own nationals from the enjoyment of the protection provided for by this Article." M. Bothe, K. Partsch & W. Solf, *supra* note 6, at 458.

[8] M. Bothe, K. Partsch & W. Solf, *supra* note 6, at 459-60.

[9] *Id.* at 460 (quoting a statement by the Canadian delegation).

ensure humane treatment for all persons involved in internal conflicts regardless of nationality.[10] Nationals of the State Party concerned are therefore protected vis-à-vis their own government.[11] This provision is of the greatest importance because Article 3 is often regarded—probably with a measure of exaggeration—as "a 'microcosm' of the remaining humanitarian provisions in each convention."[12]

Similarly, Protocol II applies to all persons affected by a non-international armed conflict, including the State's own nationals. Articles 1 and 2 clearly establish this principle. Article 2(1) contains a list of prohibited adverse distinctions, which is identical to that in Article 75(1) of Protocol I.[13] The Protocol, obviously reflecting provisions of the Political Covenant, grants important fundamental guarantees in areas such as due process and fair trial.[14]

B. *Rights and Obligations*

That States may grant to individuals direct rights or impose upon them direct duties by treaties—in contrast with the theory that norms of international law require a previous act of transformation into the national law in order to create rights or duties for individuals (derivative rights)—was recognized by the Permanent Court of International Justice. In its Advisory Opinion concerning Jurisdiction of the Courts of Danzig (1928), the Court stated: "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual

[10] Commentary on the Geneva Conventions of 12 August 1949: The Geneva Convention Relative to the Protection of Civilian Persons in Time of War 40 (O. Uhler & H. Coursier eds. 1958).

[11] But it is "possible that certain offences may be regarded as more serious or less serious according to whether they have been committed by citizens of the country concerned or by aliens." *Id.*

[12] Draper, *Humanitarian Law and Human Rights*, 1979 Acta Juridica 193, 202 [hereinafter cited as Draper, *Humanitarian Law*]. Concerning the importance of Article 3, *see* Robertson, *Human Rights as the Basis of International Humanitarian Law*, in Proceedings of the International Conference on Humanitarian Law 55, 60-61 (San Remo 1970).

[13] *See* text accompanying note 7 *supra.* For the "fundamental guarantees" provision of Protocol II, see Article 4 thereof.

[14] *See* Art. 6, Protocol II.

rights and obligations and enforceable by national courts."[15] Since that time, the direct granting of rights to individuals and the imposition of duties upon individuals through international instruments has become accepted and widespread. This is true of both humanitarian and human rights instruments, of declarations as well as of treaties.

The Universal Declaration of Human Rights emphasizes that individuals enjoy various rights (*e.g.*, Article 3 states that "Everyone has the right to life, liberty and security of person."). The drafters of the Universal Declaration also regarded the individual as a direct subject of obligations (*e.g.*, Article 29(1): "Everyone has duties to the community.").

The Universal Declaration set the pattern for numerous other declarations of a normative character, such as the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[16] (*e.g.*, Article 8, which confers rights directly on individuals); the Code of Conduct for Law Enforcement Officials[17] (*e.g.*, Article 2, imposing duties on law enforcement officials); or the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment[18] (*e.g.*, Principle 1, which imposes duties on health personnel).

International instruments provide ample precedent of treaties granting direct rights (protections) to be enjoyed by everyone, as well as of duties imposed not only upon governments but on individuals or groups. While the Geneva Conventions and human rights instruments routinely create rights for individuals through the imposition of various obligations upon States, both rights and obligations are frequently imposed directly on individuals. Examples of

[15] P.C.I.J., Ser. B, No. 15, at 17-18 (Advisory Opinion of March 3, 1928). *See also* 1 L. Oppenheim, International Law 21-22 (H. Lauterpacht ed. 1955). *See generally* Higgins, *Conceptual Thinking About the Individual in International Law*, in International Law: A Contemporary Perspective 476 (R. Falk, F. Kratochwil & S. Mendlovitz eds. 1985); Janis, *Individuals as Subjects of International Law*, 17 Cornell Int'l L. J. 61 (1984).

[16] GA Res. 3452 (XXX), 30 UN GAOR Supp. (No. 34) at 91, UN Doc. A/10034 (1975).

[17] GA Res. 34/169, 34 UN GAOR Supp. (No. 46) at 185, UN Doc. A/34/46 (1979).

[18] GA Res. 37/194, 37 UN GAOR Supp. (No. 51) at 210, UN Doc. A/37/51 (1982).

the former are Geneva Convention IV, Article 27, and Political Covenant, Article 6. Examples of the latter are Geneva Convention IV, Article 5, and Political Covenant, Articles 5(1), 20. Criminal responsibility is imposed on individuals by the grave breaches provisions of the Geneva Conventions (50/51/130/147). Under these Conventions, which reflect the principle of universality of jurisdiction, all Contracting Parties have the duty either to bring before their own courts or to extradite persons alleged to have committed, or to have ordered to be committed, grave breaches.[19] As has been aptly suggested, "the entire law of war is based on the assumption that its commands are binding not only upon States but also upon their nationals . . ."[20]

Among human rights instruments, the International Convention on the Suppression and Punishment of the Crime of *Apartheid*[21] provides (Article III) that international criminal responsibility shall apply to individuals or members of organizations and institutions, as well as to State representatives. Persons charged with the crime of *apartheid* may be tried (Article V) by a competent tribunal of any State Party which may acquire jurisdiction over the person of the accused or by an international penal tribunal having the necessary jurisdiction. The Convention on the Prevention and Punishment of the Crime of Genocide[22] provides (Article IV) that persons committing acts of genocide shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. Such persons may be, however, tried only by a competent tribunal of the State in the territory of which the act was committed, or by a competent international penal tribunal (Article VI). The Genocide

[19] Dinstein, *International Criminal Law*, 5 Israel Y. B. Human Rights 55, 63 (1975); Dinstein, *International Criminal Law*, 20 Isr. L. Rev. 206, 215 (1986).

[20] L. Oppenheim, *supra* note 15, at 341. *See also* The Law of War on Land Being Part III of the [British] Manual of Military Law 1 (1958); Dinstein, *International Criminal Law*, *supra* note 19, at 74-75; Lauterpacht, *The Subjects of the Law of Nations*, in 2 H. Lauterpacht, International Law (Collected Papers) 487, 492, 495 (insurgents as subjects of international rights and duties), 519 (individuals as subjects of international rights and duties) (E. Lauterpacht ed. 1975).

[21] 1015 UNTS 244.

[22] 78 UNTS 277.

Convention is thus not based on the universality principle of jurisdiction.[23]

No political or legal inconvenience should result from a grant of carefully selected direct rights to the individual—in contrast to groups—or the imposition of carefully selected duties upon him. Regarding the imposition of direct rights and responsibilities on groups of individuals, or on organizations, of course, the question of the effect of the provision on the political or the legal status of the group concerned may arise. Given the sensitivity of States to possible encroachments on their sovereignty, this question is of particular importance. This concern is especially significant in the context of common Article 3 which provides for the duty of "each Party to the conflict" to apply, as a minimum, the provisions stated in the Article. In light of the potential implications of the reference to the parties to the conflict, the drafters of the Geneva Conventions stated (Article 3, *in fine*) that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict." Commentators have suggested that "although their [the Parties'] legal status (*e.g.*, sovereignty) may not be affected, the factual political status and the responsibility of the 'Parties' with regard to Article 3 do change notwithstanding this vague and open-ended declaration."[24]

The practice, frequent among States, of refusing to apply common Article 3 in circumstances in which it clearly should have been applied demonstrates that the final clause of Article 3 does not effectively eliminate fears of trespass upon State sovereignty. The difficulty is not alleviated even by the fact that except for the norms

[23] Dinstein, *International Criminal Law*, *supra* note 19, at 61-62. It may be of interest to note the "understanding" of the United States to Article VI of the Genocide Convention, providing that "nothing in Article VI affects the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside a State." The understanding was designed to enable the United States to meet its obligations under Article VI by prosecuting under U.S. law a U.S. citizen accused of genocidal acts abroad. The United States reserved its right to effect its participation in an international penal tribunal (Article VI of the Genocide Convention) only by a treaty entered into specifically for that purpose with the advice and consent of the Senate. Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AJIL 612, 613, 619-21 (1986).

[24] Fleiner-Gerster & Meyer, *New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty*, 34 Int'l & Comp. L. Q. 267, 272 (1985).

stated in Article 3, those derived from the laws of humanity and the dictates of the public conscience, and such human rights as may be applicable, the relations between the parties to a non-international armed conflict are governed by the laws of the country concerned. Not surprisingly, therefore, the ICRC Commentary to common Article 3 expends considerable effort in the attempt to quiet the concern of States prompted by the language of Article 3. The Commentary suggests that "the Article . . . does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules . . ."[25] The Commentary continues:

> The obligation resting on the Party to the conflict which represents established authority is not open to question. The mere fact of the legality of a Government involved in an internal conflict suffices to bind that Government as a Contracting Party to the Convention. On the other hand, what justification is there for the obligation on the adverse Party in revolt against the established authority? At the Diplomatic Conference doubt was expressed as to whether insurgents could be legally bound by a Convention which they had not themselves signed. But if the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country or part of the country. The 'authority' in question can only free itself from its obligations under the Convention by following the procedure for denunciation laid down in Article 158. But the denunciation would not be valid, and could not in point of fact be effected, unless the denouncing authority was recognized internationally as a competent Government. It should, moreover, be noted that under Article 158 denunciation does not take effect immediately.
>
> If an insurgent party applies Article 3, so much the better for the victims of the conflict. No one will complain. If it does not apply it, it will prove that those who regard its actions as mere acts of anarchy or brigandage are right. As for the *de jure* Government, the effect on it of applying Article 3 cannot be in any way prejudicial; for no Government can possibly claim that it is *entitled* to make use of torture and other

[25] Commentary on the Geneva Conventions of 12 August 1949: The Geneva Convention Relative to the Protection of Civilian Persons in Time of War 36 (O. Uhler & H. Coursier eds. 1958).

inhuman acts prohibited by the Convention, as a means of combating its enemies.[26]

Despite the disclaimer contained in Article 3 ("the application of the preceding provisions shall not affect the legal status of the Parties to the conflict"), Abi-Saab contends that:

> common article 3 does confer a certain objective legal status on "rebels" in conflicts not of an international character. This status is more limited in its legal effects than the one deriving from a "recognition of belligerency", as it does not entail the application of *jus in bello* as a whole (but only those principles enumerated in common article 3). On the other hand, it is an objective status emanating from the Conventions themselves and thus transcending the discretionary and relative character of the "recognition of belligerency". Its effect is to have a minimum legal standard apply, independently of the will of the established government, as soon as violence attains a certain threshold . . .[27] (footnotes omitted)

Of course, the application of the norms stated in Article 3 falls far short of the application of the Geneva Conventions in their entirety. Rebels do not become protected persons or privileged combatants by virtue of the application of Article 3. The criminal law of the State continues to apply to the rebels, except as tempered by the rules stated in Article 3 and subject to the applicable human rights obligations of the State. Nevertheless, the reluctance of States to acknowledge the applicability of Article 3 demonstrates the cogency of Abi-Saab's analysis.

The origin of the obligation of the forces fighting the government to observe the provisions of Article 3 has also been questioned: "[i]f this obligation is taken for granted, are the revolutionary forces then subjects of international law, or are they bound to apply Article 3 because that provision has been incorporated into their State's internal law? What is the situation if a State . . . does not incorporate international law into its own law by a formal act of the legislature?"[28] Baxter asks:

[26] Commentary on the Geneva Conventions, *supra* note 25, at 37.

[27] Abi-Saab, *Wars of National Liberation and the Laws of War*, 3 Annals Int'l L. Studies 93, 96 (1972).

[28] Fleiner-Gerster & Meyer, *supra* note 24, at 272.

> How then can the insurgents as a "party to the conflict" be bound to carry out duties under an instrument that they have not accepted? One answer is that all nationals of high contracting parties are bound by the Conventions, including Article 3, and that the rebels, qua nationals of a Party, are bound as individuals, who have formed themselves into a political collectivity. A second basis for asserting that Article 3 is binding on the insurgents is that insurgents must be bound by the obligations of the State to the extent they purport to be the effective government of that State. These propositions may be satisfying to the mind of the international lawyer, but they do not necessarily induce compliance by rebels. The fact is that whether a group of any sort has or has not expressly accepted the obligations of an agreement does have a great deal to do psychologically with the willingness of that group to carry out its purported obligations.[29] (footnotes omitted)

Although under general principles of international law, the non-incorporation of the Geneva Conventions into internal law cannot excuse non-observance of their provisions by the States concerned, the effectiveness of the Conventions may be eviscerated where they have not been transformed into internal law by virtue of a general provision in the constitution or by an act of parliament. Therefore, it is desirable that Article 3 should be construed as imposing direct obligations on the forces fighting the government. Of course the imposition of direct obligations on such forces should not be understood as conferring on them a different legal status and should not be used by a government as a pretext for refusal to apply the duties stated in Article 3.

Article 3 should no longer be regarded as a legal aberration. Although international agreements confer rights and obligations mostly on States, and individuals accept international rights and obligations primarily through the intermediary of the State (derivative rights and obligations), in contemporary international law, international agreements grant direct rights or confer obligations on

[29] Baxter, *Jus in Bello Interno: The Present and Future Law*, in Law and Civil War in the Modern World 518, 527-28 (J. Moore ed. 1974).

The International Court of Justice complained of the frequency with which "principles of international law . . . are set at naught by individuals or groups of individuals . . ." United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), 1980 ICJ Rep. 3, 42 (Judgment of May 24).

individuals and groups with increasing frequency. This development should assuage governments' fears of the political recognition of dissident groups. They should also be reassured by the fact that, as stated by the International Court of Justice, "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights . . ."[30]

III. PROTECTION *RATIONE LOCI*

Difficulties may arise with regard to the territorial reach of human rights instruments. Such a difficulty arises concerning the territorial scope of applicability of the Political Covenant. Article 2(1) provides that each State Party undertakes to respect and "to ensure to all individuals within its territory and subject to its jurisdiction" the rights recognized in the Covenant. Thus, even if a State Party does not derogate from the Covenant by invoking Article 4, the Covenant as interpreted by some scholars would not apply to occurrences beyond the territory of the State concerned.[31] This would be a serious limitation in those situations in which agents of the State operate in foreign territories and, notably, in situations of armed conflict, when whole armies are present on foreign soil. From this viewpoint, individuals in such territories would not be protected by the Covenant. A similar problem arises with regard to the applicability of human rights instruments to the population of occupied territories.[32]

A better interpretation is that suggested by Buergenthal, who argues that the word "and" in the phrase "within its territory and subject to its jurisdiction," "should be read as a disjunctive conjunction, indicating that a State party must be deemed to have assumed the obligation to respect and to ensure the rights recognized in the Covenant 'to all individuals within its territory' *and* 'to all individuals subject to its jurisdiction.'"[33]

[30] Reparation for Injuries Suffered in the Service of the United Nations, 1949 ICJ Rep. 174 (Advisory Opinion of Apr. 11).

[31] Schindler, *Human Rights and Humanitarian Law*, 31 Am. U.L. Rev. 935, 939 (1982).

[32] *See generally* T. Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AJIL 542 (1978).

[33] Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in the International Bill of Human Rights 72, 74 (L. Henkin ed. 1981).

The language of Article 2(1) of the Political Covenant differs strikingly from that of Article 1(1) of the companion instrument, the Optional Protocol. The latter addresses communications from individuals "subject to its jurisdiction [the jurisdiction of a State Party which recognizes the competence of the Human Rights Committee established under Article 28 of the Political Covenant (the Committee) to receive and consider such communications]," without any reference to "territory." It is distressing that this discrepancy should have been allowed to occur and that the language of the Covenant was not harmonized with that of the Protocol. The language of the Optional Protocol, formulated after the language of Article 2(1) of the Political Covenant had been completed, supports Buergenthal's interpretation.

A similar position was taken by the Human Rights Committee in general comments on Article 2, made under Article 40 of the Political Covenant, in which the Committee mentioned the undertaking of States Parties to ensure the enjoyment of rights "to all individuals under their jurisdiction,"[34] without any reference to the phrase

[34] 36 UN GAOR Supp. (No. 40) at 109, UN Doc. A/36/40 (1981).

It should be noted that a similar interpretative approach was adopted in the case law of the European Commission of Human Rights. Thus, with regard to the applicability of the European Convention on Human Rights in the parts of Cyprus occupied by Turkey, and the Commission's competence *ratione loci*, the Commission stated:

> In Art. 1 of the Convention, the High Contracting Parties undertake to secure the rights and freedoms defined in Section I to everyone "within their jurisdiction" (in the French text: "relevant de leur juridiction"). The Commission finds that this term is not, as submitted by the respondent Government, equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad . . .
>
> The Commission further observes that nationals of a State, including registered ships and aircrafts [sic] are partly within its jurisdiction wherever they may be, and that authorised [sic] agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.

Application No. 6950/75, Cyprus v. Turkey, Eur. Comm'n of Human Rights, 2 Decisions and Reports 125, 136 (1975). *See also* Application No. 8007/77, Cyprus v. Turkey, Eur. Comm'n of Human Rights, 13 Decisions and Reports 85, 148-49 (1979).

"within its territory." The language of Article 2(1) has been explicitly addressed by the Committee in its consideration of communications under Article 5(4) of the Optional Protocol. One such case concerned the abduction of the victim by agents of the respondent State and his forcible transfer to the latter's territory. The Committee observed that although the arrest and the initial mistreatment of the victim allegedly took place on foreign territory, neither the language of Article 2(1) of the Political Covenant, nor that of Article 1 of the Optional Protocol barred it from considering the case "inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil."[35] The Committee construed Article 1 of the Optional Protocol to refer "not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred."[36] With regard to the more difficult problem posed by Article 2(1), the Committee stated that it "does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it."[37] Invoking Article 5(1) of the Political Covenant, the Committee emphasized that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[38] In an individual opinion, one member of the Committee, Tomuschat, explained that the words "within its territory" should not be given a strict literal meaning as this would lead to absurd results. This language was intended to confine the obligations of States to their own territory, when enforcement of the

[35] Communication No. R.12/52, Delia Saldías de Lopez v. Uruguay, 36 UN GAOR Supp. (No. 40) at 176, 182, UN Doc. A/36/40 (1981). *See also* Communication No. 56/1979, Lilian Celiberti de Casariego v. Uruguay, International Covenant on Civil and Political Rights, Human Rights Committee, Selected Decisions under the Optional Protocol (Second to sixteenth sessions), UN Doc. CCPR/C/OP/1 at 92 (1985) [hereinafter cited as Selected Decisions].

[36] Communication No. R.12/52, *supra* note 35.

[37] *Id.*

[38] *Id.* at 183.

Covenant outside of the national territory would be likely "to encounter exceptional obstacles,"[39] as in the case of the inability to ensure the effective protection of rights to citizens residing abroad. "Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity . . . [of] their citizens living abroad."[40]

IV. APPLICABILITY *RATIONE MATERIAE* AND DEROGATIONS

It may be recalled that humanitarian instruments, having been enacted to govern situations of armed conflict, are not subject to derogations, except as indicated in Chapter I, Section III, above. Human rights instruments, in contrast, are generally subject to derogations in various exceptional situations.

The principal difficulty regarding the application of international humanitarian law has been the refusal of States "to apply the conventions in situations where they clearly should be applied. Attempts to justify such refusals often cite alleged differences between the conflicts presently encountered and those for which the conventions were supposedly adopted."[41] There are, in fact, so many situations in which the applicability of the Geneva Conventions as a whole or of their common Article 3 has been denied[42] that the not uncommon practice has been rejection of the law, rather than its formal recognition and implementation. Baxter has observed that "[t]he first line of defense against international humanitarian law is to deny that it applies at all."[43] Denials of the applicability of humanitarian law are facilitated by the complexity of various conflicts, by the difficulty involved in the characterization of the conflict (*e.g.*, as international armed conflict, internationalized-internal conflict, internal conflict of an armed character, internal strife accom-

[39] *Id.* at 184.

[40] *Id.*

[41] Aldrich, *Human Rights and Armed Conflict: Conflicting Views*, 67 ASIL Proc. 141, 142 (1973).

[42] *See, e.g., id.* at 143-44; Robertson, *supra* note 12, at 61.

[43] Baxter, *Some Existing Problems of Humanitarian Law*, in The Concept of International Armed Conflict: Further Outlook 1, 2 (Proceedings of the International Symposium on Humanitarian Law, Brussels 1974).

ANNEX 2

R. Baxter, 'Jus in Bello Interno: The present and Future Law', in: J. Moore (ed.), *Law and Civil War in the Modern World*, Baltimore: Johns Hopkins University Press, 1974, pp. 518-536.

Law and Civil War in the Modern World

Edited by John Norton Moore

Published under the auspices of
the American Society of International Law
and the International Legal Research Fund
of the Columbia University School of Law
and prepared in collaboration with
Wolfgang G. Friedmann

The Johns Hopkins University Press
Baltimore and London

To Wolfgang G. Friedmann

The Johns Hopkins University Press, Baltimore, Maryland 21218
The Johns Hopkins University Press Ltd., London

Library of Congress Catalog Card Number 73-19338
ISBN 0-8018-1509-6 (clothbound)
ISBN 0-8018-1598-3 (paperbound)

Library of Congress Cataloging in Publication data
will be found on the last printed page of this book.

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Acknowledgments

This volume of studies is the culmination of the Civil War Project of the American Society of International Law Panel on the Role of International Law in Civil Wars. Publication was made possible by the financial support of the Ford Foundation and the International Legal Research Fund of the Columbia Law School.

Although the study is a collaborative effort of the Civil War Panel, a few special debts stand out. Prior to his untimely death, Professor Wolfgang G. Friedmann, the Chairman of the Panel, assisted in mapping out the contents of this volume and in obtaining the financial support of the International Legal Research Fund. Professor Richard A. Falk, the former Chairman and Rapporteur of the Panel, conceived the initial outline of the study and set the stage by a series of case studies on the role of international law in civil wars that was prepared under his auspices as Chairman and published in two earlier volumes sponsored by the Panel: R. Falk (ed.), *The International Law of Civil War* (The Johns Hopkins University Press, 1972), and W. Kane, *Civil Strife in Latin America: A Legal History of U.S. Involvement* (The Johns Hopkins University Press, 1972). John R. Stevenson, formerly Legal Adviser to the Department of State, encouraged the Civil War Project both as President of the Society and as an early member of the Panel and was instrumental in obtaining initial funding for the Project. Stephen M. Schwebel both contributed his share of intellectual excitement as a member of the Panel and as Executive Vice-President of the Society shepherded the volume from inception to publication with his inevitable good judgment and aplomb.

I would also like to thank Linda Vlasak of the Johns Hopkins University Press for careful editorial attention in the preparation of the manuscript and Frederick S. Tipson of the University of Virginia School of Law who assisted with footnote revision and preparation of the Bibliography.

Finally, I would like to thank the American Society of International Law, whose unflagging dedication to scholarly inquiry and the free exchange of ideas has contributed immeasurably to the development of the ideas expressed in this volume. The American Society of International Law is an association of American and foreign international legal scholars, judges, and practitioners from more than one hundred countries. It is not affiliated with any government or committed to any ideology other than seeking the settlement of international disputes on the basis of law and

Chapter 20 | Ius in Bello Interno: The Present and Future Law

Richard R. Baxter

Prior to 1949, the principal treaties governing the conduct of warfare on land—the Regulations annexed to Convention IV of The Hague of 1907[1] and the Geneva Prisoners of War[2] and Wounded and Sick Conventions[3] of 1929—applied only to war between states and had no bearing, according to their terms, on civil conflicts. If one looks back to the standard treatises of a quarter or half a century ago,[4] one discovers that civil war might be governed by the international law of war under one set of circumstances. If the government of a state resisting the insurrection mounted by rebels were to recognize the belligerency of the rebel faction, then the conflict would be treated as if it were an international one for the purpose of the application of the international law of war. Indeed, that recognition often came in the form of the de facto government's extending to the insurgents the protection of the international law of war. If a third state were to recognize the belligerency of the rebel faction, then the third state would be subject to the same rights and duties of neutrality as in an international armed conflict. The recognition of belligerency by third states would naturally not require the lawful government of the state to recognize the rebels as belligerents, but widespread recognition of belligerency by third states would exercise a certain influence in persuading the lawful government that the time had come to recognize the belligerency of the rebels. As Hyde wrote, paraphrasing the words of Mr. Justice Grier in the *Prize Cases*,[5]

> When the parties in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegia[illegible], have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.[6]

[1] Signed Oct. 18, 1907, 36 *Stat.* 2277, *T.S.* No. 539, 1 *Bevans* 631.
[2] Done at Geneva, July 27, 1929, 47 *Stat.* 2021, *T.S.* No. 846, 2 *Bevans* 932.
[3] Done at Geneva, July 27, 1929, 47 *Stat.* 2074, *T.S.* No. 847, 2 *Bevans* 965
[4] *See, e.g.*, W. Hall, *International Law* 36 (8th ed., 1924); II L. Oppenheim, *International Law* 173 (6th ed., 1944); III C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (2d rev. ed., 1945). And *see* as to recognition of belligerency and insurgency H. Lauterpacht, *Recognition in International Law* 175–294 (1948).
[5] C. Hyde, *supra* note 4, at 1698.

This chapter was completed on June 30, 1971 and does not take account of developments after that date.

Although the writer was a member of the United States Delegation to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, May 24 to June 12, 1971, the views expressed herein are his own and do not necessarily reflect those of the United States Government.

Among the important consequences of the recognition of belligerency was that rebels who fell into the hands of the lawful government would be treated as prisoners of war rather than criminals. That the United States had been prepared to treat its own Civil War for many purposes as if it had been an international conflict undoubtedly had a powerful influence on the development of the law.

In the period between the two World Wars, the International Committee of the Red Cross attempted on various occasions to secure the application of the international law of war during civil conflicts.[7] After the Second World War, the International Committee undertook the preparation of new draft conventions for the protection of war victims. The draft treaties approved by the XVIIth International Red Cross Conference at Stockholm and submitted to the Diplomatic Conference of Geneva of 1949 contained a common provision to the effect that:

> In all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the adversaries shall be bound to implement the provisions of the present Convention.[8]

The broad sweep of this stipulation proved to be too much for the majority of the states represented at the Diplomatic Conference. A compromise formula—that the entire convention would be applicable to internal conflicts only if there had been a recognition of belligerency by the de jure government or if the insurgent faction exercised de facto governmental functions—failed of adoption.[9] The Conference ultimately came around to the view that the most that states could be expected to accept would be a short statement of the basic humanitarian principles that should be given effect in civil conflicts. The result was Article 3, common to the four Geneva Conventions of August 12, 1949 for the Protection of the Wounded and

[6] 67 U.S. (2 Black) 635, 666–67 (1862).
[7] J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 40 (1952) [hereafter referred to as Pictet].
[8] Art. 2, para. 3, 1 *Final Record of the Diplomatic Conference of Geneva of 1949*, at 47.
[9] Pictet, *supra* note 7, at 45–6. Farer finds textual evidence and "substantial support at the Conference" for the view that all civil conflicts are not necessarily to be held within the limits of Article 3. He concludes that there is thus reason to apply the full Conventions to "serious civil strife." Farer, "Humanitarian Law and Armed Conflicts: Toward the Definition of 'International Armed Conflict,'" 71 *Colum. L. Rev.* 37, 47–48 (1971).

Sick,[10] the Wounded, Sick, and Shipwrecked at Sea;[11] Prisoners of War;[12] and Civilians.[13] The Article is a miniature Bill of Rights for those who are the victims of internal conflict. The portion of the Article here relevant provides:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (*a*) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (*b*) taking of hostages;
>
> (*c*) outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> (*d*) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.

The possibility of applying the Conventions as a whole was not overlooked. Article 3 also provides that:

> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

Presumably, this paragraph deals with the application of the Conventions under the circumstances which used to be identified through recognition of belligerency. That institution having fallen into disuse, it seemed appropriate to make the wider application of the Conventions contingent upon the

[10] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 *U.S.T.* 3114, *T.I.A.S.* No. 3362.

[11] Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 6 *U.S.T.* 3217, *T.I.A.S.* No. 3363.

[12] Convention relative to the Treatment of Prisoners of War, 6 *U.S.T.* 3316, *T.I.A.S.* No. 3364.

[13] Convention relative to the Protection of Civilian Persons in Time of War, 6 *U.S.T.* 3516, *T.I.A.S.* No. 3365.

agreement of the belligerents, which, for these purposes, would thus be put on a footing of equality.

The deceptively simple expression, "armed conflict not of an international character," has not proven easy to apply to the multiplicity of circumstances under which violence may break out in a state. It was intended that this expression should stand in contrast to the language of common Article 2, defining the scope of application of the Conventions as a whole. The Conventions are to "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

A number of states in the world are divided by provisional demarcation lines that have led to the establishment of separate governments, each of which effectively exercises jurisdiction over a portion of the territory of the state. Of such character are East and West Germany, North and South Korea, North and South Vietnam, and the People's Republic of China and the Republic of China. Because of the eagerness of the Swiss Federal Council—the depositary of the Geneva Conventions of 1949—to have as many parties to the Conventions as possible, ratifications or accessions have been received from both portions of most of these divided states.[14] If both governments are high contracting parties, then a conflict between them would seem to be a case of "declared war or any other armed conflict which may arise between two or more of the High Contracting Parties," even though for other purposes it might seem that the conflict is an internal one. However, this reading of Article 2, based on a narrowly logical construction, is not free from doubt.

A similar ambiguity exists about the nature of "wars of national liberation." When the Secretary-General was requested by the General Assembly to carry forward the study he had initiated on the adequacy of the existing conventions and on the need for new treaties, he was asked to give "special attention to the need for protection of the rights of civilians and combatants in conflicts which arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination and to the better application of existing humanitarian international conventions and rules to such conflicts."[15] If a "war of national liberation" is defined in these terms, such a conflict may range from an attempt to throw off colonial rule to resistance activities by the local populace against a belligerent occupant. The concept being as amorphous as it is, it cannot fail to provoke controversy. It can be maintained, on the one hand, that if a people under colonial rule is denied the right of self-determination guaranteed by Article 1, paragraph 2, of the Charter of the United Nations and takes up arms in order to secure its independence, then that people is entitled to political independence and

[14] *See* U.S. Department of State, *Treaties in Force, 1971* at 343, 347, and 355 (1971).

[15] G.A. Res. 2597 (XXIV), Dec. 16, 1969, 24 *U.N. GAOR* Supp. 30, at 62, U.N. Doc. A/7630 (1970).

sovereignty and should be treated as if it were a separate state.[16] This right, it is contended, is spelled out in a number of important general resolutions of the General Assembly, such as the Declaration on the Granting of Independence to Colonial Countries and Peoples,[17] as well as of resolutions applicable to particular situations. This view, it may be noted, creates a logical difficulty about the application of the Conventions as a whole under common Article 2, as the people fighting for self-determination is not a high contracting party to the Conventions. If the people constitutes a "Power," then the colonial power is bound by the Conventions in its relations with the other power—the people fighting for self-determination—if "the latter accepts and applies the provisions" of the Conventions. No such problem arises if the "war of national liberation" consists of resistance activity by members of the local population against a belligerent occupant, since in that case the persons involved depend upon high contracting parties to the Conventions, provided of course the parties to the conflict are parties to the Conventions.

The case for saying that a "war of national liberation" is a civil conflict is that the people fighting for self-determination has not yet achieved its independence. That independence would be marked by its recognition as a state by other states and by its becoming a party to the Geneva Conventions of 1949. Prior to that time, the insurgent forces would lack international personality.[18] The characterization of all wars of national liberation waged in pursuit of self-determination as internal conflicts avoids well nigh insoluble problems of characterization of internal conflict. For if a conflict fought within a state in the cause of self-determination is governed by international law but a conflict not legitimately in pursuit of self-determination is governed by Article 3 alone, then a decision concerning what body of law to apply turns on highly subjective value judgments about the nature of the conflict: A war of national liberation will turn out to be the war that I fight; the war you fight will be a colonialist one.

This problem has been recognized by the Secretary-General in his second report on the humanitarian law of war,[19] by the International Committee of the Red Cross,[20] and by the delegates participating in the I.C.R.C. Conference of Government Experts held in May and June of 1971,[21] but has not been resolved.

The two categories of war across provisional demarcation lines and

[16] *Respect for Human Rights in Armed Conflicts*; [Second] Report of the Secretary-General 66–67, U.N. Doc. A/8052 (1970).

[17] G.A. Res. 1514 (XV), Dec. 14, 1960, 15 *U.N. GAOR* Supp. 16, vol. i, at 66, U.N. Doc. A/4684 (1961).

[18] Report cited *supra* note 16, at 66.

[19] *Id.*

[20] 5 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Protection of Victims of Non-International Armed Conflicts* 23–35. Doc. CE/5b (1971).

[21] *Report of Commission II*, at 48–57 (1971).

wars of national liberation do not exhaust the circumstances in which the dividing line between international and internal conflict is obscured. A like problem will arise if the inhabitants of an area the sovereignty over which is in dispute rise in arms against the de facto authority in control of the area. If the area belongs to the territory of the government against which armed force is employed, then the conflict is an internal one. If the area is not subject to the sovereignty of that government, the conflict is an international one. In all of these instances, the perception of the conflict by the participants and by third states will turn on a subjective appraisal of the lawfulness of a government, the existence of a state, and the boundaries of the participants. So long as states and governments are left free to pursue their own recognition policies, just so long will determinations of the nature of the conflict have a highly subjective character.

The classification of a conflict as either internal or international becomes even more difficult when there is participation by a third state or third states in what had theretofore been a civil conflict. How is the conflict in Vietnam to be characterized in the strict terms of Articles 2 and 3 of the four Geneva Conventions of 1949?[22] The Republic of Vietnam, the Democratic Republic of Vietnam, and the United States are all parties to the Geneva Conventions of 1949, and, as pointed out above,[23] conflict between the Republic of Vietnam or the United States and the Democratic Republic of Vietnam is in literal terms an armed conflict between two High Contracting Parties. The Vietcong may supply the domestic element of the conflict.

It is easy enough to say that the participation of the United States internationalizes the conflict[24] so that under Article 2 of the Conventions, the whole of the humanitarian law of war applies. But as one analyzes the various pairings of opposing belligerents,[25] one is forced to give a separate classification to each such pair.

[22] The discussion in the text is based on the legal construction of Articles 2 and 3 of the four Geneva Conventions of 1949. The United States and the Republic of Vietnam have expressed their willingness to apply the Conventions in the conflict in Vietnam (5 *Int'l Rev. Red Cross* 477–78 (1965)) in response to the assertion of the International Committee of the Red Cross that "the hostilities raging at the present time in Vietnam both North and South of the 17th parallel have assumed such proportions recently that there can be no doubt they constitute an armed conflict to which the regulations of humanitarian law as a whole should be applied." Letter, June 11, 1965, from the International Committee of the Red Cross to the governments of the Democratic Republic of Vietnam, the Republic of Vietnam, and the United States and to the National Liberation Front of South Vietnam, 5 *id.* at 417. It appears that the International Committee of the Red Cross was merely encouraging the participants to apply the Conventions as a whole, rather than asserting that the Conventions already applied of their own force.

[23] *See* p. 521 *supra*.

[24] Falk, "Janus Tormented: The International Law of Internal War," in J. Rosenau (ed.), *International Aspects of Civil Strife* 185, 218 (1964); Farer, *supra* note 9, at 69; Meyrowitz, "The Law of War in the Vietnamese Conflict," in II R. Falk (ed.), *The Vietnam War and International Law* 516, 532 (1969).

[25] As done by Meyrowitz, *supra* note 24, at 524–33, but with results somewhat different from those reached here.

To start with the easy case, it would seem that hostilities between the United States and North Vietnam should be regarded as international, calling for the application of the entirety of the Conventions. At the opposite extreme, hostilities between the Republic of Vietnam and the Vietcong seem to be domestic conflict falling within Article 3. However, if, as appears to be the position of the United States, the Vietcong is an arm of the Government of the Democratic Republic of Vietnam, then conflict between South Vietnam and the Vietcong has the same character as conflict between South and North Vietnam. The nature of the conflict between the two governments in Vietnam turns of course on the answer to the questions whether war across a provisional demarcation line is international conflict and when a provisional demarcation line hardens into what amounts to an international frontier. If the conflict between South Vietnam and the Vietcong is internal and the conflict between South and North Vietnam international, then the position of a captured belligerent will turn on the forces in which he serves. If he serves the North Vietnamese forces, he is, in strict law, to be treated as a prisoner of war if he meets the requirements of Article 4 of the Geneva Prisoners of War Convention of 1949. But if he is a member of the Vietcong, then he can be tried and punished, subject only to the safeguards of Article 3 of the Conventions.

If the United States captures a member of the Vietcong, that person is to be held as a prisoner of war if the Vietcong is in actuality an instrument of the Government of North Vietnam. To say that the Vietcong is not such an instrument does not solve the problem. Is conflict between the Vietcong and the United States to be called international because of the foreign participant? The fact that the United States is assisting the Republic of Vietnam and transfers the prisoners that it takes to the Government of the Republic of Vietnam[26] suggests that members of the Vietcong should be treated in the same way as if they had been captured by the South Vietnamese armed forces in the first instance. It could not be expected that persons taken captive should be treated as prisoners of war under Articles 2 and 4 of the Prisoners of War Convention while in the custody of the United States but should lose that status and fall only under the protection of common Article 3 when transferred to South Vietnam.

The government of a state which is attacked by insurgents may, according to the view of a number of authorities, lawfully call upon a third state to assist it, and that state is entitled to aid in the suppression of the rebellion.[27] However, a state which assists the rebels through the use of armed force conducts unlawful intervention in the domestic affairs of the state in which the hostilities are carried on[28] and may by the same token be guilty of "the threat or use of force against the territorial integrity or political independence" of a state in violation of Article 2(4) of the Charter.[29] But these characterizations of the conduct of the external participant proceed on the comfortable assumption that it is possible to identify which is the lawful government and which is the insurgent faction. That simply cannot be done in many circumstances. When the attempt is made, the classification proceeds along the same subjective lines[30] previously mentioned in connection with the complexities of recognition policy.

[26] Pursuant to Article 12 of the Geneva Prisoners of War Convention of 1949.

[27] Moore, "The Lawfulness of Military Assistance to the Republic of Viet-Nam," *in* I R. Falk (ed.), *The Vietnam War and International Law* 237, 265 (1968); and see the statement by Professor Louis B. Sohn concerning the practice of the United Nations, *id.* at 266. The legality of external assistance even to the lawful government is disputed by other authorities. *See, e.g.*, 1 C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 253 (2d rev. ed. 1945).

The foregoing problems arise out of application of Article 3 common to the four Geneva Conventions of 1949 at the upper end of the spectrum of violence. At lower levels of violence, there must obviously be some distinction made between "armed conflict not of an international character" within the meaning of the Conventions and other forms of domestic violence. Students may throw paving stones at policemen. Bandits may hold a rich man for ransom. Gangs of armed men may hold up banks. Communal disorders may break out. Crowds may riot. Tribal or religious differences may lead to outbreaks of violence which the government of a state may be hard pressed to suppress. Civilian and military officials of the government may be assassinated for political purposes. Bombs may be thrown at police stations. The forms of violence are as diverse as the passions, the driving forces, the emotions, the motives, and the ingenuity of man.[31] And even those who are moved by cupidity or by the desire for power will attempt to cloak their actions in the raiment of morality or politics.

In its commentary on the Geneva Conventions of 1949, the International Committee has been able to do no more than to plead for a latitudinarian construction of Article 3, while summarizing the various proposals that had been put forward at the Diplomatic Conference for a more precise formulation of when the Conventions would be applicable to internal conflicts. These proposals—which, it must be emphasized, were not adopted—looked to such criteria as the following:

[28] As stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, under the rubric of the duty of non-intervention, ". . . [N]o state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another state, or interfere in civil strife in another state." G.A. Res. 2625 (XXV), Oct. 24, 1970, U.N. Doc. A/RES/2625 (XXV) (1970).

[29] Such conduct is often referred to as "indirect aggression."

[30] I D. O'Connell, *International Law* 326 (1965).

[31] In its report prepared for the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, the International Committee of the Red Cross referred to some of these forms of low-scale violence as "situations of internal disturbances" and "situations of internal tensions." 5 *Protection of Victims of Non-International Armed Conflicts* 79–94, Doc. CE/5b (1971).

—The party in revolt must possess an "organized military force," "an authority responsible for its acts," territory, and the means of carrying out the Conventions.

—The government is obliged to use its regular military forces against militarily organized insurgents in possession of territory.

—The insurgents have been recognized as belligerents.

—The dispute has been put on the agenda of the General Assembly or Security Council as a threat to the peace, breach of the peace, or act of aggression.

—The insurgents have an organization purporting to have the characteristics of a state, de facto authority over persons within a determinate territory, and armed forces acting under civilian direction and prepared to observe the law of war; and, moreover, agree to be bound by the provisions of the Conventions.[32]

The commentary takes these requirements to be indicative and not exhaustive and then, disregarding the stringency of these requirements, concludes that "the Article should be applied as widely as possible."[33] The justification is that no government could object to carrying out the terms of Article 3; no government should be allowed to claim the right to torture or to carry out a sentence without a previous judgment by a regularly constituted court. The discussion by the International Committee of the Red Cross leaves one with an oddly mixed impression. Those who were struggling with the problem at Geneva in 1949 were apparently thinking in terms very much like the conditions for recognition of belligerency, which would in the past have called for the application of the whole of the international law of war, while the I.C.R.C. pleads for a wide interpretation of the Article. The *ejusdem generis* rule applied to the illustrative examples would seem to point to exactly the opposite conclusion. Of only one thing one may be sure: There is no consensus as to the application of Article 3 to what are, in comparative terms, the lower levels of violence.

These problems of definition, whether at the top or the bottom of the spectrum of domestic violence, reflect, as questions of definition generally do, differences about the substantive law to be applied. Article 3 does not preclude the government of a state from punishing persons, subject to its jurisdiction, for the commission of crimes under the municipal law of that state. The rebel who kills a policeman or a soldier can thus be treated as a murderer, and nothing in Article 3 stands in the way of the imposition of the death sentence, if the trial has been properly conducted. If, on the other hand, the Geneva Prisoners of War Convention of 1949 is to be applied in its entirety, then insurgents captured in combat against the lawful government gain an immunity, it would seem, from the application of domestic law through their status as prisoners of war. The rebel is a criminal in the eyes of the government, while a prisoner of war is an individual who has violated no rule of municipal law, if he has not acted in contravention of international law. Every state must thus ask itself whether it desires to continue to apply its law for the maintenance of public order to all persons within the territory of the state or whether it is willing to grant an immunity from prosecution and a protected position under international law to those who fight against it. Criminal or protected person?

[32] Seventh Report drawn up by the Special Committee of the Joint Committee, July 16, 1949, 2B *Final Record of the Diplomatic Conference of Geneva of 1949*, at 120–23 (1949); Pictet, *supra* note 7, at 49–50.

[33] Pictet *supra* note 7, at 50.

The dilemma is at its most acute when the position of persons captured in combat is at stake, but a like choice must be made in connection with the Civilians Convention of 1949. If the humanitarian international law of war embodied in that Convention and in the Hague Regulations[34] is applied, the effect is to require treatment of territory under the control of the rebels as if it were the territory of a foreign state and treatment of insurgents and their sympathizers as if they were nationals of an enemy state. The law might even call for treating the territory recovered by the lawful government as belligerently occupied territory, if the whole of the Geneva Civilians Convention is applied. The Geneva Wounded and Sick Convention of 1949 has the least political significance, and a government would be under less embarrassment in applying it to a civil conflict than it would in the case of the Prisoners of War and Civilians Conventions.

The difficulty with the present Conventions of 1949 is thus that Article 3 does not afford enough protection, and the application of the Conventions as a whole tends to be politically unacceptable and unworkable.

Thus far our emphasis has been on the perception of the situation by the lawful government. The position of the insurgents must also be considered. Only states can be parties to the Conventions,[35] so that there is no room for an insurgent faction to become a High Contracting Party. The government of the state, which may be the same government that committed the state to the Conventions by ratification or accession or its successor, is bound according to the usual rule that it is the state, acting through its government, which is bound by a treaty. How then can the insurgents as a "party to the conflict" be bound to carry out duties under an instrument that they have not accepted? One answer is that all nationals of high contracting parties are bound by the Conventions, including Article 3, and that the rebels, qua nationals of a Party, are bound as individuals, who have formed themselves into a political collectivity.[36] A second basis for asserting

[34] Regulations annexed to Convention No. IV of The Hague respecting the Laws and Customs of War on Land, signed Oct. 18, 1907, 36 *Stat.* 2277, *L.N. T.S.* No. 539, 1 *Bevans* 631.

[35] Common Articles 56/55/136/151, 57/56/137/152, and 60/59/139/155 of the Geneva Conventions of 1949.

[36] G. Draper, *The Red Cross Conventions* 17 (1958).

that Article 3 is binding on the insurgents is that insurgents must be bound by the obligations of the State to the extent they purport to be the effective government of that State.[37] These propositions may be satisfying to the mind of the international lawyer, but they do not necessarily induce compliance by rebels. The fact is that whether a group of any sort has or has not expressly accepted the obligations of an agreement does have a great deal to do psychologically with the willingness of that group to carry out its purported obligations. The climate for compliance is even less propitious when the insurgents are rebelling against the authority of the very government that has assumed the obligations of the Conventions. And even if the obligations of Article 3 are not particularly onerous for the rebels, they will still see a certain lack of reciprocity in the government's having been afforded the opportunity to determine whether to assume the obligations of the Conventions while they, the rebels, have not been given the occasion for a like decision. Considerations such as these help to explain why it is that the National Liberation Front in Vietnam has refused to apply the Conventions. It asserted that it "was not bound by the international treaties to which others beside itself subscribed."[38]

The position under the "Convention in miniature" of Article 3 is to be contrasted with the situation envisaged under the third paragraph of that article, whereby "The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention." In that event there is a desirable mutuality of obligation under an agreement freely entered into by the rebel forces. However, the difficulty of communication and, moreover, of negotiation between a government and insurgents in revolt against its authority is such that little or no use has been made of this provision.

Neither the application of the short bill of rights in Article 3 nor the bringing into force of all or part of the Conventions by means of a special agreement between the parties to a civil war is to "affect the legal status of the parties to the conflict." Nevertheless, governments have shown a reluctance either to acknowledge the existence of internal armed conflict in terms of Article 3 or to conclude a special agreement with the rebels lest that act in any way enhance the status of the insurgents. Thus, the French Government refrained from concluding any agreement with the Gouvernement Provisoire de la République Algérienne, although urged to do so both by the International Committee of the Red Cross and the Provisional Algerian Government.[39] It is not without significance that the Government of Pakistan failed to acknowledge the existence of an internal armed conflict during the recent insurrection in East Pakistan.

The obligations of Article 3 are cast in such general terms and leave so

[37] Pictet, *supra* note 7, at 51.

[38] 5 *Int'l Rev. Red Cross* 636 (1965).

[39] Greenberg, "Law and the Conduct of the Algerian Revolution," 11 *Harv. J. Int'l L.* 37, 50–51 (1970).

many things unto that they cannot, even under the best of circumstances, be an adequate guide to the conduct of belligerents in civil strife. What legal rules should obtain in internal conflict will be discussed later in this chapter, and several instances of the inadequacies of Article 3 will suffice at this point. The principle that "The wounded and sick shall be collected and cared for" is not enough to guarantee the protection of the wounded and sick and to safeguard the position of those who minister to them. The totality of "judicial guarantees which are recognized as indispensable by civilized peoples" which are required before the "passing of sentences" are not defined. It is not enough to say that captured combatants must "be treated humanely, without any adverse distinction." The protection of non-participants in the civil strife is not spelled out.

The answer that is often given to the inadequacy of Article 3 is to call for the application of the Conventions as a whole, according to the exhortation to the parties "to endeavour to bring into force, by means of special agreements, all or part of the other provisions" of the Conventions. Aside from the difficulties, already alluded to, of negotiation between government and insurgents, there are certain technical difficulties in the application of the Prisoners of War and Civilians Conventions in civil war. Legal machinery designed with a view to its being applied to international conflict will simply not work in internal conflict. The gears of the Conventions do not in a number of respects mesh with those of civil war.

One may start with a key provision of the Prisoners of War Convention, defining the persons who are protected by the Convention. Although Article 4, defining prisoners of war, does not in most instances require that such persons not be of the same nationality as the Detaining Power, case law indicates that a person who is a national of the Detaining Power need not be treated as a prisoner of war and may be tried for treason and other unlawful acts under the law of the state that claims his allegiance.[40] Such a qualification on the broad scope of Article 4 would mean that most rebels could not claim prisoner of war status, except if the protection of the Convention as applied to civil war were to be considered to be wider than the protection of the Convention applied in international conflict. This assumption about the limits placed on Article 4 is borne out by the requirement of Article 87 of the same Convention that "When fixing the penalty [for an offense], the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance. . . ."[41]

[40] Public Prosecutor v. Oie Hee Koi, [1968] 2 W.L.R. 715 (P.C.), noted in Baxter, "The Privy Council on the Qualifications of Belligerents," 63 *Am. J. Int'l L.* 290 (1969).

[41] *See also* Article 100 of the same Convention requiring that, before the death sentence can be imposed, the attention of the court must be drawn to the fact that a prisoner of war is not a national of the Detaining Power and owes it no allegiance.

number of the obligations of the Prisoners of War vention are cast in terms of national treatment under the law of the Detaining Power. This national treatment is then in a number of instances related to the national law or courts of the Detaining Power. Article 102 provides, for example:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

The other provisions of Section III of Chapter III lay down a number of other stipulations to be observed in judicial proceedings against prisoners of war. The requirement of Article 102 poses no particular difficulty for the lawful government, but insurgents may lack a system of national law and courts and may find it difficult or impossible to observe all of the procedural safeguards called for. Article 51 requires that national legislation concerning the protection of labour be applied to prisoners of war. It is unlikely that any such legislation will have been enacted by insurgents. Many other provisions impose obligations that are too onerous to be borne by insurgents —such as the provision of sufficient food to keep prisoners in a good state of health; regard must be paid to the habitual diet of the prisoners.[42] Prisoners of war are to be interned "in premises . . . affording every guarantee of hygiene and healthfulness."[43] The guerrilla tactics and irregular warfare conducted by insurgents would often make it physically impossible for these obligations to be discharged. And in the absence of reciprocity on the part of the rebels, it is unlikely that the authorities of the state can be expected to comply in all strictness with the Geneva Prisoners of War Convention.

Two key concepts of the Geneva Civilians Convention of 1949 make it fundamentally unworkable in internal conflict. One of these is that the persons protected by the Convention must be of the nationality of another state. The first paragraph of Article 4 of the Convention provides:

> Persons protected by the Convention are those who, at any given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict, or Occupying Power of which they are not nationals.

Only fourteen articles,[44] within a section dealing with "General Protection of Populations against Certain Consequences of War," also protect a state's own population. In its literal terms, the Convention, with the exception of these fourteen articles, cannot be applied to civil conflicts because the insurgents are of the same nationality as the state undertaking the obligations of the Convention. It is not possible to say that rebels should be treated *as if*

[42] Geneva Prisoners of War Convention of 1949, Art. 26.
[43] *Id.*, at Art. 23.
[44] Arts. 13–26.

they were enemy .onals. In the first place, this is not what the Co. .i-tion says. In the second place, how can this status by analogy be determined, when the allegiance of civilians is sought by both belligerents and cannot readily be ascertained in individual cases? Nationality is a fixed legal status; loyalty or allegiance is quite another thing.

Other provisions of the Convention apply to "territory of a party to the conflict" and to "occupied territory." In internal conflict, the lawful government and the insurgents will both maintain that there is only "territory of a party to the conflict." Territory cannot be belligerently occupied by the lawful government or the rebels. There is no starting point which divides territory into friendly and enemy areas, so that, when the latter type of area is occupied, it will be belligerently occupied. It surely cannot be maintained that the insurgents should be required to treat all territory over which they exercise control as being belligerently occupied or that the lawful government should be forced to treat territory liberated from the control of rebels as belligerently occupied. It is of the essence of belligerent occupation that it should be exercised over foreign, enemy territory. Such requirements as that of Article 43 of the Hague Regulations that the occupant must respect, "unless absolutely prevented, the laws in force in the country" are simply unworkable in domestic conflict.

Even the machinery for supervision of the operation of the Conventions will not work properly in civil war. Although no Protecting Power has been appointed since the Second World War, the institution still exists.[45] It involves the activity of a third neutral state on behalf of individuals depending on one of the parties to the conflict and in the hands of the opposing belligerent. The Protecting Power maintains communication between two states, and the very appointment of the Protecting Power involves the agreement of high contracting parties to the Conventions. A government asked to designate a Protecting Power to look after its personnel in the hands of the insurgents would justifiably fear that the designation of a Protecting Power would give some degree of international legitimacy to the insurgents themselves.[46] The institution of the Protecting Power, already close to the vanishing point in international conflict, would be under more extreme stress in civil conflict.

It is unfortunate that no serious attempt has ever been made to determine which articles of the four Geneva Conventions of 1949 could work in internal conflicts. If only the "humanitarian" provisions of the law are to be applied in civil war, then it is still necessary to identify what those "humanitarian" principles are and what becomes of the rest of the Conventions. Enough has been said here to indicate that grave difficulties will be encountered in giving full effect to the entirety of the Geneva Conventions of 1949 in civil conflicts.

[45] *See* common Art. 8/8/8/9.
[46] The inability of Israel and the Arab States to designate a Protecting Power is similarly attributable, in part at least, to the fact that the Arab States do not recognize the existence of Israel. That conflict is, of course, international in character.

e generally unsatisfactory state of the law conc ıg internal conflicts has led the Secretary-General of the United Nations to suggest that this is an area of the law where elaboration of additional rules "in the form of a protocol or of a separate additional convention" is called for.[47] The International Committee of the Red Cross, which has had this subject under consideration for a number of years, submitted a series of proposals to the Conference of Government Experts held at Geneva in May and June of 1971.[48] It was recommended by the Secretary-General that the General Assembly defer further examination of the subject until the International Committee of the Red Cross had had an opportunity to deal with the question.[49]

At the Conference of Government Experts, there was a substantial amount of support for the idea of moving ahead with a protocol—amounting in effect to a new Geneva convention—applicable to internal conflicts.[50] The discussions at Geneva provided some indication of what kind of new obligations States would find acceptable. The delegation of Canada actually submitted a detailed draft,[51] and it would seem that the time has now come for the actual preparation of a draft protocol by the International Committee of the Red Cross or by a group of interested states. If that draft were to be found acceptable at a further conference of government experts, the draft could then be submitted to a diplomatic conference convened either by the Swiss Federal Council, as was the case in the Diplomatic Conference of 1949, or by the General Assembly, by reason of its awakening interest in the humanitarian law of war.

The approach which must be taken in the preparation of a protocol is that protection must be afforded to the human rights of combatants and non-combatants alike during internal conflict. At the same time, due respect must be paid to the need of governments to have at their disposal means of maintaining domestic order and of punishing those who threaten it or attack it. In the reconciliation of these two competing demands lies the principal task of those who must draft the new protocol.

At the outset, the same problem of definition encountered in connection with Article 3 arises again. The new protocol could be given the same scope as Article 3 itself, but so long as the types of conflict to which Article 3 refers are unclear, the imprecision should not be carried over into a new treaty. The alternative is to leave Article 3 as it is and to embark on a new definition of "armed conflict not of an international character" for the purposes of the prot alone. The resulting situation is not fully satisfa y, as there would then be three separate bodies of law applicable to different types of internal conflict: (a) the totality or part of the existing conventions brought into force by a special agreement between the belligerents; (b) Article 3 in its present form binding parties to the four Geneva Conventions of 1949; (c) the new protocol applicable to some of the internal conflicts covered by Article 3—or to all of them, or even to more of them. It must be borne in mind that the definition of the types of conflict to which the protocol will apply must depend on the nature of the substantive obligations to be laid down by the protocol. The easier to accept are the duties of the treaty, the more likely states are to apply the agreement to a wide range of circumstances. Correspondingly, the higher the level of performance required, the more limitative the definition will inevitably be.

One possible way of avoiding the problem of definition would be to allow each state, by analogy to the procedure whereby states accept the compulsory jurisdiction of the International Court of Justice by unilateral declaration,[52] to specify the circumstances under which it would be prepared to apply the rules of the protocol. Since the protocol would apply to internal conflicts only, there would be no need of mutuality of obligation with any other state.

But if a definition is called for, it might take the following form:[53]

> This Protocol shall apply to any case of armed conflict not of an international character which is carried on in the territory of a High Contracting Party and in which
>
> (1) organized armed forces, subject to a system of military discipline, carry on hostile activities in arms against the authorities in power, and
>
> (2) the authorities in power employ their armed forces against such persons.
>
> This Protocol has no application to situations of internal disturbance or tension.

It will be observed that the definition is cast entirely in terms of objective factors; taking into account the motives or purposes of the insurgents would blunt the edge of the definition and make it much harder to apply. The definition actually goes back to some of the criteria that were suggested for the application of Article 3 at the Diplomatic Conference of 1949.[54] The proposal of the International Committee of the Red Cross that rules should be framed for "internal disturbances" and "internal tensions"[55] does not

[47] *Respect for Human Rights in Armed Conflicts*; [Second] Report of the Secretary-General 51, U.N. Doc. A/8052 (1970).

[48] 5 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Protection of Victims of Non-International Armed Conflicts*, Doc. CE/5b (1971).

[49] Report cited *supra* note 47, at 52.

[50] *Report of Commission II*, at 3 (1971).

[51] Canadian Draft Protocol to the Geneva Conventions of 1949 relative to Conflicts not International in Character, Doc. CE Plen/2 bis (1971).

[52] Statute of the International Court of Justice, Art. 36, para. 2, 59 *Stat.* 1055, *T.S.* No. 993, 3 *Bevans* 1153; see *Report of Commission II*, at 19 (1971).

[53] Based on the Report of the Drafting Committee, Doc. CE/Com. II/13 rev. 1 (1971). The Canadian draft referred to in note 51 *supra* contained no definition.

[54] *See* p. 526 *supra*.

[55] Report cited *supra* note 48, at 79–94.

seem to have elicited much support. The exclusionary clause of the definition assures that it has no application to riots and other like disorders.

The definition makes no attempt to deal with the problem of external participation in a civil conflict. The suggestion that in that event the entire conflict should be regulated by the entirety of the humanitarian law of war[56] is not persuasive. For the government, it would offer a disincentive to acceptance of foreign aid, since the participation even of small forces of a friendly foreign state would require that captured rebels be accorded the status of prisoners of war and thus be immunized from the impact of municipal law. On the other hand, the insurgents would have a strong incentive to seek aid from outside, since they would thereby improve their position by being treated as prisoners of war. The effect would be to stimulate the escalation of internal into international conflict.[57]

If a new protocol on internal conflicts were to be drawn up there would be less reason to think in terms of automatic application of the Geneva Conventions of 1949 as a whole[58] when the conflict assumes the proportions of an inter-state conflict. The possibility should be left open of making the international body of law applicable through special agreements, as now provided by Article 3. However, as has been demonstrated above, the Conventions are not designed to operate effectively in times of civil strife. Indeed, a great service would be done if model special agreements[59] were to be drawn up, identifying those provisions that, subject to modifications in certain respects, could function effectively in time of internal conflict.

Once the hurdle of determining when the protocol on internal conflicts should be applicable has been surmounted, the substantive content of the protocol falls into place with somewhat greater ease. There are certain human rights which obviously do need protection—ones which states would not find it unduly burdensome to guarantee. Other safeguards have political implications and would find less ready acceptance.

Starting with the most obvious and acceptable stipulations, the new protocol or convention should certainly contain wider provisions for the protection of the wounded and sick and of the medical personnel who minister to them.[60] In this respect, there could be a good deal of drawing upon the Geneva Wounded and Sick Convention of 1949 and Part II of the Geneva Civilians Convention of 1949.[61] There are no provisions about relief and the functions of humanitarian organizations in the existing

[56] Report cited *supra* note 48, at 21.

[57] *See Report of Commission II*, at 41–47.

[58] As proposed by the International Committee of the Red Cross in Report cited *supra* note 48, at 15. The expression used by the I.C.R.C.—"the whole of the international humanitarian law"—is itself ambiguous.

[59] As proposed by an expert from France in Doc. CE/Com. II/5 (1971).

[60] *See* Report cited *supra* note 48, at 53; and Canadian Draft Protocol cited *supra* note 51, at 3.

[61] Applicable to "The General Protection of Populations against Certain Consequences of War."

Article 3. There is room for specific rules on this subject, but states must be sensitive to possible infringements upon their sovereignty in connection with relief operations, and those states that have had recent experience of civil war, such as Nigeria, Indonesia, and Pakistan, may be expected to counsel caution in drafting sweeping provisions on this topic.[62]

Without going so far as to grant the status of prisoners of war to captured combatants, provisions should still be inserted which will assure humane treatment of those who have engaged in belligerent acts and are hors de combat. The protocol should not stand in the way of prosecution of those who have engaged in rebellious activities against the state, but it should assure that penal proceedings are conducted with both procedural and substantive due process of law.[63] The internment of individuals who have not engaged in hostilities but are thought to represent a threat to the security of the state should likewise be subject to procedural and substantive safeguards.[64]

The International Committee of the Red Cross proposed three measures to soften the impact of municipal law upon combatants in civil conflict. One would preclude the punishment of a fighter "solely for having belonged to armed forces, unless imperative security requirements make this necessary."[65] The proposal may accomplish both too much and too little—too much in the sense of making it impossible to impose severe punishment on the leaders of an insurrection, and too little because of a general escape clause to deal with "imperative security requirements." The second proposal was to defer the imposition of the death penalty until the termination of the hostilities, again subject to the condition "unless imperative security requirements make this necessary."[66] The proposal has the advantage of avoiding the blood-bath that may come of savage justice and retaliatory killings in war, but it must also be borne in mind that to keep an individual under death sentence for a period running into years can of itself be a cruel and unusual punishment.[67] The third proposal was for a general amnesty at the conclusion of hostilities.[68] The principle is laudable, but it may be too much to put the obligation in the term of a *general* amnesty.

While states and insurgent factions may be in a position, through special agreements, to extend prisoner of war treatment to combatants in civil conflict, the protocol can best avoid offense to the sensitivities of states if it does not speak in the terms employed in the law relating to international

[62] *See, e.g., Report of Commission II* at 28 referring to the fact that developing countries, which had in a number of instances been ravaged by civil conflict, "required stability and order; the very existence of many of them had been in jeopardy."

[63] *See* Canadian Draft Protocol cited *supra* note 51, at 5.

[64] Analogous to those prescribed in Articles 78–135 of the Geneva Civilians Convention of 1949.

[65] Report cited *supra* note 48, at 57.

[66] *Id.* at 59.

[67] *Report of Commission II* at 33.

[68] Report cited *supra* note 48, at 60.

lict. Instead of granting prisoner of war status to ıbatants and noncombatants who have engaged in hostile activity, the protocol should provide humane standards for the internment or imprisonment of such individuals. The provisions on internment of civilians in the Geneva Civilians Convention can be heavily drawn upon.[69]

The provisions against inhumane treatment now found in rudimentary form in common Article 3 require expansion.

The question of the protection of the civilian population generally, particularly in connection with aerial bombardment, the use of certain types of weapons (such as napalm), and the danger to civilians posed by certain types of tactics,[70] is intimately related to the protection of the civilian population under similar circumstances in international war. Any stipulations applicable to internal conflict must therefore abide the working out of these problems in the wider context of international armed conflict.

The greatest care must be taken to assure that both the lawful government and the insurgents will be in a position to carry out the provisions of any new protocol. Not only must there be reciprocity of obligation, but the rules must be framed with a realistic understanding of what the capacities and purposes of insurgents are. Since the insurgents will not be parties to the instrument, it is essential that each provision have an inner persuasiveness and reasonableness that commends it as a humane and workable rule of law.

And finally, in light of the widespread noncompliance with the existing Geneva Conventions of 1949, one must cautiously ask whether the new protocol will simply be a number of new provisions adding to the existing bulk of the law or an effective instrument for the protection of human rights and for the amelioration of the conditions of what is often the most savage form of warfare—domestic armed conflict within the borders of a state. The new protocol will in the end be effective only if states wish to make it so.

[69] Arts. 68–135 of the Geneva Civilians Convention.

[70] *See* 3 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Protection of the Civilian Population against Dangers of Hostilities*, Doc. CE/3b (1971).

PART VII | COMMENTS BY MEMBERS OF THE PANEL

ANNEX 3

P.H. Kooijmans, 'The Security Council and Non-State Entities as Parties to Conflicts' in: K. Wellens (ed.), *International Law: Theory and Practice*, The Hague: Kluwer Law International, 1998, pp. 333-346.

from its Member States for a range of domains which resort to the organisation, including competence to take decisions on questions that engage the Member States » (personal translation).

15 *Ibidem* Article 2 (3), "any reference to the constitutive act to the Member states also applies to any Member Organisation, unless there are provisions to the contrary". (personal translation).

16 "every regional organisation of economic integration who applies for admission to the Organisation deposits, at the same time, a declaration of competence which makes explicit the questions for which its Member States have transfered competence to it". (personal translation)

17 These modifications should be examined during the next ordinary session of the Council scheduled in Morocco for October 1997.

18 See our study: Le statut de l'Union européenne dans les organisations internationales, in *op.cit.* (note 13); also see our book *L'action internationale reative au commerce des produits de base. Contribution à l'étude juridique du nouvel ordre économique international*, Paris, Pédone, 1986, which analyses the commodity agreements and in which the question of the participation of the Community in international organisations was for the first time focused on.

19 See our study, *op.cit.* (note13). The specific problems, related to the joint participation of the Community and its Member Staes in conferences and organisations when competences are mixed or shared, were the object of negotiations during the Intergovernmental Conference.

20 *Ibidem.*

21 "The meetings and works of the Committee of Ministers, the Delegates of the Ministers, the Groups of Reporters of the Delegates and any other work group... .shall be open to participation of the Commission on invitation from the competent authorities of the Council of Europe".

22 Exchange of letters between Mr Daniel Tarschys, Secretary General of the Council of Europe and Mr Jacques Santer, President of the Commission of the European Communities. This agreement comes under the exercise by the Commission of the powers that Article 229 conferred rather than under Article 230 of the Treaty of Rome, according to which the conclusion of a comprehensive agreement between the Community and the Council of Europe was planned.

23 "Even though the Community is not a Member of the C.S.D., it shall fully participate in the works of the Commission and its susidiary organs".(personal translation).

THE SECURITY COUNCIL AND NON-STATE ENTITIES AS PARTIES TO CONFLICTS

P.H. Kooijmans

I. Introduction

On 28 August 1997 - shortly before I wrote this contribution for Eric Suy's Liber Amicorum - the Security Council adopted Resolution 1127 (1997) on the situation in Angola.[1] In this resolution the Council expressed its grave concern at the serious difficulties in the peace process which it ascribed mainly to the National Union for the Total Independence of Angola (UNITA)'s slowness in implementing its obligations under the peace agreements. It called on both parties (but in particular on UNITA) to comply fully and without delay with their obligations.

In the operative part of Section B, however, the Council went further and, acting under Chapter VII of the Charter, ordered mandatory selective sanctions against UNITA. These sanctions would come into force on 30 September unless UNITA could provide evidence that it had by that time taken "concrete and irreversible steps" to comply with its obligations.

This resolution (as its predecessor Resolution 864 (1993) in which the Council also imposed sanctions on UNITA) is remarkable since on the one hand it is addressed to an entity which is not a state and does not even presume to be a state, while on the other this entity is evidently held to be legally responsible for its wrongful conduct. This raises a number of legal questions to which I will return later.

First, however, something must be said about the practice of the Security Council with regard to non-state entities who are parties to a dispute or a conflict.

II. Non-State Entities as Parties to a Conflict

From the history and also from the wording of the Charter (see, *e.g.* the first paragraph of the Preamble) it is evident that the United Nations Organization was established with one of its main purposes being the prevention of inter-state wars. Internal conflicts, where by definition at least one of the parties is a non-state entity, were generally considered to be outside the competence of the Organization by virtue of Article 2, paragraph 7 of the Charter. In the last sentence of Article 2, paragraph 7, there is an important proviso, *viz.* that the principle of non-intervention as laid down in this paragraph 'shall not prejudice the application of enforcement measures under Chapter VII'[2]. Only when the effects of an internal conflict constituted a threat to *international* peace and security was the Security Council entitled to take enforcement measures to prevent or control trans-border effects which might lead to, for example, a clash with or between neighbouring states. The Council was, however, - at least

K. Wellens (ed.), International Law: Theory and Practice, 333–346.

formally - not entitled to make suggestions regarding the settlement of the conflict itself, since this belonged to the domain reservé of the territorial state. Formally, therefore, it seemed to be out of the question that the Security Council would ever have to deal with non-state entities as parties to an internal dispute.

However, the Palestinian war of 1948, meant that the Security Council was, for the first time confronted with a non-state entity[3]. Fighting broke out in Palestine on the eve of the United Kingdom's termination of its mandate regarding the territory. At this stage the conflict was not yet a conflict between states, although a number of Arab states were involved. At the same time it was abundantly clear that international peace and security were at risk. Without much deliberation the Council invited the Jewish Agency for Palestine and the Arab Higher Committee (both non-state entities) to make representatives available to the Security Council for the purpose of arranging a truce between the Arab and Jewish armed groups and to bring about a cessation of acts of violence[4]. This effort of the Council failed; fighting continued and the Council called upon "all persons and organizations in Palestine, and especially upon the Arab Higher Committee and the Jewish Agency, to take certain measures"[5]. It should be noted that since the Jewish Agency was the forerunner of the future Provisional Israeli Government, it can hardly be compared to a normal non-state party in an internal conflict. On 15 May 1948 the State of Israel was proclaimed and from that time the conflict became an inter-state conflict; in Resolution 50 (1948) of 29 May 1948 in which the Council threatened to take action under Chapter VII (a threat which was repeated in Resolution 54 of 15 July 1948), it addressed itself to "all Governments and authorities concerned".

In the present context the case of Rhodesia also must be mentioned. It was the first time that the Council made use of its competence under Article 41 of the Charter. But, as Eisemann correctly points out, this took place in a rather peculiar setting:

> "La première mise en oeuvre de l'article 41 présentait une double originalité car, d'une part, elle visait non un Etat membre de l'O.N.U. mais une entité territoriale à laquelle était denié la qualité étatique et, d'autre part, elle intervénait dans un conflit présentant tous les caractères d'une affaire interne du Royaume-Uni".[6]

The Council was aware of the latter situation. In one of its first resolutions adopted after the Unilateral Declaration of Independence of 11 November 1965 it called upon the Government of the United Kingdom to put an end to the situation, while at the same time determining that its continuance in time constituted a threat to international peace and security. It qualified the white minority régime as an illegal authority and called upon all states not to recognize it and not to entertain any diplomatic or other relations with it[7]. In its many subsequent resolutions it did not address the minority régime directly, consistently referring to it as the illegal (racist/white minority) régime. It was only after the conclusion of the Lancaster House agreement in 1979 and after the termination of the enforcement measures taken against Rhodesia that the Council called upon 'all parties' to comply with the Lancaster House agreement. But at that time the Government of the United Kingdom had re-established its authority over the territory.

The Rhodesia case is quite unique in all its ramifications. In the first place it is doubtful whether the situation in Rhodesia in its initial phase constituted a threat to international peace and security in the traditional sense of the word, although it could easily develop into one (note the Council's considered use of the term 'its continuance in time'). Secondly, although in the course of time a bloody internal armed conflict broke out, the Security Council never dealt with it. It was the government of what - short of recognition by other states - in all other respects was a state in the sense of public international law and in any case purported to be a state, that was the target of its action. Nevertheless it is remarkable, as Eisemann points out that:

> "l'application de sanctions à la Rhodésie - i.e. contre une entité non souveraine et au motif de son organisation politique interne - n'ait donné lieu, au sein du Conseil, à aucun débat juridique approfondi"[8].

It was only after the end of the Cold War that the Security Council really involved itself in internal conflicts[9]. Although in most of its resolutions dealing with such conflicts reference is made to international repercussions, this is hardly persuasive. It is first and foremost for humanitarian reasons that the Council will get involved. In its efforts to settle such conflicts the Council usually addresses itself to 'all parties concerned', without mentioning any party in particular.

I will only deal with those cases where the Security Council envisaged or actually enacted enforcement measures against a non-state party to an internal conflict, since it is particularly in such cases where legal issues may arise.

During the conflict in the former Yugoslavia it was the refusal to accept a peace settlement which compelled the Security Council to impose sanctions on a non-state entity. Following its expressed approval of one of the various peace-plans which had been proposed, the Council "strongly condemned the Bosnian Serb Party for its refusal to accept the proposed territorial settlement" (the other parties to the conflict had accepted it). Consequently it ordered comprehensive mandatory sanctions to be imposed against "those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces"[10], comparable to those imposed already on the Federal Republic of Yugoslavia (Serbia and Montenegro) with which the Serb part of Bosnia had an open border.

The Bosnian Serb party (as the Security Council consistently called it) was actually the Republika Srpska, an entity claiming statehood. To a certain extent, therefore, the situation is comparable to that of Rhodesia. In both cases we are dealing with a territorially-based entity with state-like institutions. In both cases the Council refused to recognize this claim of statehood but nevertheless imposed sanctions against the régime as if it was a state, thereby acknowledging that the regime effectively controlled public life within the territory concerned. In all other respects, however, the situations were radically different. In Bosnia there was an open armed conflict. The Republika Srpska had seceded from the State of Bosnia and Herzegovina, whose territorial integrity, according to the Council, should be maintained at all costs. Consequently it had to either disappear as a separate entity or to accept a position within the context of a wider Bosnian State. In the case of Rhodesia the Council did not object to a separate statehood, once the

condition that multi-racial institutions were established was satisfied. However, in both cases there were more or less stabilized *de facto* regimes[11]. In the case of Rhodesia as with Republika Srpska, we are dealing with state-like entities whose claim to statehood was denied.

A completely different situation can be found in two other cases where the Security Council threatened to take or actually took enforcement measures against a non-state entity, *viz.* the Khmer Rouge in Cambodia and UNITA in Angola. In these cases it was not the refusal to *accept* a settlement endorsed by the Council, but the refusal to *implement* an agreed settlement, which moved the Council to envisage or actually impose sanctions.

When during the implementation period of the 1991 Paris Agreement on a Comprehensive Political Settlement of the Cambodia Conflict one of the parties to the agreement, the Party of Democratic Kampuchea (Khmer Rouge) sabotaged the peace-process by its conduct, the Security Council first expressed its concern and demanded that the PDK complied with its obligations, and then expressed its intention to "consider appropriate measures to be implemented should the PDK obstruct the implementation of the peaceplan, such as the freezing of the assets it holds outside Cambodia"[12]. No mention was made of Chapter VII; therefore the Council left open whether such measures would be recommendatory or mandatory in character. In the meantime the Council took some quasi-sanctions; invoking certain provisions of the peace-agreement itself it called on "those concerned" to prevent the supply of petroleum products to the areas occupied by any Cambodian party not complying with the military provisions of the agreement. The Council did not carry through its threat to take further measures.

Such further measures *were* taken in the case of Angola to which I referred already at the beginning of this article. Resolution 1127 (1997) which is mentioned above was, however, not the first occasion the Council took enforcement measures against UNITA.

On 8 May 1991 the Government of Angola informed the Secretary-General of the United Nations that a peace-agreement had been signed by the Government and UNITA. This agreement was the result of mediation by Portugal while the United States and the Soviet Union participated in the peace process as observers[13].

After elections were held in 1992 and which were won by MPLA, the government party, UNITA began to obstruct the implementation of the peace accords and it started anew its military activities. In Resolution 851 (1993) of 15 July 1993 the Security Council condemned UNITA and expressed its readiness to consider the imposition of measures, including a mandatory arms embargo. Two months later, on 15 September 1993[14] the Council determined that, as a result of UNITA's military actions, the situation in Angola constituted a threat to international peace and security and imposed a mandatory embargo on arms and petroleum products against UNITA, subject to further reporting by the Secretary-General of the United Nations.

On 15 November 1994 a new agreement was signed, the Lusaka Protocol, in which the peace accords of 1991 were again confirmed[15]. Again UNITA failed to comply with the agreement and this once again caused the Security Council to take action. This time it ordered mandatory travel restrictions to be imposed on senior UNITA officials; if UNITA continued its obstruction the Council would

take further measures, such as trade and financial restrictions. There is, however, an interesting difference between Resolution 864 (1993) and Resolution 1127 (1997). The basis for the enforcement measures taken in 1993 were UNITA's continued military activities, a finding of fact which led the Council to a determination of a threat to the peace[16]. Res. 1127 (1997) on the other hand, seems to be based on a quasi-judicial finding. Having deplored in the last preambular paragraph UNITA's failure to comply with its *obligations*, the Security Council demanded in operative section A that UNITA implemented immediately its *obligations* under the Lusaka Protocol. The fact that it failed to do so resulted in a situation that, according to the Council constitutes a threat to international peace and security (first preambular paragraph of section B) and entitled the Council to take measures under Chapter VII.

In this respect it is also noteworthy that in paragraph 7 the Security Council decided that the enforcement measures shall take effect on 30 September 1997, unless it concludes on the basis of a report by the Secretary-General, that UNITA has taken "concrete and irreversible steps to comply with all the *obligations* set out in para.'s 2 and 3 above" (these paragraphs refer to the Lusaka Protocol) (emphasis added). This use of juridical language raises a number of legal questions: are the obligations to which the Security Council constantly refers obligations under international law? And if that is the case then, how could UNITA, a non-state entity, commit itself to obligations under international law? Is the Lusaka Protocol, the peace agreement to which reference is made in section B of the resolution, an internationally binding agreement? And if this is so, does that mean that UNITA has some kind of international legal personality? These and other questions will be dealt with in the following paragraph.

III. The Position of Non-State Parties to an Internal Conflict under International Law

It is not unusual that internal conflicts are settled through agreements of an internationalized character. Sometimes they take the form of genuine international instruments. The Agreement of 23 October 1991[17] on the Political Settlement of the Cambodian Conflict can be found in a document signed by the 19 States participating in the Paris Conference on Cambodia. The Dayton Agreement[18] which brought an end to the Bosnian conflict was signed by three independent states (Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia) and was witnessed by the members of the so-called Contact Group and the European Union. In such cases the parties to the (internal) conflict are often not separate signatories in themselves but their consent is a precondition for the conclusion of the agreement.[19]

It is interesting to note that in Resolution 792 (1994), in which the Security Council condemned the failure of the Khmer Rouge to comply with its obligations under the Paris agreements, similar language is used to that of Resolution 1127 (1997). Does this mean that the Council is of the opinion that the Lusaka Protocol can nevertheless create similar obligations, considering that it is not an inter-state agreement in the sense of the Paris and Dayton Agreements but was signed by the Presidents of the Republic of Angola and of UNITA and by the

Special Representative of the Secretary-General of the United Nations as Mediator in the presence of the representatives of the observer states, the United States, Russia and Portugal? The answer seems to be in the affirmative. The fact that it is concluded between a government and an insurrectionist party does not in itself detract from its internationalized character. The United Nations as an organization of states has been deeply involved in the conflict, peace-keeping forces have been deployed, the Secretary-General through his Special Representative has continuously mediated. If a settlement is reached which is co-signed by the Secretary-General's representative, the non-state entity must be assumed to have not only committed itself to its counterpart, (the Government) but also to the United Nations. If the latter interpretation is correct then the contractual bond must necessarily have an international law character since such an agreement is by definition governed by public law.

In this respect it is interesting that in section B of Resolution 1127 reference is made only to UNITA's obligations under the Lusaka Protocol of 1994, while in the preamble the Security Council deplores UNITA's non-compliance with the Peace Accords of 1991, the Lusaka Protocol and the relevant Security Council resolutions. The Peace Accords of 1991 were, however, signed by the two Angolan parties only. Despite the fact that they were the result of international mediation, they were not internationalized agreements. They only obtained that status when they were confirmed in the Lusaka Protocol.

By means of a preliminary conclusion, therefore, we might say that insurrectionist movements who are parties to an internationalized peace-agreement or who have committed themselves in such an agreement have legal obligations under international law. If this is the correct conclusion it may also be presumed that they have rights under international law if the other party, i.e. the Government (who has status in international law) breaches the Agreement.

I can see no supportable reason why clearly recognizable entities who have been involved in a dispute which was a matter of concern to the Security Council, cannot enter into binding agreements in which they have obligations not only to the opposite party in the conflict, but also towards the international community as such, if that international community has formally approved such an agreement or even co-signed it. By their very nature such commitments are commitments under international law. It would be completely artificial and it would serve no purpose whatsoever to deny such commitments that character for the simple reason that the entity has no legal personality in the traditional sense.

The next conclusion must be that, if such obligations are considered to be obligations under international law, the non-state entity which has entered into the agreement embodying them has some form of international legal personality. In my opinion it is not necessary - and again it would indeed be artificial - to try to equate this personality with concepts which have already in the past found their way into international law, such as belligerent parties or *de facto* regimes. The function of their international legal personality is not that of being party to an internal armed conflict or being a *de facto* regime, although both factors were and in the case of UNITA - regrettably - still are the case in actual reality. But the basis of according them such personality is the fact that they are party to an internationalized peace settlement, and the personality should be confined to this quality. We can learn, however, from the traditional concept of 'recognition as belligerent party', how international law adapted itself to the interests and needs of states. That concept developed at a time when states felt the need to create the possibility for themselves to obtain a position of neutrality with regard to the warring parties in a civil war. This need hardly exists anymore and it would be foolish to resuscitate it in order to provide entities like UNITA and the Khmer Rouge a place in international law. Twenty-five years ago Wilhelm Wengler took the position that modern international law should be a '*ius inter potestates*' and therefore should encompass every political organization that acts as an effective factor in international relations[20]. I agree with what Wengler said but am inclined to add: if this is in the interest of an orderly international community. Rosalyn Higgins correctly states that "we have all been held captive by a doctrine that stipulates that all international law is to be divided into "subjects" - that is, those elements bearing, without the need for municipal intervention, rights and responsibilities; and 'objects'"[21]. Malcolm Shaw points at the 'range of interactions upon the international scene by entities of all types and the pressures upon international law to come to terms with the contemporary structure of international relations'[22].

If this approach is taken there seems to be nothing against acknowledging that entities like UNITA and the Khmer Rouge can acquire international legal personality by becoming parties to internationalized peace-agreements. This has only partly to do with the fact that they were an insurrectionist movement or a *de facto*-regime, because what qualifies their legal personality is that they formally and in a binding way have renounced such status. Their legal personality, therefore, is a peculiar one: it is by its very essence a temporary and transitional one. Once the peace-arrangement has been implemented they acquire, at best, the status of a political party and thereby lose their international personality. During the implementation phase, however, they have rights and obligations under international law and can be held accountable under international law in instances of non-compliance.

The legal basis for the enforcement-measures taken against UNITA by the Security Council is the quasi-judicial finding that it had violated its obligations under international law, and that this resulted in a situation which constituted a threat to international peace and security. But that is far from saying that it must have some sort of legal personality *because* it is the target of enforcement measures.

In carrying out its primary responsibility for the maintenance of international peace and security the Security Council is free to take measures against any entity which it considers to be an obstructive factor in the restoration of peace. Such measures do not in themselves have the effect of giving international personality to the target. It may be illustrative to again draw a comparison between the cases of Rhodesia and the Republika Srpska. These entities were considered by the Security Council to exist factually - it can be said that their mere existence was a constitutive element of a threat to peace and security which caused the Council to act under Chapter VII. Although the Council strongly condemned the violations of international humanitarian law committed in areas under the control of Bosnian Serb forces, it immediately added that those who committed or who ordered the commission of such acts would be held *individually* responsible for such acts (emphasis added)[23]. Not once did the Council say that Rhodesia or the

r ıblika Srpska as such, had refused to comply with the gal obligations as it s.. . with regard to the Khmer Rouge and UNITA[24]. In this respect it also deserves to be mentioned that the Council never referred to Rhodesia or the Republika Srpska by the 'official name' they chose for themselves, while in the case of UNITA or the Party of Democratic Kampuchea it did. The fact that it did so is logical because these were the names under which they had become a direct or an indirect party to the internationalized peace-agreement. Whereas during an internal armed conflict the Council usually refrains from addressing the parties by name and appeals to 'all parties to the conflict' or uses similar terms, it refers to such parties by name once a peace-agreement has been concluded[25].

Therefore the conclusion may be that it is not the taking of enforcement measures by the Security Council against a non-state entity that triggers off international legal personality but that a prior fact, which is *in casu* the conclusion of an *internationalized* peace-agreement[26], may lead to a restricted, temporary international legal personality for non-state parties to an internal armed conflict. It is the non-compliance with such an agreement by that entity that the Security Council uses to reach the quasi-judicial finding that the entity has failed to implement its obligations under international law and that consequently enforcement measures must be applied against such entity.

ANNEX

RESOLUTION 1127 (1997)

Adopted by the Security Council at its 3814th meeting, on 28 August 1997

The Security Council

Reaffirming its resolution 696 (1991) of 30 May 1991 and all subsequent resolutions,

Recalling the statement of its President of 23 July 1997 (S/PRST/1997/39) which expressed its readiness to consider the imposition of measures on the Uniao Nacional para a Independencia Total de Angola (UNITA), inter alia, those specifically mentioned in paragraph 26 of resolution 864 (1993),

Emphasizing the urgent need for the Government of **Angola** and in particular UNITA to complete without further delay the implementation of their obligations under the "Acordos de Paz" (S/22609, annex), the Lusaka Protocol (S/1994/1441, annex) and the relevant Security Council resolutions,

Expressing its grave concern at the seirous difficulties in the peace process, which are mainly the result of delays by UNITA in the implementation of its obligations under the Lusaka Pro l,

Expressing its firm commitment to preserve the unity, sovereign and territorial integrity of **Angola**,

Having considered the report of the Secretary-General of 13 August 1997 (S/1997/640),

Strongly deploring the failure by UNITA to comply with its obligations under the "Acordos de Paz" (S/22609, annex), the Lusaka Protocol and with relevant Security Council resolutions, in particular resolution 1118 (1997),

A

1. Demands that the Government of **Angola** and in particular UNITA complete fully and without further delay the remaining aspects of the peace process and refrain from any action which might lead to renewed hostilities;
2. Demands also that UNITA implement immediately its obligations under the Lusaka Protocol, including demilitarization of all its forces, transformation of its radio station Vorgan into a non-partisan broadcasting facility and full cooperation in the process of the normalization of State administration throughout **Angola**;
3. Demands further that UNITA provide immediately to the Joint Commission, as established under the Lusaka Protocol, accurate and complete information with regard to the strength of all armed personnel under its control, including the security detachment of the Leader of UNITA, the so-called "mining police", armed UNITA personnel returning from outside the national boundaries, and any other armed UNITA personnel, not previously reported to the United Nations, in order for them to be verified, disarmed and demobilized in accordance with the Lusaka Protocol and agreements between the parties in the context of the Joint Commission, and condemns any attempts by UNITA to restore its military capabilities;

B

Determining that the resulting situation in **Angola** constitutes a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

4. Decides that all States shall take the necessary measures:

(a) To prevent the entry into or transit through their territories of all senior officials of UNITA and of adult members of their immediate families, as designated in accordance with paragraph 11 (a) below, except those officials necessary for the full functioning of the Government of Unity and National

nciliation, the National Assembly, or the Joint Co. ssion, provided that nothing in this paragraph shall oblige a State to refuse entry into its territory to its own nationals;

(b) To suspend or cancel all travel documents, visas or residence permits issued to senior UNITA officials and adult members of their immediate families, as designated in accordance with paragraph 11 (a) below, with the exceptions referred to in subparagraph (a) above;

(c) To require the immediate and complete closure of all UNITA offices on their territories;

(d) With a view to prohibiting flights of aircraft by or for UNITA, the supply of any aircraft of aircraft components ot UNITA and the insurance, engineering and servicing of UNITA aircraft;

(i) to deny permission to any aircraft to take off from, land in, or overfly their territories if it has taken off from or is destined to land at a place in the territory of **Angola** other than one on a list supplied by the Government of **Angola** to the Committee created pursuant to resolution 864 (1993), which shall notify Member States;

(ii) to prohibit, by their nationals of from their territories or using their flag vessels or aircraft, the supply of or making available in any form, any aircraft of aircraft components to the territory of **Angola** other than through named points of entry on a list to be supplied by the Government of **Angola** to the Committee created pursuant to resolution 864 (1993), which shall notify Member States;

(iii) to prohibit, by their nationals or from territories, the provision of engineering and maintenance servicing, the certification of airtworthiness, the payments of new claims against existing insurance contracts, or the provision or renewal of direct insurance with respect to any aircraft registered in **Angola** other than those on a list to be provided by the Government of **Angola** to the Committee created pursuant to resolution 864 (1993), which shall notify Member States, or with respect to any aircraft which enterd the territory of **Angola** other than through a point of entry included in the list referred to in subparagraph (d)(i) above;

5. Further decides that the measures set out in paragraph 4 above shall not apply to cases of medical emergency or to flights of aircraft carrying food, medicine, or supplies for essential humanitarian needs, as approved in advance by the Committee created pursuant to resolution 864 (1993);

6. Urges all States and international and regional organizations to stop travel by their officials and official delegations to the central headquarters of UNITA, except for the purposes of travel to promote the peace process and humanitarian assistance;

7. Decides also that the provisions of paragraph 4 above shall come into force without any further notice at 00.01 EST on 30 September 1997, unless the Security Council decides, on the basis of a report by the Secretary-General, that UNITA has taken concrete and irreversible stept to comply with all te obligations set out in paragraphs 2 and 3 above;

8. Requests the Secretary-General to submit by 20 October 1997, and every ninety days thereafter, a report on the compliance of UNITA with all the obligations set out in paragraphs 2 and 3 above, and expresses its readiness to review the measures set out in paragraphs 4 above if the Secretary-General reports at any time that UNITA has fully complied with these obligations;

9. Expresses its readiness to consider the imposition of additional measures, such as trade and financial restrictions, if UNITA does not fully comply with its obligations under the Lusaka Protocol and all relevant Security Council resolutions;

10. Calls upon all States and all international and regional organizations to act strictly in accordance with the provisions of this resolution notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement of any contract entered into or any licence or permit granted prior to the date of adoption of this resolution, and also calls upon all States to comply strictly with the measures imposed in paragraphs 19, 20 and 21 of resolution 864 (1993);

11. Requests the Committee created pursuant to resolution 864 (1993);

(a) To draw up guidelines expeditiously for the implementation of paragraph 4 of this resolution, including the designation of officials and of adult members of their immediate families whose entry or transit is to be prevented and whose travel documents, visas or residence permits are to be suspended or cancelled in accordance with paragraphs 4 (a) and 4 (b) above;

(b) To give favourable consideration to, and decide upon, requests for the exceptions set out in paragraph 5 above;

(c) To report to the Council by 15 November 1997 regarding the actions taken by States to implement the measures set out in paragraph 4 above;

12. Requests Member States having information on flights prohibited in paragraph 4 (d) above to provide this information to the Committee created pursuant to resolution 864 (1993) for distribution to Member States;

13. Requests also Member States to provide to the Committee created pursuant to resolution 864 (1993) information on the measures they have adopted to implement the provisions of paragraph 4 above no later than 1 November 1997;

C

14. Demands that the Government of **Angola** and, in particular, UNITA cooperate fully with the United Nations Observer Mission in **Angola** (MONUA), stop restricting the verification activities of MONUA, refrain from laying new mines, and ensure the freedom of movement and especially the safety of MONUA and other international personnel;

15. Reiterates its call upon the Government of **Angola** to notify MONUA of any troop movements, in accordance with the provisions of the Lusaka Protocol;

16. Endorses the recommendation of the Secretary-General in his report of 13 August 1997 to postpone the withdrawal of the United Nations military units from **Angola** until the end of October 1997, with the understanding that the plan is for the drawdown to be completed in November 1997, taking into account the situation on the ground and progress in completing the remaining relevant aspects of the peace process, and requests the Secretary-General to

rep thereon no later than 20 October 1997, including on the schedule for the resumed withdrawal of military personnel;

17. Reiterates its belief that the long-awaited meeting within the territory of **Angola** between the President of **Angola** and the Leader of UNITA could greatly contribute to the reduction of tensions, to the process of national reconciliation and to the achievement of the goals of the peace process as a whole;

18. Expresses its appreciation to the Secretary-General, his Special Representative, and the personnel of MONUA for assisting the parties in **Angola** to implement the peace process;

19. Decides to remain actively seized of the matter.

Notes:

1 Resolution 1127 (1997) is added as an annex to this article.

2 The Dumbarton Oaks proposals contained the following formulation: "this principle shall not prejudice the application of Chapter VIII, section B" (the present Chapter VII). The smaller states were afraid that this would give the Council the competence to make such recommendations under Article 39, as it was not allowed to adopt under Chapter VI with regard to internal matters. The Council's competence was therefore limited to its policing functions.

3 It may be mentioned in this respect that during the Indonesian question the Netherlands contended that Indonesia was not a State. The Security Council did not, however, agree with this argument and addressed itself in its very first resolution on the dispute to the Netherlands as well as to the Republic of Indonesia, putting both parties on the same level as if it were an inter-state conflict (Resolution 27 (1947)). The fact that the Netherlands had de facto recognized Indonesia was an important factor for the Council.

4 Resolution 43 (1948) of 1 April 1948.

5 Resolution 46 (1948) of 17 April 1948.

6 Cot, J.P. et Pellet, A. (1991) (ed.), La Charte des Nations Unies, 2nd ed., Paris, Economica, 1553 pp., at p. 698.

7 Resolution 217 (1965) of 20 November 1965.

8 *Op. cit.*, (note 6), at p. 701.

9 It is questionable whether the situation in the Congo (Kinshasa) after independence (1960) was in all its phases "international". Note in this respect Resolution 169 (1961) in which the Council strongly deprecated "the secessionist activities illegally carried out by the provincial administration of Katanga". The Council, however, immediately added that these activities took place with the aid of external resources, without identifying these resources.

10 Resolution 942 (1994) of 23 September 1994.

11 See, e.g. Beyerlin, U. in Wolfrum, R. (1995), (ed) - United Nations: Law, Policies and Practice, Munich, Verlag C.H. Beck, Dordrecht, Martinus Nijhoff Publishers, 1533 pp., at p. 1116: "As Chapter VII - with the exception of article 40 ("parties concerned") does not contain any indication as to who might be the addressee of such measures, it seems that they can be taken not only against member states, but also against non-recognized states and stabilized de facto-regimes."

12 Resolution 792 (1992) of 30 November 1992.

13 UN Doc. S/22609.

14 Resolution 864 (1993) of 15 September 1993.

15 UN Doc. S/1994/1441.

16 Preambular paragraph 4 of Section B: "Determining that, as a result of the National Union's military action, the situation in Angola constitutes a threat to international peace and security".

17 ILM 31 (1992), 174.

18 ILM 35 (1996), 96.

19 The Paris Agreement on Cambodia, e.g. contains the following paragraph:
"Welcoming the Framework Document of 28 August 1990 which was accepted by the Cambodian parties as the basis for settling the Cambodia conflict and which was subsequently unanimously endorsed by Security Council Resolution 668 (1970) of 20 September 1990 and General Assembly Resolution 45/3 of 15 October 1990."

20 Wengler, W., Das Begriff des Völkerrechtssubjektes im Lichte der politischen Gegenwart, in Friedenswarte 51 (1951/53), pp. 113 et seq.

21 Higgins, R. (1994), Problems and Process: International Law and how we use it., Oxford, Oxford University Press, 274 pp., at p. 49.

22 Shaw, M., (1997), International Law, 4th ed., Cambridge, Cambridge University Press, 939 pp., at p. 191.

23 Resolution 941 (1994) of 23 September 1994.

24 I do not exclude that Rhodesia and the Republika Srpska must be considered to have had international legal personality, but such personality cannot be deduced from the resolutions of the Security Council.

25 See, e.g., also Resolution 729 (1992) after the conclusion of a peace-agreement between the Government of El Salvador and the Frente Faribundo Marti and Resolution 797 (1992) with regard to

the agreement concluded between the Government of Mozambique and the resistance movement RENAMO.

26 See also Mosler's cautious but careful definition of a subject of international law: "Subjects of international law are .... organized groups or corporate entities of various kinds whose legal capacity to take part in international relations is recognized by States", in Berhardt, R. (ed.), Encyclopedia of Public International Law, 1984, Vol. 7, at p. 442.

THE GRANTING OF OBSERVER STATUS BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS TO THE INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES

Wilfried Remans

In 1986 the UN Director-General for Europe, Mr. Eric Suy, addressed the 25th International Conference of the Red Cross[1]: "We in the United Nations have watched with admiration how they [i.e. the Red Cross and Red Crescent] have saved lives and considerably reduced suffering of all kinds. Our humanitarian objectives are identical, but our means and ways of action are different because the nature of our institutions is not the same" - the UN being governmental; the Red Cross not.

Yet recently there has been a legal development in the nature of the Red Cross: the International Federation of Red Cross and Red Crescent Societies was granted observer status to the UN General Assembly. This article is a token of respect for the years of support Professor Eric Suy has given - and is still giving - to the Belgian Red Cross-Flanders, both as Chairman of the Advisory Commission on Humanitarian Law and as a member of the policy-making Community Council!

The particularity of the 'International Red Cross and Red Crescent Movement' (hereinafter 'the Movement') starts with its structure: it is composed of 173 national Red Cross and Red Crescent Societies, the International Federation (in full 'the International Federation of Red Cross and Red Crescent Societies') and the International Committee of the Red Cross (ICRC), all having a separate legal identity. This contribution will focus on the International Federation, the component of the Movement which represents, at the international level, all Red Cross and Red Crescent Societies, coordinates disaster relief and supports National Societies in their development work. Every two years all National Societies decide on policy matters in the General Assembly, and in between representatives meet in the Executive Council to follow up on these decisions. Practically, all of this is coordinated by a Secretariat, located in Geneva and managed by a Secretary-General, at present the Canadian Mr. George Weber.

Obtaining observer status was the result of a considerable effort. In October 1990 the Executive Council nominated a commission to study governments' positions on a possible application for observer status. In 1991 it asked the Secretary-General to pursue the matter with relevant States, organizations and individuals. In October 1993 the Federation's General Assembly decided that the Federation's President and Secretary-General should ask UN member states to put the question on the agenda of the UN General Assembly. A first request to put it on the agenda of the UN General Assembly (48th session) was introduced

ANNEX 4

R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Clarendon Press, 1994, pp. 48-51.

Problems and Process

INTERNATIONAL LAW AND HOW WE USE IT

ROSALYN HIGGINS

CLARENDON PRESS · OXFORD
1994

Oxford University Press, Walton Street, Oxford OX2 6DP
Oxford New York Toronto
Delhi Bombay Calcutta Madras Karachi
Kuala Lumpur Singapore Hong Kong Tokyo
Nairobi Dar es Salaam Cape Town
Melbourne Auckland Madrid
and associated companies in
Berlin Ibadan

Oxford is a trade mark of Oxford University Press

Published in the United States
by Oxford University Press Inc., New York

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Higgins, Rosalyn.
Problems and process: international law and how we use it/
Rosalyn Higgins.
p. cm.
Includes index.
1. International law. I. Title.
JX3091.H54 1993
341—dc20 93-35770
ISBN 0-19-825767-8

1 3 5 7 9 10 8 6 4 2

Typeset by Cambrian Typesetters
Frimley, Surrey
Printed in Great Britain
on acid-free paper by
Biddles Ltd., Guildford and Kings Lynn

PREFACE

To every international lawyer, an invitation from the Curatorium of the Hague Academy to deliver the General Course in International Law is the greatest possible honour. The last Briton to give the General Course was James Fawcett in 1971. I express my appreciation for the invitation to offer my views on international law in fifteen lectures—and the firm indication from the Curatorium that what was sought was a personal statement.

But it is hard to describe the magnitude of the task that this honour bestows; or the difficulties that it presents. Can there really be anything new or interesting still to say, or is not all wisdom and scholarship already gathered in the Collected General Courses? The problem was accentuated by the fact that in recent years there had been some exceptionally admired General Courses: I may particularly mention those of Professor Michel Virally, Professor Oscar Schachter, and Professor Lou Henkin.

There were further problems. Would not a *tour d'horizon* of the corpus of international law in fifteen lectures necessarily result in dealing with any given subject in a shallow way? After all, on any topic that one might choose for a single lecture, there would exist a vast literature in a variety of languages, and often a very substantial jurisprudence as well. How could one conceivably begin to do justice to any one of these topics?

For several months these seemed insoluble, and indeed overwhelming, problems. But then a beam of light was shown to me by Judge Sir Robert Jennings QC, President of the International Court. He offered the wise advice that one should never lose sight of the fact that one was not writing the definitive treatise on the entirety of international law, but rather lecturing to students about the ideas underlying international law.

From that moment the task seemed marginally less daunting. Of course, it would still be necessary to immerse oneself in as much as possible of the vast literature on each topic. But my job would not be to summarize or synthesize all that had ever been said on a given theme, but rather to offer my own perspectives and ideas. The learned writings, the state practice, the judicial and arbitral decisions would assist in helping me decide what seemed the key issues on which I wished to comment.

That decision, together with the insistence with which it had been put to me that the General Course is intended as a vehicle for one's personal views and philosophy, led rapidly to another decision. My course would not follow the traditional chapter headings of the textbooks; nor would it endeavour to deal with every matter that should properly be covered in a textbook, or in a university course. Our tasks were different.

CONTENTS

personality. If the attributes are there, personality exists. It is not a matter of recognition. It is a matter of objective reality.[28]

Closely related is the difficult question of the legal status in domestic law of a body having personality in international law. Does the fact that an international organization has, under its constituent instrument, expressly or by implication, powers to sue or be sued, to enter into contracts, to bear responsibilities, mean that it is to be recognized as a legal person in domestic law? The answer to that question lies in the laws of the various jurisdictions. Some domestic courts will take the provisions of the international instrument as a guide to what status the local forum should accord the organization. Others will require the source of the personality to be accorded the organization to be found in domestic law. This is especially likely to be the case if the jurisdiction concerned does not automatically 'receive' treaties as part of domestic law, but requires them to be incorporated into domestic law before local effect will be given to them. Thus the courts of the United Kingdom found that the International Tin Council (ITC) had legal personality—not because it was clearly provided for in the International Tin Agreement, but because that provision was made part of English law by a statutory instrument.[29] Thus, said the House of Lords in a striking and disturbing phrase, the statutory instrument 'created' the ITC in English law. It necessarily followed that, when another international organization, the Arab Monetary Fund—clearly and objectively existing in any real-world sense—was not accorded personality by any provision of English law, it was held by the House of Lords to be a non-existent international organization, legally speaking.[30]

Individuals

International law has traditionally been defined by reference to those to whom it is said to apply. The classic definition of it as law binding on states has been expanded to include also international organizations. As for the place of individuals in this scheme of things, rational debate has been constrained first by the notion that the appropriate framework of enquiry is

Organisationen im Verhaltnis zu Nichtmitgliedstaaten' (1961) 11 *Osterreichische Zeitschrift fur offentliches Recht* 497–506; I. Seidl-Hohenveldern, 'Recentsbeziehungen zwischen Internationalen Organisationen und den einselnenstaaten' (1953–4) 4 *Archiv des Volkerrechts* 33; H. Mosler, 'Reflexions sur la personnalité juridique en droit international public', *Mélanges offerts à Henri Rolin* (1964); W. Wengler, *Actes officiels du Congres international d'études sur la Communauté Européene du Charbon et de l'Acier* (1958), iii. 10–13, 318–19.

[28] See *ITC* v. *Amalgamet Inc.* 80 ILR 31.

[29] *J. H. Rayner Ltd.* v. *Department of Trade and Industry* [1989] 3 WLR 969. For comment and criticism, see R. Jennings, 'An International Lawyer Takes Stock' (1990) 39 *ICLQ* 513.

[30] See *Arab Monetary Fund* v. *Hashim* (No. 3) [1991] 2 WLR 729.

that of the concept of 'subjects and objects of international law'; and, secondly, by a conservative belief that what presently is, necessarily always has to remain so.

Let me begin my argument at the beginning. Plutarch and later Francisco de Vitoria in 1532 both wrote in terms that effectively acknowledged that non-state entities had internationally recognized legal rights. De Vitoria, of course, was speaking of the Indian Kingdoms of America. A century later Grotius, in his *De jure belli ac pacis* of 1625, was refining the idea. Verzijl has suggested that the first scholar to use the technical term 'subject of international law' (in fact to describe the status of a state) was Liebnitz in the preface to his *Codex juris gentium diplomaticus*, of 1693.

The designating of states as 'subjects' within the international legal system in turn led to an embracing, especially by the leading jurists of the positivist school of international law, of the position that under a legal system there exist only 'objects' and 'subjects'. This starting-point has received a widespread and uncritical acceptance and has necessarily dictated the framework of any examination. We have all been held captive by a doctrine that stipulates that all international law is to be divided into 'subjects'—that is, those elements bearing, without the need for municipal intervention, rights and responsibilities; and 'objects'—that is, the rest. Certain authors have contended vigorously that only states are the subjects of international law.[31] And to the positivist there is no permissive rule of international law that allows individuals to be bearers of rights and duties.[32] They must, therefore, be *objects*: that is to say, they are like 'boundaries' or 'rivers' or 'territory' or any of the other chapter headings found in the traditional textbooks.

I believe every step of this argument to be wrong. I have already argued that international law is not to be understood as a set of 'rules'. First of all, international law is not only 'rules'; moreover, its norms are not fixed indefinitely and are thus wholly responsive to the needs of the system. Further, the positivist definition assumes that some specific rule is required 'permitting' the individual to be a 'subject' of international law. Finally, the whole notion of 'subjects' and 'objects' has no credible reality, and, in my view, no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint.

There are others who reject the positivist view that the individual is a mere object under international law, and suggest that the individual can be

[31] D. Anzilotti, *Cours de droit international* (1929), 134; Gihl, *Folkratt under* ...*ed* (1956) M. Siotto-Pintor, *Recueil des cours* (1932, III), 356.

[32] Schwarzenberger, *Manual; International Law as Applied by International Courts and Tribunals* (3rd edn., 1957), i. 140–55.

a subject having, in certain limited cases, rights and duties.[33] But this view, too, is based upon the assumption that the correct starting-point is an examination of whether individuals can or cannot be 'subjects' of international law.

But I believe that there is room for another view: that it is not particularly helpful, either intellectually or operationally, to rely on the subject–object dichotomy that runs through so much of the writings. It is more helpful, and closer to perceived reality, to return to the view of international law as a particular decision-making process. Within that process (which is a dynamic and not a static one) there are a variety of participants, making claims across state lines, with the object of maximizing various values. Determinations will be made on those claims by various authoritative decision-makers—Foreign Office Legal Advisers, arbitral tribunals, courts.

Now, in this model, there are no 'subjects' and 'objects', but only *participants*. Individuals *are* participants, along with states, international organizations (such as the United Nations, or the International Monetary Fund (IMF) or the ILO), multinational corporations, and indeed private non-governmental groups. Elsewhere I have put it this way:

> In the way our world is organized, it is States which are mostly interested in, for example, sea space, or boundaries, or treaties; it is thus States which advance claims and counter-claims about these. Individuals' interests lie in other directions: in protection from the physical excesses of others, in their personal treatment abroad, in the protection abroad of their property interests, in fairness and predictability in their international business transactions and in securing some external support for the establishment of a tolerable balance between their rights and duties within their national state. Thus, the topics of minimum standard of treatment of aliens, requirements as to the conduct of hostilities and human rights, are not simply exceptions conceded by historical chance within a system of rules that operates as between states. Rather, they are simply part and parcel of the fabric of international law, representing the claims that are naturally made by individual participants in contradistinction to state-participants.[34]

Among the few writers who rejected the subject–object dichotomy was the late Professor D. P. O'Connell, who as early as 1965 had realized that the debate over the position of the individual in international law 'goes to the heart of legal philosophy'. He continued:

> Does it suffice to admit that the individual's good is the ultimate end of the law but refuse the individual any capacity in the realisation of that good? Is the good in fact attained through treating the individual as an instrumentality of law and not as an

[33] e.g. C. Norgaard, *The Position of the Individual in International Law* (1962).

[34] R. Higgins, 'Conceptual Thinking about the Individual in International Law' (1978) 4 *British Journal of International Studies* 1 at 5.

> actor? Philosophy and practice demonstrate that the answer to all these questions must be in the negative . . .[35]

There are certain other matters concerning the individual in international law which must also be mentioned. Undoubtedly, whatever view one takes on the somewhat philosophical matters we have been discussing, individuals are extremely handicapped in international law from the procedural point of view. They have little access to international arenas; and are dependent upon the nationality-of-claims rule, whereby an individual must, generally speaking, pursue a claim at the international level by getting his government to take it up on his behalf. There is, of course, a close relationship between the notion of nationality of claims and the unavailability of most[36] international tribunals to the individual. Articles 35 and 65 of the Statute of the International Court allow only states and international organs to obtain, respectively, judgments and advisory opinions. Why can an individual not bring a claim before the Court in respect of a subject-matter of immediate legal interest to him—an expropriation issue, for example? The traditional view is that, if State A expropriates the property rights of Mr X, a foreigner, without compensation, it has violated no right of Mr X (because he *has* no rights under international law) but has caused damage to his national state, State B, through harm to one of its nationals. Accordingly, it is for State B to decide whether it wishes to bring a legal claim. (The same principle operates should State B decide to make a diplomatic protest, rather than commence litigation.)

Does harm to a state's national amount to harm to the state? And, even if the answer is 'yes', does that *also* mean that the individual has no rights under international law himself, either substantive or procedural? Some states take the view that physical harm to their citizens abroad is to be assimilated as harm to the state itself such that it triggers the right to self-defence for 'an armed attack upon the state'. That view is a controversial one. To claim that *all* damage to individuals, including material damage, is damage to the state is to press the legal fiction even further. If the harm were really harm to the state, there would surely be a requirement that *all* instances of such harm be reported to the state, so that that state would be in a position to decide whether to make diplomatic representations or pursue legal remedies. But the state does *not* decide how to protect itself on the basis of such necessary information. The reality is that individuals who have been harmed will seek their own remedies (often through negotiation, through action in the courts of the foreign state); but if

[35] D. P. O'Connell, *International Law* (1965), i. 116.

[36] cf. the European Court. The Court acts, *inter alia*, as an administrative tribunal in respect of the acts or omissions of Community organs; and as a constitutional court interpreting the Treaty at the request of national courts: See Art. 177, EEC Treaty.

ANNEX 5

R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam: North-Holland, 1992, Volume I, p. 148 and R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam: North-Holland, 1997, Volume 3, pp. 938-939.

ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW

PUBLISHED UNDER THE AUSPICES OF THE
MAX PLANCK INSTITUTE FOR COMPARATIVE
PUBLIC LAW AND INTERNATIONAL LAW
UNDER THE DIRECTION OF
RUDOLF BERNHARDT

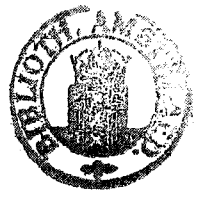
VOLUME ONE

AALANDS ISLANDS TO DUMBARTON
OAKS CONFERENCE (1944)

1992

NORTH-HOLLAND
AMSTERDAM · LONDON · NEW YORK · TOKYO

ELSEVIER SCIENCE PUBLISHERS B.V.
SARA BURGERHARTSTRAAT 25
P.O. BOX 211, 1000 AE AMSTERDAM
THE NETHERLANDS



Library of Congress Cataloging in Publication Data

Main entry under title:
Encyclopedia of public international law.
Issued in parts.
Includes index.
1. International law – Dictionaries.
I. Bernhardt, Rudolf, 1925–
II. Max-Planck-Institut für
ausländisches öffentliches Recht
und Völkerrecht (Heidelberg, Germany)
JX1226.E5 341'.03 81–939
AACR2

ISBN: 0 444 86244 7

This book is printed on acid-free paper.

PRINTED IN THE NETHERLANDS

ate compensation on what it regarded as Aminoil's legitimate expectations. It pointed out that "over the years, Aminoil had come to accept the principle of a moderate estimate of profits, and that it was this that constituted its legitimate expectations" (para. 161, at p. 1037).

Although the Tribunal did not give precise details about how it arrived at its final figure, it would seem that the latter represented an aggregate of two elements. One was the present replacement cost of the physical assets as at the date of transfer, and taking due account of the depreciation they had undergone by reason of wear and tear and obsolescence. The other was the value of the undertaking itself, as a source of profit, based on the 1977 annual rate of return and worked out for the term of the service contract that would have replaced the 1948 concession. In this way, the Tribunal finally arrived at a figure of US $ 206 041 000.

6. Interest

Since the Aminoil Arbitration took place during a period of extreme economic instability, which was characterized by an exceptionally high rate of inflation, the Tribunal decided that, in order to establish what was due in 1982, the outcome of the balance-sheet of the rights and obligations of the parties as at September 19, 1977 had to be subjected not only to a reasonable rate of interest, which it put at 7.5 per cent per annum, but also to a level of inflation, which it fixed at an overall rate of 10 per cent per annum. Applying the rate of 17.5 per cent per annum compounded, the Tribunal awarded Aminoil US $ 179 750 764 as of July 1, 1982.

Award in the Matter of an Arbitration between Kuwait and the American Independent Oil Company (Aminoil), March 24, 1982, ILM, Vol. 21 (1982) 976–1053.

[1991] AHMED S. EL-KOSHERI

AMNESTY CLAUSE

1. Definition and Types of Amnesty

Amnesty clauses are frequently found in → peace treaties and signify the will of the parties to apply the principle of *tabula rasa* to past offences, generally political delicts such as treason, sedition and rebellion, but also to → war crimes. As a sovereign act of oblivion, amnesty may be granted to all persons guilty of such offences or only to certain categories of offenders.

It is important to draw distinctions between various types of amnesty, i.e. between general amnesty providing immunity for all wrongful acts done by the belligerents themselves, the members of their forces and their subjects during the war, and limited amnesty which provides immunity, for example, only for political offences committed by the enemy before or during the war. While the typical amnesty clause prevents the parties from punishing enemy war offenders after the conclusion of peace, it does not necessarily prevent them from punishing members of their own forces or any of their own subjects who, during the war, may have deserted or committed treason (→ Deserters) unless the contrary has been expressly stipulated in the treaty of peace.

One should also distinguish between internal and external amnesties; the former are frequently issued after revolutions or civil wars by municipal authorities, and are political acts of primarily domestic significance, whereas the latter are provided for in treaties of peace after international wars.

2. Purpose

The idea of clemency is the opposite of the old principle of *vae victis*. It also goes beyond doing mere justice to the vanquished (*etiam hosti justitia*), since retribution demands the just punishment of offenders; indeed, the main argument against amnesties has always been that murderers and deserters should not be allowed to go unpunished. However, justice is not the only consideration in peace-making (*fiat justitia, pereat mundus*) and many statesmen have given priority to the political goal of placating passions inflamed not only by the war itself but also by the → propaganda that accompanied it; they have thus considered an official act of "forgetting" ("il y aura un oubli général"; cf. Art. 3 of the Treaty of Nimeguen of 1678; Art. 2 of the Treaty of Utrecht of 1713; Art. 2 of the Treaty of Aix-la-Chapelle of 1748; Art. 2 of the Treaty of Paris of 1763), as indispensable to facilitating a new beginning. Nevertheless, customary international law does not require that peace treaties contain amnesty clauses.

ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW

PUBLISHED UNDER THE AUSPICES OF THE
MAX PLANCK INSTITUTE FOR COMPARATIVE
PUBLIC LAW AND INTERNATIONAL LAW
UNDER THE DIRECTION OF
RUDOLF BERNHARDT

VOLUME THREE

JAN MAYEN TO PUEBLO INCIDENT

1997

ELSEVIER

AMSTERDAM–LAUSANNE–NEW YORK–OXFORD–SHANNON–SINGAPORE–TOKYO

ELSEVIER SCIENCE B.V.
SARA BURGERHARTSTRAAT 25
P.O. BOX 211, 1000 AE AMSTERDAM
THE NETHERLANDS

Library of Congress Cataloging in Publication Data

Main entry under title:
Encyclopedia of public international law.
Issued in parts.
Includes index.
1. International law – Dictionaries.
I. Bernhardt, Rudolf, 1925–
II. Max-Planck-Institut für
ausländisches öffentliches Recht
und Völkerrecht (Heidelberg, Germany)
JX1226.E5 341'.03 81–939
AACR2

ISBN: 0 444 86246 3

This book is printed on acid-free paper.

PRINTED IN THE NETHERLANDS

for the disappearance of threats to international peace in the foreseeable future.

Repertory of Practice of United Nations Organs, Vol. 2 Articles 23 to 54 of the Charter (1955); Supp, 2, Articles 9 to 54 (1964); Vol. 5, Articles 92 to 111 of the Charter (1955); Supp. 3, Articles 92 to 111 of the Charter (1973).

C.G. FENWICK, When is There A Threat to the Peace? – Rhodesia, AJIL, Vol. 61 (1967) 753–755.

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H. NEUHOLD, Internationale Konflikte, Verbotene und erlaubte Mittel ihrer Austragung (1977).

[1982] HANSPETER NEUHOLD

Addendum 1996

The fall of the Communist régimes in Eastern Europe and the ensuing end of the Cold War also reduced antagonisms among the permanent members of the United Nations Security Council. As a result, the Security Council was able to agree on action in several conflicts, including measures against the invasion of Kuwait by Iraq (→ Gulf Conflict (1990/1991)) and against parties to the armed conflicts in the former Yugoslavia (→ Yugoslavia, Dissolution of) as well as in the fighting in Somalia and against Libya for the latter's involvement in international terrorism.

In most cases, the Security Council simply stated that it was acting under Chapter VII of the UN Charter. Occasionally, however, it referred to a threat to international peace and security. Its Res. 733 (1992) on the situation in Somalia, Res. 748 (1992) against Libya, and Res. 757 (1992) on sanctions against the then recently proclaimed Federal Republic of Yugoslavia (Serbia and Montenegro) may be mentioned as examples. The Security Council continued to apply a broad notion of such threats.

C. DOMINICÉ, La sécurité collective et la crise du Golfe, European Journal of International Law, Vol. 2 (1991) 85–109.

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F.-E. HUFNAGEL, UN-Friedensoperationen der zweiten Generation. Vom Puffer zur Neuen Treuhand (1996).

H.N.

PEACE TREATIES

1. Historical Development. 2. Function: (a) Termination of war. (b) Restoring friendly relations. 3. Negotiation and Conclusion: (a) Participants. (b) Negotiating procedure. (c) Preliminaries. (d) Relevance of compulsion. 4. Structure and Scope of the Treaty Document: (a) General order of contents. (b) Preamble. (c) Political and territorial clauses. (d) Financial, economic and juridical clauses. 5. Safeguards and Guarantees. 6. Revision and Peaceful Change. 7. Current Significance. 8. Philosophy of Peacemaking.

1. Historical Development

Termination of → war by conclusion of a peace treaty is one of the oldest institutions of international law. A famous example from a period which knew an international order with the characteristics of a truly → international law is the peace treaty concluded circa 1280 B.C. between the Egyptian Pharaoh, Rameses II, and Hattusilis II, the King of the Hittites. In addition to the → armistices and temporary peace settlements, which prevailed in the termination of disputes of the Greek *polis* with rival communities, the political system of ancient Greece was also familiar with a general type of peace treaty. Not only the participants in the preceding hostilities but also third parties were included in these, and they regularly stipulated a joint commitment to → sanctions against the perpetrator of a breach of the peace.

In his definition of *jus gentium*, Isidore of Seville (c. 560–636) mentioned *paces* as one of the elements of international law. In medieval practice, peace was closely interwoven with the legal institutions of feudalism. Christian theology, linking the concepts of peace with justice, deeply influenced the meaning of peace (→ Peace, Historical Movement towards), but with the schisms of the Reformation, it became increasingly difficult to agree on a concept of *justitia* as *fundamentum pacis*. Philosophers like Spinoza and

Hobbes laid the emphasis on peace as a state of assured internal order, the *pax civilis*. Peace between States could only be conceived as an interruption of the normal *bellum omnium* (*civitatum*) *contra omnes* by means of a treaty. Whereas most of the classic proponents of the rationalist → natural law theory continued to regard peace as the normal relationship between States, they agreed with Hobbes in viewing peace as the product of contractual arrangements. *Status pacis* and *pactum pacis* became identical.

With peace and justice thus categorized separately, it became the main function of a peace treaty to terminate hostilities and violence, to settle controversial claims by compromise or renunciation, and to establish a new order which, regardless of right or wrong, insured stability, security and tranquility. However, peace continued to be considered as more than a mere state of non-violence, an absence of armed hostilities, or a period of non-belligerence (→ Peace and War). The task and function of a peace treaty was to achieve a durable accommodation and reconciliation between former enemies, and oblivion and amnesty for their citizens who perpetrated acts of hostility, violence, offence, injury or damnification ("perpetua oblivio et amnestia", Art. II, Instrumentum Pacis Osnabrugense, 1648; → Amnesty Clause). Good neighbour relations and friendship were to be restored ("fida vicinitas et secura studiorum pacis atque amicitiae cultura revirescant et florescant", Art. I, Instrumentum Pacis Osnabrugense).

In another sense the major peace treaties of modern times tried to achieve more than the cessation of hostilities; they endeavoured to construct a new political order on the European Continent. It is this that gives the Westphalian Peace Treaties of Münster and Osnabrück (→ Westphalia, Peace of (1648)) their historical reputation, a reputation which at times has been exaggerated by claims that they gave birth to modern international law and upon which doubt has been cast by modern research.

Similarly, the Peace Treaties of Utrecht (1713), Aix-la-Chapelle (1748), Vienna (→ Vienna Congress (1815)), Paris (→ Paris Peace Treaty (1856)), and → Versailles (together with the → Saint-Germain, → Trianon, → Neuilly and → Lausanne Peace Treaties, 1919–1923) in turn modified and renewed the European political order. They were general peace treaties, in most cases including States which had not participated in the preceding war, but were at the same time indispensable for the establishment of a workable and effective political system. Significantly, these general peace treaties often included principles and rules which were considered to be essential for a stable and viable political system, such as the equality in law of the Catholic and Protestant religions and the principle *cuius regio eius religio* linked with the right of emigration (Peace of Westphalia). This ended the period of religious wars. Another instance is the principle of the → balance of power in Europe, which was expressly mentioned in the Peace Treaty of Utrecht (Art. 2): "ad firmandam stabiliendamque Pacem ac Tranquillitatem Christiani Orbis, iusto Potentiae Aequilibrio, quod optimum et maxima solidum mutuae Amicitiae at duraturae undiquaque Concordiae fundamentum est." This was tacitly also contained in the Vienna peace settlement of 1815. The Paris Peace Treaties of 1919 included the Covenant of the → League of Nations, by which a new type of international organization for peacekeeping and the maintenance of the → *status quo* was created.

Another significant feature of these general peace treaties was that they constituted or confirmed rules of general international law. The Final Act of the Vienna Congress (Arts. 108 to 117) included a "Règlement pour la libre navigation des rivières" (→ International Rivers; → Navigation, Freedom of), another document with respect to the *cérémoniel diplomatique* (→ Diplomacy), and an annex which included a "Déclaration contre la traite des nègres" (→ Slavery).

The Paris Peace Treaty of 1856 incorporated Turkey into the *droit public de l'Europe*; that peace conference adopted the "Déclaration sur le droit de guerre maritime" (→ Sea Warfare; → War, Laws of, History).

2. *Function*

(a) *Termination of war*

Legally, the main purpose of a peace treaty is the termination of a state of war and the restoration of normal friendly relations between the former belligerents based on a settlement of matters arising out of the war. But a peace treaty is

ANNEX 6

Constitutional Court of South Africa, Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and others, Case no. CCT17/96, 25 July 1996, par. 22, 24, 32 and summary. Full text in pdf-format available at: http://www.concourt.gov.za/files/azapo/azapo.pdf.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 17/96

THE AZANIAN PEOPLES ORGANIZATION (AZAPO)	First Applicant
NONTSIKELELO MARGARET BIKO	Second Applicant
CHURCHILL MHLELI MXENGE	Third Applicant
CHRIS RIBEIRO	Fourth Applicant

versus

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE MINISTER OF JUSTICE	Third Respondent
THE MINISTER OF SAFETY AND SECURITY	Fourth Respondent
THE CHAIRPERSON OF THE TRUTH AND RECONCILIATION COMMISSION	Fifth Respondent

Heard on: 30 May 1996

Decided on: 25 July 1996

JUDGMENT

MAHOMED DP:
(...)

[1] South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order. Chile, Argentina and El Salvador are among the countries which have in modern times been confronted with a similar need. Although the mechanisms adopted to facilitate that process have differed from country to country and from time to time, the principle that amnesty

should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries and truth commissions were also established in such countries.

[2] The Argentinean truth commission was created by Executive Decree 187 of 15 December 1983. It disclosed to the government the names of over one thousand alleged offenders gathered during the investigations.[1] The Chilean Commission on Truth and Reconciliation was established on 25 April 1990. It came to be known as the Rettig Commission after its chairman, Raul Rettig. Its report was published in 1991 and consisted of 850 pages pursuant to its mandate to clarify "the truth about the most serious human right violations ... in order to bring about the reconciliation of all Chileans".[2] The Commission on the Truth for El Salvador was established with similar objectives in 1992 to investigate "serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth".[3] In many cases amnesties followed in all these countries.[4]

[3] What emerges from the experience of these and other countries that have ended periods of authoritarian and abusive rule, is that there is no single or uniform

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1 Pasqualucci "The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System" 12 *Boston University International Law Journal* 321 (1994) at 337-8.

2 Id at 338, quoting the National Commission on Truth and Reconciliation "Report of the Chilean Commission on Truth and Reconciliation" Berryman (trans) (1993).

3 Id at 339, quoting the Report of the Commission on the Truth for El Salvador "From Madness to Hope: The 12-Year War in El Salvador" United Nations s/25500 (1993).

4 Id at 343.

international practice in relation to amnesty. Decisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a state covering up its own crimes by granting itself immunity. In the former case, it is not a question of the governmental agents responsible for the violations indemnifying themselves, but rather, one of a constitutional compact being entered into by all sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses.

(...)

[4] Considered in this context, I am not persuaded that there is anything in the Act and more particularly in the impugned section 20(7) thereof, which can properly be said to be a breach of the obligations of this country in terms of the instruments of public international law relied on by Mr Soggot. The amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorised for the purposes of effecting a constructive transition towards a democratic order. It is available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past. That objective has to be evaluated having regard to the careful criteria listed in section 20(3) of the Act, including the very important relationship which the act perpetrated bears in proportion to the object pursued.

Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and others

Constitutional Court - CCT17/96 | **Judgment date: 25 July 1996**

Right of access to court – limitation of rights – constitutionality of amnesty provisions in Promotion of National Unity and Reconciliation Act 34 of 1995.

Summary of Judgment

The applicants applied for direct access to the Constitutional Court and for an order declaring s 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 unconstitutional. Section 20(7), read with other sections of the Act, permits the Committee on Amnesty established by the Act to grant amnesty to a perpetrator of an unlawful act associated with a political objective and committed prior to 6 December 1993. As a result of the grant of amnesty, the perpetrator cannot be criminally or civilly liable in respect of that act. Equally, the state or any other body, organisation or person that would ordinarily have been vicariously liable for such act, cannot be liable in law.

The Court upheld the constitutionality of the section. It acknowledged that the section limited the applicants' right in terms of s 22 of the interim Constitution to 'have justiciable disputes settled by a court of law, or . . . other independent or impartial forum'. However, in terms of s 33(2) of the Constitution, violations of rights are permissible either if sanctioned by the Constitution or if justified in terms of s 33(1) of the Constitution (the limitation section). The Court held that the epilogue ('National Unity and Reconciliation') to the Constitution sanctioned the limitation on the right of access to court.

The Court held that amnesty for criminal liability was permitted by the epilogue because without it there would be no incentive for offenders to disclose the truth about past atrocities. The truth might unfold with such an amnesty, assisting in the process of reconciliation and reconstruction. Further, the Court noted that such an amnesty was a crucial component of the negotiated settlement itself, without which the Constitution would not have come into being. It found that the amnesty provisions were not inconsistent with international norms and did not breach any of the country's obligations in terms of public international law instruments.

The Court held that the amnesty for civil liability was also permitted by the epilogue, again because the absence of such an amnesty would constitute a disincentive for the disclosure of the truth.

The Court held that the epilogue permitted the granting of amnesty to the state for any civil liability. The Court said that Parliament was entitled to adopt a wide concept of reparations. This would allow the state to decide on proper reparations for victims of past abuses having regard to the resources of the state and the competing demands thereon. Further, Parliament was authorised to provide for individualised and nuanced reparations taking into account the claims of all the victims, rather than preserving state liability for provable and unprescribed delictual claims only.

The Court held that the epilogue authorised the granting of amnesty to bodies, organisations or other persons which would otherwise have been vicariously liable for acts committed in the past. The truth might not be told if these organisations or individuals were not given amnesty. Indeed, according to the Court, the Constitution itself might not have been negotiated had this amnesty not been provided for.

The judgment of the Court was delivered by Mahomed DP and was concurred in by the other members of the Court. Didcott J delivered a separate concurring judgment.

ANNEX 7

R. v. Bow Street Metropolitan Stipendiary Magistrate. *Ex Parte* Pinochet, House of Lords, 25 November 1998, speech of Lord Lloyd of Berwick; full text available at: http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino07.htm.

Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)
Regina v. Evans and another and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)

HOUSE OF LORDS

Lord Slynn of Hadley Lord Lloyd of Berwick Lord Nicholls of Birkenhead
Lord Steyn Lord Hoffmann

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

REGINA

v.

BARTLE AND THE COMMISSIONER OF POLICE FOR THE METROPOLIS AND OTHERS (APPELLANTS)
EX PARTE PINOCHET (RESPONDENT)
(ON APPEAL FROM A DIVISIONAL COURT OF THE QUEEN'S BENCH DIVISION)

REGINA

v.

EVANS AND ANOTHER AND THE COMMISSIONER OF POLICE FOR THE METROPOLIS AND OTHERS (APPELLANTS)
EX PARTE PINOCHET (RESPONDENT)
(ON APPEAL FROM A DIVISIONAL COURT OF THE QUEEN'S BENCH DIVISION)

ON 25 NOVEMBER 1998

UNAMENDED

LORD LLOYD OF BERWICK

My Lords, *Background*

On 11 September 1973 General Augusto Pinochet Ugarte assumed power in Chile after a military coup. He was appointed president of the Governing Junta the same day. On 22 September the new regime was recognised by Her Majesty's Government. By a decree dated 11 December 1974 General Pinochet assumed the title of President of the Republic. In 1980 a new constitution came into force in Chile, approved by a national referendum. It provided for executive power in Chile to be exercised by the President of the Republic as head of state. Democratic elections were held in December 1989. As a result, General Pinochet handed over power to President Aylwin on 11 March 1990.

In opening the appeal before your Lordships Mr. Alun Jones Q.C. took as the first of the three main issues for decision whether General Pinochet was head of state throughout the whole period of the allegations against him. It is clear beyond doubt that he was. So I say no more about that.

I return to the narrative. On 19 April 1978, while General Pinochet was still head of state, the senate passed a decree granting an amnesty to all persons involved in criminal acts (with certain exceptions) between 11 September 1973 and 10 March 1978. The purpose of the amnesty was stated to be for the "general tranquillity, peace and order" of the nation. After General Pinochet fell from power, the new democratic government appointed a Commission for Truth and Reconciliation, thus foreshadowing the appointment of a similar commission in South Africa. The Commission consisted of eight civilians of varying political viewpoints under the chairmanship of Don Raul Rettig. Their terms of reference were to investigate all violations of human rights between 1973 and 1990, and to make recommendations. The Commission reported on 9 February 1991.

In 1994 Senator Pinochet came to the United Kingdom on a special diplomatic mission: (he had previously been appointed senator for life). He came again in 1995 and 1997. According to the evidence of Professor Walters, a former foreign minister and ambassador to the United Kingdom, Senator Pinochet was accorded normal diplomatic courtesies. The Foreign Office was informed in advance of his visit to London in September 1998, where at the age of 82 he has undergone an operation at the London Clinic.

At 11.25 p.m. on 16 October he was arrested while still at the London Clinic pursuant to a provisional warrant ("the first provisional warrant") issued under section 8(1)(b) of the Extradition Act 1989. The warrant had been issued by Mr. Evans, a metropolitan stipendiary magistrate, at his home at about 9 p.m. the same evening. The reason for the urgency was said to be that Senator Pinochet was returning to Chile the next day. We do not know the terms of the Spanish international warrant of arrest, also issued on 16 October. All we know is that in the first provisional warrant Senator Pinochet was accused of the murder of Spanish citizens in Chile between 11 September 1973 and 31 December 1983.

For reasons explained by the Divisional Court the first provisional warrant was bad on its face. The murder of Spanish citizens in Chile is not an extradition crime under section 2(1)(b) of the Extradition Act for which Senator Pinochet could be extradited, for the simple reason that the murder of a *British* citizen in Chile would not be an offence against *our* law. The underlying principle of all extradition agreements between states, including the European Extradition Convention of 1957, is reciprocity. We do not extradite for offences for which we would not expect and could not request extradition by others.

On 17 October the Chilean Government protested. The protest was renewed on 23 October. The purpose of the protest was to claim immunity from suit on behalf of Senator Pinochet both as a visiting diplomat and as a former head of state, and to request his immediate release.

Meanwhile the flaw in the first provisional warrant must have become apparent to the Crown Prosecution Service, acting on behalf of the State of Spain. At all events, Judge Garzon in Madrid issued a second international warrant of arrest dated 18 October, alleging crimes of genocide and terrorism. This in turn led to a second provisional warrant of arrest in England issued on this occasion by Mr. Ronald Bartle. Senator Pinochet was re-arrested in pursuance of the second warrant on 23 October.

The second warrant alleges five offences, the first being that Senator Pinochet "being a public official conspired with persons unknown to intentionally inflict severe pain or suffering on another in the . . . purported performance of his official duties . . . within the jurisdiction of the government of Spain." In other words, that he was guilty of torture. The reason for the unusual language is that the second provisional warrant was carefully drawn to follow the wording of section 134 of the Criminal Justice Act 1988 which itself reflects article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). Section 134(1) provides:

> "A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."

It will be noticed that unlike murder, torture is an offence under English law wherever the act of torture is committed. So unlike the first provisional warrant, the second provisional warrant is not bad on its face. The alleged acts of torture are extradition crimes under section 2 of the Extradition Act, as article 8 of the Convention required, and as Mr. Nichols conceded. The same is true of the third alleged offence, namely, the taking of hostages. Section 1 of the Taking of Hostages Act 1982 creates an offence under English law wherever the act of hostage-taking takes place. So hostage taking, like torture, is an extradition crime. The remaining offences do not call for separate mention.

It was argued that torture and hostage-taking only became extradition crimes after 1988 (torture) and 1982 (hostage-taking) since neither section 134 of the Criminal Justice Act 1988, nor section 1 of the Taking of Hostages Act 1982 are retrospective. But I agree with the Divisional Court that this argument is bad. It involves a misunderstanding of section 2 of the Extradition Act. Section 2(1)(a) refers to conduct which *would* constitute an offence in the United Kingdom *now*. It does not refer to conduct which *would have* constituted an offence *then*.

The torture allegations in the second provisional warrant are confined to the period from 1 January 1988 to 31 December 1992. Mr. Alun Jones does not rely on conduct subsequent to 11 March 1990. So we are left with the period from 1 January 1988 to 11 March 1990. Only one of the alleged acts of torture took place during that period. The hostage-taking allegations relate to the period from 1 January 1982 to 31 January 1992.

There are no alleged acts of hostage-taking during that period. So the second provisional warrant hangs on a very narrow thread. But it was argued that the second provisional warrant is no longer the critical document, and that we ought now to be looking at the complete list of crimes alleged in the formal request of the Spanish Government. I am content to assume, without deciding, that this is so.

Returning again to the narrative, Senator Pinochet made an application for certiorari to quash the first provisional warrant on 22 October and a second application to quash the second provisional warrant on 26 October. It was these applications which succeeded before the Divisional Court on 28 October 1998, with a stay pending an appeal to your Lordships' House. The question certified by the Divisional Court was as to "the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state."

On 3 November 1998 the Chilean Senate adopted a formal protest against the manner in which the Spanish courts had violated the sovereignty of Chile by asserting extra-territorial jurisdiction. They resolved also to protest that the British Government had disregarded Senator Pinochet's immunity from jurisdiction as a former head of state. This latter protest may be based on a misunderstanding. The British Government has done nothing. This is not a case where the Secretary of State has already issued an authority to proceed under section 7 of the Extradition Act, since the provisional warrants were issued without his authority (the case being urgent) under section 8(1)(b) of the Act. It is true that the Secretary of State might have cancelled the warrants under section 8(4). But as the Divisional Court pointed out, it is not the duty of the Secretary of State to review the validity of provisional warrants. It was submitted that it should have been obvious to the Secretary of State that Senator Pinochet was entitled to immunity as a former head of state. But the Divisional Court rejected that submission. In the event leave to move against the Secretary of State was refused.

There are two further points made by Professor Walters in his evidence relating to the present state of affairs in Chile. In the first place he gives a list of 11 criminal suits which have been filed against Senator Pinochet in Chile and five further suits where the Supreme Court has ruled that the 1978 amnesty does not apply. Secondly, he has drawn attention to public concern over the continued detention of Senator Pinochet.

> "I should add that there are grave concerns in Chile that the continued detention and attempted prosecution of Senator Pinochet in a foreign court will upset the delicate political balance and transition to democracy that has been achieved since the institution of democratic rule in Chile. It is felt that the current stable position has been achieved by a number of internal measures including the establishment and reporting of the Rettig Commission on Truth and Reconciliation. The intervention of a foreign court in matters more proper to internal domestic resolution may seriously undermine the balance achieved by the present democratic government."

Summary of Issues

The argument has ranged over a very wide field in the course of a hearing lasting six days. The main issues which emerged can be grouped as follows:

(1) Is Senator Pinochet entitled to immunity as a former head of state at common law? This depends on the requirements of customary international law, which are observed and enforced by our courts as part of the common law.

(2) Is Senator Pinochet entitled to immunity as a former head of state under Part 1 of the State Immunity Act 1978? If not, does Part 1 of the State Immunity Act cut down or affect any immunity to which he would otherwise be entitled at common law?

(3) Is Senator Pinochet entitled to immunity as a former head of state under Part 3 of the State Immunity Act, and the articles of the Vienna Convention as set out in the schedule to the Diplomatic Privileges Act 1964? It should be noticed that despite an assertion by the Chilean Government that Senator Pinochet is present in England on a diplomatic passport at the request of the Royal Ordnance, Miss Clare Montgomery Q.C. does not seek to argue that he is entitled to diplomatic immunity on that narrow ground, for which, she says, she cannot produce the appropriate evidence.

(4) Is this a case where the court ought to decline jurisdiction on the ground that the issues raised are non-justiciable?

The last of these four heads is sometimes referred to as "the Act of State" doctrine, especially in the United States. But Act of State is a confusing term. It is used in different senses in many different contexts. So it is better to refer to non-justiciability. The principles of sovereign immunity and non-justiciability overlap in practice. But in legal theory they are separate. State immunity, including head of state immunity, is a principle of public international law. It creates a procedural bar to the jurisdiction of the court. Logically therefore it comes first. Non-justiciability is a principle of private international law. It goes to the substance of the issues to be decided. It requires the court to withdraw from adjudication on the grounds that the issues are such as the court is not competent to decide. State immunity, being a procedural bar to the jurisdiction of the court, can be waived by the state. Non-justiciability, being a substantive bar to adjudication, cannot.

Issue one: head of state immunity at common law

As already mentioned, the common law incorporates the rules of customary international law. The matter is put thus in *Oppenheim's International Law* 9th ed. 1992, p. 57:

> "The application of international law as part of the law of the land means that, subject to the overriding effect of statute law, rights and duties flowing from the rules of customary international law will be

recognised and given effect by English courts without the need for any specific Act adopting those rules into English law."

So what is the relevant rule of customary international law? I cannot put it better than it is put by the appellants themselves in para. 26 of their written case:

"No international agreement specifically provides for the immunities of a former head of state. However, under customary international law, it is accepted that a state is entitled to expect that its former head of state will not be subjected to the jurisdiction of the courts of another state for certain categories of acts performed while he was head of state unless immunity is waived by the current government of the state of which he was once the head. The immunity is accorded for the benefit not of the former head of state himself but for the state of which he was once the head and any international law obligations are owed to that state and not to the individual."

The important point to notice in this formulation of the immunity principle is that the rationale is the same for former heads of state as it is for current heads of state. In each case the obligation in international law is owed to the state, and not the individual, though in the case of a current head of state he will have a concurrent immunity *ratione personae*. This rationale explains why it is the state, and the state alone, which can waive the immunity. Where, therefore, a state is seeking the extradition of its own former head of state, as has happened in a number of cases, the immunity is waived ex hypothesi. It cannot be asserted by the former head of state. But here the situation is the reverse. Chile is not waiving its immunity in respect of the acts of Senator Pinochet as former head of state. It is asserting that immunity in the strongest possible terms, both in respect of the Spanish international warrant, and also in respect of the extradition proceedings in the United Kingdom.

Another point to notice is that it is only in respect of "certain categories of acts" that the former head of state is immune from the jurisdiction of municipal courts. The distinction drawn by customary international law in this connection is between private acts on the one hand, and public, official or governmental acts on the other. Again I cannot put it better than it is put by the appellants in para. 27 of their written case. Like para. 26 it has the authority of Professor Greenwood; and like para. 26 it is not in dispute.

"It is generally agreed that private acts performed by the former head of state attract no such immunity. Official acts, on the other hand, will normally attract immunity. . . . Immunity in respect of such acts, which has sometimes been applied to officials below the rank of head of state, is an aspect of the principle that the courts of one state will not normally exercise jurisdiction in respect of the sovereign acts of another state."

The rule that a former head of state cannot be prosecuted in the municipal courts of a foreign state for his official acts as head of state has the universal support of writers on international law. They all speak with one voice. Thus Sir Arthur Watts K.C.M.G. Q.C. in his monograph on the Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers (1994) *Recueil des Cours* vol. 247 at p. 89 says:

"A head of state's official acts, performed in his public capacity as head of state, are however subject to different considerations. Such acts are acts of the state rather than the head of state's personal acts, and he cannot be sued for them even after he has ceased to be head of state."

In Satow's *Guide to Diplomatic Practice* 5th ed. we find:

"2.2 The personal status of a head of a foreign state therefore continues to be regulated by long-established rules of customary international law which can be stated in simple terms. He is entitled to immunity--probably without exception - from criminal and civil jurisdiction . . . 2.4 A head of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as a head of state. He will be entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts were performed in his official capacity; in this his position is no different from that of any agent of the state."

In *Oppenheim's International Law* 9th ed. para. 456, we find:

"All privileges mentioned must be granted to a head of state only so long as he holds that position. Therefore, after he has been deposed or has abdicated, he may be sued, at least in respect of obligations of a private character entered into while head of state. For his official acts as head of state he will, like any other agent of a state, enjoy continuing immunity."

It was suggested by Professor Brownlie that the American Restatement of the Foreign Relations Law of the United States was to the contrary effect. But I doubt if this is so. In vol. 1, para. 464 we find:

> "Former heads of state or government have sometimes sought immunity from suit in respect of claims arising out of their official acts while in office. Ordinarily, such acts are not within the jurisdiction to prescribe of other states. However a former head of state appears to have no immunity from jurisdiction to adjudicate."

The last sentence means only that it is competent for the court of the foreign state to inquire whether the acts complained of were official acts of the head of state, or private acts. Unless the court is persuaded that they were private acts the immunity is absolute.

Decided cases support the same approach. In *Duke of Brunswick v. King of Hanover* (1848) 2 H.L. Cas. p. 1, a case discussed by Professor F. A. Mann in his illuminating article published in 59 L.Q.R. (1943) p. 42, the reigning King of Hanover (who happened to be in England) was sued by the former reigning Duke of Brunswick. It was held by this House that the action must fail, not on the ground that the King of Hanover was entitled to personal immunity so long as he was in England (*ratione personae*) but on the wider ground (*ratione materiae*) that a foreign sovereign

> "cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the courts of this country cannot sit in judgment upon an act of a sovereign, effected by virtue of his sovereign authority abroad."

In *Hatch v. Baez* (1876) 7 Hun. 596 the plaintiff complained of an injury which he sustained at the hands of the defendant when president of the Dominican Republic. After the defendant had ceased to be president, he was arrested in New York at the suit of the plaintiff. There was a full argument before what would now, I think, be called the Second Circuit Court of Appeals, with extensive citation of authority including *Duke of Brunswick v. King of Hanover*. The plaintiff contended (just as the appellants have contended in the present appeal) that the acts of the defendant must be regarded as having been committed in his private capacity. I quote from the argument at p. 596-597:

> "No unjust or oppressive act committed by his direction upon any one of his subjects, or upon others entitled to protection, is in any true sense the act of the executive in his public and representative capacity, but of the *man* simply, rated as other men are rated in private stations; for in the perpetration of unauthorised offences of this nature, he divests himself of his "regal prerogatives" and descends to the level of those untitled offenders, against whose crimes it is the highest purpose of government to afford protection."

But the court rejected the plaintiff's argument. At p. 599 Gilbert J. said:

> "The wrongs and injuries of which the plaintiff complains were inflicted upon him by the Government of St. Domingo, while he was residing in that country, and was in all respects subject to its laws. They consist of acts done by the defendant in his official capacity of president of that republic. The sole question is, whether he is amenable to the jurisdiction of the courts of this state for those acts."

A little later we find, at p. 600:

> "The general rule, no doubt, is that all persons and property within the territorial jurisdiction of a state are amenable to the jurisdiction of its courts. But the immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of the sovereignty thereof, is

> essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law. It is also recognised in all the judicial decisions on the subject that have come to my knowledge."

The court concluded:

> "The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government."

In *Underhill v. Hernandez* (1897) 168 U.S. 250 the plaintiff was an American citizen resident in Venezuela. The defendant was a general in command of revolutionary forces, which afterwards prevailed. The plaintiffs brought proceedings against the defendant in New York, alleging wrongful imprisonment during the revolution. In a celebrated passage Chief Justice Fuller said, at 252:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

The Supreme Court approved, at p. 254 a statement by the Circuit Court of Appeals "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."

On the other side of the line is *Jimenez v. Aristeguieta* (1962) 311 F. 2d547. In that case the State of Venezuela sought the extradition of a former chief executive alleging four charges of murder, and various financial crimes. There was insufficient evidence to connect the defendant with the murder charges. But the judge found that the alleged financial crimes were committed for his private financial benefit, and that they constituted "common crimes committed by the Chief of State done in violation of his position and not in pursuance of it." The defendant argued that as a former chief executive he was entitled to sovereign immunity, and he relied on *Underhill v. Hernandez*. Not surprisingly the Fifth Circuit Court of Appeals rejected this argument. At p. 557, they said:

> "It is only when officials having sovereign authority act in an official capacity that the act of state doctrine applies."

To the same effect is *United States of America v. Noriega* (1990) 746 F.Supp. 1506. The defendant was charged with various drug offences. He claimed immunity as de facto head of the Panamanian government. The court considered the claim under three heads, sovereign immunity, the act of state doctrine and diplomatic immunity. Having referred to *Hatch v. Baez* and *Underhill v. Hernandez* the court continued, at pp. 1521-1522:

> "In order for the act of state doctrine to apply, the defendant must establish that his activities are 'acts of state', i.e. that they were taken on behalf of the state and not, as private acts, on behalf of the actor himself. . . . That the acts must be *public* acts of the *sovereign* has been repeatedly affirmed. . . . Though the distinction between the public and private acts of government officials may prove elusive, this difficulty has not prevented courts from scrutinising the character of the conduct in question."

The court concluded that *Noriega*'s alleged drug trafficking could not conceivably constitute public acts on behalf of the Panamanian state.

These cases (and there are many others to which we were referred) underline the critical distinction between personal or private acts on the one hand, and public or official acts done in the execution or under colour of sovereign authority on the other. Despite the plethora of authorities, especially in the United States, the appellants were unable to point to a single case in which official acts committed by a head of state have been made the subject of suit or prosecution after he has left office. The nearest they got was *Hilao v. Marcos* (1994) 25 F. 3d 1467, in which a claim for immunity by the estate of former President Marcos failed. But the facts were special. Although there was no formal waiver of immunity in the case, the government of the Philippines made plain their view that the claim should proceed. Indeed they filed a brief in which they asserted that foreign relations with the United States would *not* be adversely affected if claims against ex-President Marcos and his estate were litigated in U.S. courts. There is an obvious contrast with the facts of the present case.

So the question comes to this: on which side of the line does the present case come? In committing the crimes which are alleged against him, was Senator Pinochet acting in his private capacity or was he acting in a sovereign capacity as head of state? In my opinion there can be only one answer. He was acting in a sovereign capacity. It has not been suggested that he was personally guilty of any of the crimes of torture or hostage-taking in the sense that he carried them out with his own hands. What is alleged against him is that he organised the commission of such crimes, including the elimination of his political opponents, as head of the Chilean government, and that he did so in co-operation with other governments under Plan Condor, and in particular with the government of Argentina. I do not see how in these circumstances he can be treated as having acted in a private capacity.

In order to make the above point good it is necessary to quote some passages from the second international warrant.

> "It can be inferred from the inquiries made that, since September 1973 in Chile and since 1976 in the Republic of Argentina a series of events and punishable actions were committed under the fiercest ideological repression against the citizens and residents in these countries. The plans and instructions established beforehand from the government enabled these actions to be carried out. . . .
> It has been ascertained that there were coordination actions at international level that were called 'Operativo Condor' in which different countries, Chile and Argentina among them, were involved and whose purpose was to coordinate the oppressive actions among them.
> In this sense Augusto Pinochet Ugarte, Commander-in-Chief of the Armed Forces and head of the Chilean government at the time, committed punishable acts in coordination with the military authorities in Argentina between 1976 and 1983 . . . as he gave orders to eliminate, torture and kidnap persons and to cause others to disappear, both Chileans and individuals from different nationalities, in Chile and in other countries, through the actions of the secret service (D.I.N.A.) and within the framework of the above-mentioned 'Plan Condor'."

Where a person is accused of organising the commission of crimes as the head of the government, in cooperation with other governments, and carrying out those crimes through the agency of the police and the secret

service, the inevitable conclusion must be that he was acting in a sovereign capacity and not in a personal or private capacity.

But the appellants have two further arguments. First they say that the crimes alleged against Senator Pinochet are so horrific that an exception must be made to the ordinary rule of customary international law. Secondly they say that the crimes in question are crimes against international law, and that international law cannot both condemn conduct as a breach of international law and at the same time grant immunity from prosecution. It cannot give with one hand and take away with the other.

As to the first submission, the difficulty, as the Divisional Court pointed out, is to know where to draw the line. Torture is, indeed, a horrific crime, but so is murder. It is a regrettable fact that almost all leaders of revolutionary movements are guilty of killing their political opponents in the course of coming to power, and many are guilty of murdering their political opponents thereafter in order to secure their power. Yet it is not suggested (I think) that the crime of murder puts the successful revolutionary beyond the pale of immunity in customary international law. Of course it is strange to think of murder or torture as "official" acts or as part of the head of state's "public functions." But if for "official" one substitutes "governmental" then the true nature of the distinction between private acts and official acts becomes apparent. For reasons already mentioned I have no doubt that the crimes of which Senator Pinochet is accused, including the crime of torture, were governmental in nature. I agree with Collins J. in the Divisional Court that it would be unjustifiable in theory, and unworkable in practice, to impose any restriction on head of state immunity by reference to the number or gravity of the alleged crimes. Otherwise one would get to this position: that the crimes of a head of state in the execution of his governmental authority are to be attributed to the state so long as they are not too serious. But beyond a certain (undefined) degree of seriousness the crimes cease to be attributable to the state, and are instead to be treated as his private crimes. That would not make sense.

As to the second submission, the question is whether there should be an exception from the general rule of immunity in the case of crimes which have been made the subject of international conventions, such as the International Convention against the Taking of Hostages (1980) and the Convention against Torture (1984). The purpose of these conventions, in very broad terms, was to ensure that acts of torture and hostage-taking should be made (or remain) offences under the criminal law of each of the state parties, and that each state party should take measures to establish extra-territorial jurisdiction in specified cases. Thus in the case of torture a state party is obliged to establish extra-territorial jurisdiction when the alleged offender is a national of that state, but not where the victim is a national. In the latter case the state has a discretion: see article 5.1(b)

and (c). In addition there is an obligation on a state to extradite or prosecute where a person accused of torture is found within its territory--aut dedere aut judicare: see article 7. But there is nothing in the Torture Convention which touches on state immunity. The contrast with the Convention on the Prevention and Punishment of the Crime of Genocide (1948) could not be more marked. Article 4 of the Genocide Convention provides:

> "Persons committing genocide or any of the other acts enumerated in article 3 shall be punished whether they are constitutionally responsible rulers or public officials or private individuals."

There is no equivalent provision in either the Torture Convention or the Taking of Hostages Convention.

Moreover when the Genocide Convention was incorporated into English law by the Genocide Act 1969, article 4 was omitted. So Parliament must clearly have intended, or at least contemplated, that a head of state accused of genocide would be able to plead sovereign immunity. If the Torture Convention and the Taking of Hostages Convention had contained a provision equivalent to article 4 of the Genocide Convention (which they did not) it is reasonable to suppose that, as with genocide, the equivalent provisions would have been omitted when Parliament incorporated those conventions into English law. I cannot for my part see any inconsistency between the purposes underlying these Conventions and the rule of international law which allows a head of state procedural immunity in respect of crimes covered by the Conventions.

Nor is any distinction drawn between torture and other crimes in state practice. In *Al-Adsani v. Government of Kuwait* (1996) 107 I.L.R. 536 the plaintiff brought civil proceedings against the government of Kuwait alleging that he had been tortured in Kuwait by government agents. He was given leave by the Court of Appeal to serve out of the jurisdiction on the ground that state immunity does not extend to acts of torture. When the case came back to the Court of Appeal on an application to set aside service, it was argued that a state is not entitled to immunity in respect of acts that are contrary to international law, and that since torture is a violation of jus cogens, a state accused of torture forfeits its immunity. The argument was rejected. Stuart Smith L.J. observed that the draftsman of the State Immunity Act must have been well aware of the numerous international conventions covering torture (although he could not, of course, have been aware of the convention against torture in 1984). If civil claims based on acts of torture were intended to be excluded from the immunity afforded by section 1(1) of the Act of 1978, because of the horrifying nature of such acts, or because they are condemned by international law, it is inconceivable that section 1(1) would not have said so.

The same conclusion has been reached in the United States. In *Siderman de Blake v. Republic of Argentina* (1992) 965F 2d 699 the plaintiff brought civil proceedings for alleged acts of torture against the Government of Argentina. It was held by the 9th Circuit Court of Appeals that although prohibition against torture has attained the status of jus cogens in international law (citing *Filartiga v. Pena-Irala* (1980) 630F 2d 876) it did not deprive the defendant state of immunity under the Foreign Sovereign Immunities Act.

Admittedly these cases were civil cases, and they turned on the terms of the Sovereign Immunity Act in England and the Foreign Sovereign Immunity Act in the United States. But they lend no support to the view that an allegation of torture "trumps" a plea of immunity. I return later to the suggestion that an allegation of torture excludes the principle of non-justiciability.

Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about 1 million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government.

In some cases the validity of these amnesties has been questioned. For example, the Committee against Torture (the body established to implement the Torture Convention under article 17) reported on the Argentine amnesty in 1990. In 1996 the Inter-American Commission investigated and reported on the Chilean amnesty. It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators. Notwithstanding the wide terms of the Torture Convention and the Taking of Hostages Convention, state practice does not at present support an obligation to extradite or prosecute in all cases. Mr. David Lloyd Jones (to whom we are all much indebted for his help as amicus) put the matter as follows:

> "It is submitted that while there is some support for the view that generally applicable rules of state immunity should be displaced in cases concerning infringements of jus cogens, e.g. cases of torture, this does not yet constitute a rule of public international law. In particular it must be particularly doubtful whether there exists a rule of public international law requiring states not to accord immunity in such circumstances. Such a rule would be inconsistent with the practice of many states."

Professor Greenwood took us back to the charter of the International Military Tribunal for the trial of war criminals at Nuremburg, and drew attention to article 7, which provides:

> "The official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment."

One finds the same provision in almost identical language in article 7(2) of the Statute of the International Tribunal for the Former Yugoslavia (1993), article 6(2) of the Statue of the International Tribunal for Rwanda (1994) and most recently in article 27 of the Statute of the International Criminal Court (1998). Like the Divisional Court, I regard this as an argument more against the appellants than in their favour. The setting up of these special international tribunals for the trial of those accused of genocide and other crimes against humanity, including torture, shows that such crimes, when committed by heads of state or other responsible government officials cannot be tried in the ordinary courts of other states. If they could, there would be little need for the international tribunal.

Professor Greenwood's reference to these tribunals also provides the answer to those who say, with reason, that there must be a means of bringing such men as Senator Pinochet to justice. There is. He may be tried (1) in his own country, or (2) in any other country that can assert jurisdiction, provided his own country waives state immunity, or (3) before the International Criminal Court when it is established, or (4) before a specially constituted international court, such as those to which Professor Greenwood referred. But in the absence of waiver he cannot be tried in the municipal courts of other states.

On the first issue I would hold that Senator Pinochet is entitled to immunity as former head of state in respect of the crimes alleged against him on well established principles of customary international law, which principles form part of the common law of England.

Issue two: Immunity under Part I of the State Immunity Act 1978

The long title of the State Immunity Act 1978 states as its first purpose the making of *new* provision with respect to proceedings in the United Kingdom by or against other states. Other purposes include the making of *new* provision with respect to immunities and privileges of heads of state. It is common ground that the Act of 1978 must be read against the background of customary international law current in 1978; for it is highly unlikely, as Lord Diplock said in *Alcom Ltd. v. Republic of Colombia* [1984] 4 A.C. 580 at p. 600 that Parliament intended to require United Kingdom courts to act contrary to international law unless the clear language of the statute compels such a conclusion. It is for this reason that it made sense to start with customary international law before coming to the statute.

The relevant sections are as follows:

> "1. *General immunity from jurisdiction*
> (1) A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
> (2) A court shall give effect to the immunity conferred by this section even though the state does not appear in the proceedings in question.
> "14. *States entitled to immunities and privileges*
> "(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth state other than the United Kingdom; and references to a state include references to -
> (a) the sovereign or other head of that state in his public capacity;

(b) the government of that state; and
(c) any department of that government,
but not to any entity (hereafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the state and capable of suing or being sued.
(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if -
(a) the proceedings relate to anything done by it in the exercise of sovereign authority; . . .
"16. *Excluded matters*
(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 . . .
(4) This Part of this Act does not apply to criminal proceedings."

Mr. Nichols drew attention to the width of section 1(1) of the Act. He submitted that it confirms the rule of absolute immunity at common law, subject to the exceptions contained in sections 2-11, and that the immunity covers criminal as well as civil proceedings. Faced with the objection that Part I of the Act is stated not to apply to criminal proceedings by virtue of the exclusion in section 16(4), he argues that the exclusion applies only to sections 2-11. In other words section 16(4) is an exception on an exception. It does not touch section 1. This was a bold argument, and I cannot accept it. It seems clear that the exclusions in section 16(2)(3) and (5) all apply to Part I as a whole, including section 1(1). I can see no reason why section 16(4) should not also apply to section 1(1). Mr. Nichols referred us to an observation of the Lord Chancellor in moving the Second Reading of the Bill in the House of Lords: Hansard 17 January 1978 col. 52. In relation to Part I of the Bill he said "immunity from criminal jurisdiction is not affected, and that will remain." I do not see how this helps Mr. Nicholls. It confirms that the purpose of Part I was to enact the restrictive theory of sovereign immunity in relation to commercial transactions and other matters of a civil nature. It was not intended to affect immunity in criminal proceedings.

The remaining question under this head is whether the express exclusion of criminal proceedings from Part I of the Act, including section 1(1), means that the immunity in respect of criminal proceedings which exists at common law has been abolished. In *Al Adsani v. Government of Kuwait* 107 I.L.R. 536 at 542 Stuart Smith L.J. referred to the State Immunity Act as providing a "comprehensive code." So indeed it does. But obviously it does not provide a code in respect of matters which it does not purport to cover. In my opinion the immunity of a former head of state in respect of criminal acts committed by him in exercise of sovereign power is untouched by Part I of the Act.

Issue 3: Immunity under Part III of the State Immunity Act

The relevant provision is section 20 which reads:

"(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to -
(a) a sovereign or other head of State;
(b) members of his family forming part of his household; and
(c) his private servants,
as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants. . . .

"(5) This section applies to the sovereign or other head of any state on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of state in his public capacity."

The Diplomatic Privileges Act 1964 was enacted to give force to the Vienna Convention on diplomatic privileges. Section 1 provides that the Act is to have effect in *substitution* for any previous enactment or rule of law.

So again the question arises whether the common law immunities have been abolished by statute. So far as the immunities and privileges of diplomats are concerned, this may well be the case. Whether the same applies to heads of state is more debatable. But it does not matter. For in my view the immunities to which Senator Pinochet is entitled under section 20 of the State Immunity Act are identical to the immunities which he enjoys at common law.

The Vienna Convention provides as follows:

"Article 29: The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. . . .

"Article 31: A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. . . .

"Article 39(1): Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state on proceedings to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

(2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

The critical provision is the second sentence of article 39(2). How is this sentence to be applied (as it must) to a head of state? What are the "necessary modifications" which are required under section 20 of the State Immunity Act? It is a matter of regret that in such an important sphere of international law as the immunity of heads of state from the jurisdiction of our courts Parliament should have legislated in such a round-about way. But we must do our best.

The most extreme view, advanced only, I think, by Professor Brownlie for the Interveners and soon abandoned, is that the immunity extends only to acts performed by a visiting head of state while within the United Kingdom. I would reject this submission. Article 39(2) is not expressly confined to acts performed in the United Kingdom, and it is difficult to see what functions a visiting heads of state would be able to exercise in the United Kingdom as head of state other than purely ceremonial functions.

A less extensive view was advanced by Mr. Alun Jones as his first submission in reply. This was that the immunity only applies to the acts of heads of state in the exercise of their external functions, that is to say, in the conduct of international relations and foreign affairs generally. But in making the "necessary modifications" to article 39 to fit a head of state, I

see no reason to read "functions" as meaning "external functions." It is true that diplomats operate in foreign countries as members of a mission. But heads of state do not. The normal sphere of a head of state's operations is his own country. So I would reject Mr. Alun Jones's first submission.

Mr. Alun Jones's alternative submission in reply was as follows:

> "However, if this interpretation is wrong, and Parliament's intention in section 20(1)(a) of the State Immunity Act was to confer immunity in respect of the exercise of the internal, as well as the external, functions of the head of state, then the second sentence of article 39(2) must be read as if it said: 'with respect to official acts performed by a head of state in the exercise of his functions as head of state, immunity shall continue to subsist.'"

Here Mr. Alun Jones hits the mark. His formulation was accepted as correct by Mr. Nicholls and Miss Clare Montgomery on behalf of the respondents, and by Mr. David Lloyd Jones as amicus curiae.

So the question on his alternative submission is whether the acts of which Senator Pinochet is accused were "official acts performed by him in the exercise of his functions as head of state." For the reasons given in answer to issue 1, the answer must be that they were.

So the answer is the same whether at common law or under the statute. And the rationale is the same. The former head of state enjoys continuing immunity in respect of governmental acts which he performed as head of state because in both cases the acts are attributed to the state itself.

Issue 4--non-justiciability

If I am right that Senator Pinochet is entitled to immunity at common law, and under the statute, then the question of Non-justiciability does not arise. But I regard it as a question of overriding importance in the present context, so I intend to say something about it.

The principle of non-justiciability may be traced back to the same source as head of state immunity, namely, the *Duke of Brunswick v. The King of Hanover.* Since then the principles have developed separately; but they frequently overlap, and are sometimes confused. The authoritative expression of modern doctrine of non-justiciability is to be found in the speech of Lord Wilberforce in *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888. One of the questions in that case was whether there exists in English law a general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Lord Wilberforce answered the question in the affirmative. At 932 he said:

> "In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process."

Lord Wilberforce traces the principle from *Duke of Brunswick v. King of Hanover* through numerous decisions of the Supreme Court of the United

States including *Underhill v. Hernandez*, *Oetjen v. Central Leather Co.* (1918) 246 U.S. 297 and *Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S. 398. In the latter case Lord Wilberforce detected a more flexible use of the principle on a case-by-case basis. This is borne out by the most recent decision of the Supreme Court in *W.S. Kirkpatrick & Co. Inc. v. Environmental Tectonics Corporation International* (1990) 493 U.S. 400. These and other cases are analysed in depth by Mance J. in his judgment in *Kuwait Airways Corporation v. Iraqi Airways Co.* (unreported) 29 July 1998, from which I have derived much assistance. In the event Mance J. held that judicial restraint was not required on the facts of that case. The question is whether it is required (or would be required if head of state immunity were not a sufficient answer) on the facts of the present case. In my opinion there are compelling reasons for regarding the present case as falling within the non-justiciability principle.

In the *Buttes Gas* case the court was being asked "to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law." Lord Wilberforce concluded that the case raised issues upon which a municipal court could not pass. In the present case the State of Spain is claiming the right to try Senator Pinochet, a former head of state, for crimes committed in Chile, some of which are said to be in breach of international law. They have requested his extradition. Other states have also requested extradition. Meanwhile Chile is demanding the return of Senator Pinochet on the ground that the crimes alleged against him are crimes for which Chile is entitled to claim state immunity under international law. These crimes were the subject of a general amnesty in 1978, and subsequent scrutiny by the Commission of Truth and Reconciliation in 1990. The Supreme Court in Chile has ruled that in respect of at least some of these crimes the 1978 amnesty does not apply. It is obvious, therefore, that issues of great sensitivity have arisen between Spain and Chile. The United Kingdom is caught in the crossfire. In addition there are allegations that Chile was collaborating with other states in South America, and in particular with Argentina, in execution of Plan Condor.

If we quash the second provisional warrant, Senator Pinochet will return to Chile, and Spain will complain that we have failed to comply with our international obligations under the European Convention on Extradition. If we do not quash the second provisional warrant, Chile will complain that Senator Pinochet has been arrested in defiance of Chile's claim for immunity, and in breach of our obligations under customary international law. In these circumstances, quite apart from any embarrassment in our foreign relations, or potential breach of comity, and quite apart from any fear that, by assuming jurisdiction, we would only serve to "imperil the amicable relations between governments and vex the peace of nations" (see *Oetjen v. Central Leather Co.* (1918) 246 U.S. 297 at 304) we would be entering a field in which we are simply not competent to adjudicate. We apply customary international law as part of the common law, and we give effect to our international obligations so far as they are incorporated in our statute law; but we are not an international court. For an English court to investigate and pronounce on the validity of the amnesty in Chile would be to assert jurisdiction over the internal affairs of that state at the very time when the Supreme Court in Chile is itself performing the same task. In my view this is a case in which, even if there were no valid claim to sovereign immunity, as I think there is, we should exercise judicial restraint by declining jurisdiction.

There are three arguments the other way. The first is that it is always open to the Secretary of State to refuse to make an order for the return of Senator Pinochet to Spain in the exercise of his discretion under section 12 of the Extradition Act. But so far as Chile is concerned, the damage will by then have been done. The English courts will have condoned the arrest. The Secretary of State's discretion will come too late. The fact that these proceedings were initiated by a provisional warrant under section 8(1)(b) without the Secretary of State's authority to proceed, means that the courts cannot escape responsibility for deciding now whether or not to accept jurisdiction.

Secondly it is said that by allowing the extradition request to proceed, we will not be adjudicating ourselves. That will be the task of the courts in Spain. In an obvious sense this is true. But we will be taking an essential step towards allowing the trial to take place, by upholding the validity of the arrest. It is to the taking of that step that Chile has raised objections, as much as to the trial itself.

Thirdly it is said that in the case of torture Parliament has removed any concern that the court might otherwise have by enacting section 134 of the Criminal Justice Act 1988 in which the offence of torture is defined as the intentional infliction of severe pain by "a public official or . . . person acting in an official capacity." I can see nothing in this definition to override the obligation of the court to decline jurisdiction (as Lord Wilberforce pointed out it is an obligation, and not a discretion) if the circumstances of the case so require. In some cases there will be no

difficulty. Where a public official or person acting in an official capacity is accused of torture, the court will usually be competent to try the case if there is no plea of sovereign imunity, or if sovereign immunity is waived. But here the circumstances are very different. The whole thrust of Lord Wilberforce's speech was that non-justiciability is a flexible principle, depending on the circumstances of the particular case. If I had not been of the view that Senator Pinochet is entitled to immunity as a former head of state, I should have held that the principle of non-justiciability applies.

For these reasons, and the reasons given in the judgment of the Divisional Court with which I agree, I would dismiss the appeal.

ANNEX 8

J. Dugard, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?", *Leiden Journal of International Law*, (12) 1999, pp. 1001-1015.

Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?*

*John Dugard***

Keywords: amnesty; international criminal law; International Criminal Tribunal; truth commissions.

Abstract: From time immemorial amnesty has been employed as a means of promoting a political settlement and advancing reconciliation in societies that have emerged from repression. At present there is a trend in support of prosecution of those who have committed international crimes, such as torture and crimes against humanity, which excludes the possibility of amnesty. That amnesty is no longer favored is illustrated by the failure of the Rome Statute of the International Criminal Court to recognize amnesty as a defence to prosecution. While there is no place for unconditional amnesty in the contemporary international legal order an intermediate solution such as a Truth and Reconciliation Commission with power to grant amnesty after investigation, of the South African kind, may contribute to the achievement of peace and justice in a society in transition more effectively than mandatory prosecution.

1. INTRODUCTION

How to deal with the crimes of removed repressive regimes is now a principal preoccupation of international law. Amnesty is no longer accepted as the natural price to be paid for transition from repression to democracy. Inspired by the establishment of *ad hoc* international criminal tribunals for the Former Yugoslavia and Rwanda, and the prospect of a permanent International Criminal Court, prosecution has become the preferred choice. Whether it is the wisest course to pursue remains a matter of debate. In some situations amnesty may still offer the best prospect for peace – if not for justice. In others an intermediate course may be more suitable. The Truth and Reconciliation Commission, of the kind established in several Latin-American countries and South Africa, may serve the interests of peace and justice better than prosecution or amnesty. In this article I shall examine this debate in the context of contemporary international law, with special reference to the case of Augusto Pinochet.

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* This article is based on the Third Manfred Lachs Memorial Lecture, delivered at the Peace Palace, The Hague, on 15 April 1999.

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2. AMNESTY, PROSECUTION OR TRUTH COMMISSION?

Amnesty is a practice that has its roots in the early history of mankind. From time immemorial successor regimes have sought to secure peace through the pardoning of their enemies. The sole alternative, until present times, was brutal punishment without trial. Consequently, human rights advocates pleaded for amnesty for political prisoners, even for those from fallen regimes.

The past decade has seen a change in attitude. There is now a demand for prosecution of the villains of past regimes. There are many reasons for this. The abuse of amnesty by military dictatorships that have enacted 'self-amnesty' laws before surrendering power is an obvious reason. Perhaps the most important reason, however, is the internationalization of crime in the global village. Most of the atrocities committed by dictators today are not merely national crimes. They are frequently international crimes – genocide, crimes against humanity, torture, hostage-taking and apartheid – which concern the international community as well as the national state. Moreover, international criminal courts have been, and are being, established to punish the perpetrators of such crimes. In these circumstances the international community has an interest in the treatment of human rights violations, and sees punishment before national courts or international courts as the best solution.

Consequently successor regimes are now told by the high priests of public opinion – NGOs and scholars – not only that they *ought* to prosecute but that they are *obliged* under international law to prosecute.

Support for this argument is to be found in the Genocide Convention of 1948, which contains an absolute obligation to prosecute offenders;[1] in decisions of the Inter-American Court and Commission of Human Rights[2] holding that amnesties granted by Argentina and Uruguay were incompatible with the American Convention on Human Rights; in the decision of the American Court of Human Rights in the *Velasquez Rodriguez Case*[3] holding, in respect of Honduras, that Article 1 (1) of the Convention, requiring states to "ensure the rights set forth in the Convention", obliged states to investigate and punish any violation of the rights recognized by the American Convention of Human Rights; in a comment by the UN Human Rights Committee that amnesties covering acts of torture are "generally incompatible with the duty of states to investigate such acts";[4] in the 1996 International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, which obliges states to try or extra-

1. Art. 4 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951).
2. Inter-American Commission on Human Rights, Report No. 29/92 (Uruguay) 82nd session OEA/LV/11.82.Doc. 25 (2 Oct. 1992); *id.*, Report No. 24/92 (Argentina), Doc. 24.
3. 1988 IACHR (Ser. C), No. 4, para. 165.
4. General Comment No. 20 (44), (Art. 7), UN Doc. CCPR/C21/Rev. 1/Add 3., para 15 (1992).

dite those alleged to have committed crimes against humanity;[5] in the Final Declaration and Programme of Action of the 1993 World Conference on Human Rights[6] calling on states to prosecute those responsible for grave human rights violations, such as torture, and to abrogate legislation leading to impunity for such crimes; in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968;[7] and in the Statutes for the International Criminal Tribunal for the Former Yugoslavia (ICTY)[8] and the International Criminal Tribunal for Rwanda (ICTR)[9] which require prosecution of those responsible for the crimes punishable under these statutes. Support for prosecution is also derived from the obligation to prosecute or extradite those guilty of grave breaches of the 1949 Geneva Conventions.[10] Here it is argued that the distinction between international and non-international armed conflicts has largely disappeared and that the obligation to prosecute grave breaches or similar war crimes extends to internal conflicts. Finally, of course, there is a substantial body of academic writing to support this argument.[11]

The implication of this argument is that international law prohibits amnesty. This is clearly spelt out by the Trial Chamber of the ICTY in *Prosecutor v. Furundžija*[12] which held that amnesties for torture are null and void and will not receive foreign recognition.

It is, however, doubtful, whether international law has reached this stage. State practice hardly supports such a rule as modern history is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them. In many of these cases, notably that of South Africa, the United Nations has welcomed such a solution.[13]

The decisions of national courts may also provide evidence of state practice. And here it must be stressed that national constitutional courts have generally upheld the validity of amnesty laws; sometimes, as in the case of the courts of

5. Art. 6 Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission of the Work of its Forty-eighth Session, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1966).
6. Part II, para. 60, UN Doc. A/Conf/57/24 (1993); 32 ILM 166 (1992).
7. 8 ILM 68 (1969).
8. Security Council Resolution 827 (1993); 32 ILM 1192 (1993).
9. Security Council Resolution 955; 33 ILM 1598 (1994).
10. *See, for example*, Arts.146 and 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950).
11. *See, for example*, M Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 Law and Contemporary Problems 9 (1996); D. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale Law Journal 2537, 2568 (1991); C. Edelenbos, *Human Rights Violations; A Duty to Prosecute?* 7 Leiden Journal of International Law 5, 15 (1994).
12. Case No. IT-95-17/1-T (10 December 1998); (1999) 39 ILM, at paras. 151-157 (1999).
13. *See* M. Scharf, *The Letter of the Law: the Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 Law and Contemporary Problems 41, 47 (1996).

South Africa[14] and El Salvador,[15] expressing the view that international law not only fails to prohibit amnesty but rather encourages it. These courts have invoked Article 6 (5) of Additional Protocol II of 1977 which on the face of it, although this is disputed by the International Committee of the Red Cross,[16] encourages amnesty by providing that at the end of hostilities in internal conflicts the authorities "shall endeavour to grant the broadest possible amnesty to persons who have participated in the conflict."

Of the twelve Law Lords who heard the *Pinochet* case, only one commented on the question of amnesty. Although he was one of the minority judges (in the first *Pinochet* case), few would disagree with Lord Lloyd's statement that:

> Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government [...] It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.[17]

Although international law does not – yet – prohibit the granting of amnesty for international crimes it is clearly moving in this direction. The Statute of the International Criminal Court (ICC),[18] adopted in Rome in 1998, makes no provision for amnesty. Moreover, the adoption of the principle of 'complementarity' in the Rome Statute,[19] which gives both national courts and the ICC jurisdiction over war crimes, crimes against humanity and genocide, suggests that national courts will assert their permissive jurisdiction over such crimes with more enthusiasm than in the past. Moreover, it can confidently be expected that NGO's will, in future, bring pressure on both national and international courts to prosecute international criminals and that the granting of amnesty will be challenged with new vigor.

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14. Azanian Peoples Organization (AZAPO) *v.* President of the Republic of South Africa, 1996 (4) SA 671 (CC), at 691, para. 32.
15. Proceedings No. 10-93 (May 20, 1993); *reprinted in* N.J. Kritz (Ed.), Transitional Justice, Vol. 3, 549, 555 (1995).
16. *See* D. Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 Law and Contemporary Problems 196, 212 (1996).
17. R. *v.* Bow Street Metropolitan Stipendiary Magistrate. *Ex Parte* Pinochet [1998] 4 All ER 897 (HL), at 929 h-i.
18. The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), *reprinted in* 37 ILM 999 (1998).
19. Preamble, para. 10, Art. 17.

Strangely, at the very point in time that international opinion is moving towards prosecution and away from amnesty, a new institution has appeared on the scene which challenges prosecution as the only option. This is the truth or truth and reconciliation commission.

Since 1974 some seventeen truth commissions have been established to enquire into the past of particular societies, to "tell the truth" of what happened.[20] Probably the best known are those of Chile, Argentina, El Salvador, South Africa and Guatemala. There are now proposals to establish truth commission for Cambodia and Bosnia.

Truth commissions vary considerably in respect of composition, independence and mandate, although they are all committed to healing by means of truth telling. They are not, *in theory*, antithetical to prosecution. Thus Louis Joinet in his 1997 Report on the "Question of the Impunity of Perpetrators of Human Rights Violations" to the Sub-Commission on Prevention of Discrimination and Protection of Minorities[21] recommends that an extrajudicial commission of enquiry into the events of the past should go hand in hand with prosecution and punishment of human rights violators. *In practice* the position is very different. In most cases a truth commission is established because the new regime lacks the power to embark on prosecution – as in the case of Chile where President Aylwin's democratic government operated in the shadow of the Pinochet-led military; or because the political compact that has produced democracy is premised on a compromise between old and new regimes which precludes prosecution – as in the case of South Africa, whose democracy was founded on an agreement between the National Party apartheid regime and the African National Congress (ANC) based on conditional amnesty. In her study of fifteen truth commissions Priscilla Hayner states that prosecutions are "very rare" after a truth commission report even where the identity of the perpetrators is known. She adds "[i]n only a few of the fifteen cases looked at [...] was there an amnesty law passed explicitly preventing trials, but in most other cases there was in effect a *de facto* amnesty – prosecutions were never seriously considered."[22]

So in practice truth commissions and prosecutions are competing mechanisms for dealing with crimes of the past. Blanket, unconditional amnesty, unaccompanied by a truth commission is no longer an acceptable option. The choice is between prosecution or amnesty accompanied by a truth commission.

Each has its merits. Prosecution emphasizes the right to justice, and society's demand for retribution. The truth commission seeks to satisfy the right to know and understand the past, and aims at reconciliation rather than retribution. Which course is most likely to heal a divided society is unclear. While interna-

20. P Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, 16 Human Rights Quarterly 600 (1994).
21. UN Doc. E/CN, 4/sub.2/1997/20/Rev 1 (1997).
22. *Supra* note 20, at n. 4.

tional opinion increasingly demands prosecution and justice, domestic opinion has other priorities. One has only to read the eloquent judgment of South Africa's present Chief Justice, Ismail Mahomed, in the challenge to the constitutionality of South Africa's amnesty legislation in *Azapo v. President of the Republic of South Africa*[23] to understand why societies prefer truth to prosecution:

> Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the law which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously, and most of them no longer survive to tell their tales. [...] Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The [Promotion of National Unity and Reconciliation] Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible.
>
> That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosure and to reveal the truth which persons in the positions of the applicants so desperately desire [...]

International opinion, often driven by NGO's and western activists who are strangers to repression, fails to pay sufficient attention to the circumstances of the society which chooses amnesty above prosecution; and to the argument that wounds are best healed at home, by national courts and truth commissions, rather than by foreign courts and international tribunals.

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23. 1996 (4) SA 671, at 683-685.

3. THE *PINOCHET* CASE

What are the lessons to be learned from the *Pinochet* case – comprising two judgments[24] of the House of Lords – for the purpose of the present thesis?

Augusto Pinochet was granted amnesty by a military decree of 1978, which granted unconditional, total amnesty for crimes committed between 1973 and 1978.[25] He was also entitled to immunity from prosecution in Chile by virtue of his office of senator. Yet neither his lawyers nor the Chilean government raised this amnesty in the legal proceedings. No doubt, this was because it was realized that a foreign court was unlikely to give serious consideration to an amnesty decree in effect granted by Pinochet to himself.

The Law Lords, with two exceptions,[26] failed even to mention the question of amnesty. This does not, however, mean that they were unsympathetic to the view that the treatment of a former head of state is best left to the territorial state, the state in which the crimes were committed. Although there is no express approval of this view, it may be suggested that support for such a solution is implicit in the reasoning and decision of the House of Lords. Two reasons may be advanced for this proposition.

First, although both judgments may be labelled as progressive by reason of their refusal to accord immunity to a former head of state in respect of international crimes (*in casu* torture), the second and decisive judgment was hardly progressive in its reasoning or effect. Only one judge (Lord Millett) was prepared to accept that torture was an international crime with universal jurisdiction under customary international law before 1988, with the result that the double criminality requirement was met in respect of acts of torture committed from 1973 onwards.[27] The other judges insisted that only the enactment of the Torture Convention of 1984 into English law in 1988 made the international crime of torture punishable under English law in fulfilment of the double criminality requirement.

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24. R. *v.* Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte, [1998] 4 All ER 897 (HL) and R. *v.* Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte (No. 3), [1993] 2 All ER 97 (HL). The rehearing was occasioned by the fact that the first judgment was set aside on the ground of irregularity because one of the members of the House of Lords (Lord Hoffmann) was found to have close ties with Amnesty International, an intervening party in the proceedings: reported in R. *v.* Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte (No 2), [1999] 1 All ER 577 (HL).
25. *See* N.J. Kritz (Ed.), Transitional Justice. How Emerging Democracies Deal With Former Regimes, Vol. 2, at 500 (1995).
26. Lord Lloyd in the first judgment, [1998] 4 All ER, at 929, h-i. Lord Goff in the second judgment, [1999] 2 All ER, at 127-128.
27. [1999] 2 All ER, at 178 b-c.

The concept of double criminality too was restrictively interpreted. Instead of following the normal practice, supported by the Netherlands,[28] of requiring the extraditable crime to be a crime in the requested state (the United Kingdom) at the time of the extradition request, it held that it should be a crime in the United Kingdom at the time the alleged offence was committed in the foreign state.[29] This finding was based on a highly restrictive interpretation of the Extradition Act of 1989, which reads a requirement under the old Extradition Act of 1870 into treaty arrangements between European states, which finds no basis in the European Convention on Extradition of 1957.[30] This is not to suggest that it is an untenable interpretation. However, it is not the only possible interpretation, as is shown by the fact that the Chief Justice, Lord Bingham C.J., and Lord Lloyd had rejected this interpretation in earlier judgments in this matter,[31] in which they relied on the plain language of the extradition statute.

The judicial decision is an exercise in choice, particularly in the field of statutory interpretation. It is trite that the judges are frequently influenced by extra-legal factors in their choice – and properly so because judges are not bricklayers of the law but architects. They must interpret the law in its political and social context. In the *Pinochet* case it is not improbable that judges were influenced by the argument strongly advanced by the government of Chile in its public utterances that it should be left to Chile to deal with Pinochet, if necessary by trying him itself, and that the extradition of Pinochet to Spain would endanger the fragile peace between army and civilian government in that country.

This view receives support from the second reason for suggesting that the judgment gives implied support to the view that Pinochet should be returned to Chile. Five judges (all except Lords Goff and Phillips) attached a codicil to their speeches exhorting the Secretary of State to reconsider his decision to allow the extradition hearing to proceed in the light of the substantial reduction in the number of charges against Pinochet. This recommendation, which is more political than judicial in character, strongly suggests that the House of Lords was of the mind that the extradition proceedings should be discontinued. (On 15 April the Secretary of State decided that the extradition proceedings should continue.)

This assessment of judicial behaviour in the realist tradition is not intended to imply a lack of integrity on the part of the Law Lords. Like many they seem to have been unsure about the best way to deal with an ex-dictator whose pun-

28. *See* the decisions of the Hoge Raad of 16 Januari 1973 (*NJ*, 1973, no. 281) and 28 June 1977 (*NJ*, 1978, no. 438). This is also the position in Germany, *see* W. Schomberg & O. Lagodny, Internationale Rechtshilfe in Strafsachen 52 (1998).
29. *See* the speech of Lord Browne-Wilkinson, [1999] 2 All ER, at 104-107.
30. Art. 2 European Convention on Extradition 1957, (ETS No. 24), opened for signature 13 December 1957, entered into force 18 April 1960 (ECEx).
31. [1999] 2 All ER, at 105.

ishment abroad might disturb the peace at home. Their judgment, which some may interpret as Solomonic in effect, provides testimony of their doubts.

4. PERMISSIBLE AND IMPERMISSIBLE AMNESTIES. THE CASE OF SOUTH AFRICA

A solution must be made to reconcile the competing needs and interests of the territorial state and the international community. In practice this means that an attempt must be made to provide for the legitimation of amnesty, and for its recognition by foreign and international courts.

Obviously not all amnesties should be recognized abroad. The kind of blanket, unconditional amnesty given by Pinochet and his regime to themselves cannot hope to receive international recognition. But does this apply to conditional amnesty, accompanied by a thorough investigation by a truth and reconciliation commission, of the South African kind? The South African Truth and Reconciliation Commission (TRC) obviously believed it was entitled to more favourable treatment as in its final Report it appealed to the international community for recognition of its process. The Report states:

> The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies.[32]

Reconciliation between the international demand for prosecution of international crimes and the national appeal for a political compromise involving amnesty can best be achieved by drawing a distinction between permissible and impermissible amnesties, and by limiting international recognition to the former.

Here it is instructive to compare and contrast the experiences of Chile and South Africa.

The *Reports* of the Chilean National Commission on Truth and Reconciliation (1991)[33] and the South African Truth and Reconciliation Commission (1998)[34] have much in common. This is no surprise as the South African process was inspired by and modelled on that of Chile. Both *Reports* seek to provide a full picture of the gross violations of human rights that occurred in their countries; both examine the role of the judiciary, media and churches; both list the

32. Truth and Reconciliation Commission Report, Vol. 5, at 349 (1998).
33. Report of the Chilean National Commission on Truth and Reconciliation, translated by P.E. Berryman (1993); excerpts *in* N.J. Kritz (Ed.), Transitional Justice, Vol. 3, at 105 (1995).
34. *Supra* note 32.

names of victims; both recommend reparations and measures to prevent a recurrence of the past.

But there are important differences:

1. The Chilean Commission confined its investigations to the dead; the South African TRC investigated all gross human rights violations, involving killing, abduction, torture or severe ill-treatment, even where death did not result. Thus the former did not investigate torture where the victim had survived; the latter did.
2. The Chilean Commission had no subpoena powers to compel witnesses to testify, which meant in practice that members of the security forces refused to co-operate. The South African TRC had such powers and used them to ensure that reluctant witnesses testified.
3. The Chilean Commission had no power to name the names of perpetrators. The South African TRC had such a power, to be executed after giving notice to the person to be named, and in its final report it makes important findings on individual responsibility. Thus it finds that former State President P.W. Botha facilitated gross violations of human rights and was accountable;[35] that P.W. Botha, Magnus Malan (Minister of Defence) and Chief Mangosuthu Buthelezi were accountable for the gross human rights violations committed by paramilitary units in KwaZulu;[36] and that Winnie Madikizela-Mandela was accountable for the acts of murder, torture and assaults committed by the Mandela Football Club.[37]
4. In Chile the National Commission operated in the shadow of its former dictator, Augusto Pinochet, who remained Commander-in-Chief of the Army. No such threat existed in South Africa and many members of the security forces testified before the TRC.
5. The most important difference related to amnesty. The Chilean National Commission was bound by the 1978 Amnesty Decree in which the armed forces under Pinochet had given themselves immunity from prosecution for crimes committed between 1973 and 1978. The Commission therefore had no competence to pronounce on matters of amnesty. In contrast amnesty was (and still is) an integral part of the South African truth and reconciliation process.

Amnesty was one of the most difficult issues that faced negotiators after the abandonment of apartheid. Prosecution *à la* Nuremberg that had been threatened by the African National Congress (ANC) while engaged in the armed struggle was clearly impossible in a situation in which there was no victor. On the other

35. *Supra* note 32, Vol. 5, at 225.
36. *Id.*, at 235.
37. *Id.*, at 243.

hand, absolute, unconditional amnesty, of the kind favoured by the retiring apartheid regime, was unacceptable to the ANC. The compromise was conditional amnesty on application. This was given legislative effect by the 1993[38] and 1996[39] Constitutions and the Promotion of National Unity and Reconciliation Act of 1995.[40]

The Promotion of National Unity and Reconciliation Act established a Truth and Reconciliation Commission with a dual task: the compilation of a complete picture of the human rights violations of the past; and the facilitation of amnesty. For the latter purpose a quasi-judicial Amnesty Committee was established comprising judges and senior lawyers. Although this Committee – later extended to several committees to cope with an expanded workload – operated (and still operates) separately from the TRC, it was part of the TRC structure.[41]

An Amnesty Committee considers applications for amnesty and may grant amnesty if it is satisfied that the applicant has committed an act constituting "a gross violation of human rights", made "a full disclosure of all relevant facts", and that the act to which the application relates is "an act associated with a political objective committed in the course of conflicts of the past".[42] The criteria to be employed for deciding whether the act is one "associated with a political objective" are drawn from the principles used in extradition law for deciding whether the offence in respect of which extradition is sought is a political offence. These criteria include, *inter alia*, the motive of the offender; the context in which the act took place and, in particular, whether it was committed "in the course of or as part of a political uprising, disturbance or event";[43] the gravity of the act; the objective of the act, and in particular, whether it was "primarily directed at a political opponent or State property or personnel or against private property or individuals";[44] and the relationship between the act and the political objective pursued, and "in particular the directness and proximity of the relationship and the proportionality of the act to the objective pursued".[45] A person granted amnesty shall not be criminally or civilly liable in respect of the act in question.[46] Amnesty Committees conduct their hearings in public; and both applicants and victims are permitted legal representation.

While the TRC has completed its work the Amnesty Committees are unlikely to complete their task before the end of 1999. Of the over 7000 applications received, 150 have been granted, almost 5000 dismissed and 2000 remain to be

38. Act 200 of 1993.
39. Act 108 of 1996.
40. Act 34 of 1995.
41. Sections 10(1), 19(3)(b)(iii) of Act 34 of 1995.
42. Section 20 of Act 34 of 1995.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

dealt with. These applications, mainly from members of the police force, and not the army, have provided, and continue to provide, a horrifying picture of brutality by the security forces, involving torture, murder, disappearances and repression.

Those who have failed to obtain amnesty from an amnesty committee, or who failed to apply for amnesty, are exposed to prosecution. Some prosecutions have been completed, others are under way, and no doubt there will be more to come as evidence of complicity in human rights violations becomes available. A special unit within the Prosecutor's office has been established for this purpose. This serves to emphasize that amnesty in South Africa is conditional.

At present, there are serious attempts to prepare guidelines[47] for the operation of truth commissions, which will provide assistance in determining the minimum requirements for acceptable truth commissions. On the basis of these guidelines and the experience of truth commissions from different parts of the world, it is suggested that the following minimum requirements be met:

1. The Commission should be established by the legislature or executive of a democratically elected regime;
2. The Commission should be a representative and independent body;
3. The Commission should have a broad mandate to enable it to make a thorough investigation. It should not, for example, be restricted to deaths and disappearances (as with Chile) but should be permitted instead to investigate all forms of gross human rights violations;
4. The Commission should hold public hearings at which victims of human rights abuses are permitted to testify;
5. The perpetrators of gross human rights violations should be named, provided adequate opportunity is given to them to challenge their accusers before the Commission;
6. The Commission should be required to submit a comprehensive report and recommendations within a reasonable time;
7. The Commission should be empowered to recommend reparations for victims of gross human rights violations; and
8. Amnesty should be denied to perpetrators of gross human rights abuses who refuse to co-operate with the Commission or who refuse to make a full disclosure of their crimes.

47. *See* the Report by Louis Joinet on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1997/20/Rev 1 (1997); N.J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 Law and Contemporary Problems 127 (1996); P. Hayner, *International Guidelines for the Location and Operation of Truth Commissions: A Preliminary Proposal*, *id.*, at 173; S. Landsman, *id.*, at 81.

If a state follows these guidelines – as has South Africa – will its amnesties receive recognition by foreign courts? Or will its amnesties be ignored, as has happened in the case of Augusto Pinochet?

5. THE INTERNATIONAL CRIMINAL COURT AND AMNESTY

Amnesty was on the agenda of the Rome Diplomatic Conference as it had been considered in the *travaux préparatoires*.[48] The final text of the Rome Statute is, however, silent on the subject.

How is this silence to be interpreted? One view[49] holds that the omission of amnesty is deliberate. Support for this position is to be found in the Preamble which affirms that "serious crimes of concern to the international community as a whole must not go unpunished" and expresses the determination "to put an end to impunity for the perpetrators of these crimes".[50] Moreover genocide and 'grave breaches' of the Geneva Conventions, which feature prominently among the crimes falling within the jurisdiction of the Court, are crimes in respect of which states are obliged to prosecute. Had the Rome Statute intended amnesty to be a defence, it is argued, special provision would have been made for it in the clauses dealing with the defence of *ne bis in idem* and surrender to the Court (extradition). However, Article 20 on *ne bis in idem* allows this defence only where a person has been 'tried' by another court, and the *travaux préparatoires* show that the exclusion of amnesty and pardon was deliberate.[51] "Surrender" to the Court is to be distinguished from 'extradition'.[52] Consequently the fact that amnesty may be a bar to extradition between states[53] is irrelevant in respect of 'surrender' to the Court.

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48. Both amnesty and pardon were considered and rejected in the context of the defence of *ne bis in idem*: *see* Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, at 40 (para. 174) (Proceedings of the Preparatory Committee during March-April and August 1996) GAOR, 51st Session, Supplement No 22 (UN Doc. A/51/22); UN Doc. A/CONF./283/2/Add. 1 (1998), Art. 19. Ruth Wedgwood reports that in August 1997 the United States circulated a 'non paper' to the Preparatory Committee suggesting that a responsible decision by a democratic regime to allow an amnesty should be taken into account in judging the admissibility of a case, *see* R. Wedgwood, *The International Criminal Court: An American View*, 10 European Journal of International Law 93, at 96 (1999).
49. *See* G. Hafner, K. Boon, A. Rubesame & J. Huston, *A Response to the American View as Presented by Ruth Wedgwood*, 10 European Journal of International Law 108, at 109-113 (1999).
50. Paras. 4 and 5.
51. *Supra* note 44.
52. Art. 102.
53. The 1990 UN Model Treaty on Extradition lists amnesty granted by either requesting or requested state as a mandatory ground for the refusal of extradition: General Assembly Resolution 45/116 of 14 December; 30 ILM 1407 (1991). Art. 3(e). The 1996 European Union Extradition Agreement allows the requested state to refuse extradition where it has granted amnesty and was competent to prosecute the offence under its own criminal law, *see* OJEC, No. 313/12 of 23 October 1996.

Another view[54] holds that the Rome Statute contains provisions which allow amnesty to be recognized indirectly.

First, it is suggested that the Security Council, acting under Article 16, may order the deferral of a prosecution for twelve months (or more) where amnesty has been granted. This is difficult to accept, however, as such a deferral must be made in a resolution under Chapter VII and it is difficult to contemplate a situation in which refusal to recognize a national amnesty could constitute a threat to international peace.

Secondly, it is argued that Article 17(1)(b) of the Rome Statute contemplates recognition of amnesty. It provides that the International Criminal Court will declare that a case is inadmissible where

> the case has been investigated by a State which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

While the first part of the provision might be imaginatively interpreted to cover South Africa-style amnesty – that is the decision not to prosecute and instead to grant amnesty after an investigation – it is difficult to maintain such an interpretation against the qualification as in such a case the amnesty will result from an 'unwillingness' on the part of the State to prosecute.

Thirdly, and more plausibly, it is suggested that amnesty may be dealt with by prosecutorial discretion. Article 53(2)(c) allows the Prosecutor to refuse prosecution at the instance of a state or the Security Council where, after investigation, she or he concludes that 'a prosecution is not in the interests of justice, taking into account all the circumstances'. This decision is subject to review by the Pre-Trial Chamber. Similarly the Prosecutor may decline to exercise her or his direction to prosecute *proprio motu* under Article 15 on the ground that the suspect has been granted amnesty.

Finally it may be suggested that the Court itself might have regard to an amnesty, if only as a factor in mitigation of sentence.

From the United States come pleas for a re-opening of the Rome Statute, which might allow reconsideration of the question of amnesty. This is highly unlikely. The Rome Statute is a compromise package of provisions reached after intense negotiations. There is no serious prospect of the Statute being re-opened for amendment or for an Amending Protocol. In these circumstances it seems clear that amnesty can only be accommodated within the existing text. Prosecutorial discretion alone offers a real opportunity for the recognition of amnesty. If a set of guidelines is drawn up for the exercise of prosecutorial discretion – as

54. M. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 Cornell International Law Journal (1999) (not yet published).

has been proposed – it is suggested that amnesty should be addressed in these guidelines. This would go some way towards curing an omission in the Statute.

What such guidelines to the Prosecutor might include is another matter. Some international crimes, notably genocide, are not appropriate for the grant of amnesty and this should be made clear. War crimes or 'grave breaches' of the Geneva Conventions committed in international armed conflicts are also not capable of amnesty as they have an international dimension that demands extradition or prosecution. Difficulties arise in respect of torture and crimes against humanity committed by a repressive regime or in the course of an internal conflict. Ideally the perpetrators of such crimes should be tried before a national or international court, as stressed by the ICTY in *Furundžija*.[55] Where, however, a state opts for amnesty in order to achieve reconciliation and requires amnesty seekers to undergo the type of screening process involved in the South African model, it is difficult for foreign and international courts simply to ignore these amnesties.

6. CONCLUSION

The present state of international law on the issue of amnesty is, to put it mildly, unsettled. While amnesty is prohibited in the case of genocide and war crimes committed in international armed conflicts, there are no clear rules prohibiting amnesty in the case of other international crimes. This uncertainty has a major advantage: it allows prosecutions to proceed where they will not impede peace, but at the same time permits societies to 'trade' amnesty for peace where there is no alternative. Unconditional amnesty for atrocious crimes is, however, no longer generally accepted by the international community. Here the Truth and Reconciliation Commission may serve as a useful compromise to ensure that justice is not entirely sacrificed to the cause of peace.

55. *Supra* note 12.

ANNEX 9

A. O'Shea, *Amnesty for Crime in International Law and Practice*, The Hague: Kluwer 2002, p. 265.

Amnesty for Crime in International Law and Practice

by

Andreas O'Shea

Kluwer Law International

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KLUWER LAW INTERNATIONAL
THE HAGUE / LONDON / NEW YORK

A C.I.P. Catalogue record for this book is available from the Library of Congress

ISBN 90-411-1759-8

Published by Kluwer Law International,
P.O. Box 85889, 2508 CN The Hague, The Netherlands.

Sold and distributed in North, Central and South America
by Kluwer Law International,
101 Philip Drive, Norwell, MA 02061, U.S.A.
kluwerlaw@wkap.com

In all other countries, sold and distributed
by Kluwer Law International, Distribution Centre,
P.O. Box 322, 3300 AH Dordrecht, The Netherlands.

Printed on acid-free paper

Printed in the Netherlands.

To Millicent

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TABLE OF TREATIES AND OTHER AGREEMENTS

A more significant source of state practice of amnesties is the long-standing practice of including amnesty clauses in peace treaties.[198] This practice clearly covered violations of the laws of war and was so constant that where it was not express, it was implied. For centuries it would seem, states have acted under the belief that they were entitled to negotiate these clauses, even in relation to crimes that constituted violations *erga omnes*. Consequently, there was a customary right to include amnesty clauses in peace agreements. To what extent has this right survived?

The right would not in itself prevent the development of a rule requiring the punishment of international criminals, subject to an exception where there is an amnesty clause in a peace treaty. For the right to be reversed there would need to be a clear and uniform practice to the contrary. This is the case with respect to torture and genocide. With respect to these crimes, a solid body of state practice has grown out of clearly expressed treaty provisions that are irreconcilable with a right to agree on amnesty. It is less clearly so with respect to those other crimes falling under the general duty to prosecute. However, while there is a customary duty to prosecute or extradite perpetrators of extra-judicial executions, because this duty does not originally derive from clearly defined treaty provisions, its existence is subject to a customary exception permitting states to contract out of the duty following conflict. While there is no logical distinction to be drawn between arbitrary executions and torture, this result would appear to follow by default.

Here, the older customary right to agree on amnesty may be viewed not as inconsistent state practice, but as a surviving exception to the new customary duty in the particular moment in time of a society emerging from conflict or oppression.[199] There is no inconsistency in state practice here because, as Professor Teitel aptly points out as the central theme of her inspiring work on transitional justice,[200] transitional justice mechanisms are an exceptional response to an extraordinary event in a particular moment in time.[201] Normal considerations and understandings of the rule of law are inapplicable and this is why general state practice supporting a general duty to

[198] See chapter 2, *supra*, at 5-20.

[199] See the incorporation of this exception in the suggestion solution in Annex 1, *infra*.

[200] See Ruti G. Teitel, *Transitional Justice*, 2000.

[201] Ibid.: chapter 1, 'The Rule of Law in Transition'.

prosecute can emerge and can be reconciled as consistent with a right not to prosecute in exceptional circumstances.

10. *Conclusion*

This chapter has highlighted a determination on the part of the international community to ensure the punishment of international criminals and establish an unmitigated respect for the international rule of law. This has led to the emergence of a number of distinct customary rules requiring the prosecution, in the absence of extradition, of offenders. Attempts to assimilate the accumulated evidence into a general customary duty to prosecute international crimes do not hold up to scrutiny.

In my judgement, in the current climate of state practice and *opinio juris*, the current obligations to prosecute or extradite cover the most serious and systematic violations of human rights and humanitarian norms. More specifically, there is a particular obligation to prosecute torture and extra-legal executions, and there is a general duty to prosecute customary crimes and those covered by the jurisdiction of the International Criminal Court.[202] There is also an unmitigated duty to punish or extradite torturers and those that commit genocide. The duty to punish extra-judicial executions and customary crimes other than torture and genocide, while emergent, may be avoided through the negotiation of a peace treaty between states. This would also apply to crimes against humanity and serious violations of human rights. In the case of purely civil wars, an amnesty covering these crimes would need to be negotiated between the state and the international community as a whole, possibly through the agency of the UN.

This state of affairs has its advantages in reconciling the need to secure peace with the need to maintain the international rule of law. States can lawfully give amnesty from prosecution in their own courts providing they are prepared to surrender an individual to the international Court. In the event that the establishment of peace absolutely requires amnesty from both prosecution and extradition, this can be negotiated between the parties and the international community as a whole. In chapter 10, I will consider how this reality can be reconciled with the emerging regime of the International Criminal

[202] See further Article 3 of the Draft Protocol to the Statute of the International Criminal Court on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition, Annex I, *infra*.