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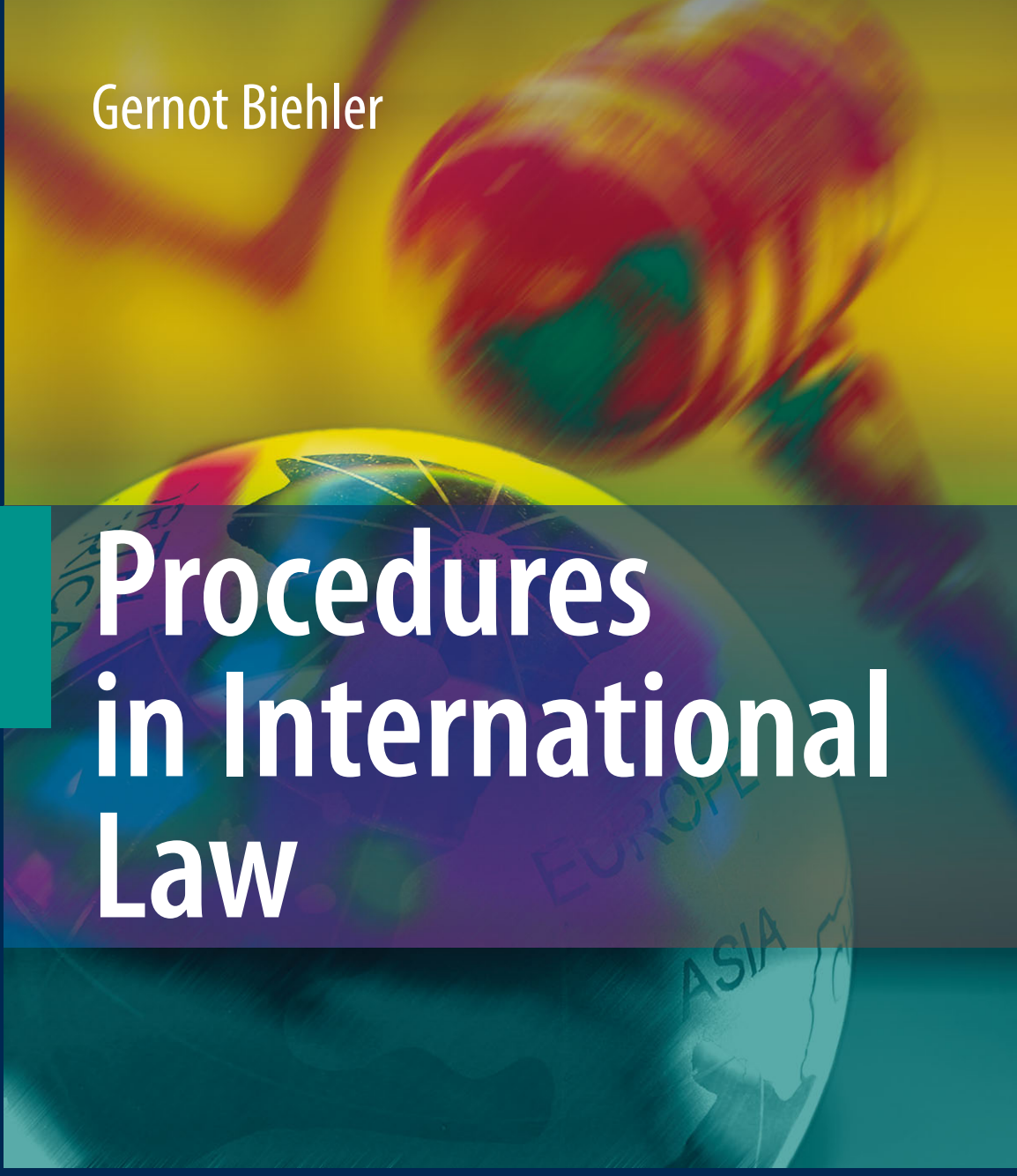

Procedures in International Law

Springer

Chapter 6

Substantive International Law Before National Fora

6.1 Challenges in Applying International Law

6.1.1 Unalterable Procedures of National Courts

National courts pronounce regularly on international law.[1] Whether immunity is granted[2] or a ship in distress on the open sea may avail herself of a safe haven in an adjacent port[3] or the suggested illegality of the British American Iraq campaign is put forward as a justification for disobeying military orders[4] let alone international humanitarian law or human rights; there are few areas left where substantive international law may not have an impact. This increasingly requires national courts to determine and apply international law in various contexts as part of their national legal proceedings.

The main challenge involved in this task is that national legal procedures are not made for international law. The international community of states as creator and patron of international law[5] does not appear itself before the national bench.[6]

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1 Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing, Oxford and Portland, Oregon, 2005) gives an impressive overview of how substantive international law (alphabetically) from aviation law to warfare and weapons law is applied by the English courts.

2 *Dralle v Republic of Czechoslovakia* Austrian Supreme Court, 10 May 1950, 17 ILR 155, Case No. 41.

3 *ACT Shipping (PTE) Ltd v Minister of the Marine* [1995] 3 IR 406.

4 *Germany v Pfaff* Bundesverwaltungsgericht of 21 June 2005, (2006) NJW 77, ILDC 483.

5 Colin Warbrick "States and Recognitions in International Law" in Malcolm Evans (ed.), *International Law* (2nd ed., OUP, 2006) p. 217 *et seq*.: "States were the original and remain the prime actors in the international legal system."

6 Except in the rare event of foreign states' appearances as *amicus curiae,* exemplified *infra* in *F. Hoffmann La Roche* (Germany, Canada and Japan before US courts) or in their "private" capacity when commercial activities on the same level with private companies are at issue usually excluding the application of some parts of international law to the benefit of some applicable national law. See Lowenfeld, *International Economic Law* (2nd ed., OUP, 2008) p. 518 *et seq.* "Litigation Around the World"; Hazel Fox, *The Law of State Immunity* (OUP, 2002) p. 272.

Most of the national procedural means rooted in international law are "avoidance techniques"[7] such as immunity, act of state, judicial restraint or prerogatives concerning foreign policy which exist exclusively to ensure that states will not have to appear before domestic courts. Therefore, national courts will normally pronounce on questions of international law, not between states directly as the ICJ would do, but indirectly as an incidental question in lawsuits where at least one side is a private party. This provides a unique context to questions of international law shedding a specific light on it but making the treatment of international law subject to the limitations stemming from the context and from procedures not originally made for international law suits.

Another consideration is that before national courts usually national procedures, the *lex fori proceduralis*, are applied irrespective of the substantive law relevant to the case before the court including international law. Except for the procedural means described in the preceding chapter, national procedures do not make any allowances for international law. The traditions of the forum which prescribe how justice is rendered are not altered when international law applies. The immense procedural flexibility of international adjudication known from the ICJ, the PCA and many other international *fora* accustomed to determining international law issues between states often more arbitrating between the state parties than handing down judgments with ultimate authority, is unknown to national courts. The advantage of national procedures, on the other hand, is that they produce effective judgments which provide state practice and *opinio iuris* besides giving evidence of the state of international law within the meaning of Article 38.1.b and d of the ICJ Statute, something which international judicial bodies are not always able to deliver.

Another difference is that international law is usually determined by state practice and only in exceptional cases by adjudication whereas national law is almost entirely determined by adjudication (based on common law and statutes) and it is only in very exceptional cases that an alleged injustice suffered cannot find its way to a national court. All this gives national procedures certain features which do not match those found in international law.

6.1.2 Conflict with the Floating Nature of International Law

Sometimes it is questioned whether international law is really law and not just a branch of power politics. This recurring concern is related to its deep roots in state practices and politics which give a distinct character to international law. The constant influence of states in reshaping international law through their dealings, opinions and practices particularly in the field of international customary law, gives international law a floating character. It is not stable and unal-

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[7] Term borrowed from Hazel Fox "International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States" in Malcolm Evans (ed.), *International Law* (2nd ed, OUP, 2006) p. 361.

tered through the ages, a property which is, however, very much associated with other fields of the law. This idea of unaltered and stable law finds its procedural expression in the rule of *stare decisis* applied by English speaking courts all over the common law world. Similar approaches can be found in the rules of statutory interpretation which aim for consistency in both the civil and the common law worlds. This rule of *stare decisis* applied by the common law courts as part of their own procedural law is particularly unsuited to take cognisance of the floating character of international law and also poses a certain challenge for judges who are not accustomed to questioning parts of their forum's procedural laws (*lex fori proceduralis*) because of the character of the substantive law to be applied by them (*lex causae*).

This issue was addressed in *Trendtex Trading Corporation v Central Bank of Nigeria*.[8] The reasoning in the case addressing this question was linked to the doctrines employed to apply international law as part of national law, the transformation and incorporation theories. It is submitted that the question of how to deal procedurally with questions of international law in relation to *stare decisis* could be argued without recourse to the transformation/incorporation issue. However, it does no harm to present the argument as it is presented in *Trendtex*. It was suggested by the defendant[9] that change in international law is subject to the *stare decisis* rule because international law is part of the law of England only inasmuch as the particular rule has been adopted and made part of English law by legislation or judicial decision: otherwise it is a mere source of potential law but not (yet) law before the English courts. Only once a principle is adopted and made part of English law, does it become a rule of law. Therefore, a subsequent change in international law even if proved by evidence to be the subject of a general consensus among the nations cannot have any effect in England until adopted and made part of English law.

Lord Denning MR expressed himself clearly in relation to this contention starting from the very nature of international law:

> "It is certain that international law does change. I would use of international law the words which Galileo used of the earth: 'But it does move.' International law does change: and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English courts were justified in applying the modern rules of international law[10]. Again, the

[8] [1977] QB 529 (CA).

[9] *Ibid*. at 542.

[10] See the "Statement of Opinion" by Sir R. Phillimore, Mr. M. Bernard and Sir H. S. Maine appended to the Report of the Royal Commission on Fugitive Slaves (1876) p. XXV, paras. 4 and 5.

> extent of territorial waters varies from time to time according to the rule of international law current at the time, and the courts will apply it accordingly:[11] The bounds of sovereign immunity have changed greatly in the last 30 years. The changes have been recognised in many countries, and the courts – of our country and of theirs – have given effect to them, without any legislation for the purpose."[12]

Understandably, he concluded that an earlier decision of a national court (in this case it was the English Court of Appeal) on the state of international law is not binding on the courts today. As international law itself knows no rule of *stare decisis,* he opines for the court that the courts should not apply such a rule when determining the contents of international law. If a national court today considers that a rule of international law has changed from what it was some time ago, it can give effect to that change, and apply the change in English law, without waiting for a higher court or parliament to do it.

6.1.3 Procedural Effects

This chapter is designed to give an overview of national courts' procedural practices in applying substantive international law. It is not intended to give an account of substantive international law as applied by national courts but rather to select certain cases representing situations which give rise to certain procedural challenges. As already outlined, international law before national courts is not dealt with in the abstract or in a neat inter state situation. In many cases questions of international law will only be implicitly dealt with. However, international law will only be relevant to the court (and it will only be necessary for the court to pronounce on it) when it makes a difference to the outcome of the case which it is called upon to decide. This is what brings together all cases dealt with here and it is also the situation in which "international law matters". In other words all cases which would have been decided differently but for international law are relevant to this discussion.

Starting from this perspective some situations may be distinguished; international law may be relevant in a lawsuit between private parties, however, it may well be that the forum state or a foreign state acts as applicant or defendant against a private party. The very unusual action in which two states are parties before a national bench is not unheard of[13] but is extremely rare and has not given rise to any particular insights. It will not be addressed here. From these

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[11] See *R v Kent Justices, ex p. Lye* [1967] 2 QB 153, 173, 189.

[12] Notably in the decision of the Privy Council in *The Philippine Admiral* [1977] AC 373.

[13] *Federal Republic of Yugoslavia v Croatia and other states* (successor states of the former Yugoslavia), Cour de Cassation (France, Supreme Court), decision of 12 October 1999 on appeal from the Cour d'Appel (Court of Appeal) Paris, 1st Chamber Civil, section C, of 27 February 1997.

possible scenarios before national courts applying international law a certain structure develops which it is suggested may reveal certain procedural patterns as courts will act differently depending on the different character of the parties and the questions. This not only applies to politicised questions often encountered in the international law context, when, for example, the UK/US Iraq campaign or Guantanamo figures prominently in the proceedings, but also to the commercial character of operations and the attitude of parties which in the case of states can be very different to those involving private individuals or multinational companies. When an individual wants to probe foreign policy[14] over his government's involvement in the Iraq war a court may act differently than where a bank's relationship to its corporate customer in different jurisdictions[15] or an arms deal bribery case[16] is at issue. It is the special context of these cases which not only sets the agenda but presents certain challenges to the procedures of national courts because they cannot but have an impact on the foreign policy options of the governments concerned. The increasing variety of contexts is part of what is usually called globalisation.

Traditionally, national courts were only extremely rarely exposed to international law because it was perceived as largely irrelevant as it focused on the foreign relations administered by the governments among themselves without judicial assistance let alone advice. There was an accepted if not intended lack of familiarity with the nature of this field of law on the part of national judges which was perceived as diplomatic rather than judicial. International law was seen as the esoteric preserve of a handful of very distinguished professors or Foreign Ministry mandarins, but not something which impinged on the professional lives of ordinary practitioners or national courts. In addition, a sometimes convenient employment of avoidance techniques coupled with a transformative approach to international law secured the overriding nature of national over international law at least before such domestic courts. Over time broader constituencies,[17] inventive litigation such as the revival of the US Alien Tort Claims Act 1789 to extend jurisdiction to agents of foreign states, a litigious stress on human rights,[18] and the growing influence of international or European norms at a national level have rendered the traditional hesitation of courts to address international law less tenable. An enhanced role for all international norms is accepted by most national judges

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[14] *Horgan v An Taoiseach* [2003] 2 IR 468.

[15] *X AG v A Bank* [1983] 2 All ER 468.

[16] Sylvia Pfeifer "BAE executives held as US steps up arms deal probe" in *Financial Times*, 19 May 2008, p. 3 with further reports on the US subpoenas.

[17] Harold H Koh "Transnational Legal Process" (1994) 75 Neb L Rev 181, 184.

[18] Yuval Shany "How Supreme is the Supreme Law of the Land? A Comparative Analysis of the Influence of International Human Rights Conventions upon the Interpretation of Constitutional Texts by Domestic Courts" (2006) 31 Brook J Int'l L 341, 352 *et seq*.

in their legal proceedings.[19] This is further strengthened by a tighter co-operation between courts which may even sometimes use international norms and standards including opinions from other courts to improve their own standing nationally in relation to other branches of the government.[20] The avoidance techniques are under some pressure which may gradually limit their application.[21] Today, many national courts entertain claims which were formerly considered justiciable only at an interstate level before international courts or arbitrators. This increased application of international law by national courts results in a further approximation between the work of national courts and international adjudicative bodies. However, they do not usually address the same parties as international adjudication remains the domain of interstate disputes as opposed to the normally incidental nature of international legal questions before national courts. Yet, both national and international procedures address the same issues, affect the same legal relationships and apply the same laws, norms and standards. Sometimes this is even mirrored in parallel proceedings in both international adjudicative bodies and national courts.[22] A clear tendency on the part of many states to extend their jurisdiction into areas claimed by others through long arm statutes or aggressive judicial practices[23] not only by the US but by Germany[24] and others[25] may be observed. These developments give national courts a much more prominent role in determining and adjudicating on international law and a more global impact than ever before in history. It is not anything new that national courts generally regard international law, for example, as part of the law of the land and apply it but the intensity and increasing areas in which international law will be relevant and applied is unprecedented. Therefore, the legal procedures employed in this context deserve special attention.

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[19] Francesco Francioni "International Law as a Common Language for National Courts" (2001) 36 Tex Int'l L J 587 *et seq*.; Ann-Marie Slaughter "Judicial Globalisation" (2000) 40 Va J Int'l L 1103, 1105 *et seq*.

[20] Anthony Arnull, *The European Union and the Court of Justice* (2nd ed., OUP, 2006) p. 99.

[21] Hazel Fox, *The Law of State Immunity* (OUP, 2002), pp. 272, 523.

[22] The *LaGrand* and *Avena* cases (ICJ and US Supreme Court) are a sad example; *Sanchez-Llamas v Oregon* 548 US 331 (2006); *Beit Sourik Village Council v Israel* (Israelian) HCJ 2056/04; 58(4) PD 807; *Ecuador v Occidental Exploration & Petroleum Co* [2005] EWHC 774 (QB).

[23] Haig Simonian, "Top UBS banker held in US tax probe" *Financial Times,* 7 May 2008 p. 1 :"… the detention [of the Swiss banker by the US] was an aggressive tactic and might have been chosen by the [US] authorities to put pressure on UBS [the leading Swiss bank] and its employees to reveal its business practices."

[24] German Act to introduce the Code of Crimes Against International Law of 26 June 2002, 42 ILM 998 (2003).

[25] Canadian Geneva Convention Act, RS, 1985, c G-3.

6.2 Individual Applicants and Defendants

International law has an impact in a great variety of areas where litigation takes place between private parties. In family affairs or commercial dealings any transborder transaction may be subject to international rules codified in conventions or treaties both in relation to the substantive and the procedural law applicable.

6.2.1 The Incidental Nature of International Law or Direct Effect

International law is rarely directly invoked by private litigants. It is usually indirectly relevant in determining their private law obligations and is treated by the courts implicitly as an incidental question. However, there are cases where direct effect is given to international treaties.

In *Okpeitcha v Okpeitcha*[26] the wife and six children of the defendant lodged a complaint alleging violation of his obligation to provide them with financial support with the Constitutional Court of Benin. Some of the children were minors under 18 years of age, and Mrs Okpeitcha was a housewife without any income. The court, unable to identify any basis in national law for its decision, held that by failing to provide his family with the necessary financial assistance, Mr Okpeitcha had violated Article 29(1) of the African Charter on Human and Peoples' Rights. The court elaborated:[27]

> "Considérant qu'il ressort des éléments du dossier et notamment de la réponse faite par dame Aline Odode épouse Okpeitcha aux mesures d'instruction de la Cour que Monsieur Mathieu Okpeitcha a cessé sans motif d'assurer l'entretien et l'éducation de ses enfants et partant, de sa famille; qu'en se comportant comme il le fait, Monsieur Mathieu Okpeitcha viole l'article 29 alinéa 1, 1er tiret de la Charte Africaine des Droits de l'Homme et des Peuples."
>
> "Considering that it emerges from the information in the file, and particularly from the response made by Mrs Aline Odode married Okpeitcha to the court orders, that Mr Mathieu Okpeitcha has ceased without grounds to ensure the upkeep and education of his children and thus of his family; that in behaving in this way, Mr Mathieu Okpeitcha violates article 29(1) of the African Charter of Human and Peoples' Rights."

The complainants in *Maja Dreo v Slovenia*[28] argued before the Constitutional Court of Slovenia that the provisions of a Slovenian Statute, which did not allow

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[26] Constitutional Court of Benin, decision of 17 August 2001, DCC 01–082, (2002) AHRLR 33 (BnCC 2001); ILDC 192.

[27] *Ibid*. at para. 10.

[28] *Individual constitutional complaint procedure*, U–I–312/00, 23 April 2003, Constitutional Court of the Republic of Slovenia, Official Gazette RS, No. 42/2003; ILDC 414.

separated parents to maintain joint custody of their child, violated Article 18 of the UN Convention of the Right of the Child (CRC), according to which parents share joint responsibility for the upbringing and development of their child. The court held that the provisions of Article 9, paragraph 3, of the CRC are clear and precise enough to be self–executing in so far as they recognise the right of the child to maintain personal relations and direct contact with both parents on a regular basis. Since the provisions of the CRC prevail over the Act because these provisions are higher up in the hierarchy of norms and enacted subsequently, this right of the child is clearly and without doubt recognised in the Slovenian legal order, even if the Slovenian Statute does not also recognise the access right as a right of the child, and even if it does not promote this right in a more explicit manner.[29]

A copyright conflict[30] shows the potential impact of international law in areas where this is rarely expected or encountered. The claimants, a music publishing company in England, sought a declaration that they were the owners or alternatively the exclusive licensees of the UK copyright in certain Cuban music. They based their alleged rights on assignments in writing, dating from the 1930s and 1940s, made by the Cuban composers of the works, and on "confirmation of rights" documents signed by the composers' heirs in about 1989 or 1990. The defendant music publishing companies also claimed to be the exclusive licensees of the same copyright, pursuant to a licence granted by a Cuban state enterprise which claimed to be the owner of the disputed copyright on the basis of a Cuban law of 1960. This law was passed in the wake of the Cuban Revolution in order to "re-exert Cuban control over intellectual property rights owned by Cuban nationals and to prevent further exploitation of these rights by foreign companies",[31] such as the claimants.

The claims were denied because as a matter of public international law no state ought to seek to exercise sovereignty over property outside its own territory, and because no state can expect to make its laws effective in the territory of another.[32] The court also highlighted the view of Lord Templeman[33] that there is undoubtedly a national and international rule which prevents one sovereign state from changing title to property so long as that property is situated in another state. In addition, the court relied on statements in *Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation*,[34] where Lord Hoffmann considered it a general principle of international law that one sovereign state should not trespass upon the authority of

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[29] Paras. 14 and 20 of the decision.

[30] *Peer International Corpn v Termidor Music Publishers Ltd (Editora Musical de Cuba, Part 20 Defendant)* [2003] EWCA Civ 1156; [2004] Ch 212.

[31] *Peer International Corpn v Termidor Music Publishers Ltd (Editora Musical de Cuba, Part 20 Defendant)* [2003] EWCA Civ 1156, para. 14.

[32] Para. 37 of the judgment.

[33] *Williams and Humbert Ltd v W & H Trademarks (Jersey) Ltd* [1986] 1 AC 368.

[34] *Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation* [2003] 3 WLR 21; ILDC 254.

another by attempting to seize assets situated within the other's jurisdiction[35] and where Lord Millett thought it to be a near universal rule of international law that sovereignty, both legislative and adjudicative, is territorial, in that it may be exercised only in relation to persons and things within the territory of the state concerned or in respect of its own nationals.

6.2.2 Indirect Application of International Law

What may be the most striking feature procedurally is the very indirect application of international law rules in private litigation. International law is applied but very much determined by the context. Two typical applications of these indirect applications of international rules and standards may be found when sanctions or expropriation against foreign countries are decisive before national courts.

6.2.2.1 Sanctions

Sanctions have recently become of great importance in international relations.[36] They are meant to disrupt private economic relations. Contractual obligations are meant to be severed or terminated and may not be fulfilled under a sanctions regime. Sanctions may have their roots in Article 41 of the United Nations Charter and with it the authority of the Security Council or they may just be unilaterally imposed by one or more states. Notably the United States has a long tradition of unilateral sanctions which has led to some litigation of relevance here.[37] Superimposed by the UN or the US, sanctions must be considered by courts when economic relations between private entities are at stake. The freezing of bank accounts interferes with the contractual relationship between a bank and its customers at the heart of which is the obligation of the bank to repay its debt (or the other way around as the case may be). Delivery of goods, payment for received goods or banking guarantees may be an issue and normal legal relationships may necessarily be severely harmed by sanctions. The approach to these issues in this context should be to analyse the final procedural impact of sanctions. However, sanctions originate either directly in international law when imposed by the UN Security Council or in major US foreign policy interests when imposed unilaterally. The former group of sanctions pose serious questions in relation to judicial review before national courts and the ECJ and should be dealt with separately from the international implementation of US sanctions which raise very different questions to be addressed later.

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[35] Para. 41 of the judgment.

[36] The ideas on sanctions expressed here had been developed earlier in a response to Andreas Lowenfeld in our joint Fourth Annual Hibernian Law Journal Lecture; see Andreas Lowenfeld "Sanctions and International Law: Connect or Disconnect ?" (2003) 4 Hibernian Law Journal 1; Gernot Biehler "Legal Limits to International Sanctions" (2003) 4 Hibernian Law Journal 15.

[37] Lowenfeld, Andreas F., *International Economic Law* (2nd ed., OUP, 2008) p. 890.

6.2.2.1.1 UN Sanctions

Since the stalemate of the superpowers ended in 1990 the United Nations Security Council has authorised more and more sophisticated kinds of actions identifying not only states or regimes but numerous individuals as targets of so called "smart" sanctions.[38] The United States as the most potent actor on the international scene may be seen as the principal author of this action and it has also implemented a great variety of measures unilaterally. Economic measures for political ends[39] are often portrayed as a preferred alternative to the use of military force or simply doing nothing. Certainly, it seems persuasive to compare sanctions with military force or with general inactivity on the international plane which for a long time paralysed UN security policy reflecting the stalemate between the then dominant superpowers. Neither option appears too attractive. Presented as the only other way out in a given scenario the solution seems inevitably to be sanctions particularly when these are labelled as "smart". However, it is important to scrutinise carefully this favourable approach to sanctions on its own merits. Do sanctions conform to standards and values embodied in international law, in particular humanitarian values? What are the main underlying considerations which advocate or refute them? Who is actually responsible for improving a situation found not to conform to certain international law standards? Is it the implementing state, the Security Council, its Sanctions Committee or when applicable the European Union? To shed light on some of these questions two issues must be addressed; human rights and the sanctions' regimes and individuals indirectly hurt by the implementation of sanctions frustrating their payments or the performance of contracts entered into before the sanctions were endorsed.

Sanctions and Human Rights are currently often discussed in the context of so-called "humanitarian intervention". This is not meant to denote the intervention as humanitarian but an effort to achieve a more favourable situation through military intervention. An otherwise illegal means, the use of force, is held by many to be justified in view of its aims. The landmark example remains the air raids on Belgrade in early 1999.

Here the reverse situation will be considered; legal sanctions should be weighed against their detrimental humanitarian effects. Can actions be legal under international law if they cause humanitarian suffering not justified save by their ulterior political aims? How far may sanctions legally subject the population and their humanitarian needs to political ends?

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[38] Lowenfeld, Andreas F., *International Economic Law* (2nd ed., OUP, 2008) p. 708 provides a list of all sanctions following the end of the cold war.

[39] Lowenfeld, Andreas F., *International Economic Law* (2nd ed., OUP, 2008) p. 847 provides this broad definition of sanctions in international law; *Trade Controls for Political Ends* (2nd ed., 1983) is the title of his first book on the issue which outlines the different characters and political backgrounds of trade sanctions *e.g.*, between the former Soviet Union and the US and the "trade wars" between the EU and the US.

Sanctions have been severely criticised on these grounds. The General Assembly has given a critical account of the detrimental humanitarian effects of the Iraq sanctions and their contradiction of international humanitarian standards on behalf of the UN Economic and Social Council.[40]

The most striking attacks against the United National sanctions against Iraq between the first and second Iraq war were launched by UN organs and UN officials themselves. The then UN Humanitarian co-ordinators in Iraq, the Irish former Assistant Secretary General of the UN, Dennis Halliday, and his successor Count Hans Sponeck[41] quote "Caritas", "Save the Children" and "UNICEF" in support of their contention that "the current policy of economic sanctions has destroyed society in Iraq and caused the death of thousands, young and old."[42] This criticism is based on the UN Secretary General's statement to the Security Council that "the humanitarian situation in Iraq poses a serious moral dilemma … we are accused of causing suffering to an entire population … we are in danger of losing the argument … about who is responsible for this situation in Iraq – President Saddam Hussein or the United Nations."[43]

Assuming there was or may have been some serious suffering in Iraq which may have been caused by sanctions, it has to be acknowledged that the internal Security Council Sanctions Committee procedures, for example, "food for oil" or the individual granting of permission to supply goods which are needed, did not always address these humanitarian needs satisfactorily. There may be a conflict between some sanctions' political aim, for example, to weaken the Iraqi government and the possibly devastating humanitarian effects of the sanctions. It would be frustrating to style these effects as the price to be paid for the political aims endorsed by the Security Council. Such reasoning would provide a blanket justification for those exercising physical power for all measures violating international legal standards.

Admittedly, measures adopted according to Article 41 of the United Nations Charter are to be carried out by the member states in accordance with the present Charter as provided for by Article 25 UNC. The general prohibition against interfering with the domestic jurisdiction of states in Article 2 para. 7 UNC will be overcome by its express provision that enforcement measures under Chapter VII shall not be prejudiced.[44]

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[40] UN General Assembly, Doc. E/cn.4/Sub.2/2000/33: "The adverse consequences of economic sanctions on the enjoyment of human rights". This report was drafted by Prof. Bossuyt from Belgium and adopted by the Economic and Social Council of the General Assembly on the recommendation of its Human Rights Committee.

[41] See their joint article in *The Guardian,* 29 November 2001 "Former UN relief chiefs Hans von Sponeck and Dennis Halliday speak out against an attack on Iraq".

[42] Halliday and Sponeck, in *The Guardian,* 29 November 2001.

[43] Discussing the humanitarian needs in Iraq, UN Document SG/SM/7338, SC/6834.

[44] Lowenfeld, *International Economic Law*, p. 855 quotes the provision in detail in footnote 2; he also provides a most excellent overview on "Iraq and the Role of Sanctions" p. 871, which goes much further in terms of analysis than is provided here.

Let us assume the Security Council did not foresee the human rights consequences of its sanctions. Was the Security Council in a position to remedy this situation when it was informed by the Secretary General of the undesirable results in this case? Article 41 UNC does not make any provision for the ending of sanctions nor do the resolutions of the Security Council. It is held therefore that a sanction resolution can be terminated only by another resolution adopted in accordance with the Security Council's normal voting procedure. All permanent members are allowed to veto such a resolution. This means if only one of the five permanent members has a political interest in upholding the sanctions they can be neither amended nor terminated. The Iraq sanctions provide a leading example as they were adopted explicitly in connection with the illegal occupation of Kuwait in 1990 but continued in force after this reason ceased to exist.[45] Other reasons, for example the alleged existence of Iraqi weapons of mass destruction[46] did not provide some of the permanent five members with a reason to continue with the sanctions, however, they were not able to change the course of the sanctions. France and Russia, backed by a clear majority of states urged the termination of the sanctions during the second half of the nineties. The voting procedure and the US insistence[47] on continuing with the sanctions did not allow for that.

However, certain exemptions and moderations in the application of sanctions were permitted by the Security Council's Sanctions Committee under the "oil for food" programme. All members were free to apply for certain exemptions and some prohibitions seem to have been to some extent negotiable.[48] The "oil for food" programme, although so heavily criticised by the then UN humanitarian representatives in Iraq, was set up to meet, *inter alia*, humanitarian needs under the sanctions regime. It should be acknowledged that some of those needs were met by the Sanctions Committee's procedure. Others were probably not. The Committee is a political body as is the Security Council. Its decisions reflect the political strengths and weaknesses of its members. The proposal of a German company to provide some water supply equipment might not obtain the approval of the Com-

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[45] SC Res. 661 of 6 August 1990 is the basic resolution in this context and provides that its purpose is "to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait."

[46] Hans Blix, *Disarming Iraq, the Search for Weapons of Mass Destruction*, 2004. The chief UN weapons inspector at the time of the Iraq sanctions and the US/UK led invasion describes the stances of Blair, Chirac and Bush in his account on the issue; summary in *The Independent*, 8 March 2004, p. 17.

[47] The then US Secretary of State Albright said in May 1998: "The fact that Iraqi children are dying is not the fault of the US but of Saddam Hussein … It is ridiculous for the United States to be blamed for the dictatorial and cruel, barbaric ways that Saddam Hussein treats his people." Quoted from Gregory Gause; "Getting It Backward on Iraq" (1999) 78 Foreign Affairs 54.

[48] Lowenfeld, *loc.cit*. p. 871 *et seq*. gives some examples *e.g.* granting permission to fly over Iraqi territory for the Muslim pilgrimage in Saudi Arabia which would have been prohibited under the Iraq sanctions regime.

mittee because of some US competitor.[49] To sum up, the Security Council sanctions procedure is a political process which could not claim to resolve conflicting human rights considerations and sanctions implementation according to legal standards from the perspective of an objective bystander.

It is to be concluded that the Security Council does not have a mechanism which sufficiently balances human rights and concerns in the implementation of sanctions. The efforts of the Secretary General, the General Assembly or the UN representatives in Iraq in trying to make an impact[50] were not too successful. How could the conflicting aims be realigned, who could weigh these up?

Usually, weighing conflicting legal obligations[51] is the task of a court of law if this balancing process can be achieved by the application of legal standards. The obligation to implement sanctions and to adhere at the same time to human rights standards are certainly legal obligations of states under international law.

The International Court of Justice in The Hague may entertain the claims of states against other states but would not be competent to directly revise actions of the United Nations. The open challenge of Security Council sanctions by Libya in the *Lockerbie* case before the ICJ brought a confirmation of this situation although it is claimed by some that the ICJ reviewed some Security Council resolutions by affirming their validity.[52] No other judicial authority under international law may decide on the legality of Security Council sanctions. Its acts do not lend themselves too readily to judicial review.[53] This would also be true in relation to regional or unilateral sanctions.

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[49] In this case the fervent support of the German government for the proposed contract was certainly enhanced by the fact that the company provided employment in the constituency of one of the leading politicians and supporters of Chancellor Schroeder in the Bundestag. The US opposition to this contract in the Committee, backed by its government's veto power, may have had comparable reasons as seemingly no connection between the denial of permission and the aims of the sanctions could be reasonably established. The example given by Lowenfeld, *loc.cit*. p. 850, footnote 5, that the strongest proponents of sanctions were some domestic US producers who wanted to keep the sanctioned country's exports out of the US, may be summed up in his words: "sometimes motives are mixed".

[50] Two of them, Halliday and Sponeck, resigned because they felt frustrated by the futility of their attempts to bring in human rights considerations in order to balance some of the sanctions' harsh effects on the population.

[51] Assuming that there is a legal obligation on the member states of the United Nations to adhere to the human rights standards and that it is doubtful whether the effects of the sanctions were in line with this obligation. For the sake of argument Bossuyt's (UN GA ECOSOC) assumptions that violations effected by the sanctions existed shall be taken for granted.

[52] August Reinisch "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions" (2001) 95 AJIL 851, with detailed references on p. 865 *et seq*.

[53] See Colin Warbrick "The Jurisdiction of the Security Council: Original Intention and New World Order(s)" in Patrick Capps *et al* (eds.), *Asserting Jurisdiction* (Hart Publishing, 2003) p. 127 *et seq*., gives an excellent overview on this question of SC judicial review.

Does that mean that the states' governments carry out the balancing process individually and implement sanctions only in so far as they think it is right to do so. There is a practice in the UK, the US, Jordan, Portugal and South Africa, which may support the contention that states have a certain autonomy to implement sanctions or not to do so if they think that there are considerations adverse to them. When the UK unilaterally announced that it would no longer enforce Security Council sanctions against what was then Rhodesia and the US followed suit, the General Assembly passed a resolution[54] "deploring the moves by certain states to lift sanctions unilaterally" and declared that the sanctions[55] could only be revoked by the decision of the Security Council and "that any unilateral action in this regard would be a violation of the obligation assumed by member states under Article 25 of the Charter". Jordan did not enforce some of the Iraq sanctions during the Iraqi invasion of Kuwait which was of some significance. Jordan is a neighbouring state of Iraq and has considerable trade with it. No steps were taken to seek to force Jordan to comply with the sanctions. There is state practice which suggests that states do not have a discretion in implementing sanctions; France and Russia among others opposed the sanctions against Iraq in the second half of the 1990s in line with the Secretary General's reports on humanitarian grounds that they caused massive damage to the civilian population. These states, however, did not feel entitled to take steps on their own behalf and their political opposition did not cause any visible benefit to the people concerned.

To allow states to decide themselves how far they think the obligation to implement sanctions goes in the light of some humanitarian legal considerations would meet fierce criticism and would obviously undermine the very system of sanctions and render sanctions potentially futile. Winston Churchill's remarks about the then Prime Minister Chamberlain in relation to the useless sanctions of the League of Nations against Italy's invasion of Ethiopia come to mind: "First the Prime Minister had declared that sanctions meant war; secondly, he was resolved that there must be no war; and thirdly, he decided upon sanctions. It was evidently impossible to comply with these three conditions."[56] This is the point of the efficiency of sanctions and it should be taken seriously. They can function only when applied generally. However, this is rather a statement of feasibility than of law. States would not like to see their political aims pursued by powerful sanctions to be diluted by legal considerations assessed by some "objective bystanders" or whosoever. This would certainly meet determined opposition. The international community of governments has therefore made the UN as immune from all legal scrutiny or weighing processes as has ever been possible.[57] Does this really mean that the

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[54] No.192 of 18 December 1979.

[55] Security Council Resolution 253.

[56] Winston Churchill, *The Gathering Storm* (Cassell, 1948) p. 175.

[57] Articles 103, 105 UNC and the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, Article II para. 2 in Vol. 1 UNRS p. 16; see a discussion with further references in Reinisch, *Developing Human Rights*, *loc.cit*. p. 866.

effects of sanctions may not be legally reviewed? Two considerations militate against this. The political character of sanctions and their direct effects on the individual who is usually the beneficiary of some fundamental or human rights may lead to a different conclusion. It would be too easy to state that although sanctions may result in effects coming close to the gravest crimes under international law, causing starvation and the death of civilians, and even though the purpose of the sanctions may be no longer valid, the political situation in the Security Council prevents the lifting of these sanctions. The pursuit of political aims may not be the ultimate answer of international law.

Even considering a rather less dramatic scenario, who might be a suitable "objective bystander" to hear the case? Sanctions interfere voluntarily with valid contracts entered into before they came into force. Someone may have delivered some goods to Iraq but not yet received full payment. Even if he has reserved ownership until full payment is made it does not help as all imports and exports into Iraq will cease immediately without exception.[58] Or the other way around; an Iraqi supplier has delivered but not received payment. Can it be an equitable result not to offer any solution? The European Court of Justice declined to provide relief when it concluded:

> "The alleged damage can be attributed … only to the United Nations Security Council Resolution No. 661 (1990) which imposed the embargo on trade with Iraq. It follows from the forgoing that the applicant has not demonstrated the existence of a direct causal link between the alleged damage and the adoption of Regulation No. 2340/90."[59]

With this the ECJ denies national or European responsibility for the implementation of sanctions and their effect on the individual concerned. However, this is a questionable conclusion. Security Council Resolutions address states and bind them according to Article 25 UNC under international law. Their national implementation requires member states to actively co-operate and to participate. As the UK, US, Jordanian, Portugese and South African practice shows, some governments use political discretion to stop applying or not to implement sanctions. At that stage the responsibility of the implementing state towards all people under its authority comes into play. The imperative of the Security Council resolution has to be balanced against other considerations, political and legal. This is shown by US authorities.[60]

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[58] See *Dorsch Consult Ingenieursgesellschaft mbH v Council of the European Union and Commission of the European Communities* (Case T-184/95); 117 ILR 363.

[59] See *Dorsch*, 117 ILR, 363, 388 (para.74); this Resolution 2430/90 was meant to implement Security Council Resolution 661 into national law in this case collectively for the members of the European Communities.

[60] *Diggs v Shultz* 470 F 2d 461 (DC Cir 1972); see Jose Alvarez "Judging the Security Council" (1996) 90 AJIL 1, 12, footnote 64.

There Security Council resolutions mandating sanctions were held to be unenforceable in the light of domestic statute law of more recent origin. This proves beyond doubt the responsibility of the national legal order addressed by the Security Council at the level of international law to assess conflicting legal considerations. This may be done by executive or judicial decisions or by legislation. In any case it has to be done to bring sanctions into a legal context. The need to integrate sanctions into the international legal order necessitates that states balance conflicting legal interests. The governments or courts of either Berlin or Baghdad should have found an equitable solution to enable payment in *Dorsch*.[61]

In *Bosphorus*[62] by virtue of a lease agreement made in April 1992, Yugoslav Airlines (JAT) leased two of its aircraft to Bosphorus which were then registered in the Turkish Register of Civil Aviation, thus rendering them Turkish without affecting JAT's ownership. One of the planes arrived in Dublin in April 1993 for the carrying out of maintenance work. The Irish government issued instructions in May 1993 that "the aircraft was to be stopped" according to EC Regulation 990/93 of the same year which incorporated the United Nations Security Council Resolution 820/1993 prohibiting trade with what was then Yugoslavia according to Article 41 of the United Nations Charter. The New York UN Sanctions Committee notified Ireland that the aircraft fell within the terms of these provisions. A judicial saga began which left the essential question of judicial review of the sanctions on the merits unanswered.[63]

The Irish High Court held that the United Nations resolutions did not form part of Irish domestic law, the Security Council Resolution did not bind the court and in relation to the finding of the Security Council Committee concluded that "the unexplained conclusion of the United Nations Sanctions Committee was of no value to the court." The majority and controlling interest in the aircraft was held by the applicant alone and so Murphy J held that the sanctions did not apply.

However, in view of its desire to formally comply with the sanctions requirements from an international perspective[64] the government appealed against the re-

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[61] *Dorsch Consult Ingenieursgesellschaft mbH v Council of the European Union and Commission of the European Communities* (Case T-184/95); 117 ILR 363.

[62] *Bosphorus v Minister for Transport and Ireland* [1994] 2 ILRM 551 (Irish High Court); [1997] 2 IR 1 (Irish Supreme Court); ECJ (Case C- 84/95) [1996] ECR I – 395; (2006) 42 EHRR 1 (ECtHR).

[63] Biehler "Between the Irish, the Strasbourg and the Luxembourg Courts: Jurisdictional Issues in Human Rights Enforcement" (2006) 28 DULJ 317; in the context of the conflict of judicial levels both national and international, the case is treated more thoroughly in Chapter 9 of this book.

[64] The written submissions in the Strasbourg case lead us to assume that the owner of Bosphorus, Mr Ozbay, had considerably alienated part of the government so that it would not agree that he was a *bona fide* applicant in the matter although the court subsequently confirmed him to be such.

lease of the plane to the Supreme Court[65] which in turn according to Article 234 EC referred the question to the ECJ of whether the sanctions applied to Bosphorus. The ECJ answered this question in the affirmative, considering itself bound in making this decision by the Security Council Sanction Committee's decision to the same effect. Imposing its own reading of the Security Council sanction instead of that of the competent national court the Luxembourg court made it impossible to consider any judicial review on the merits of such highly political measures severely inhibiting property rights and access to the court. The rather bizarre reasoning of the ECtHR in this case that these rights must generally be seen as safeguarded by the ECJ (although not one word of the ECJ judgment available to the ECtHR considered any of Bosphorus' possible property or judicial review rights) left the applicant without anything remotely close to judicial review and implicitly established the extra-judicial character of Security Council sanctions. It must be admitted that this is in the ultimate interest of sanctions and of those who are able to impose them, being the executive governments of the most powerful states assembled in the Security Council notably the United States. From the perspective of the (possibly erroneously) targeted individual plaintiffs this seems untenable.

The latter position was elaborated on by the Advocate General of the ECJ in the pending case of *Kadi*.[66] Kadi has been listed by the US through the Security Council[67] and his assets have been frozen now for many years leaving him virtually without means and without any substantial judicial review. The Advocate General of the ECJ stated as follows:

> "50. The respondents argue, however, that in so far as there have been restrictions on the right to be heard and the right to effective judicial review, these restrictions are justified. They maintain that any effort on the part of the Community or its Member States to provide administrative or judicial procedures for challenging the lawfulness of the sanctions imposed by the contested regulation would contravene the underlying Security Council resolutions and therefore

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[65] The facts are represented here in a slightly simplified manner as there had been not one but two High Court and two Supreme Court decisions and to distinguish them would not contribute to the issue dealt with here.

[66] *Kadi v EU*, ECJ (Case C-402/05). See the judgment of the Court of First Instance of 21 September 2005 *Kadi v Council and Commission* (Case C-315/01). The opinion of the Advocate General is of 16 January 2008. The long period since (I write this at the end of June 2008) without any decision of the ECJ is unusual and invites speculation about the reasons for the delay which may relate to the strong executive interest in avoiding judicial review on the merits.

[67] Biehler "Individuell Sanktionen der Vereinten Nationen und Grundrechte" (2003) 41 *Archiv des Völkerrechts* 169; describing at p. 172 the "blacklist" and the procedures employed in listing at the Security Council through the then US Office of Foreign Assets Control. This is possibly one of the first publications addressing the issue. The legal questions then identified have not been answered yet.

jeopardise the fight against international terrorism. In consonance with that view, they have not made any submissions that would enable this Court to exercise review in respect of the specific situation of the appellant.

51. I shall not dwell too much upon the alleged breach of the right to be heard. Suffice it to say that, although certain restrictions on that right may be envisaged for public security reasons, in the present case the Community institutions have not afforded any opportunity to the appellant to make known his views on whether the sanctions against him are justified and whether they should be kept in force. The existence of a de-listing procedure at the level of the United Nations offers no consolation in that regard. That procedure allows petitioners to submit a request to the Sanctions Committee or to their government for removal from the list. Yet, the processing of that request is purely a matter of intergovernmental consultation. There is no obligation on the Sanctions Committee actually to take the views of the petitioner into account. Moreover, the de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list. In fact, access to such information is denied regardless of any substantiated claim as to the need to protect its confidentiality. One of the crucial reasons for which the right to be heard must be respected is to enable the parties concerned to defend their rights effectively, particularly in legal proceedings which might be brought after the administrative control procedure has come to a close. In that sense, respect for the right to be heard is directly relevant to ensuring the right to effective judicial review. Procedural safeguards at the administrative level can never remove the need for subsequent judicial review. Yet, the absence of such administrative safeguards has significant adverse affects on the appellant's right to effective judicial protection.

52. The right to effective judicial protection holds a prominent place in the firmament of fundamental rights. While certain limitations on that right might be permitted if there are other compelling interests, it is unacceptable in a democratic society to impair the very essence of that right. …

53. The appellant has been listed for several years in Annex I to the contested regulation and still the Community institutions refuse to grant him an opportunity to dispute the grounds for his continued inclusion on the list. They have, in effect, levelled extremely serious allegations against him and have, on that basis, subjected him to severe sanctions. Yet, they entirely reject the notion of an independent tribunal assessing the fairness of these allegations and the reasonableness of these sanctions. As a result of this denial, there is a real

> possibility that the sanctions taken against the appellant within the Community may be disproportionate or even misdirected, and might nevertheless remain in place indefinitely. The Court has no way of knowing whether that is the case in reality, but the mere existence of that possibility is anathema in a society that respects the rule of law.
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> 54. Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists. As the Commission and the Council themselves have stressed in their pleadings, the decision whether or not to remove a person from the United Nations sanctions list remains within the full discretion of the Sanctions Committee – a diplomatic organ. In those circumstances, it must be held that the right to judicial review by an independent tribunal has not been secured at the level of the United Nations. As a consequence, the Community institutions cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Community legal order.
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> 55. It follows that the appellant's claim that the contested regulation infringes the right to be heard, the right to judicial review, and the right to property is well founded. The Court should annul the contested regulation in so far as it concerns the appellant."

The use of the word "anathema" here by the Advocate General is telling.

It must be noted that in an order of 27 April 2008 the ECJ granted leave to three executive governments at this late stage to intervene to oppose the Advocate General's views. One is a veto power of the Security Council itself. Needless to say they do not hurry and no statement has yet been received by the ECJ.[68]

UN sanctions are likely to cause inconvenience to some courts for some time to come. The refreshing contrast of the US jurisprudence in *Diggs v Shultz*[69] to what has been described here is not forgotten.

6.2.2.1.2 US Sanctions Internationally Applied

Currently, the US Department of Treasury Office of Foreign Assets Controls maintains economic sanctions programmes (asset freezing) applicable to the Western Balkans, Belarus, Burma (Myanmar), Ivory Coast, Congo (Kinshasa), Iran, Iraq, former Liberian Regime of Charles Taylor, North Korea, Sudan, Syria

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[68] As of the end of May 2008.

[69] *Diggs v Shultz* 470 F 2d 461 (DC Circuit 1972); cert. den. 411 US 931 (1972). ("Byrd Amendment").

and Zimbabwe. The US Department of Commerce Export Administration maintains export/import controls in relation to Cuba, Iraq, North Korea, Iran, Rwanda and Syria.[70]

All these measures are meant to apply internationally and to interfere with private or commercial relationships between individuals and companies. They are not unique to the US as other states have also imposed sanctions at a national level. This was done, for example, by the UK, Canada, Australia and New Zealand against Argentina and vice versa during the Falklands conflict in 1982 or by states implementing cold war sanctions before 1990 against the then communist bloc.[71] However, currently the measure and sophistication of sanctions is rather unique to the US. Litigation before the US courts challenging these measures is non-existent as the sanctions are legally based in national law and may hardly be tried generally.

However, the US government directed US banks in London and elsewhere to refuse to honour payment or withdrawal orders from entities identified by the US sanctions, for example, Iranian account holders. This amounts to a jurisdictional challenge comparable to those dealt with in another context in this book,[72] notably in *X AG v B Bank*.[73] What had been said there was repeated in *Libyan Arab Foreign Bank v Bankers Trust Co*,[74] where the issue was dealt with according to principles of private international law. The facts of this case were as follows. At 4 pm on 8 January 1986 the President of the United States of America signed an executive order freezing all Libyan property in the United States or in the possession or control of United States persons including overseas branches of United States persons.[75] The Libyan Arab Foreign Bank as plaintiff demanded payment of US$131m, the balance standing to the credit of the London account at the close of business on 8 January 1986 and a further US$161m on

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[70] See the websites of these organisations; Lowenfeld, Andreas F., *International Economic Law* (2nd ed., OUP, 2008) p. 892, footnote 9.

[71] For those more advanced in age the COCOM in Paris which co-ordinated these sanctions among the Western States is a vivid memory still. See Adler-Karlsson, *Western Economic Warfare 1947-1967* (McGraw Hill, New York, 1968).

[72] Chapter 4.4.

[73] [1983] 2 All E R 465.

[74] [1989] QB 728.

[75] "I, Ronald Reagan, President of the United States, hereby order blocked all property and interests in property of the Government of Libya, its agencies, instrumentalities and controlled entities and the Central Bank of Libya that are in the United States that hereafter come within the United States or that are or hereafter come within the possession or control of U.S. persons including overseas branches of U.S. persons. The Secretary of the Treasury, in consultation with the Secretary of State, is authorized to employ all powers granted to me by the International Emergency Economic Powers Act 50 U.S.C. 1701 et seq. to carry out the provisions of this Order. This Order is effective immediately and shall be transmitted to the Congress and published in the Federal Register. Ronald Reagan The White House 8 January 1986".

the basis that that sum should have been transferred from the New York to the London account on 8 January. The defendant, the Bankers Trust Co, refused to pay contending that it would be impossible for them to make any payment to the plaintiffs without committing an illegal act in the United States. The plaintiffs commenced proceedings before the English High Court, claiming the sums in debt or damages. The court held *per* Staughton J

> "There is no dispute as to the general principles involved. Performance of a contract is excused if (i) it has become illegal by the proper law of the contract, or (ii) it necessarily involves doing an act which is unlawful by the law of the place where the act has to be done. I need cite no authority for that proposition since it is well established and was not challenged. Equally it was not suggested that New York law is relevant because it is the national law of Bankers Trust, or because payment in London would expose Bankers Trust to sanctions under the United States legislation …"[76]

However, he concluded that the proper law of the contract was English law and thus with reference to *X AG v A Bank*[77] held the US decree not to be applicable to it.

6.2.2.2 Expropriation

Confiscations and expropriation are usually connected with some regime change in a country and the original expropriated owner is usually the applicant against a beneficiary of the expropriation where its proceeds are within the reach of another forum. Both possible positions of either disregarding or upholding the effects of the expropriation have been reasoned in *Luther v Sagor* in both the High Court and the Court of Appeal.[78] At issue were confiscations by the Soviet Union which were not recognised by the United Kingdom. A plethora of cases followed the reasoning of *Luther v Sagor* virtually giving effect to such expropriations. The latest is a fascinating case concerning the expropriation of some multi national oil interests by the Chavez government of Venezuela and the handling of it by the English High Court in *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA*.[79] The full set of judicial means and safeguards reflecting 90 years of experience of commercial enterprises with expropriations including freezing orders, arbitrations and bank guarantees is reflected in this case. However, the basic reasoning which gives effect to the expropriating measures is virtually unchanged since *Luther* which makes it unnecessary to cover any of the cases in too much detail including celeb-

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[76] [1989] QB 728, 743.

[77] [1983] 2 All ER 465.

[78] [1921] 1 KB 456; [1921] 3 KB 532.

[79] [2008] EWHC 532 (Comm), 20 March 2008.

rities such as *Sabbatino*[80] (Cuban expropriations before US courts) or the *Bremer Tabakfall*[81] (Indonesian expropriations before the German and Dutch courts).

However, almost as current as *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* and possibly more fertile in relation to the implementation of substantive international law diverting from the *Luther* "avoidance of substantive international law to the benefit of international relations" line of argument is *National Unity Party v TRNC Assembly of the Republic.*[82] It may indicate a further development in the area and it is therefore proposed to cover it more thoroughly as it has not found the appropriate attention yet elsewhere.[83]

At the core of the dispute is Article 159/1–b and c of the TRNC Constitution of 1985 which reads:

> "All immovable properties, buildings and installations which were found abandoned on l3th February, 1975 when the Turkish Federated State of Cyprus was proclaimed […] shall be the property of the Turkish Republic of Northern Cyprus notwithstanding the fact that they are not so registered in the records of the Land Registry Office; and the Land Registry Office records shall be amended accordingly."

This provision was meant to expropriate the property of Greek Cypriots who were resettled to the Republic of Cyprus in the south of the island after the Turks took control in Northern Cyprus after 1974. However, until 1995, the TRNC authorities carefully avoided any direct expropriation by issuing only a type of "possessor certificate" which did not transfer title of these properties to Turkish Cypriots using the abandoned houses of the Greek Cypriots. This changed in 1995 when title was transferred to Turkish Cypriots triggering dispossessed Greek Cypriots to apply to the European Court of Human Rights (ECtHR) against Turkey in relation to

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[80] *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964).

[81] *Vereneigde Deli-Maatschppijen v Deutsch-Indonesische Tabak Handelsgesellschaft mbH*, decision of the Oberlandesgericht Bremen (Court of Appeal of Bremen, Germany) of 21 August 1959, translated partly by Martin Domke, "Indonesian Nationalisation Measures before Foreign Courts" (1960) 54 AJIL 305, 313 *et seq*.; however see the Dutch decision of the Amsterdam Court of Appeal with a different outcome *Senembah Maatschappij NV v Republiek Indonesie Bank Indonesia and De Twentsche Bank NV,* decision of 4 June 1959, 1959 Nederlandse Jurisprudentie 850.

[82] Annulment Lawsuit under Article 147 of the Turkish Republic of Northern Cyprus Constitution, Supreme Court sitting as Constitutional Court, Judgment D 3/2006 of 21 June 2006. The original language is Turkish, a translation of parts of the judgment is reported in "International Law in Domestic Courts" ILDC 499 (internet service of Oxford University Press), which is taken as the basis of this comment.

[83] Biehler "Property Rights for Individuals under International Humanitarian Law" (2007) 45 *Archiv des Völkerrechts* 432. The discussion of the TRNC case here is mainly based on my comments in this article.

their property rights in the TRNC.[84] The ECtHR attributed international responsibility for Convention violations in Northern Cyprus to Turkey, due to its overall effective control in this part of the island. With this decision the ECtHR strongly indicated that this was a situation which may give rise to the application of the international humanitarian law of occupation as codified in the Hague Convention (IV) of 1907 and its safeguard of private property in Article 46. With a view to meeting the standards set out in the ECtHR's judgments,[85] the TRNC Parliament passed a Property Law on Compensation, Exchange and Return of Immovable Properties to Greek Cypriots in 2005 providing for different types of redress such as compensation (in lieu of return of their properties and/or for their loss of use), exchange of property, or restitution of their original properties. It must be noted that the ECtHR itself is only competent to express itself on the European Convention on Human Rights which is a human rights instrument. Therefore, the ECtHR did not expressly decide whether the Hague Convention IV and humanitarian law was applicable. However, by accepting Turkey as the defendant in the cases brought forward by the Greek Cypriots, the ECtHR implicitly admitted that Turkey was internationally responsible for the dispossessions in the TRNC which means that she exercised effective control in a foreign territory. These are exactly the preconditions which trigger the application of the law of occupation (*ius in bello*) as codified, *inter alia*, in Article 46 of the Hague Convention IV. To put it the other way around; Turkey could not be a defendant before the ECtHR if it were not to be held responsible internationally for acts happening in the TRNC.

The main opposition party (Ulusal Birlik Partisi–UBP) in Northern Cyprus filed an application to the TRNC Constitutional Court against this Property Law returning Greek Cypriot property arguing that it was unconstitutional as Article 159 of the TRNC Constitution declared the property of displaced Greek Cypriots to be state property. In the hierarchy of norms, the Constitution had the highest position, and neither legislation nor international law prevailed over it. Therefore, it was argued, the Property Law should not be able to undo the constitutional provisions which were explicit and unequivocal in expropriating the displaced Greek Cypriots. So the Constitutional Court was faced with the option of either upholding the 2005 Property Law which met standards of international law but disregarded Article 159 of the TRNC Constitution or applying the latter and with it violating international law. This conflict made this decision highly significant in determining the relationship between national (constitutional) and international

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[84] *Loizidou v Turkey* (Preliminary Objections, 23/03/1995; Application No. 40/1993/435/514) and more generally *Cyprus v Turkey* (Merits, 10/05/2001; Application No. 25781/94), *Xenides–Arestis v Turkey* (admissibility decision, 14/03/2005; Application No. 46347/99).

[85] The main motive of the TRNC Court may have been to structure the TRNC legal procedures in such a way that they would be accepted as valid domestic remedies barring direct individual access to ECtHR jurisdiction until their exhaustion (Article 15 ECHR). In *Cyprus v Turkey* (Merits, 10/05/2001; Application No. 25781/94) para. 102 the ECtHR elaborated that "for the purposes of the […] convention, remedies available in the 'TRNC' may be regarded as 'domestic remedies' of the respondant state (Turkey)".

law, what the current international (customary) law actually is in relation to private property expropriated under the effective control of a foreign power (occupation) and finally what status as a source of international law according to Article 38.1 of the Statute of the ICJ a non-recognised state's court's decision such as this would have in international law.

The court in determining the relationship between national (constitutional) and international law presented the view of the traditional primacy of international law starting from Article 27 of the Vienna Convention on the Law of Treaties which reads:

> "A party may not invoke the provision of its internal law as justification for its failure to perform a treaty …"

This general claim to primacy which is usually understood to comprise both treaties and custom is certainly anything but generally accepted by national laws. Some national courts faced with such a conflict between an international law obligation and a national (statutory) law would rather argue the preponderance of at least national constitutional or statutory provisions over any kind of international law.[86] Therefore, this judicial holding on a direct conflict between Article 159 of the TRCN Constitution and international law is remarkable as it is probably one of the first direct conflicts of a constitutional provision with international law addressed and decided by a court. It contrasts nicely with other courts' avoidance techniques[87] in the case of such conflicts.[88]

The decision of the TRNC Constitutional Court to give priority to international law over the constitutional provision in Article 159.4 was based[89] on a holding of the PCIJ relating to Polish Nationals in Danzig.[90] It reads:

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[86] For the USA, *Diggs v Shultz* 470 F 2d 461, cert. den. 411 US 931 (1972); for the UK, *Mortensen v Peters* (1906) 8 F (J) 93; for Ireland, *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97; for Germany, Land-Gericht Hamburg (Chilean Copper Case) in *Aussenwirtschaftsdienst* 1973, p. 163; *Kunig in Vitzthum* (ed.) *Völkerrecht* (3rd ed., 2004) *Völkerrecht und staatliches Recht*, para. 152, p. 137 *et seq*.: "Es gibt jedoch keinen Anhaltspunkt dafür, dass das Grundgesetz sich selbst unter den Vorbehalt seiner Nichtkollision mit allgemeinem Völkerrecht stellen würde."

[87] The term is borrowed from Hazel Fox "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States, in Malcolm D. Evans (ed.), *International Law* (2nd ed., OUP, 2006) p. 363.

[88] The Bundesverfassungsgericht/German Federal Constitutional Court in BVerfGE 84, 90 *et seq*. was faced with a similar conflict between international legal property rights of dispossessed owners under foreign occupation and the German Constitution's Article 143.3. guaranteeing this expropriations similar to Article 159.4 of the TRNC Constitution. It upheld the constitutional provision and just decided not to address the conflict with international law before it.

[89] Para. 72 (concerning Article 27of the VCLT) and para. 54 (concerning the customary rule as expressed in the PCIJ Polish Nationals in Danzig case) of the judgment.

> "[…] a State cannot adduce as against another State its own Constitution with a view of evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig."

This case lends itself favourably to be applied in the circumstances of the TRNC. The minority rights and the status of Polish nationals in the then internationalised area of the Free City of Danzig[91] was decided on the basis of international stipulations as opposed to conflicting domestic rules. The TRNC Constitutional Court felt that this approach should be equally applied to the Greek Cypriot minority in Northern Cyprus. With it the court decided in a principled way to favour international law over its explicit constitutional provision.

On the substantive law issue of what the current international (customary) law actually is in relation to private property expropriated under the effective control of a foreign power (occupation), the court restated Article 46 of the Hague Convention IV that immovable private property in a territory under military control cannot be appropriated by the invading belligerent.[92] Displaced persons, therefore, must still be regarded as owners of their land. Although the TRNC is not recognised internationally and is thus prevented from entering obligations by becoming a member of international treaties its international obligations at the time of the beginning of the occupation in 1974 remain in force and the TRNC is obliged to follow the rules of customary international law. Article 46 of the Hague Convention IV reflects current customary law and was therefore applied by the court.[93]

It needs no further elaboration to say that this judgment is most welcome. It strengthens international law in relation to conflicting national constitutional provisions, confirms its applicability even in special circumstances such as, for example, the non-recognised status of the TRNC and applies Article 46 of the Hague Convention IV as customary international law. It remains to address the issue of the legal value that this decision of a non-recognised state's court would have as a source of international law according to Article 38.1 of the Statute of the ICJ.

The ECtHR has held Turkey internationally responsible for what happened in the TRNC.[94] Turkey was understood to be in effective overall control of the terri-

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[90] PCIJ Rep, Ser A/B No. 44, p. 24.

[91] Which was integrated into Poland after 1945 losing its independent status defined in the Versailles Treaty of 1919 and has since been known as Gdansk.

[92] Para. 30 of the judgment.

[93] Para. 37 of the judgment.

[94] *Loizidou v Turkey* (Preliminary Objections, 23/03/1995; Application No. 40/1993/435/514) and more generally *Cyprus v Turkey* (Merits, 10/05/2001; Application No. 25781/94); *Xenides–Arestis v Turkey* (Admissibility Decision, 14/03/2005; Application No. 46347/99).

tory and given her responsibility all acts of the TRNC authorities were considered to be legally relevant internationally despite the non-recognition of the territory's independence. This is in line with judicial practice towards acts of non-recognised states; the hitherto non-recognised East Germany was accorded legal status before English courts in the 1960s as "an agency of the Soviet Union" which was considered internationally responsible for acts of the East German authorities.[95] The same rationale was applied later to the Ciskei, a former non-recognised South African homeland, by according its acts legal value by upholding the ultimate responsibility of South Africa for all Ciskei acts likening it to the then East Germany with the same result whereby South Africa was held internationally responsible for the legal acts of the Ciskei authorities.[96] This view does not leave legal black holes in international law but looks to the effective control exercised in a given territory. Particularly, it guarantees that international law is applicable irrespective of the status of a territory which is significant wherever troops act abroad and create legal uncertainty. Only the occupied Palestine territories, Iraq, Guantanamo Bay (Cuba), Diego Garcia (Maldives), Transdnistria (Moldova), Kosovo or Afghanistan need be mentioned in order to indicate how significant it is to have accepted international customary law allocating responsibility to those in power and defining the rules applicable in them when considering acts of expropriation.

Remarkably, the TRNC Constitutional Court accepts this view implicitly by applying international humanitarian law and with it recognising that the TRNC is "a territory under military control where private property cannot be appropriated by the invading belligerent."[97] This terminology clarifies that the Court did not just mean to refer to the 1st Add. Protocol of the ECHR as a human rights instrument but based its judgment on humanitarian law (*ius in bellum*) which it held to be primarily applicable. With this categorisation the Court implicitly admitted that the law of occupation applied in the TRNC, thereby admitting that Northern Cyprus was indeed occupied by Turkey and that the latter may be held responsible internationally. This distinction between the 1st Add. Protocol of the ECHR (human rights) and Article 46 of the Hague Convention IV (humanitarian) is very significant although the substantive content of both rules are identical in the given context; acts of expropriation must not be upheld. It may have been the ulterior motive of the TRNC authorities and their Constitutional Court to come to terms with the ECtHR and the human rights standards set out in the 1st Add. Protocol, however, the court relied rightly on humanitarian law as opposed to human rights. This is because the rules of humanitarian law when applicable may take precedence over all other laws normally applicable and may pre-empt any application

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95 *Carl Zeiss Stiftung v Rayner & Keller Ltd* [1967] 1 AC 853.

96 *Gur Corporation v Trust Bank of Africa* [1987] QB 599.

97 Para. 30 of the judgment.

of all the remaining laws including human rights if the necessities of occupational control and order so require.[98]

Both from the TRNC and from the international perspective the practice of returning property to dispossessed Greek Cypriot owners as confirmed in the decision must be considered to be state practice of Turkey and her "agent" the TRNC. The other component necessary to create customary international law according to Article 38.1.b of the Statute of the ICJ is that this state practice is accepted as law (*opinio iuris*). There is rarely a better way of expressing a state's acceptance of a practice as law than a final decision of its highest court. Therefore, the decision creates and confirms international customary law despite the fact that it was handed down by an internationally non-recognised state's court. Besides its role in creating and confirming international customary law this judicial decision may be defined as a subsidiary means for the determination of the rules of international law under Article 38.1.d of the Statute of the ICJ. The decision caries particular weight as it is handed down by a court of a country which exercises effective (occupational) control and would usually neither have an interest in allowing conflicts of this kind to be decided judicially nor advocate the application of stringent limits of international law as codified in the Hague Conventions to their executive government's activities. This suggests that it is self evident that the decisions will be followed and implemented so that they reflect state practice accepted as law. Therefore, they are indicative of and give evidence of current customary international law according to Article 38.1.b of the Statute of the ICJ. This is particularly relevant as the adherence to the rule now so resoundingly confirmed suffered some setbacks in the aftermath of World War II before courts of countries benefiting from confiscated property[99] until the decision in *Liechtenstein v Germany* before the ICJ.[100] The TRNC expropriation case before a national court may indeed hint that the international legal practice of courts concerning expropriation is developing.

6.2.3 Individuals and States

While traditionally states are considered to be the main subjects of international law the status of individuals relying on international law before both national and international courts is emerging. Primarily, it is in the field of human rights that numerous adjudicative bodies such as the IACtHR, the UNHRC or the ECtHR grant access to the individual plaintiff. In addition international rules not only

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[98] An excellent elaboration of this preponderance of humanitarian standards over human rights and related claims in tort and the fine distinction between both fields of law by Elias J may be found in *Bici v Minister of Defence* [2004] EWHC 786 (QB), particularly after para. 80 of the judgment.

[99] See *Hoffmann et al v US* cert. den. 125 S Ct 619 (No. 00-1131, Decided 2004) with very (water-) colourful background stories, or the well known *Van Zuylen* case before the ECJ implicitly sanctioning the expropriation of the German Café Haag brand.

[100] *Liechtenstein v Germany*, ICJ 10 February 2005, Case No. 123.

concerning human rights but relating to refugee protection, humanitarian standards in armed conflicts or free trade agreements often envisage a direct benefit for the individual. This distinguishes them from areas of international law such as the prohibition of the use of force in inter-state relations, which at first sight seems to protect the sovereignty and integrity of the state *qua* state only.

However, in the last analysis it is always the individual who is the ultimate subject of all law both national and international. Conventionally, we employ legal personalities to serve certain purposes; however, all such fictions may be broken down to the individuals behind the veil of such ideas, be it a company or a state if the exigencies of the situation require this to be done. In the case of failed states and their property, rights and duties, for example, Somalia and its embassies, bank accounts and debts abroad, such an intellectual breakdown is inevitable as in the winding up of a company according to some other rules. From a perspective of political philosophy, it is doubtful whether one can think of any other justification for the protection of the sovereignty and the integrity of the state except the necessity for the fulfilment of an essential task, namely to end the insecurity that the absence of a legal system gives rise to and to safeguard citizens' fundamental rights and interests by legally co-ordinating societal life in a way that enables the single individual to pursue his or her personal concept of "the good life".[101] As the former Secretary General of the United Nations said:

> "I have often recalled that the United Nations Charter begins with the words: "We the peoples". What is not always recognised is that "We the peoples" are made up of individuals whose claims to the most fundamental rights have too often been sacrificed in the supposed interests of the state or the nation … I have sought to place human beings at the centre of everything we do … real and lasting improvement in the lives of individual men and women is the measure of all we do …"[102]

If it is true that all substantive international law pursues individual well-being directly or indirectly it will be even more regrettable that international procedures, for example, employed by the ICJ not only lack classic enforcement powers but only under exceptional circumstances allow individuals on their own initiative to seek the judicial protection of international law provisions. Hence, the classical concept of international law as a legal order exclusively *inter nationes* may no longer be true in substance, but mostly still is in procedural terms as far as interna-

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[101] Fernando R. Tesón, "The Kantian Theory of International Law*"* (1992) 92 Col L Rev 53 esp. pp. 70-74 and passim, based on the Kantian political philosophy; For an examination of the social function of (international) law Phillip Allott, "The Concept of International Law" (1999) 10 EJIL 31.

[102] Kofi Annan, Nobel Peace Prize Lecture, 10 December 2001 visited at http://www.unhnhr.ch.

tional adjudication is concerned. It is therefore up to national courts to fill this gap by allowing for private enforcement of international law provisions.

When considering to what extent national courts lend their procedures to claims based on international law, three main categories may be distinguished. First, the individual may himself, relying on international law arguments, bring proceedings against the forum state – be it in order to protect the public interest by ensuring the compliance of the state with its inter-state obligations in the political sphere, to protect his own economic interests against the administration of the forum or to enforce (international) fundamental rights by judicial means.

Claims of individuals against states before national courts may, secondly, arise vis-à-vis foreign states. US jurisprudence based on the US Alien Tort Claim Act 1789 which provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"[103] is an almost unique example thereof. Another is the increasing frequency with which a state appears as defendant in investment arbitration and related proceedings.

Finally, domestic courts may use international law when it comes to individual liability for torts or criminal offences as most famously genocide, war crimes and crimes against humanity are made part of national criminal codes in some countries. This is usually effected from some moral high ground which does not always stand the test of practice.[104]

In very different circumstances people may employ international law as a defence against prosecution, for example, as whistleblowers they would refer to an illegal act of the prosecuting state under international law. The court has then to consider whether violations of international law may be heard in the court proceedings as a valid defence.

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[103] 28 USC § 1350.

[104] For example, Germany introduced such Articles in its *Strafgesetzbuch* (Penal Code); however, during the first application of these laws, when some sought to have the former US Secretary of Defence (after his retirement from US government service which for the time being provided him with immunity from German prosecution) indicted before the German courts for an illegal invasion into Iraq, torture etc. the shortcomings of such highly politicised laws became more than obvious. Needless to say that Donald Rumsfeld was not prosecuted as such laws, as all involved in the US administration instinctively understood, are made for others. Reference is according to an AFP report of 14 November 2006, which was in almost all newspapers the following day: "Ein internationales Bündnis von Anwälten hat bei der Bundesanwaltschaft in Karlsruhe Anzeige gegen den früheren US-Verteidigungsminister Donald Rumsfeld wegen Kriegsverbrechen erstattet. Konkret werde Rumsfeld die Misshandlung von Gefangenen im Irak sowie im US-Gefangenenlager Guantánamo auf Kuba vorgeworfen, sagte einer der klagenden Anwälte, Hannes Honecker, in Berlin. Die 220 Seiten umfassende Strafanzeige sei bei Generalbundesanwältin Monika Harms hinterlegt worden."

6.2.4 Locus Standi of the Individual

Considering the traditional attitude that international law is law between states the crucial question is whether a non-state actor, an individual or a company, will be heard on the merits with a claim based on international law. Would a non-state actor pass the preliminary stage of national legal proceedings and be granted *locus standi*? How is this argued by the courts? The question is particularly relevant where the claim concerns the foreign policy decisions of the forum's executive government and other areas with a strong political context.

6.2.4.1 Political Contexts

The decision of the Irish High Court in *Horgan v An Taoiseach*[105] is relevant in this context. The plaintiff in *Horgan* was an Irish citizen and a retired officer in the Defence Forces. He asserted that the decision taken by the Irish government to allow aircraft of the United States of America to stop for the purposes of refuelling at Shannon Airport on the way to the combat in Iraq was violating Irish neutrality. It was claimed that this support of the US war efforts amounted to a breach of neutrality under customary international law (as Ireland, not having ratified the Neutrality Convention, lacked a formal treaty obligation to behave neutrally),[106] and that it involved participation by the state in the war in Iraq contrary to the generally recognised principles of international law.

The Irish government as defendant had no doubt about the plaintiff's *locus standi* and that the case should be heard on the merits: "The defendants accept that the plaintiff has *locus standi* in the sense that he may, qua citizen, bring declaratory proceedings for relief under the Constitution."[107]

As there is no further mention of the *locus standi* issue, it must be assumed that the court accepted the consensual submission of the plaintiff and the defendants to its jurisdiction and thus granted *Horgan* legal standing.

On the merits of the legality of the Iraq war the court outlined:

> "Thus, while the legality of the war in Iraq may well be, in the words of a recent article about these proceedings in an Irish national newspaper "the elephant in the room that is impossible to ignore", this case has proceeded in a manner where both sides have given that "elephant" a wide berth, a course which permits, indeed compels, this court to do likewise."[108]

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[105] [2003] 2 IR 468. On the question of *locus standi* in *Horgan,* see also Gernot Biehler, *International Law in Practice: An Irish Perspective* (Dublin, Thomson Round Hall, 2005) p. 198 *et seq.*

[106] On Irish neutrality in general, see Biehler "One Hundred Years On – The Hague Convention V on Neutrality and Irish Neutrality" (2007) 25 Irish Law Times 226.

[107] *Horgan v An Taoiseach* [2003] 2 IR 468, 494.

[108] *Ibid.* at 503.

Considering, *inter alia*, the thorough arguments on Irish neutrality under international law[109] there can be little doubt about the fact that Kearns J scrutinised the case on the merits, implicitly acknowledging the plaintiff's *locus standi*.[110] The holding on neutrality is the most substantial decision on the issue for decades in any country and represents the current state of international law in the area. Kearns J outlines:

> "Traditionally, as noted by Oppenheim Lauterpacht (International Law) 1952 at 675, there was a duty of impartiality on neutral States which comprised abstention from any active or passive co-operation with belligerents. At para. 316 the authors state:–
>
> > 'It has already been stated above that impartiality excludes such assistance and succour to one of the belligerents as is detrimental to the other, and, further, such injuries to one of the belligerents as benefit the other, and that it includes active measures on the part of the neutral for the purpose of preventing belligerents from making use of neutral territories and neutral resources for their military and naval purposes …'
>
> 1907 Hague Convention V is asserted to be declaratory of customary international law. The various texts relied upon by the plaintiff certainly tend to support such an interpretation. The defendants have argued that a more qualified or nuanced form of neutrality also exists, being one which has been practised by this State for many years, and indeed throughout the Second World War. However, it does not appear to me that even that form of neutrality is to be seen as including the notion that the granting of passage over its territory by a neutral State for large numbers of troops and munitions from one belligerent State only en route to a theatre of war with another is compatible with the status of neutrality in international law. No authority has been offered to the court by the defendants to support such a view. Nor can it be an answer to say that a small number of other states have done the same thing in recent times. Different questions and considerations may well arise

[109] *Ibid.* at 503 *et seq*.

[110] In *Eoin Dubsky v The Government of Ireland, The Minister for Foreign Affairs, The Minister for Transport, Ireland, Attorney General* [2007] 1 IR 63 the issue of the US overflights and fuel stops at Shannon Airport again became the subject of judicial review in light of Ireland's neutral status. Dubsky's claim was essentially the same as Horgan's. In *Dubsky*, however, the respondents actually contested the applicant's *locus standi* (see [2007] 1 IR 63, 65). The answer of the court however does not render the above interpretation – namely that the fact that individuals may not rely upon the generally recognised principles of international law is not a question of *locus standi*, but a question that has to be dealt with on the merits – implausible (see [2007] 1 IR 63, 103).

> where measures of collective security are carried out or led by the UN in conformity with the Charter: Article 2 (5) of the Charter obliges *all* members to assist the UN in any action it takes in accordance with the Charter.
>
> The court is prepared to hold therefore that there is an identifiable rule of customary law in relation to the status of neutrality whereunder a neutral state may not permit the movement of large numbers of troops or munitions of one belligerent State through its territory en route to a theatre of war with another."[111]

With this statement the Irish practice of helping the US in its war effort was found to be illegal under international law by the court. It is impressive how clearly this was phrased by a court which eventually concludes, as expected, that the question of neutrality is not to be adjudicated by it as international law may not directly be employed against the foreign policy of the government by individuals, relying on an earlier decision against any national effect of the UN Human Rights Committee to the benefit of the individual. [112]

Further, Kearns J argued that, even if the above argument proved to be incorrect, the generally recognised principles of international law could not be considered to be an "absolute restriction of the […] powers of the State" but (only) had to be accepted as a guide to relations with other states.[113] Article 29 of the Irish Constitution should be interpreted to be of "aspirational" rather than of strictly legally binding character.[114]

In *Association of Lawyers for Peace v Netherlands*[115] five private-law governed associations sought injunctive relief against upcoming Dutch participation in the military activities, or the threat thereof, against the Taliban and al Qaeda training camps in Afghanistan. The District Court answered the question of *locus standi* of private parties in relation to a claim against the forum state based on international law in the affirmative. This becomes clear as the court could not have argued the legality of Operation Enduring Freedom in Afghanistan as part of the merits stage without accepting the *locus standi* of the plaintiff organisations. The Dutch Supreme Court decision, however, does not explicitly mention the issue at all. In-

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[111] [2003] 2 IR 468, 504-505.

[112] *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97.

[113] [2003] 2 IR 468, 513 mainly relying on the Irish text of the Constitution, which was held to support this interpretation.

[114] *Ibid.*

[115] *Association of Lawyers for Peace, The Green Party, Women for Peace, Hague Platform for Peace, New Communist Party v State of the Netherlands* Nr C02/217HR, NJ 2004/329; also reported – including a translated summary of the judgement – in "International Law in Domestic Courts" (hereafter: ILDC) case No. 152 (internet service of Oxford University Press).

stead, referring to its own judgment of 29 November 2002[116] and affirming the reasoning of the Court of Appeal it denied the applicants the right to rely on the international law provisions invoked, as they were held not to have direct effect:

> "This prohibition of the use of force [Article 2(4) of the Charter of the United Nations] is intended to protect States. The provision therefore cannot be invoked by a citizen in his national court. The same applies to the closely related provisions of articles 42 and 51 of the Charter."
>
> "Dit geweldverbod strekt derhalve tot bescherming van staten en het hof heeft dan ook met juistheid geoordeeld dat een burger voor zijn nationale rechter geen beroep kan doen op deze bepaling en evenmin op de nauw hiermee samenhangende art. 42 en 51 van het Handvest ."[117]

The different approaches of the Court of Appeal which granted *locus standi* to the organisations and the Supreme Court which relied more on the traditional attitude of international law as directed only to states present the two lines of argument possible in this context. However, it shows that it is possible to discuss the issues of foreign policy on the merits before national courts.[118] The experience is comparable with the Irish High Court's treatment in *Horgan*.

The Israeli Supreme Court in December 2006 decided along the same lines proceeding to the merits stage but stopping short of compelling the government to specifically alter its policy.[119] The petitioners, two human rights organizations,

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[116] *Danikovic and 6 others v the State of the Netherlands* Supreme Court, 29 November 2002, *NJ* (2003) No. 35. This case concerned the application to the District Court of The Hague by seven Yugoslav military personnel for an interim injunction restraining the State of the Netherlands with immediate effect from engaging or participating in the further use of force in the Federal Republic of Yugoslavia; for an English translation of the judgment see (2004) 35 NYIL 522.

[117] ILDC 152, para. 3.4.

[118] Further commentaries on the case by Leonard F M Besselink, "The Constitutional Duty to Promote the Development of the International Legal Order: the Significance and Meaning of Article 90 of the Netherlands Constitution" (2003) 34 NYIL 133; J W A Fleuren, "De maximis non curat praetor? Over de plaats van de Nederlandse rechter in de nationale en de internationale rechtsorde" in P P T Bovend'Eert, P M van den Eijnden & C A J M Kortmann (eds.), *Grenzen aan de rechtspraak? Political question, acte de gouvernement en rechterlijk interventionisme* (Deventer: Kluwer, 2004) pp. 127 – 159; J W A Fleuren "Directe en indirecte toepassing van internationaal recht door de Nederlandse rechter", 131 Mededelingen van de Nederlandse Vereniging voor Internationaal Recht (2005) pp. 126- 131.

[119] *The Public Committee against Torture in Israel et al v The Government of Israel et al* HCJ 769/02 (judgment of 14 December 2006, Supreme Court sitting as the High Court of Justice); an official English translation which will be referred to here is reported in

challenged the policy of preventive strikes employed by Israel in the Gaza strip and the West Bank, by which it aimed to kill people who were allegedly involved in attacks against the occupying Israelis in these areas (so-called "targeted killings policy"). In the petitioners' view this policy violated the international rules on the use of force and on conduct in armed conflicts. They argued that Israel was not permitted to conduct military acts pursuant to the law of armed conflict as part of its struggle against the Palestinian terrorist organizations, as the right to take self defensive military action under Article 51 of the UN Charter only applies to conflicts between states. Alternatively they submitted that, even if the court held that the military actions pursued by Israel came within the scope of self-defence and thus triggered the application of the law of armed conflict, the targeted killing policy would be in breach of Israel's international obligations as it disregarded the protected status of civilians granted by the Geneva Conventions and the Additional Protocols. Accordingly, the relief sought by the applicants was an order forcing the Israeli government to cancel the targeted killing policy and to refrain from acting in accordance with it.

With regard to the legal standing of the applicants the practice of the Israeli Supreme Court conforms with the pattern of the Dutch Courts. The respondents did not object on the point of *locus standi*, nor did the court address the matter on its own initiative. Although some preliminary objections were in fact submitted and considered the issue of whether the petitioning organizations had the legal capacity to institute the proceedings was literally not raised.[120] Hence, the case was dismissed on the merits, however, not without the court expressing major concerns about and defining the legal limits of government policy. Specifically, three restricting principles had to be borne in mind:

> "[F]irst, well based information is needed before categorizing a civilian as falling into one of the discussed categories [i.e. considering him a combatant]. Innocent civilians are not to be harmed."[121]

In this regard the burden of proof is heavy and it is up to the army to ensure that enemy civilians are not attacked based on a mere suspicion of involvement in military attacks. Secondly the principle of proportionality applies so that

> "a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed"[122]

ILDC 597. For a critical assessment of the case, see Hilly Moodrick-Even Khen, "Case Note: Can We Now Tell What 'Direct Participation in Hostilities' Is? HCJ 769/02 the Public Committee Against Torture in Israel v The Government of Israel" (2007) 40 Israel Law Review 213.

[120] The preliminary objections submitted claimed institutional injusticiability of the matter, see ILDC 597, para. 9 and the court's answer at para. 47 *et seq*.

[121] ILDC 597, para. 40.

[122] *Ibid.*

> and that an "attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportional to the military advantage (in protecting combatants and civilians)"[123].

If innocent civilians are harmed, compensation should be paid.[124] And finally the court held that:

> "[A]fter an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively)."[125]

Although, as in all the other cases considered above, the petition was not granted in its initial form, the decision is likely to have an impact on the political agenda. This is mainly due to the implied threat that judicial action against the individual targeted killings might well be successful unless the military conduct satisfies particular conditions. Moreover, it is apparent from the judgment that the judges had major concerns about the policy of targeted killings, most likely of both a moral and legal kind, and it might be suggested that it was this concern that led them not to try to take the easy way out. The Israeli Supreme Court not only neglects the question of *locus standi* but avoids the issue of whether the invoked rules of international law, namely Article 51 of the Charter of the United Nations and the Geneva Conventions, can be considered to have direct effect and can thus be relied upon by private parties without any direct connection to the events in question, without denying it explicitly.

All the reported cases employ a "yes and no" policy, stopping short of embarrassing governments with any direct advice. The merits stage is usually reached and some arguments on the substance of international law can be derived from decisions which may be in the public domain. This is all that can be hoped for by individual applicants given the present state of affairs promoting politically charged issues based on international law against their own governments before their own forums.

6.2.4.2 Economic Interests

There may also be a focus on economic interests when non-state actors sue before national courts relying on norms of international law. Usually such cases are not brought by a non governmental organisation which exists to promote peace like the *Association of Lawyers for Peace* before the Dutch courts or Edward Horgan who with his impressive personal background of UN peacekeeping from Congo to

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[123] ILDC 597, para. 45.

[124] *Ibid.* at para. 40.

[125] *Ibid.*

Lebanon and a degree from Trinity College, Dublin had all possible credibility as a citizen to ask the government before the High Court how its support for the US Iraq war efforts relates to Irish neutrality cherished so much on the green island. When economic interests are at stake companies are on the stage. From a procedural point of view these are not too different from the "political" cases where individuals or non governmental organisations sue; again the *locus standi* issue and the application of the relevant standards of international law against the decisions of national authorities of the forum state are under scrutiny. However, it is more an export/import issue or price fixing "market order" regulation executed by some national authority often itself informed by European Communities Regulations than a foreign policy issue. Needless to say the interests in these "market orders" are strong on either side. An economic analysis would reveal what economic effect any decision could possibly have.

In *International Fruit Company*[126] four fruit importing companies led by International Fruit Company applied to the competent Netherlands regulatory authority, the *Produktschaab voor Groenten en Fruit*, for certificates allowing them to import eating apples from non EC Member States into the Netherlands. The *Produktschaab voor Groenten en Fruit* refused to issue them with the certificates and informed the fruit importers that their application had to be rejected. International Fruit Company and its three co-plaintiffs challenged this decision before the Dutch courts, claiming it to be contrary to Art XI of the General Agreement on Tariffs and Trade (GATT 1994), which provides:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

As the decision of the *Produktschaab voor Groenten en Fruit* was based upon on a Community regulation the Dutch court asked the European Court of Justice for a preliminary ruling on the question of whether the validity of the underlying regulations of the Commission were invalid as being in breach of the Community's obligations under the GATT. The fact alone that the Dutch judiciary did not ask whether it was possible for an individual to claim the invalidity of Community legislative acts before domestic courts because of inconsistencies with the Community's international obligations but confined the question solely to the validity of the EC regulations – an issue that can only arise on the merits of the case – shows that the question of *locus standi* was not in any doubt. Even the question of direct effect of international agreements was only brought up by the ECJ ruling.

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[126] For the judgment of the ECJ on this matter see *International Fruit Company v Produktschab voor Groenten en Fruit* (Case 21-24/72); [1972] ECR 1219.

Whereas the ECJ did not comment on the former point, its decision on the latter became a landmark. It held that individuals may only rely on the Community's international agreements if they confer rights upon individuals. This was not the case in relation to the GATT. The ECJ considered the agreement to be insufficiently precise and unconditional, the provisions allowed for too great a degree of flexibility and the obligations included left too much room for modification.[127] By defining the criteria for direct effect, however, the ECJ acknowledged the possibility of direct effect and thus a possible invocation of international agreements before national courts in principle.

Van Parys,[128] a case heard before the Belgian *Raad van State*, concerned bananas in Belgium rather than apples in the Netherlands which, however, became a symbol and landmark for this kind of litigation in Europe. *Van Parys*, a Belgian company that imported bananas from Ecuador into the European Community requested *Belgisch Interventie-en Restitutiebureau* (BIRB) to issue it with import licences for bananas from Ecuador. The BRIB however refused to issue it with import licences for the full amount of bananas that *Van Parys* had applied for. *Van Parys* brought actions before the Belgian courts and submitted that the refusal of the BRIB was unlawful, as it was based on the EC regulations governing the import of bananas into the Community and the latter were in conflict with WTO rules – a fact that the WTO Dispute settlement body had already confirmed. The *Raad van State* stayed the proceedings and called upon the ECJ to give a preliminary ruling on the legality of the contested EC regulations.

Again as in *International Fruit Company* the question that the *Raad van State* submitted to the ECJ is proof enough of the granting of *locus standi* to the individual to defend its economic interests by international law means. The validity of the regulation only comes to the fore after the court has entered the merits of the case. From that it is clear that the applicant's legal standing was in no way problematic. Again, just as in *International Fruit Company*, it is only the ECJ that points to the necessity of assessing the ability of individuals to rely on the international agreements of the Community before domestic courts first. Recalling that WTO rules are because of their nature and their structure generally not capable of having direct effect, the ECJ seems to amend or even replace the criterion of rights-conferring provisions by the following:

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[127] ECJ *International Fruit Company v Produktschab voor Groenten en Fruit* (Case 21-24/72); [1972] ECR 1219, paras. 19-27; see also Paul Craig and Gráinne de Búrca, *EU Law* (4th ed., OUP, 2008) p. 208. For a criticism of this rationale Ernst-Ulrich Petersmann, *The GATT/WTO dispute settlement system: international law, international organizations, and dispute settlement* (London, The Hague: Kluwer Law International, 1997) p. 238.

[128] *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau,* ECJ (Case C-377/02); [2005] ECR I-1465.

> "It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules."[129]

This means international legal economic standards as determined by the WTO/GATT system would only be held to be effective when the ECJ holds that the Community wants them to be ("only where the Community has intended to implement a particular obligation assumed in the context of the WTO"). As the EU and all its member states are member states of the WTO/GATT this could have easily been assumed as EC law does not want to coerce the Community and its member states into violating WTO/GATT obligations. However, the opposite was the case before the ECJ and it is submitted that the decision was more informed by economic interests than legal insights. An effective protection of economic interests by international law standards failed when provisions of WTO agreements were invoked by the plaintiffs. Even though domestic courts show their willingness to give way to such international law claims by granting legal standing the ECJ is reluctant to allow for such a claim on the merits.[130] In light of the ECJ decision, individual economic interests cannot efficiently be protected through international law before national courts.

However, one case, *Kupferberg*,[131] which was referred to the ECJ by the German courts, hints in another direction. The German company Kupferberg imported port wine from Portugal, which at that time had not yet acceded to the European Community, and was charged a "monopoly equalization duty" (*Monopolausgleich*) levied by the German law on the (State) Monopoly in Spirits by the Hauptzollamt Mainz, a German customs and tax authority. This duty was equal in amount to the "spirits surcharge" that applied to domestically produced spirits. The latter however included a charge reduction scheme, provided certain conditions were met, that was not available to the imported spirits under the law on the (State) Monopoly in Spirits. Kupferberg brought proceedings before the Finance Court Rhineland-Palatinate (Finanzgericht Rheinland-Pfalz) and argued that this was a discriminatory distinction, illegal under Article 21(1) of the Agreement made on the 22 July 1972 between the EEC and the Portuguese Republic, which provides:

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[129] *Ibid.* at para. 40. These criteria were introduced by the ECJ in *Germany v Commission* (Case C-280/93); [1994] ECR I-79, a case that also concerned the EC regulations on the importation of bananas.

[130] See, *inter alia*, also *Portugal v Council,* ECJ (Case C-149/96), [1999] ECR I-8395; *Germany v Commission* (Case C-280/93), [1994] ECR I-79; *Polydor Ltd and RSO Records Inc v Harlequin Record Shops Ltd and Simons Records Ltd* (Case 270/80), [1982] ECR 329 (with regard to a free trade agreement between the Community and Portugal).

[131] *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG aA* (Case 104/81) [1982] ECR 3641.

> "The Contracting Parties shall refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one Contracting Party and like products originating in the territory of the other Contracting Party."[132]

Indeed, the court held in favour of Kupferberg. It applied the levy reduction originally only provided for the spirits surcharge to the monopoly equalization duty and based its reasoning to a considerable extent on the free-trade agreement with Portugal. Both *locus standi* and the direct effect of the treaty provision in question were accepted.[133]

In contrast to the European Community context where references to international agreements in the economic sector have been large in number and important in academic debate,[134] the amount of US case-law on both the direct effect of these treaties and the *locus standi* of private parties is comparatively small. However, whenever litigants challenged state action by referring to GATT provisions US courts seemed to be willing to give way to it.

When George E. Bardwill & Sons[135] challenged an import duty levied by the US Collector of Customs on an importation of banquet and luncheon sets from Portugal, the US Court of Customs and Patent Appeals faced the question of whether, as the plaintiff claimed, the withdrawal by the US President of the importation concession initially negotiated under the GATT system with the Peoples Republic of China was unlawful under Article XXVII GATT and if so, whether

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[132] Council Regulation 2844/72/EEC Concluding an Agreement between the European Economic Community and the Portuguese Republic, [Special Edition 1972] OJ Eur Comm (No. L 301/164) 166 (Dec. 19, 1972) p. 170.

[133] The Hauptzollamt Mainz appealed against this decision and the German Federal Court in fiscal matters (*Bundesfinanzhof*) submitted the case for a preliminary ruling to the ECJ. In its preliminary ruling the ECJ confirmed that private parties can directly rely upon the agreement between the EEC and Portugal. See *Hauptzollamt Mainz v CA Kupferberg & Cie KG aA,* ECJ (Case 104/81); [1982] ECR 3641 and the comment by G. Bebr, "Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg" (1983) 20 CML Rev 35.

[134] See, *e.g.,* Judson Osterhoudt Berkey, "The European Court of Justice and Direct Effect for the GATT: a Question Worth Revisiting" (1998) 9 European Journal of International Law 626; Axel Desmedt "ECJ Restricts Effect of WTO Agreements in the EC Legal Order" (2000) 3 J Int'l Econ Law 191 *et seq*.; Miguel Montana i Mora, "European Community Law – Legal Status of International Agreements within the Community Legal Order – General Agreement on Tariffs and Trade – Lome Conventions" (1997) 91 AJIL 152; Ernst-Ulrich Petersmann, "Application of GATT by the Court of Justice of the European Communities" (1983) 20 CML Rev 397; Joel P. Trachtman, "Bananas, Direct Effect, and Compliance" (1999) 10 EJIL 655; Geert Zonnekeyn, "The Direct Effect of GATT in Community Law: From International Fruit Company to the Banana Cases" (1996) 2 International Trade Law & Regulation 63.

[135] *George E Bardwill & Sons v US* 42 CCPA 118, 1955 WL 6831.

the concession still had to be granted by applying an accordingly reduced importation duty.[136] Without any mention at all of either direct effect or legal standing the US judges held against the plaintiff although not on grounds of *locus standi* or the admissibility of Bardwill's claim but, having scrutinized at length the GATT provisions in question, clearly on the merits: the conditions for the withdrawal of the concession were met.

Although in light of the more recent ECJ jurisprudence this reluctance to address the question of *locus standi* and direct effect may be surprising, subsequent US case law on the matter affirms this tendency: in many cases private applicants are granted *locus standi* to advance arguments grounded on principles of international economic law without further scrutiny by the courts.[137] The Uruguay Round Agreements Act of 1994 ended this series of GATT/WTO-friendly jurisprudence by explicitly denying the direct effect of the WTO Agreement. Thus it can no longer be applied by US courts.[138]

The comparision of the US and the European approach in cases of international economic interests is twofold; national courts (and the ECJ must be counted as such here too as it just informs the national courts of the member states according to Article 234 ECT on the interpretation of EC law) on either side of the Atlantic are slow to give effect to economic rights of individuals based on international law particularly WTO/GATT norms. While the ECJ focuses on the lack of purported direct effect of very precise WTO/DSU panel decisions against the parties to uphold particularly the Banana market order privileging certain importers over others against free trade ideas, the US courts go to the merits stage and apply international law but give room to US governmental interests in the field, a feature not unknown to US courts from other areas of the law. Neither court may be fully persuaded on the merits but at least the latter approach by the US courts allows for substantive discussion of international law norms without discarding them at the preliminary stage as non-applicable ("no direct effect"), which can hardly be persuasive in the case of WTO/GATT obligations where all concerned are members and agree to comply.

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[136] *Ibid.*

[137] See, *inter alia*, *Bercut-Vandervoort & Co v United States*, 151 F Supp 942 and *Texas Association of Steel Importers, et al v Texas Highway Commission* 364 SW 2d 749. On the treatment of the General Agreement of Tariffs and Trade by US Courts in general Ronald A. Brand, "The Status of the General Agreement of Tariffs and Trade in United States Domestic Law" (1989-1990) 26 Stan J Int'l L 479; Thomas William France, "The Domestic Legal Status of the GATT: The Need for Clarification" (1994) 51 Washington & Lee L Rev 1481.

[138] See Uruguay Round Agreements Act, H.R. 5110, 103d Cong, 2d Sess, became Pub L No 103-465, 108 Stat 4809 at Sec 102 (c) (1) (A) and (B).

6.2.4.3 Fundamental and Human Rights

Another area in which individuals rely on international law before national courts is the area of basic, fundamental or human rights which have recently become very prominent.[139] The effect of international human rights treaties and decisions of international human rights courts and committees on national law and the individual's capacity to invoke these rights and decisions before national courts is a recurrent issue in most of the participating countries' courts in relation to the two International Covenants of the United Nations and the European Convention of Human Rights (ECHR) but equally in the jurisprudence of the Inter American Court of Human Rights (IACHR) too.

An Irish case shows one side of the coin and one attitude regularly held by national courts when they are faced with international human rights adjudicated upon by the competent bodies. In *Kavanagh v Governor of Mountjoy Prison*[140] the national effect of a decision of the Human Rights Committee established under the International Covenant on Civil and Political Rights ("ICCPR") was addressed by the Irish Supreme Court. The applicant had been convicted in 1997 by three judges sitting without a jury in the Special Criminal Court, of offences of a scheduled nature including, *inter alia*, possession of a firearm with intent to commit an indictable offence and demanding money with menaces. When called upon by the applicant the Committee held that the State had failed to provide sufficient justification for denying the applicant his right to a jury trial and had thus infringed the applicant's rights under Article 26 of the ICCPR. Relying on this favourable conclusion of the United Nations Human Rights Committee Mr Kavanagh sought judicial review before the High Court. He argued that the national provisions that had led the Director of Public Prosecution to certify that he had to be tried before the Special Criminal Court were incompatible with the ICCPR and were thus repugnant to Articles 29.2 and 29.3 of the Irish Constitution. Given that the applicant had in earlier proceedings already unsuccessfully challenged the constitutionality of his trial before the Special Criminal Court, the incompatibility of his trial with the ICCPR was his only claim; accordingly, he only advanced international law arguments, but did he have *locus standi* to do so before Irish courts?

In the High Court, Finnegan J denied the applicant permission to extend his complaint to include seeking a declaration that the relevant section of the Offences Against the State Act 1939 pursuant to which he had been tried was unconstitutional as it was not in conformity with the ICCPR. Mainly this was because he had not put forward this argument before and thus not exhausted all available local

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[139] See for a comprehensive and comparative study on the subject Benedetto Conforti, Francesco Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (The Hague, Boston, London: Martinus Nijhoff Publishers, 1997), with articles on the judicial practice of Italy, the United Kingdom, France, Germany, Chile, Argentina, Austria, the United States, Israel, Japan, Canada and China.

[140] [2002] 3 IR 97, 106.

remedies. Moreover, international law was held to have as its subject the relations between States and not to confer rights upon individuals. Finnegan J stated as follows:

> "[T]hat Art 29 [of the Constitution] has as its subject the relation between states only and […] cannot affect the rights of individuals […] This proposition applies equally to international law whether created by treaty or by convention or the source of which is customary international law."[141]

Before the Supreme Court Finnegan J's refusal to give leave to seek judicial review was upheld. The rationale remained the same as stated by Fennelly J:

> "The obligation of Ireland to respect the invoked principles [namely the generally recognised principles of international law] is expressed only in the sense that it is to be "its rule of conduct in its relation with other States". It is patent that this provision confers no right on individuals. No single word in the section even arguably expresses an intention to confer rights capable of being invoked by individuals."[142]

From that it is obvious however, that the judicial response to Kavanagh's international law claim was not the principled denial of *locus standi* for claims exclusively based on international human rights instruments. The stumbling block for Kavanagh's complaint was an interpretation of a constitutional provision, Article 29.3 which is hardly persuasive. The provisions may refer to relations between states but nothing in its wording supports the extraordinary result that international law which is expressly meant to benefit the individual, as all human rights provisions are, may not be applied in Ireland. Such a conclusion is refuted by the fact that Irish courts apply international law also to the benefit of individuals[143] as do the courts of most other states.

In November 2005 the Dutch Council of State was given the opportunity to deal with the question of the effect which the ICCPR has in the legal order of the Netherlands.[144] The applicant A, an unaccompanied minor, had been denied asylum status by the Minister of Immigration and Integration of the Netherlands. Arguing that by refusing to grant asylum, the Minister had violated Article 24(1) of the ICCPR, which lays down the right of children to such protective measures as are required by their status as minors, A instituted proceedings which eventually

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[141] *Ibid.* at 106.

[142] *Ibid.* at 126.

[143] *ACT Shipping (PTE) Ltd v Minister of the Marine* [1995] 3 I R 406. See Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 19.

[144] *A v Minister of Immigration and Integration* Administrative appeal, 200505825/1 (Administrative Law Division); Jurisprudentie Vreemdelingenrecht (JV) 2006/23, 29 November 2005; reported with an English summary of the decision in ILDC 550.

ended up before the Council of State. There A's claim was dismissed. Although the court neither denied the applicant *locus standi* nor could in principle rule out the invocation of ICCPR provisions, the Council of State argued that Article 24(1) was not directly applicable by a national court:

> "Deze bepaling bevat, gelet op haar formulering, behoudens het daarin neergelegde discriminatieverbod, geen norm die zonder nadere uitwerking in nationale wet– en regelgeving door de rechter direct toepasbaar is."[145]

Applying the same line of reasoning the Second Public Law Chamber of the Swiss Federal Supreme Court dismissed the applicants' claim in *A and B v Government of the Canton Zurich*.[146] After the Government of the Canton of Zurich adopted a new Regulation on Tuition for Students of the Schools of Higher Education (Zürcher Fachhochschule) in September 1999, A and her son B challenged this regulation before the Swiss Federal Supreme Court. They claimed that this new Regulation, by introducing new registration and tuition fees, violated Article 13(2)(b) and (c) of the International Covenant on Economic, Social and Cultural Rights (ICESC). On the question of the legal standing of the applicants the court had no difficulties in noting that at least the son himself had *locus standi*, as the court outlined: "durch die angefochtene Gebührenregelung in seiner Rechtsstellung virtuell betroffen und daher zur staatsrechtlichen Beschwerde gegen die umstrittene Verordnung legitimiert"[147] and went on to add that "[m]it der staatsrechtlichen Beschwerde kann auch die Verletzung von Staatsverträgen gerügt werden".[148]

Under Swiss law this possibility is limited to treaties that are self-executing and are thus sufficiently clear and precise to be directly applicable by national judges. Referring to previous case law the court held that for the ICESC this was in principle not the case, as:

> "Die von der Schweiz mit diesem Pakt eingegangenen völkerrechtlichen Verpflichtungen haben […] programmatischen Charakter; die Vorschriften des Paktes richten sich – anders als die direkt anwendbaren Garantien des Internationalen Paktes vom 16. Dezember 1966 über bürgerliche und politische Rechte (UNO–Pakt II; SR 0.103.2), dem die Schweiz gleichzeitig ebenfalls beigetreten ist – nicht an den Einzelnen, sondern (primär) an die Gesetzgeber der Vertragsstaaten, welche sie als Richtlinien für ihre Tätigkeit zu beachten haben."[149]

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[145] ILDC 550, para. 2.2.2.

[146] *A and B v Government of the Canton of Zurich* Appeal judgment, Case No 2P.273/1999; partly published as BGE 126 I 242, 22 September 2000 (*A und B v Regierungsrat des Kantons Zürich*); English summary of the case at ILDC 350.

[147] ILDC 350, para. 1b.

[148] *Ibid.* at para. 2b.

[149] *Ibid.* at para. 2c.

Although the court acknowledged that exceptions to that rule were possible it denied that the case in question could justify such an exception. Previous cases had already decided on the matter, even in relation to the precise articles in question, and there was no reason for a deviation from that jurisprudence.[150] Accordingly the claim was unsuccessful.

In *Görgülü*[151] a custody battle before the German courts brought up similar questions to those raised by *Kavanagh*, with one difference: it was the relationship to decisions of the European Court of Human Rights and their binding force before domestic courts that was relied on by the applicant and disputed by the defendants. The applicant was the father of an illegitimate child. The mother of the child and the applicant lived apart and immediately after the child was born the mother decided to give him up for adoption. In a long series of proceedings before the German civil courts and eventually the German Federal Constitutional Court the applicant sought unsuccessfully to obtain access rights and custody of his son. Finally, he instituted proceedings before the European Court of Human Rights in Strasbourg arguing that by not granting him the right to custody and contact with his child Germany had, *inter alia*, violated his right to family life provided for in Article 8 of the European Convention of Human Rights. The court agreed and concluded: "In the case at hand this means making it possible for the applicant to at least have access to his child."[152] Armed with this holding he resumed his struggle before the German judiciary and the County Court (*Amtsgericht*) Wittenberg held in his favour. On appeal by the appointed guardian of the son the Higher Regional Court (*OLG*) Naumburg reversed the decision. Although it acknowledged that the decision of the ECtHR had shown the incompatibility with the European Convention, it argued that "dieser Urteilsspruch unmittelbar nur die Bundesrepublik Deutschland als Völkerrechtssubjekt [binde], nicht aber deren Organe oder Behörden und namentlich nicht die Gerichte als nach Article 97 Abs. 1 GG unabhängige Organe der Rechtsprechung."[153] For present purposes it must be emphasised that up to that point of the proceedings the material outcome of the decisions was highly dependent on the deciding court: whereas even before the judgment of the ECtHR the County Court always held in favour of the applicant, the Higher Regional Court used every opportunity to quash the decisions of the former. The *locus standi* of the applicant to invoke arguments based on the European Convention on Human Rights as an instrument of international human rights protection was not objected to at any stage of the proceedings.

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[150] *Ibid.* at para. 2d.

[151] *Görgülü v Germany* ECHR No. 74969/01, Judgment of 26 February 2004; [2004] 1 FLR 894.

[152] *Ibid.* at para. 64.

[153] *X v Y* OLG Naumburg, Beschluss v. 30.6.2004, 14 WF 64/04, reported in FamRZ 2004, 1510. Quotation at para. 24.

In a famous ruling which did not, however, escape hostile academic comment,[154] the Federal Constitutional Court found for the applicant and took a crucial step beyond merely granting applicants relying on the European Convention on Human Rights and the corresponding decisions of the Strasbourg court *locus standi*. Referring to § 359 No. 6 of the German Code on Criminal Procedures (StPO), which provides for the possibility of resuming proceedings before national courts if the ECtHR finds that the fundamental rights of a convicted applicant have been violated during criminal proceedings or by the application of criminal law,[155] the Federal Constitutional Court stated:

> "Dabei äußert das Gesetz die grundsätzliche Erwartung, dass das Gericht seine ursprüngliche – konventionswidrige – Entscheidung ändert, soweit diese auf der Verletzung beruht."[156]

Entirely in line with this intention of the legislature the Federal Constitutional Court felt obliged "to avoid and redress, as far as possible, violations of international public law, consisting in a deficient application of or non-compliance with obligations under international law by German courts". It considered itself to be "on indirect service for the enforcement of international public law" (in German: "steht damit mittelbar im dienst der Durchsetzung des Völkerrechts") and concluded accordingly: it must be possible to contest that German courts have disregarded or not considered the decisions of the ECtHR in an action before the Federal Constitutional Court. In the words of some commentators, it thus created a fundamental right to consideration of and respect for (in German: "Urteile des EGMR müssen berücksichtigt warden") the decisions of the ECtHR.[157] Surprisingly in the *dictum* of the Federal Constitutional Court this right to bring an action in cases of non-compliance with Strasbourg jurisprudence is not limited to decisions in which Germany has been the defendant. It is, however, far too early to say if this kind of national enforcement of international law against third states ("act

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[154] See, *inter alia*, Hans-Joachim Cremer, "Zur Bindungswirkung von EGMR-Urteilen" (2004) Europäische Grundrechte-Zeitschrift 683; Jochen Abr. Frowein, "Die traurigen Missverständnisse. Bundesverfassungsgericht und Europäischer Gerichtshof für Menschenrechte", in Klaus Dicke *et al* (eds.), *Weltinnenrecht – Liber amicorum Jost Delbrück* (Berlin, Duncker & Humblot, 2005) pp. 279 – 287; Eckart Klein, "Anmerkung zu BVerfG, Beschluss vom 14.10. 2004 (Görgülü)" (2004) Juristen Zeitung 1176.

[155] It is worth noting that as a reaction to the decision in question similar provision have been passed for proceedings concerning civil law (§ 580 Nr. 8 ZPO), labour law (§ 79 ArbGG), social law (§ 179 SGG), and administrative law (§ 153 VwGO), and for proceedings before the courts for fiscal matters (§ 134 FGO).

[156] BVerfG (2004) NJW 3407, 3410: "The law has normally the expectation that the (national German) Court would change its former decision as far as it relies on a violation of the European Convention".

[157] Breuer, Martin, "Karlsruhe und die Gretchenfrage: Wie hast du's mit Straßburg?" (2005) Neue Zeitschrift für Verwaltungsrecht 412.

of State") will prove useful, especially for this latter kind of case. In light of these developments it goes without saying that with regard to the ECtHR both the question of *locus standi* and the issue of direct effect have, as a matter of course, been answered in the affirmative by the German courts.[158]

6.2.4.4 Diplomatic Protection

When the individual's rights are violated by another state and he does not have a legal procedural remedy which allows him to bring a claim himself against the allegedly violating state, the state of which he is a citizen may bring his case to the attention of the other state and may seek a solution including a judicial settlement. Internationally, this agency called diplomatic protection in the interests of individuals is well settled before the ICJ as a result of *Barcelona Traction*.[159] Nationally, individuals in precarious situations caused by other states often try to persuade their own states to do something by bringing a case before the national courts. This will usually be based on human and fundamental rights arguments, but obviously goes into the realm of international relations between states. The underlying question is how far constitutional standards of fundamental rights (*e.g*. habeas corpus, property rights, access to court etc.) and international human rights mirroring these constitutional rights which may have been infringed by a third party state may be used to judicially coerce a government to pursue the individual's case in interstate relations. As can be easily predicted, courts are slow to grant such rights against the forum state's government as this would be a very indirect enforcement of the individual's rights which may concern the third party state's "acts of state" and certainly would interfere with the interstate relations between the forum state and the third party state. Nevertheless, the very precarious situation of British citizens in Guantanamo Bay, a case involving a former British prime minister's son who was interned in Zimbabwe to be extradited to Equatorial Guinea or the case of one of Hitler's former ministers without portfolio kept for more than forty years mostly in isolation set the scene for colourful litigation, where the procedural stage was passed and *locus standi* granted. Unlike in the case of human rights violations by

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[158] Although some applicants are granted *locus standi* even when relying on other international instruments of human rights protection, their claims often fail because the respective treaties are held not to directly confer rights on individuals which they can invoke in national procedures. See for the Convention on the Elimination of all Forms of Discrimination against Women *OVG Hamburg*, 1 Bs 535/04 of 21 December 2004, reported in (2005) Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport 258. In contrast however, for the International Covenant on Economic, Cultural and Social Rights – direct effect cannot in principle be ruled out – BVerwG, 6 C 13/03 of 3 December 2003, reported in Buchholz 421.2 Hochschulrecht no. 160 and for the protection of property under international law BVerfG, 2 BvR 955/00 of 26 October 2004, available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20041026_2bvr095500.html para. 79 *et seq*.

[159] *Canada, Belgium v Spain* (Barcelona Traction) [1970] ICJ Rep 40.

the forum state where the issue is quite straightforward, if individuals suffer severe violations of internationally recognised human rights at the hands of foreign states, the question arises as to whether there is a duty on the home state to protect its citizens abroad and whether there is an enforceable corresponding right to diplomatic protection.

Abbasi[160] is probably now the leading case in the field of diplomatic protection before national courts. The English Court of Appeal departed from former precedent in *Buttes*,[161] and did not apply the doctrine of non-justiciability but granted judicial review of the government's refusal to grant diplomatic protection to the applicant, reaching the same result by a reasoning on the merits. A significant point is that an emerging right to diplomatic protection may be seen from the decision in *Abbasi*. Abbasi was a British citizen who had been captured by US military forces engaged in armed conflict in Afghanistan. In January 2002, Abbasi was flown to a US naval base in Guantanamo Bay, Cuba, where, by the time of the hearing, he had remained captive for eight months without charge, and without access to a court or other tribunal, or even to a lawyer. On learning of her son's situation, Abbasi's mother, the second claimant, made representations through lawyers to the UK Foreign and Commonwealth Office, asking it to assist in ensuring that the conditions of her son's detention were humane, and to obtain clarification from the US authorities as to her son's status: how long he was to be detained, whether he was to be charged and prosecuted, and, if so, whether before a military commission or court. As the UK government did not seem to be making any efforts to improve Abbasi's situation, the claimants applied for permission to seek judicial review, and ultimately sought an order to compel the UK government to make representations to the US government on Abbasi's behalf, or to take other appropriate action, or at least to explain why this had not been done.

The main question before the Court of Appeal, which gave final judgement in this case, was whether the UK Foreign Secretary owed Abbasi a duty to respond positively to his, and his mother's, request for diplomatic assistance. Referring to the *Barcelona Traction* case[162] the court started with a common proposition:

> "It is clear that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with injury in a foreign State."[163]

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[160] *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1598 (CA); also reported in ILDC 246.

[161] *Buttes Gas and Oil Co. v Hammer (No 3)* [1982] AC 888 (HL).

[162] *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, Second Phase [1970] ICJ Rep 3.

[163] ILDC 246, para. 69.

The European Convention of Human Rights in conjunction with the Human Rights Act was not capable of rendering the UK authorities liable for the situation Abbasi found himself in and thus imposing a duty to exercise diplomatic protection in his favour. As the main jurisdictional principle governing the Convention was the territoriality principle and as Abbasi was detained outside the UK his Convention argument failed.[164] However, the court was willing to help Abbasi out and introduced an argument that had not been submitted by the claimants. Referring to the doctrine of "legitimate expectations" the court held that "so long as [a governmental policy or state practice] remains unchanged, the subject is entitled to have it properly taken into account in considering his individual case".[165] Having examined several official statements it concluded:

> "What then is the nature of the expectation that a British subject in the position of Mr Abbasi can legitimately hold in relation to the response of the government to a request for assistance? The policy statements that we have cited underline the very limited nature of the expectation. They indicate that where certain criteria are satisfied, the government will 'consider' making representations. Whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State. […] [T]hat does not mean the whole process is immune from judicial scrutiny. The citizen's legitimate expectation is that his request will be 'considered', and that in that consideration all relevant factors will be thrown into the balance."[166]

As the government was able to prove that they had actually entered into official contact with the US government over the detainees at Guantanamo Bay, this standard was clearly met. Consequently, there was no more the court could do for Abbasi; his claim was dismissed.

The Federal Court of Australia also pronounced on the matter in *Hicks*.[167] Hicks was an Australian citizen who was captured by the Northern Alliance in Afghanistan in November 2001 and transferred into the custody of the United States in December 2001. He was accused of committing belligerent acts for the Taliban against the United States in the Afghan conflict in 2001 and was confined at Guantanamo Bay Naval Base by the US authorities in January 2002. In 2004 he was charged with terrorist offences and was to be tried by one of the military commissions established by the United States to try Guantanamo Bay detainees. Instead of undertaking diplomatic efforts in favour of Hicks the Australian government declined to make any request to the United States for his repatriation and

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[164] *Ibid.* at paras. 70-79.

[165] *Ibid.* at para. 82.

[166] *Ibid.* at para. 99.

[167] *Hicks v Ruddock* [2007] FCA 299; also reported in ILDC 746.

even supported the trial before the military tribunal as under Australian law Hicks could not have been tried before the Australian courts because of a lack of jurisdiction. In 2006 Hicks brought an application for judicial review of the Australian government's decision to refuse to exercise diplomatic protection on his behalf by requesting his release and repatriation to Australia. The Australian government applied for summary dismissal of Hicks' claim.

Tamberlin J in the Federal Court held in favour of Hicks and decided that he had a right to have his case tested on the merits as it was not "without any reasonable prospect of success". With regard to the *locus standi* of the applicant and the related question of the justiciability of the government's refusal to grant diplomatic protection, Tamberlin J relied heavily on the holding of Gummow J in *Re Ditford.*[168] In a crucial passage he noted that:

> "[Q]uestions as to the character and extent of the powers of the executive government in relation to the conduct of international relations may give rise to a matter which involves the interpretation of s 61 of the Constitution, and consequently will affect the interests of a plaintiff so as to afford him or her standing. Where this is so, there is subject matter for the exercise of federal jurisdiction and no question of non-justiciability will ordinarily arise."[169]

Thus Tamberlin J found a way to distinguish *Buttes*, the origin of the doctrine of non-justiciability. There Lord Wilberforce had argued that governmental practice in inter-state relations was non-justiciable as there were "no judicial or manageable standards by which to judge these issues" and "the court would be in a judicial no mans land".[170] Accordingly, in *Hicks* the Federal Court concluded:

> "[N]either the Act of State doctrine nor the principle of non–justiciability justify summary judgement at this stage of the proceeding."[171]

Tamberlin J did not make a final decision on the merits as the case only involved the respondent's claim to dismiss the action in a summary judgment. However, after having recourse to a number of precedents, he found that Hicks' allegation that the state had an albeit unenforceable diplomatic duty of protection and that this duty should lead to the exclusion of certain considerations on which the denial by the government was founded, could not be ruled out either by principle or authority. Therefore, he noted that "the case for Mr Hicks is in some respects diffi-

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[168] *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347.

[169] ILDC 746, para. 27.

[170] *Ibid.* at para 15 quoting from *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 938 (HL).

[171] ILDC 746, para. 34.

cult and novel, but it does not follow that it has no reasonable prospect of success."[172]

In *Kaunda*[173] the South African Constitutional Court was required to express its views on the issue of diplomatic protection. The applicants, 69 South African citizens, had been arrested in Zimbabwe on various charges. Shortly afterwards 15 other South Africans had been arrested in Equatorial Guinea and accused of plotting a coup against the President of that country. Fearing that the government of Equatorial Guinea might seek the extradition of the 69 applicants from Zimbabwe to Equatorial Guinea where they might face the death penalty in connection with the attempted coup, the 69 applicants petitioned the High Court of Pretoria for orders directing the Government of South Africa to ensure that they would not be extradited to Equatorial Guinea and that therefore the South African Government should seek their extradition. According to press reports the son of a former British Prime Minister Sir Mark Thatcher was involved. As the High Court dismissed the claim the proceedings ended up in the Constitutional Court where the applicants argued that there was a duty on states under international customary law to grant their citizens diplomatic protection and that many of their fundamental rights were being infringed in Zimbabwe and would be in Equatorial Guinea. The court dismissed the action, although it had no doubt in relation to the *locus standi* of the applicants. Every national had the right to have a request for diplomatic protection considered and responded to appropriately by the government. Where this did not happen the court would review the decision when called upon by the individual. Quite bluntly the court held:

> "The exercise of all public power is subject to constitutional control. […] This also applies to an allegation that government has failed to respond appropriately to a request for diplomatic protection."[174]

Accordingly it was on the merits that the applicants' claim failed. The court rejected their main argument and held that there was no international human right to diplomatic protection:

> "[T]here is no enforceable right to diplomatic protection, [but] South African citizens are entitled to request South Africa for protection under international law against wrongful acts of a foreign state."[175]

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[172] *Ibid.* at 92.

[173] *Kaunda v President of South Africa* 2005 (4) SA 235 (CC). The judgment is also reported in ILDC 89, which is taken as the basis of the following comment.

[174] ILDC 89, para. 78.

[175] *Ibid.* at para. 60.

Even if a duty to actually grant diplomatic protection could be shown to exist in cases in which the human rights of the state's citizens were severely violated by other states, the government would have a wide room for manoeuvre:

> "What needs to be stressed, however, … is that government has a broad discretion in such matters [i.e. in matters of diplomatic protection] which must be respected by our courts.[176] A court cannot tell the government how to make diplomatic interventions for the protection of its nationals."[177]

However, there are limits. The court identified two of them and allowed for further restrictions:

> "Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision. There may possibly be other grounds as well and these illustrations should not be understood as a closed list."[178]

As the governmental decision satisfied these criteria the applicants' claim was dismissed.[179]

As in *Abbasi* there was a tendency to refuse *locus standi* but to embark on the issue on the merits observing standards which, however, did not embarrass the government. In 1980 the German Federal Constitutional Court faced these kinds of issues in the *Rudolf Hess*[180] case. The applicant was a former minister in Hitler's Cabinet but without portfolio or any operational authority. Interned by the British in 1941 he was later tried by the Nuremberg Tribunal. He was convicted of crimes against humanity, a crime developed after the war by the Allied Forces as a fall back option for cases where no actual operational involvement in other crimes could be argued. Hess claimed that his conviction by the Nuremberg Tribunal violated the principle *nullum crimen sine lege* because at the time of any alleged wrongdoing, the concept of crimes against humanity was unknown and undefined in law both national and international. Further it was maintained that peremptory norms of international law and fundamental human rights stood against his solitary confinement in the Berlin prison to which he was transferred from the Tower of London, where he happened to be the last prisoner. He asked the German government for help and demanded diplomatic protection. The government declared

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[176] *Ibid.* at para. 81.

[177] *Ibid.* at para. 73.

[178] *Ibid.* at para. 80.

[179] This judgment was more recently confirmed in a South African context by *Van Zyl v Government of the Republic of South Africa* 2005 (4) All SA 96 (T); also reported in ILDC 171.

[180] BVerfGE 55, 349.

that it supported Hess's cause, but was not able to deliver any result. The Federal Constitutional Court neither expressly granting nor expressly denying the applicant *locus standi*, held on the merits that Hess's action was "– its admissibility assumed – ill-founded".[181]

Although the government had, as the court held, a duty to protect its citizens and their interests against foreign states, it enjoyed a wide discretionary power when deciding on the means by which it exercised diplomatic protection:

> "Allein aus dem Umstand, daß die bisherigen Schritte der Bundesregierung die Freilassung des Beschwerdeführers nicht haben bewirken können, ergibt sich freilich noch nicht ohne weiteres die verfassungsrechtliche Pflicht der Bundesregierung, nunmehr bestimmte andere Maßnahmen von möglicherweise größerer Tragweite zu ergreifen. Es muß ihrer außenpolitischen Einschätzung und Abwägung überlassen bleiben, inwieweit sie andere Maßnahmen für geeignet und – gerade auch mit Rücksicht auf die Interessen des Beschwerdeführers selbst wie auf die Belange der Allgemeinheit – für angebracht hält."[182]
>
> "The sole fact that the steps of the Federal Government did not effect the release of the applicant does not cause any constitutional obligation of the Federal Government to envisage different steps of possibly enhanced efficiency. It must remain in its foreign policy discretion and weighing power how far it considers other means to be appropriate – particularly regarding the interests of the applicant himself but also the concerns of the public."

However, it could not be established that the governmental measures were "auch im Hinblick auf die für den Beschwerdeführer auf dem Spiel stehenden Verfassungsgüter unter keinem vernünftigen Gesichtspunkt mehr verständlich erschiene.", "actually totally inappropriate regarding the constitutional rights of the applicant considering the different aspects of the case."[183]

All cases reported here in the context of diplomatic protection grant access (*locus standi*) but there is a wide margin of appreciation granted to governments as to whether and how they decide to protect their citizens' rights against third party states.

6.2.4.5 Tort Claims Against States Before National Courts

The activities of the Israeli occupying powers in Gaza Strip and the West Bank have repeatedly given rise to such claims. Among those the *Jecir Palace Hotel*

[181] BVerfGE 55, 349 (364).

[182] BVerfGE 55, 349 (366).

[183] BVerfGE 55, 349 (368).

case seems particularly noteworthy.[184] The Jecir Palace Hotel served as a support point for the Israeli Army in the context of their occupational tasks. However, when the Israeli soldiers left the hotel, the owner found the interior completely destroyed. Based on the argument that the vandalising soldiers had disregarded the protection of private property under international humanitarian law, namely under Article 46 of the Hague Convention IV, he claimed compensation for the damage caused by the Israeli Army before the Israeli courts. While his – quite promising – claim was pending before an Israeli court, the Israeli parliament, the Knesset, promulgated a statute excluding claims for damage caused by the armed forces in the occupied territories and declared it retrospectively applicable. The applicant's response to this was to institute proceedings before the Supreme Court where he successfully challenged the constitutionality of the statute. The Supreme Court allowed him to further pursue his claim and, giving special weight to Article 46 of the Hague Convention IV, essentially followed the applicant's international humanitarian law line of argument.[185] Referring to precedent on the issue of the protection of property the Supreme Court stuck to a former decision that held that whenever

> "a person's property is harmed or expropriated illegally, it is difficult to believe that the Court will whisk its hand away from him, merely since his right might be disputed in political negotiations".[186]

Given the political circumstances this judicial stance is remarkable. It was clearly not in the interests of the government to lend international humanitarian law the procedures of the national courts and with them their respective enforcement mechanisms.

Quite differently, in *Distomo*[187] the German Federal Constitutional Court showed some reluctance to recognise tort claims based on violations of international law. Again it was international humanitarian law that had been violated, however the events in question dated back to 1944. In June 1944 members of an SS unit integrated into the German occupying troops in the Greek village of Distomo shot about a hundred selected inhabitants of the village as part of retribution measures for the ambush and killing of some German soldiers in proximity to the village by the Greek partisan army. The descendants of some of the Greek victims brought

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[184] For further comment on this case, see Biehler, Gernot, "Property Rights for Individuals under International Humanitarian Law" (2007) 45 *Archiv des Völkerrechts* 432, 438 *et seq*.

[185] Decision of the Supreme Court sitting as Constitutional Court of 12 December 2006, reporting all the history of the case and the prior cases. Unfortunately, this case is not available in an English translation so it must stay more in the narrative here.

[186] HCJ 606/78 *Oyeh v Minister of Defense* 33(2) PD 113, 124.

[187] BVerfG, 2 BvR 1476/03 of 15 February 2006; reported with an English summary in ILDC 390.

proceedings before the German courts in order to seek compensation for the material damage they had suffered due to the massacre. After several lower courts and finally the German Supreme Court (*Bundesgerichtshof)* had rejected the claim, the applicants instituted constitutional complaint proceedings before the Federal Constitutional Court where they argued that as the retribution measure carried out by the German SS unit had violated the Hague Convention IV, as the latter provided in its Article 3 that "[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation" and since these entitlements formed part of the applicants' property, the rejection of their claims by the lower courts was in violation of, *inter alia*, their constitutionally guaranteed right to property under Article 14 of the German Basic Law (*Grundgesetz*).

The Federal Constitutional Court dismissed the claim and held that in the present case the applicants could not base their claim for compensation on either Article 3 of the Hague Convention IV or on the German provisions on public liability (*Amtshaftung*). They also referred to the fact that Article 3 of the Hague Convention IV was not self-executing and to the finding that at the time of the events the individual was generally not recognised as a subject of international law and could not directly claim damages for violations of international humanitarian law as embodied in the Hague Convention on Land Warfare of 1907.[188] Interestingly, the *Areiopag*, the Greek Supreme Court, held differently.[189] However, the Greek decision could not be executed against Germany as Germany held immunity in respect of its official acts (acts of state).

Although it was clear that in principle the violation of international law could give rise to public liability under national constitutional law, this claim was also rejected by the Federal Constitutional Court. Only where the foreign state would have accepted similar claims from German citizens had they suffered violations under international law by the state agent of the respondent state, were foreign citizens entitled to claim damages on grounds of public liability. Since such a reciprocal arrangement did not exist, the claims of the applicants were deemed to fail.[190] This national requirement of reciprocity is a very interesting feature of German law in relation to international law claims before German national courts.

6.2.5 Proceedings by the Forum State

6.2.5.1 Criminal Prosecution

Individual responsibility under international law is a rather recent phenomenon. The number of international courts, hybrid courts and tribunals has been rising

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[188] ILDC 390, para. 20; BVerfG, 2 BvR 1476/03 of 15 February 2006.

[189] *Federal Republic of Germany v Prefecture of Voiotia*, Hellenic Supreme Court (*Areios Pagos*) (Plenary) 11/2000, 49 *Nomiko Vima* [Law Tribune] 2000, pp. 212—229.

[190] ILDC 390, para. 23 *et seq*.; BVerfG, 2 BvR 1476/03 of 15 February 2006.

enormously and in the academic realm international criminal law has become increasingly popular.[191] The globalisation of criminal law leaves its traces not only on an international level. From time to time national criminal prosecution is strongly influenced by the international criminal system, be it directly, when national courts apply provisions of international criminal law in the national forum, or indirectly, when international standards such as the ICC Statute pressure national prosecution authorities into actually charging potential or actual offenders even if this is politically inexpedient.

In *Paulov*[192] the Estonian Supreme Court dealt with a case in the former category. The accused in this case, Karl–Leonhard Paulov, was charged with having killed three members of a group resisting the Soviet occupying regime, the so-called "forest brothers", who hid in the forests and fought against the Soviet regime. Both the County Court and the Circuit Court held that Paulov had committed the alleged murders but that they did not constitute crimes against humanity as international agreements, especially the Nuremberg Charter and the Statute of the ICTY, did not regard killing a member of a group resisting an occupying regime with the intent of destroying that group as a crime against humanity. As the Supreme Court pointed out these holdings were flawed as a result of a misreading of the relevant clause 1 of section 611 of the Estonian Criminal Code. In its judgment the Supreme Court held

> "that 'a group initiating resistance against an occupying regime' as noted the composition of Section 611 of the Estonian Criminal Code, is a feature of an offence of genocide, not of a crime against humanity."

Hence in the, indeed confusingly worded, Section 611 of the Criminal Code only a short passage specifies crimes against humanity: "crimes against humanity […] as those are defined in the rules of international law". Having regard to these rules of international law the Supreme Court concluded that

> "depriving an individual of their right to life and to fair trial could be qualified as a crime against humanity as stipulated in Art 6(c) of the Charter the Nuremberg International Military Tribunal."[193]

Paulov's attempted justification, namely that he had acted in conformity with an order of a superior was rejected by the court, borrowing an argument from international criminal instruments:

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[191] Antonio Cassese, *International Criminal Law* (OUP, 2003).

[192] *Prosecutor v Paulov* Estonian Supreme Court judgment No 3–1–1–31–00 (Official Gazette Riigi Teataja—RT) Part III 2000, 11, 118; the English translation that was used for the following comment is reported in ILDC 198.

[193] ILDC 198 at para. 8.

> "Pursuant to Article 8 of the Charter of the Nuremberg International Military Tribunal, the accused is not freed from responsibility if he acted pursuant to the order of his Government or of a superior and therefore the application of the provisions of Section 611 with respect to the defendant is legitimate."[194]

Basically, the Supreme Court thus applied substantive international criminal law to the case. It must be noted that this is still quite exceptional reasoning, although informed by a current tendency to support international criminal law. Certainly, few courts would employ such reasoning and most would stick to the national guarantees of criminal procedure and law which, *inter alia*, exist to safeguard the rights of the accused. Although *Paulov* cannot escape the slight suspicion of political application of criminal law (would the court have acted in the same manner if he had killed Soviet soldiers in the same circumstances?) a feature not unknown to international criminal law, the case is a valid expression of state practice and the *opinio iuris* of Estonia under international law.

Similarly, in *Van Anraat*[195] the Dutch Court of Appeal in The Hague applied international criminal law as an auxiliary means of establishing whether the accused had had a sufficient degree of intent to be convicted of complicity in genocide. According to the charges, from 1985 until early 1988, Van Anraat supplied at least 1,100 tons of Thiodiglycol (TDG) to the Iraqi regime, which it allegedly used for the production of chemical weapons, which later on were used in attacks that formed part of a larger complex of actions carried out over years by the Saddam Hussein regime against the Kurds in the Northern Iraqi territory with the intention of destroying the Kurdish population in whole or in part. Hundreds of thousands of Kurdish civilians were chased from their homes and deported and tens of thousands of Kurds were killed. The charge was based on the Dutch Genocide Convention Implementation Act, although international criminal law jurisprudence was considered by the court. This was particularly so when examining the degree of intent required for a conviction on account of complicity in genocide. Here the court noted:

> "The international aspects of the case under consideration have given the Court cause for a focus on international criminal law, especially when answering the question whether the defendant had the legally required degree of intention in committing the offences that he has been charged with. In this respect the Court concludes that, especially regarding the question which degree of intention is required for a conviction on account of complicity in genocide, inter-

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[194] *Ibid.* at para. 4.

[195] *Public Prosecutor v Van Anraat* LJN: BA4676 (judgment of 9 May 2007, Court of Appeal, The Hague); the English translation that was used for this comment is reported in ILDC 753.

> national criminal law is still in a stage of development and does not seem to have crystallized out completely."[196]

As Van Anraat did not in any way have knowledge of the genocidal intent of the perpetrators themselves, he could not even satisfy possible minimal standards of intent and the question of which standards were to be considered appropriate for international law was purposely left open.[197] Accordingly the court acquitted him and concluded:

> "Seen that this criteria of intention, which is regarded as minimal, (also from an international criminal law point of view) has not been met, the Court believes that it has not been legally and convincingly proven that his intentional act, not even in a conditional way, was also targeted at the genocidal intention of the perpetrators."[198]

While in *Paulov* the influence of international rules operated against the interests of the accused and international provisions affected the interpretation of the *mens rea* requirements in *Van Anraat*, in *Massaba*[199] the Congolese Military Tribunal of Ituri based its charge entirely on the Rome Statute of the International Criminal Court. Blaise Massaba, a captain in the Congolese army, was accused of having ordered his soldiers to arrest and later shoot five pupils on the pretext that they were members of the armed militias in eastern Congo. It was exactly these armed militias that the Congolese army was fighting at that time. Criminal proceedings were instituted and Massaba was charged with war crimes as provided for in Articles 8(2)(b)(xvi) and 8(2)(a)(i), respectively, of the Rome Statute and the Congolese military penal code.[200] Although the latter included a definition of war crimes and related procedural rules in its Articles 173 to 175 it exhibited "une lacune criante en ne sanctionnant pas, en effet, le crime de guerre qui y est dépourvu de peine". Even though the Congolese Penal Code recognised the rule of *nulla poena sine lege* in Article 2 and the criminal code clearly lacked a rule providing for the punishment of war crimes, the military tribunal found a way to fill this gap. Arguing that "le législateur congolais n'avait nullement l'intention de laisser impuni ce crime atroce dont il a reconnu la haute gravité en ratifiant le Traité de Rome"[201]

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[196] ILDC 753, para. 7.

[197] *Ibid.*

[198] *Ibid.*

[199] *L'Auditeur Militaire v Bongi Massaba* Military Tribunal of Ituri, judgment of 24 March 2006, RP No 018/2006; also reported – accompanied by an English summary of the decision – in ILDC 387, which will be used for citations here.

[200] See "Loi No. 024/2002 du 18 Novembre 2002 portant code pénal militaire" in Journal Officiel – Numéro Spécial – 20 Mars 2003; also available at http://www.leganet.cd/legislation.htm#2002.

[201] ILDC 387, para. 67.

the judges held that "cette omission de la pénalité n'est en définitive qu'une erreur purement matérielle".[202]

They recalled that the Military Tribunal of Mbandaka had previously decided that in many respects the direct application of the Rome Statute was preferable to reliance on the domestic criminal code when it comes to crimes provided for in both: it provided the better mechanism for the protection of victims' rights, its rules were more precisely defined and it included less severe penalties, in particular it did not provide for the death penalty.[203] Accordingly, and in light of constitutional rules providing for the "superior authority" of ratified international agreements,[204] the tribunal in *Massaba* based the charge of war crimes directly on the Rome Statute itself and thus directly applied substantive international criminal law.

A similar situation arose in the proceedings against *Adolfo Scilingo*[205] before the Spanish High Court (*Audiencia Nacional*). Scilingo was an Argentine officer accused of having participated in the military operation for the removal of the constitutional President of Argentina, Maria Estela Martinez de Peron, and the elimination of the political opposition. The latter included a systematic criminal plan to kidnap, torture, cause the disappearance of, and finally physically eliminate persons who were reputed to be "subversive". The Spanish State prosecutor charged Scilingo with the crime of genocide in conjunction with several charges of purposeful homicide. Although the High Court in fact found that Scilingo was a member of the said operation and had participated in the killing of 30 people who had been considered incompatible with the envisaged social and political project because of their thinking, activities, or political affiliations, the judges argued for a narrow interpretation of the crime of genocide under Spanish law and held that Scilingo was liable under the prohibition of crimes against humanity. The international law perspective came to the fore as the Spanish criminal code did not penalize crimes against humanity until October 2004 and the acts had been committed in the late 1970s. In the High Court's opinion, however, a domestic legislative provision prohibiting the conduct at issue was not required for a conviction that satisfies the principles of legality and *nullum crimen sine lege*; an international law provision providing for the criminality of the acts at the time when the alleged crime was committed is sufficient: "even if we find ourselves in what appears to be a situation where the only applicable law is internal law this is not the case, since the conduct being prosecuted is also in breach of international criminal law."[206]

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[202] *Ibid.* at para. 68.

[203] *Ibid.* at para. 73.

[204] *Ibid.* at para. 72.

[205] *Graciela P de L v Scilingo* Judgment 16/2005; Appeal 139/1997; Reference Aranzadi JUR 2005/132318; ILDC 136. For a comprehensive discussion, see the contributions of Christian Tomuschat, Alicia Gil Gil and Giulia Pinzauti to the symposium on the *Scilingo* case in (2005) 3 Journal of International Criminal Justice 1074 *et seq*.

[206] ILDC 136, para. B 1.

In relation to Scilingo's offences the High Court was "in no doubt that there is an *opinio iuris cogentis* in relation to the imperative nature of the law that prohibits genocide, the slave trade, aggression or, in general, crimes against humanity"[207] and held that "regardless of what may occur on the internal policy front … there is no doubt that this type of international crime, which gives rise to individual criminal responsibility, has been in force in international law for decades".[208] Holding that these international customs are part of the Spanish legal order, the High Court sentenced Scilingo to a total of 640 years of imprisonment.[209]

In comparison to the two cases considered above the importance of international criminal law in *Scilingo* reaches a higher level. In *Paulov* the Estonian Criminal Code expressly referred to international rules on the matter so that it was essentially domestic law that ordered the application of international criminal provisions. In *Massaba*, too, the prohibition of the committed acts was apparent from the Congolese criminal code even though it did not provide for a penalty. However, in *Scilingo* international criminal rules were applied without any relation to national provisions referring to international law or providing for their application. The High Court applied international custom independently from national criminal law and the conviction of Scilingo was therefore exclusively based on international law.

Except for these cases decided on the basis of substantive international law, the manner in which international criminal law as embodied in the Rome statute of the International Criminal Court may affect national criminal procedures is rather indirect. As the case of the British Colonel Mendonca shows, international safeguards against impunity might pressure national prosecutors into charging possible offenders, even in the face of adverse reasons of political expediency.[210]

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[207] *Ibid.* para. B 2.

[208] *Ibid.* para. B 2.3.

[209] On 18 September 2001 a similar case was decided by the Dutch Supreme Court in *Bouterse (Appeal in cassation in the interests of the law)* No. HR 00749/01 CW 2323 LJN; AB1471, NJ 2002, 559; English translation at ILDC 80. Unlike the Spanish court in *Scilingo*, however, the Dutch judges held that international customary law could not justify a conviction where domestic law did not provide for the punishment of the offence in question.

[210] As Colonel Mendonca's court trial ended with an acquittal and this judgment has not been published anywhere the case was reconstructed mainly on the basis of different newspaper articles. See *inter alia*, Severin Carrell, "Army Colonel facing trial for war crimes" in *Independent on Sunday*, 22 May 2005, available at http://www.independent.co.uk/news/uk/crime/army-colonel-facing-trial-for-war-crimes-491655.html; Michael Evans, David Charter and Steve Bird, "Prosecutions will uphold Army integrity, says Reid" in *The Times*, 20 July 2005 available at http://www.timesonline.co.uk/tol/news/world/iraq/article545964.ece; Thomas Harding, Toby Helm, Joshua Rozenberg, "Blair and Goldsmith accused over court martial of Col Mendonca" in *The Daily Telegraph*, 21 July 2006, available at http://www.telegraph.co.uk/news/uknews/1503000/Blair-and-Goldsmith-accused-over-court-martial-of-Col-Mendonca.html; Duncan Hooper, "Colonel cleared over mistreatment of Iraqis" in *The Daily Telegraph*, 15 February 2007,

Jorge Mendonca was the commander of the Queen's Lancashire Regiment serving in Basra, Iraq in 2003. Several Iraqi civilians, who had been detained by the British Regiment during that time, claimed to have been assaulted, hooded, cuffed, deprived of sleep and beaten for failing to hold stress positions over a 36-hour period by British soldiers under the command of Mendonca. One of the detainees, Baha Da'oud Salim Musa, was killed by the British soldiers; it was stated that he "died as a result of the treatment", a phrase which indicates proximity to medical negligence cases. Although, these methods of treatment may constitute torture and with it a severe violation of international law, the British public and political debate tended to sympathise with the armed forces, essentially arguing that (international) criminal proceedings against the responsible servicemen would undermine the morale of the army and endanger its functioning. As Lord Hoyle, not a Law Lord but a member of the House of Lords, put it in a parliamentary debate on the subject:

> "If they charge the colonel or other soldiers under the International Criminal Court they will destroy the morale of all the soldiers, not just the Queen's Lancashire Regiment but soldiers serving in Iraq, Afghanistan or any other theatre of war."[211]

The provision of command responsibility in the Statute of the ICC (Article 28a) on which a charge against Colonel Mendonca would most likely have been based was especially criticised as "extremely wide-ranging" and as "a catch-all".[212] Although the public statements at the time were cautious enough not to state it in clear terms it seems rather unlikely that Colonel Mendonca would have faced criminal prosecution. However, as the United Kingdom had ratified the Rome Statute of the International Criminal Court without any reservations, the alleged offences fell within the jurisdiction of the ICC and – much to the indignation of the British – the accused were in danger of being prosecuted in The Hague:

> "What is now hanging over him and other soldiers is that the case may be referred to the International Criminal Court. That court was not set up for that purpose. It was set up to deal with cases of genocide and with war criminals. That that gallant officer could be in the

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available at http://www.telegraph.co.uk/news/uknews/1542618/Colonel-cleared-over-mistreatment-of-Iraqis.html and the article "Why soldiers had no case to answer" in *BBC News*, 13 March 2007, available at http://news.bbc.co.uk/2/hi/uk_news/6447717.stm.

[211] Lord Hoyle, *House of Lords Hansard*, 14 July 2005, Column 1224.

[212] Lord Hoyle, *House of Lords Hansard*, 14 July 2005, Column 1223; see also Thomas Harding, Toby Helm, Joshua Rozenberg, "Blair and Goldsmith accused over court martial of Col Mendonca" in *The Daily Telegraph* of 21 July 2006, available at http://www.telegraph.co.uk/news/uknews/1503000/Blair-and-Goldsmith-accused-over-court-martial-of-Col-Mendonca.html.

> same dock as that in which Milosevic has appeared must be wrong in itself."[213]

Lord Boyce in a similar capacity as a member of the House of Lords stated in the parliamentary debates at Westminster:

> "In this context I would mention the threat of being taken before the International Criminal Court. While I accept that it will be an extreme that sees the ICC gaining jurisdiction, the theoretical possibility does exist."[214]

As the ICC can only take up a case when the national judiciary is unwilling or unable to guarantee prosecution, Lord Drayson pointed to the solution: "We remain confident that UK authorities will always act properly. As long as they do, there will never be any basis for the ICC to exercise jurisdiction."[215] What followed was a charge of war crimes against Colonel Mendonca for having negligently failed to ensure that his men did not abuse prisoners in Basra. However, in February 2007 he was cleared of all charges and McKinnon J in Old Bailey ordered the Colonel's acquittal and held that Mendonca had "no case to answer".

6.2.5.2 International Law as a Defence Before National Courts

The reverse role of international law can be observed when it is employed as a defence in certain circumstances. The difference from the cases referred to above is well mirrored in the personalities and styles as well as public allegiances of Colonel Mendonca on the one hand and the other accused now to be introduced on the other hand.

In *DPP v Clancy* which was decided by the Dublin Circuit Criminal Court in 2006 international law provided a defence against prosecution.[216] Three women and two men entered Shannon Airport on an early morning in February 2003 and tried to make a stand against what they considered the clearly illegal and deadly UK/US war against the people of Iraq and rendered one US Navy plane incapable of flight as well as making a big show by beating planes with an inflatable hammer in an admitted attempt to raise public awareness. Next to the plane they left a written statement setting out that they felt obliged to act as they did for the protection of life and property and to avoid a breach of international law by US forces

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[213] Lord Hoyle, *House of Lords Hansard*, 14 July 2005, Column 1223.

[214] Lord Boyce, *House of Lords Hansard*, 14 July 2005, Column 1236.

[215] Lord Drayson, *House of Lords Hansard*, 14 July 2005, Column 1263.

[216] *DPP v Clancy, Dunlop, Fallon, Moran and O'Reilly* Circuit Criminal Court, 25 July 2006; for a brief analysis of the case, see Joe Noonan, "*DPP v Clancy, Dunlop, Fallon, Moran and O'Reilly* (the Pitstop Ploughshares Case)" (2006) 1 Irish Yearbook of International Law 337.

continuing the violence in Iraq. The police caught the offenders at the scene of the crime and charged them with criminal damage contrary to section 2(1) of the Criminal Damage Act 1991. In section 6(2)(c) the same Act provides for a "lawful excuse" on which the accused based their arguments. Under the Criminal Damage Act this excuse is dependent on different criteria. First, the offender has to act in order to protect himself or another, his or another's property or his or another's right or interest therein. If this is the case the act committed must prove to be objectively reasonable in the circumstances as the accused honestly believed them to be, given their understanding of the illegality of the use of force by the states engaged in the war against Iraq. To show that their belief was soundly based and could be honestly held the accused were allowed to present their own understanding of the legal situation under international law. An international law expert[217] heard on the matter reported on current academic opinion that was entirely in line with the submissions of the accused and showed that their view was one that could be honestly held. Although this was only one of the criteria that the accused had to satisfy in order to be lawfully excused[218] and although their defence was based on a statutory justification, international law played an important part. Reliance on the relevant provisions of international law governing the use of force was an essential part in the accused's defence and determined the outcome of the case. The Dublin Circuit Court found them to be not guilty following a jury verdict to this effect.

In the decision of the German Federal Administrative Court (*Bundesverwaltungsgericht*) in *Pfaff* international law served a similar purpose.[219] It was not a jury based decision of a lower court with a "no case to answer" holding which naturally stays unreasoned, but a decision of the highest court of a major player on the international plane and is thoroughly reasoned although exceptional.

The applicant was and is still a Major with the German Army (*Bundeswehr*) where he was involved in the realisation of an IT-programme for logistical purposes. As the applicant had considerable concerns about the legality of the war in Iraq and about the contribution which German military forces and he in particular was making thereto, a possibility which even his superior officer could not rule out, he refused to continue his work on the said IT-programme. His superior officer ordered him to resume his work but he disobeyed arguing that since he could not be sure whether the tasks he was supposed to perform in some way supported the unlawful war in Iraq he felt unable to and legally bound not to execute the orders. The applicant was tried before a military court (*Truppendienstgericht*) on disciplinary grounds. He was relegated to an inferior position within the armed

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[217] This was Jean Allain of Queen's University Belfast who was, as the author was in this case, called as an expert witness for the defence.

[218] See Noonan, "*DPP v Clancy, Dunlop, Fallon, Moran and O'Reilly* (the Pitstop Ploughshares Case)" (2006) 1 Irish Yearbook of International Law 344: "International was not the only factor, and perhaps not even the decisive factor, in the jury's decision to acquit."

[219] BVerwG, 2 WD 12/04 of 21 June 2005; reported in (2006) NJW 77 and with an English summary in ILDC 483.

forces and the court convicted him for his refusal to obey orders. The applicant appealed against this decision and the *Bundesverwaltungsgericht* held in his favour but avoided making a clear statement that the project the applicant was involved in was unlawful under international public law and that thus he was free to disobey the orders. Instead the *Bundesverwaltungsgericht* found other arguments that justified the soldier's disobedience, namely the constitutional guarantee of freedom of conscience:

> "Aus Art. 1 III GG sowie aus dem Wortlaut, der Entstehungsgeschichte und aus dem Regelungszusammenhang des Art. 4 I GG ergibt sich jedoch, dass ein militärischer Befehl jedenfalls dann als unzumutbar nicht befolgt zu werden braucht, wenn der betroffene Untergebene sich insoweit auf den Schutz des Grundrechts der Freiheit des Gewissens berufen kann."
>
> "The wording, the genesis and the context of Article 1.3. of the German Basic Law (Constitution) in relation to Article 4.1. indicate, however, that a military order may be not obeyed being an outrageous one if the subordinate can rely insofar on the safeguards of the freedom of conscience." [220]

With regard to the case in question the *Bundesverwaltungsgericht* held that at the time when the alleged violation of official duty had taken place the possibility that the project the applicant worked on would contribute to the war effort could not entirely be ruled out. In the court's opinion this constituted a sufficient basis for a constitutionally protected conscientious objection to the orders he had received.[221] The court thus vacated the conviction of the military court. The applicant was allowed to disobey the order, as he felt morally obliged not to perform it.

In effect, even though in a rather circuitous line of reasoning, the court accepted the applicant's international law defence, or rather accepted his constitutional defence based on international law evidence. As the court acknowledged that the possible or even likely illegality in terms of international public law of a military order might create a moral dilemma for the recipient whose right to make a conscientious decision is constitutionally protected, it paved the way for an international law defence against disciplinary action due to disobedience. In some parts the judgment even takes a step beyond this. Almost in passing and certainly in an *obiter* context, the *Bundesverwaltungsgericht* notes that a violation of the general rules of public international law as referred to in Article 25 of the German Constitution might also justify a refusal to execute an order.[222] Thus, in this case the applicant could alternatively have argued that the order to continue his work on the IT-programme demanded participation in or at least a contribution to a military attack that was illegal according to international customary law. Moreover, as the

[220] BVerwG (2006) NJW 77, 83.

[221] *Ibid*. at 93.

[222] *Ibid*. at 82.

court noted, an order may be ignored if it is not within the tasks that are constitutionally provided for the army. The constitutional task of the German military is "defence". In the definition that the *Bundesverwaltungsgericht* provides this includes everything

> "was nach dem geltenden Völkerrecht zum Selbstverteidigungsrecht nach Art. 51 der Charta der Vereinten Nationen (UN-Charta), der die Bundesrepublik Deutschland wirksam beigetreten ist, zu rechnen ist."
>
> "which according to current international law is part of the inherent right to self defence according to Article 52 of the UN Charter, of which the Federal Republic is a party."[223]

Could this remit be recommended to the Secretary of Defence? It could hardly have been clearer: where obedience entails a violation of international public law, disobedience may not be judged a violation of duty. This international law argument provides a valid defence against disciplinary or criminal enforcement actions.

The issue of whether violations of international law prior to the actual proceedings before the court have any impact was crucial to the English House of Lords' decision in *Bennett*.[224] Bennett was a New Zealand citizen who had purchased a helicopter in the UK. The monetary means for this purchase was raised by a series of false pretences and had not been paid back. The UK therefore wanted him in the country to subject him to criminal prosecution. As Bennett was in South Africa and no previous extradition agreements existed between the UK and South Africa the UK police convinced the South African authorities to arrest and forcibly return Bennett to the UK on the pretext of an extradition to New Zealand. The plane to New Zealand took a route via Heathrow airport where the British police got hold of Bennett, arrested him and tried him for his offences. The accused claimed an abuse of process and argued that the House of Lords lacked jurisdiction to try the case in as much as the return to England was in breach of international law. In a majority ruling[225] the court decided in favour of Bennett. Lord Griffiths stated that "if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it"[226] and relied mainly on an estoppel argument:

> "The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution."[227]

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[223] BVerwG (2006) NJW 77, 80 *et seq*.

[224] *R. v Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 AC 42.

[225] 4:1, Lord Oliver of Aylmerton dissenting.

[226] [1994] 1 AC 42, 62.

[227] *Ibid*.

Lord Bridge of Harwich agreed and, explicitly referring to the international law violation, added a rule of law argument:

> "There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance."[228]

Lord Lowry also emphasized the issue of an international law defence. Examining the limits of prosecution after formal extradition procedures, namely that the accused can only be charged with crimes that he has been extradited for, Lord Lowry pointed out that these limits could be circumvented if domestic courts accepted jurisdiction in the case of illegal abductions. However, he stated:

> "[I]t seems to represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed, [i.e. formal extradition procedures had been followed]."[229]

It is by staying procedures in cases like this that courts can express disapproval; discourage similar executive behaviour in future cases and thus "maintain the purity of the stream of justice".[230] Overall, Bennett's defence was accepted, for the sake of the rule of law, whether national law or international law.[231]

Without expressly using the term it is nonetheless apparent that in *Bennett* the main issue was the applicability of the "fruit of the poisonous tree doctrine". As the decision of the German *Landgericht* (District Court) Frankfurt in *Gäfgen*[232] illustrates quite clearly this doctrine is not, at least not unconditionally, applied in German criminal proceedings. In a case that is currently pending before the ECtHR the accused claimed that his conviction violated the procedural guarantees of the European Convention of Human Rights.[233] Gäfgen had killed the 11 year

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[228] [1994] 1 AC 42, 67.

[229] *Ibid.* at 76.

[230] *Ibid.* at 77.

[231] Before South African courts a case almost identical to *Bennett* (in both facts and outcome) came up in *S v Ebrahim* 1991 (2) SA 553. In *Bennett* this case is frequently referred to.

[232] *Creditors of State Bonds v Argentina* Land-Gericht Frankfurt, 5/22 Ks 3490 Js 230118/02 of 9 April 2003, (2003) *Strafverteidiger* 325.

[233] For the decision on the admissibility of Gäfgen's complaint see *Magnus Gäfgen v Germany* ECHR, No. 22978/05, Judgment of 10 April 2007; German translation reported in

old son of a well-known banker's family and police arrested him when he tried to leave the country. Gäfgen pretended to the police that the boy was still alive and the vice president of the Frankfurt police, considering the life of the child to be in extreme danger, ordered that Gäfgen be questioned under the threat of the infliction of extreme pain to force him to reveal where the child was hidden. Gäfgen confessed to the crime. Although the *Landgericht* Frankfurt acknowledged that because of the clear violations of German procedural rules and Article 3 of the ECHR Gäfgen's confessions could not be used by the court, it refused to exclude the evidence that the police had obtained as a result of the confessions, such as the boy's body and his clothes and the money they had found in Gäfgen's apartment.[234] In the court's opinion the infringement of Gäfgen's fundamental rights could be outweighed by the severity of the alleged crime, so that the evidence was admissible and Gäfgen was convicted.[235] Gäfgen brought an action before the ECtHR which is still pending. Gäfgen argues that the criminal proceedings should have been stayed as the use of the evidence violated his right to a fair trial and made an effective defence impossible. In the decision on the admissibility of Gäfgen's claim the ECtHR stated that it was at least not manifestly ill-founded.[236] Even though any forecast of the outcome is highly hypothetical it may be worth considering how the proceedings might continue if the ECtHR indeed find a violation of Article 6 ECHR. As will be recalled, German courts must take into account the judgments of the ECtHR within the German legal order. As the German Code on Criminal Procedure (StPO) in § 359 Nr. 6 provides for the possibility of resuming proceedings after the ECtHR has found a violation of the Convention and the preceding decision of the national court can be held to be based on this violation, Gäfgen could have a valid defence by relying on international law. The violation of the fruit of the poisonous tree doctrine – if the ECtHR holds this to be a violation of the Convention – could be invoked before national courts and in so far as the domestic judgment rests upon this violation the decision may have to be reversed.[237]

(2007) NJW 2461; English judgment available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=html&highlight=22978/05&sessionid=7915775&skin=hudoc-en.

[234] LG Frankfurt, 5/22 Ks 3490 Js 230118/02 of 9 April 2003, [2003] *Strafverteidiger* 325, para. 16 *et seq.*

[235] *Ibid.*

[236] *Magnus Gäfgen v Germany* ECHR, No. 22978/05, Judgment of 10 April 2007; (2007) NJW 2461, 2464.

[237] In *Rukundo v Federal Office of Justice* (Federal Supreme Court of Switzerland, decision of 3 September 2001, Cases No 1A.129/2001 and1A.130/2001) the Swiss courts, too, acknowledged the possibility of a ECHR based defence. At stake was the transferral of Emmanuel Rukundo to the International Criminal Tribunal for Rwanda (ICTR). Rukundo claimed that the procedures before the ICTR did not satisfy Article 6 ECHR and that Swiss authorities should therefore not co-operate with the tribunal and transfer him to the court. The Swiss Federal Supreme Court held that in principle this defence was valid, however, *in casu* they considered Rukundo's objection unsubstantiated.

In *Nguyen Tuong Van*[238] the Singapore Court of Appeals also had to face the question of whether in the light of clear international law violations evidence had to be excluded from the proceedings. More precisely *Nguyen Tuong Van* concerned the question of whether the accused in criminal proceedings might rely upon a violation of Article 36(1) of the Vienna Convention on Consular Relations (VCCR) to render statements used as evidence for his conviction inadmissible. Nguyen Tuong Van was an Australian national who was arrested in possession of two packets of heroin while in transit through Singapore's Changi Airport. The following day he made a statement in which he apologized for the inconvenience caused and revealed that there were other people involved in the attempted drug trafficking. The Court of Appeal classified this statement as a confession, as it clearly linked the accused to the offence.[239] Yet the arresting authority had not informed the Australian consular representation of Tuong Van's detention before his confession was recorded and Tuong Van submitted that this constituted a breach of Article 36 (1) VCCR that rendered the confession inadmissible in the criminal proceedings. The Court of Appeal held against Tuong Van and affirmed the decision of the High Court. Although Singapore was not a party to the Vienna Convention on Consular Relations the court considered itself bound by its rules through customary state practice.[240] Referring to the ICJ judgment in the *Avena* case,[241] the court held that in principle the recording of statements before the notification of the consular post of the arrested foreigner could not be considered a breach of Article 36 (1) VCCR as embodied in international customary law.[242] In an *obiter dictum* the judges stated that while the trial judge in the High Court had found that if a breach of the relevant VCCR provision had occurred and if there was a "resultant prejudice" the court might exclude the statements in question, this was incorrect as Article 36(2) VCCR subjected the rights created under the first paragraph to domestic legislation. Hence, it was according to the domestic procedural standards that the question of admissibility had to be decided. As the national rules ensured the "voluntariness with which statements are made and the reliability of confessions" these were sufficient.[243] In effect, the international law defence was rejected. Only where the violation of Article 36(1) VCCR led to a situation that did not satisfy the criteria that statements necessarily had to satisfy under domestic rules could the admissibility of the statement be challenged.

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[238] *Nguyen Tuong Van v Public Prosecutor* Singapore Court of Appeals, decision of 20 October 2004, [2004] SGCA 47; all references here refer to the text reported in ILDC 88.

[239] ILDC 88, para. 22.

[240] *Ibid.* at para. 24.

[241] *Avena and other Mexican nationals (Mexico v United States of America)* [2004] ICJ Rep 12.

[242] ILDC 88, para. 33.

[243] *Ibid.* at para. 35.

6.2.5.3 Extradition

6.2.5.3.1 The Political Offence Exception

Article 3 of the European Convention on Extradition 1957 provides that "[e]xtradition shall not be granted if the offence in respect of which it is requested is regarded by the requested party as a political offence or as an offence connected with a political offence". The rationale behind the so-called political offence exception was adverted to by Lord Diplock in the course of his judgment in *R v Governor of Pentonville Prison, ex p Cheng*[244] commenting on the provision in section 3(1) of the Extradition Act 1870 that: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character". In his view "to put it bluntly … the draftsman contemplated that a foreign government in its eagerness to revenge itself upon a political opponent might attempt to misuse an extradition treaty for this purpose".[245]

While Stephen J, writing extra-judicially, expressed the view in *The History of the Criminal Law of England*[246] that political offences were crimes which were "incidental to and formed part of political disturbances", it must be acknowledged that it is difficult to formulate a definition of "political offence" which is consistent and can take account of changing attitudes towards this type of activity. While the extensive discussion by Lord Radcliffe of the concept in his speech in *Schtraks v Government of Israel*[247] is useful, it has been suggested that "his reflections impel one, the more one ponders, to the conclusion that the formulation of a workable rule is impossible".[248] It is therefore interesting to examine the attempts of the judiciary in Ireland, a jurisdiction which had more reason than most to address this question as a result of paramilitary activity there particularly in the 1980s, to grapple with the definition of "political offence". While the judgments of the Supreme Court must be read against the specific background of Irish constitutional law, they nevertheless provide some useful insights into the area which might be employed in an international context.

Part III of the Extradition Act 1965, which related solely to extradition to the United Kingdom, while it lacked a number of the safeguards provided in Part II of the Act which made provision for extradition to all other countries, did provide that an extradition order would not be made where the offence to which the warrant related was, *inter alia*, a "political offence or an offence connected with a political offence". The attitude adopted by the Irish courts prior to the early 1980s is

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[244] [1973] AC 931.

[245] *Ibid*. at 944.

[246] (1883) Vol II, p. 70-71. See also *Re Castioni* [1891] 1 QB 149, 165 where Hawkins J stated that he would "adopt… absolutely" the interpretation of Stephen J, who also sat in the Court of Appeal in that case.

[247] [1962] 3 All ER 529.

[248] Shearer, *Extradition in International Law* (Manchester University Press, 1971) p. 178.

exemplified by that adopted in *McLaughlin v Attorney General*[249] where Finlay P in the High Court stated that "even murder … if carried out by or on behalf of an organisation which seeks to overthrow the government of its country by force is a political offence".[250] So in reality all politically motivated offenders could claim the benefit of the political offence exception.

However in the wake of the Supreme Court decision in *McGlinchey v Wren*[251] this defence was only available where the activity in question was one which "reasonable, civilised people would regard as political activity".[252] Subsequently, in *Russell v Fanning*[253] the Supreme Court further circumscribed the scope of the political offence exception and denied the benefit of it to all members of illegal paramilitary groups whose objectives included the unconstitutional subversion of the Irish State and the Constitution of Ireland.[254] This decision can be seen as an attempt to narrow the scope of the political offence exemption by examining the political motives of the perpetrators of paramilitary crime in the context of the constitutional imperatives which the Irish courts are bound to uphold. However, in some respects the decision of the Supreme Court in *Russell* marked the high watermark of judicial reasoning against the interests of those involved in paramilitary crime.

Subsequently, in *Finucane v McMahon*[255] the Supreme Court held that extradition should be refused where it would involve an infringement of the suspect's constitutional rights. Walsh J drew a distinction between what can properly be regarded as terrorism on the one hand and politically motivated offences on the other hand and said that "political offences" are defined as offences which usually, although not necessarily, consist of violent crime directed at securing a change in the political order. In his view, while the use of violence did not of itself rule out reliance on the political offence exception, certain forms of indiscriminate, violent activities should be more correctly classed as "terrorism" and should not come within the definition of "political offence". While the judgment of Walsh J provided little real guidance other than this about how the distinction between terrorism strictly so-called and political offences was to be drawn in future cases, it clearly went some way towards restoring the judicial attitude which had prevailed in the 1970s in cases such as *McLoughlin v Attorney-General*. It therefore meant that politically motivated offenders could once again claim the benefit of the political offence exception provided they were not involved in acts of indiscriminate violence.

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[249] High Court, 5 December 1974.

[250] *Ibid.* at 4-5.

[251] [1982] IR 154.

[252] *Ibid*. at 160 *per* O'Higgins CJ.

[253] [1988] IR 505.

[254] See also *Quinn v Wren* [1985] IR 322.

[255] [1990] 1 IR 165. See also *Clarke v McMahon* [1990] 1 IR 226; and *Carron v McMahon* [1990] 1 IR 239.

The Extradition (European Convention on the Suppression of Terrorism) Act 1987 was passed to give effect to the European Convention on the Suppression of Terrorism adopted in 1977 by most of the members of the Council of Europe, although it was not signed by Ireland until 1986. A number of criticisms were levelled at the legislation, in particular that it failed to give adequate effect to Article 2 of the European Convention on the Suppression of Terrorism which gave Ireland the option of providing by legislation that certain serious offences, such as murder and manslaughter, could not be regarded as political in nature. In addition, the failure of the Act to include within its ambit "possession" as opposed to "use" of a weapon and the fact that it did not extend to non-automatic firearms were omissions which greatly reduced its effectiveness.

The reasoning in *McGlinchey v Wren* to the effect that indiscriminate violence can never qualify as a political offence must still be regarded as good law. This seems clear from the decision of Kelly J in *Quinlivan v Conroy*,[256] where he held that the offences in respect of which the applicant was sought did not concern individuals with any direct or indirect involvement in political activity and consisted of violence which could result in indiscriminate death or serious injury to ordinary members of the public. He therefore held that they could not be classified as political offences or offences connected with a political offence.

The scope of the political offence exception has been reduced in a number of jurisdictions partly as a result of the growth in the commission of offences of a "terrorist" nature for political motives. In England, the Extradition Act 2003 removed the exception completely, although section 13 provides that a person's extradition shall be barred by reason of extraneous considerations if it appears that the warrant is in fact issued "for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions".

Consideration was given to how these principles will be interpreted by Scott Baker LJ in *Hilali v Central Court of Criminal Proceedings Number 5 of the National Court of Madrid*.[257] He said that the burden is on the appellant to show a causal link between the issue of the warrant, his detention, prosecution, punishment or the prejudice which he asserts he will suffer and the extraneous consideration, whether it be race, religion or political opinion. Scott Baker LJ added that he does not have to prove on the balance of probabilities that the events described in the section will take place, but he must show that there is a "reasonable chance" or "reasonable grounds for thinking" or a "serious possibility" that these events will occur.[258] He also reiterated that in considering such matters the court is not bound by the ordinary rules of evidence and that the appellant may rely on any material to

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[256] [2000] 3 IR 154.

[257] [2006] EWHC 1239 (Admin).

[258] Referring to the *dicta* of Lord Diplock in *Fernandez v The Government of Singapore* [1971] 1 WLR 987, 994.

support a submission based on the provisions of section 13.[259] The interpretation of "political opinions" for this purpose was also considered by Collins J in *Gomez v Secretary of State for the Home Department*.[260] He expressed the view that a broad purposive construction should be given to this ground and that it is not necessary to establish that the prosecution's only motive is political persecution and that it is sufficient if political motivation forms part of the reason for acting.

6.2.5.3.2 The Rule Against Double Jeopardy

The rule against double jeopardy, sometimes referred to as the principle *non bis in idem,* operates in the context of extradition proceedings to prevent an individual being prosecuted for the same offence more than once in different jurisdictions. An example of this principle in extradition legislation is the provision set out in section 12 of the United Kingdom Extradition Act 2003 which provides:

> "A person's extradition to a category 1 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption–
>
> (a) that the conduct constituting the extradition offence constituted an offence in the part of the United Kingdom where the judge exercises jurisdiction;
>
> (b) that the person were charged with the extradition offence in that part of the United Kingdom."

So, a defendant can rely on section 12 in circumstances where if he were charged in the United Kingdom with an offence for which his extradition is sought, he could plead the principles of *autrefois acquit* or *autrefois convict*.

The circumstances in which a person whose extradition is sought may seek to bar his extradition on this basis were considered in some detail recently by Auld LJ in the decision of the English High Court in *Fofana v Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France*.[261] The appellants had been prosecuted for fraud in criminal proceedings commenced shortly before the issue of the extradition warrant which were completed in Southwark Crown Court in November 2005 a few weeks before the extradition proceedings were heard and determined on 21 December 2005. The appellants argued that the indictment which they had faced was based on the same conduct, including the same alleged false documentation, relied upon by French authorities in the extradition warrants. Following an examination of the relevant English authorities, Auld LJ stated as follows:

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[259] See further *Schtraks v Government of Israel* [1964] AC 556.

[260] [2000] INLR 549.

[261] [2006] EWHC 744 (Admin).

> "In summary the authorities establish two circumstance in English law that offend the principle of double jeopardy:
>
> i) Following an acquittal or conviction for an offence, which is the same in fact and law – *autrefois acquit or convict;* and
>
> ii) following a trial for any offence which was founded on 'the same or substantially the same facts', where the court would normally consider it right to stay the prosecution as an abuse of process and/or unless the prosecution can show "special circumstances" why another trial should take place."[262]

He then considered the application of the two constituents of the double jeopardy principle to the facts of the case before him. He found that the first, the plea of *autrefois acquit or convict,* clearly did not arise, since the transactions identified in the warrant, considered separately or as part of a course of conduct, although covering some of the same facts in the Southwark Crown Court indictment, described wider criminality than the substantive offences charged in that indictment. Counsel for the respondent relied on the decision of the High Court in *Boudhiba v Central Examining Court No 5 of the National Court of Justice, Madrid, Spain*,[263] in which Smith LJ accepted that the Spanish authorities might prosecute the appellant for wide-ranging offences concerning the forgery of passports, despite his conviction in England for an offence of using a particular passport. She did not find it to be an abuse of process that the offences to be prosecuted in Spain were of a more serious nature, and observed that it would be appropriate for the evidence supporting the conviction in this country to be led in Spain in support of any prosecution there for the wider forgery offences. However, Auld LJ was satisfied that the facts in *Boudhiba* could be distinguished from those in the matter before him. He stated that the contrast in extent and seriousness between the two sets of proceedings was not so great and that a hypothetical attempt to prosecute the appellants again in England on a broader charge would, in his view, be vulnerable to the court directing a stay as an abuse of process. He held that although the extradition offence specified in the warrant was not based on exactly, was based only partly, on the same facts as those charged in the Southwark indictment, there was such a significant overlap between them as to have required the District Judge to stay the extradition proceedings as an abuse of process. Auld LJ concluded that in any event, given what was known, and the material available, to the Crown Prosecution Service when committing this matter to the Southwark Crown Court, extradition of the appellants would be an abuse of process and, on that account, would be barred by reason of the rule against double jeopardy.

However, it should be noted that a much narrower view was taken of the principle of double jeopardy in the context of extradition proceedings in *Bohning v*

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[262] *Ibid*. at para. 18.

[263] [2006] EWHC 167 (Admin).

Government of the United States of America,[264] which involved the interpretation of section 80 of the Extradition Act 2003, which concerns the application of the principle to so-called Category 2 Territories, such as the United States.[265] Newman J stated that he "would be very slow to introduce into extradition law principles applied in civil proceedings between private parties" and that "[e]xtradition proceedings bring the public interest of sovereign states in the criminal sphere into play."[266] He said that he was satisfied that the fundamental principle is that a person cannot be prosecuted twice for the same crime and that this does not extend to create a bar to prosecution for offences arising out of the same facts, or to offences which could have been but were not charged. While such circumstances could involve consideration of the principle of abuse of process, he was satisfied that the categories of misconduct, which are at the heart of an abuse of process allegation were already provided for by the scheme of the 2003 Act in the context of "extraneous circumstances". He added, quoting from the *dicta* of Rose LJ in *R. (Kashamu) v Governor of Brixton Prison* [267] that "… extradition contemplates trial in another jurisdiction according to the law there. It is there that questions of admissibility, adequacy of evidence and fairness of the trial itself will be addressed …" In the circumstances, Newman J concluded that there was no bar to the extradition on the basis of the double jeopardy principle.

It is submitted by Nicholls, Montgomery and Knowles[268] that the decision in *Forfana* provides a correct interpretation of the double jeopardy principles contained in sections 12 and 80 of the Extradition Act 2003. They point out that the broader interpretation is more consistent with the approach taken by the European Court of Justice in relation to Article 3(2) of the European Arrest Warrant Framework Decision of 13 June 2002 which is similar in terms to Article 54 of the Schengen Convention.[269]

The key issue in determining whether the principle against double jeopardy applies is whether further proceedings involve another prosecution or not and this is clear from the decision of Lord Woolf CJ in *Oncel v Governor of HM Prison Brixton*.[270] The applicant had been tried and acquitted by a military court in Turkey

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[264] [2005] EWHC 2613 (Admin).

[265] S.80 provides that "A person's extradition to a category 2 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction if he were charged with the extradition offence in the part of the United Kingdom where the judge exercises his jurisdiction."

[266] [2005] EWHC 2613 (Admin) para. 20.

[267] [2002] QB 687.

[268] *The Law of Extradition and Mutual Assistance* (2nd ed., OUP, 2007) p. 74.

[269] See *Gozutok and Brugge* (Case C-87/01); [2003] ECR – I 5689; *Van Esbroeck,* ECJ (Case C-436/04) 9 March 2006.

[270] [2001] EWHC 1142 (Admin).

but this acquittal was set aside on appeal and a re-trial ordered. However, his argument that he should be entitled to apply to resist his extradition on the basis of the principle of *autrefois acquit* failed. Lord Woolf CJ stated that "[w]hat is critical is whether there is more than one prosecution involved".[271] He explained that in Turkey, as he understood the position, there was only one prosecution, but a prosecution process is not necessarily brought to an end as a result of an acquittal at first instance and could be followed by a retrial, as would happen in the applicant's case if he were returned to Turkey. In his view "[i]t is not right to regard the applicant as being in double jeopardy because he remained in jeopardy, even though he had been acquitted. He remained in jeopardy, as he was aware, because he knew that there was a right of appeal which was being initiated, and that that right of appeal could result in his being tried again."[272] In these circumstances he accepted the submission of counsel for the respondents that it is only when the prosecution process reaches an acquittal with finality that the plea put forward would be available.

6.2.5.3.3 The Rule of Specialty

The purpose of the rule of specialty is to ensure that a person is not tried in the requesting state in respect of any offence other than the one for which his extradition has been granted. Scott Baker LJ described the rationale behind the rule as being "the exercise and preservation of sovereignty of the requested state over the person who is returned to the requesting territory".[273] More recently there is evidence of a relaxing of a strict construction of the rule of specialty to allow a person to be tried for an offence other than the one in respect of which his extradition is granted provided this offence is disclosed by the facts upon which his surrender was based.

As with other bars to extradition, the burden lies on the person resisting it to establish circumstances which should prevent it. In *Hilali v Central Court of the Criminal Proceedings Number 5 of the National Court of Madrid*[274] the issue was whether there were practical and effective arrangements in Spain to ensure that the appellant would only be tried for the offence for which he was being extradited or others disclosed by the same facts. Scott Baker LJ stated that it seemed surprising to the court that a submission should be made that Spain was likely to act in breach of the international obligations which it had signed up to. In his view "there is no evidence before us that it has done so in the past and in these circumstances we would need compelling evidence that it is likely to do so in the future". The court concluded that there was no evidence to suggest that the Spanish gov-

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[271] *Ibid.* at para. 15.

[272] *Ibid.*

[273] *Hilali v Central Court of the Criminal Proceedings Number 5 of the National Court of Madrid* [2006] EWHC 1239 (Admin) para. 50.

[274] [2006] EWHC 1239 (Admin).

ernment was seeking the appellant's return for other than *bona fide* reasons or that they were asking for his return for other than the purpose requested. In the circumstances there was no reason why the appellant should not be extradited.

The issue of how the rule of specialty has been interpreted where extradition is sought from the United Kingdom to the United States was considered by Ouseley J in *Welsh v Secretary of State for the Home Department*.[275] The US Government sought the extradition of the appellants from the UK on a variety of conspiracy and substantive charges arising out of a complex advanced fee fraud, committed largely but not wholly in the US on US residents. The appellants submitted that the US would act in breach of the specialty rule, *inter alia*, by seeking, and on past experience obtaining, an indictment which superseded the one upon which the extradition request was based, and which in particular would contain counts relating to money laundering offences upon which the US accepted that it could not seek extradition because of the double criminality rule, and which might also contain counts relating to other frauds not based on the facts underlying the extradition request. They also contended that the rule of specialty would be breached if the US used the facts related to the money laundering to prove other fraud offences and to increase the sentences which the appellants would otherwise face for the wire and mail fraud offences on the grounds, *inter alia*, that they had fled the jurisdiction and then contested their extradition.

Ouseley J made it clear that the US had denied that either its executive exercising its prosecutorial function or the judiciary in its judicial capacity breached or would breach the specialty rule and said that they had instead asserted their adherence to it. The appellants had contended that US courts "routinely ignore" the specialty rule and Ouseley J stated that he did "not regard this general submission as remotely justified".[276] He said that if there had been a routine disregard of the specialty rule, he would have expected that over the decades of extradition to the US from the UK, the UK courts would have refused extradition where this was an available option. He also stated that the decision of the Supreme Court in *Johnson v Browne*[277] makes clear that the US Supreme Court adheres to the specialty rule and its decisions are binding on all lower courts and on the executive exercising its prosecutorial functions. In addition, he said that no decision had been cited to the court in which any US court expressed itself in a way which suggested or could support an allegation of disregard for the specialty rule as interpreted there. He continued by saying that the US courts treat the origin and purpose of the specialty rule as deriving from the state parties' interests in extradition, and regard adher-

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[275] [2006] EWHC 156 (Admin).

[276] *Ibid*. at para. 35. See also the comments of Laws LJ in *Ahmad v Government of the United States of America* [2006] EWHC 2927 (Admin) para. 75 that "[o]ver this continued and uninterrupted history of extradition relations there is no instance of any assurance given by the United States, as the requesting State in an extradition case, having been dishonoured".

[277] 205 US 309 (1907).

ence to it as a matter of international comity and respecting foreign relations embodied in the treaty arrangements. Their purpose is to protect the sending state against abuse of its discretionary act of extradition.[278] In his view the US applies the rule of specialty even where there is no treaty obligation requiring it to do so and this means that the position of the sending state is regarded as of the highest importance.

Ouseley J referred to a number of US authorities and concluded as follows:

> "The US Courts do not infer consent merely because there is silence. They do not turn a blind eye to what are obvious problems in the sending state's known attitude, whether from past extradition requests or from the particular case or Treaty involved. Rather, it seems clear to me, they adopt a realistic assessment of the sending state's attitude, in recognition of the specialty doctrine as a principle of international comity and out of respect for a foreign state's sovereignty. But the Courts do not treat it as a technical hurdle devised for the benefit of properly convicted criminals, enabling them to take points which truly belong to the sending state and which the Courts properly infer that the sending state does not take." .[279]

A further issue raised by the appellants was that the US Courts would permit the extradition offence to be proved by evidence relating to offences upon which extradition had been expressly refused. However, Ouseley J pointed out that the US Courts do not regard that as a breach of the specialty rule because the rule is not seen as regulating the manner in which the extradition offence is proved. He added that he had seen no UK authority which suggests that the specialty rule is breached in these circumstances and expressed the view that it does not limit the evidence which can be admitted to prove the extradition offence and that the rules which govern the admissibility of evidence are those of the trial state.

Another decision in which the manner in which specialty arrangements operate between the UK and US was examined is *R. (Bermingham) v Director of the Serious Fraud Office*,[280] which concerned a decision to extradite the appellants, the so-called Nat West 3, to the US from the UK for alleged fraud offences. The question arose as to whether the Secretary of State had correctly concluded that there were "speciality arrangements" with the United States within the meaning of section 95 of the Extradition Act 2003. Laws LJ expressed agreement with the views expressed by Ouseley J in *Welsh*. He said that while there was no doubt that "superseding indictments" are deployed in the United States for the trial of extradited defendants, that was not to say that such defendants were put on trial in breach of

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[278] *US v Paroutian* 299 F 2d 486 (2nd Cir 1962).

[279] *Welsh v Secretary of State for the Home Department* [2006] EWHC 1239 (Admin) para. 84.

[280] [2006] EWHC 200 (Admin).

the specialty rule. He referred to the following statement of Circuit Judge Garza in *LeBaron*,[281] taken from an earlier decision in *Andonian*:[282]

> "[T]he doctrine of specialty is concerned primarily with prosecution for different substantive offenses than those for which consent has been given, and not prosecution for additional or separate counts of the same offense. The appropriate test for a violation of specialty 'is whether the extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited'."

Laws LJ made reference to the fact that the US Department of Justice had offered an undertaking that the "US authorities will not seek a superseding indictment charging [the appellants] with offenses arising from conduct other than that conduct for which [they] have been extradited from the United Kingdom". He noted that no superseding indictment had been filed and in the circumstances Laws LJ was satisfied that the specialty rule had not been breached.

6.2.5.3.4 Appropriate Forum

The *Bermingham* or Nat West 3 case raised another interesting question, namely that of the most appropriate forum for trial where extradition is sought. Although the case related to the affairs of the American company, Enron Corporation, the defendants were not employees, officers or shareholders of that company and were at the material time employed in London by Greenwich NatWest, a division of National Westminster Bank plc. The defendants were British citizens, resident in the United Kingdom, and were part of a team responsible for a number of the bank's clients, including Enron, in the United States. They brought judicial review proceedings to challenge the failure of the Serious Fraud Office to prosecute them in the UK, and although these proceedings were unsuccessful, this raised questions about the appropriateness of a request to extradite UK citizens in respect of an alleged crime effectively committed in the UK.

Paragraph 3 of Schedule 13 to the Police and Justice Act 2006 inserted a new section 19B into the Extradition Act 2003, designed to provide a bar to extradition in circumstances where the UK would be a more appropriate forum for trial. Section 19B provides as follows:

> "(1) A person's extradition to a category 1 territory ('the requesting territory') is barred by reason of forum if (and only if) it appears that–
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> (a) a significant part of the conduct alleged to constitute the extradition offence is conduct in the United Kingdom, and

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[281] 156 F 3d 621 (5th Cir 1998).

[282] 29 F 3d 1432 (9th Cir 1994).

(b) in view of that and all the other circumstances, it would not be in the interests of justice for the person to be tried for the offence in the requesting territory.

(2) For the purposes of subsection (1)(b) the judge must take into account whether the relevant prosecution authorities in the United Kingdom have decided not to take proceedings against the person in respect of the conduct in question.

(3) This section does not apply if the person is alleged to be unlawfully at large after conviction of the extradition offence."

A similar provision, section 83A, was inserted for Category 2 Territories but paragraph 6 of Schedule 13 to the Police and Justice Act 2006 provided that an order bringing the provisions of this subsection into force should not be made within the 12 months of the passing of the legislation in November 2006 and they may never come into force.[283]

While the provisions of section 19B now provide a mechanism for barring extradition where it appears that a significant amount of the conduct alleged to constitute the offence has been committed in the UK in the case of Category 1 Territories, controversy remains about this issue in the case of Category 2 Territories such as the US. The Treaty on Extradition between the Government of the United States of America and the United Kingdom of Great Britain and Northern Ireland was signed on 31 March 2006 but not ratified by the US until 30 September 2006. In the course of his judgment in *R. (Norris) v Secretary of State for the Home Department*[284] the President of the Queen's Bench Division commented on the "lack of symmetry" in the transitional arrangements between the two countries pending ratification. However, the reality is that even following this there is a distinct lack of equality in the requirements imposed on the two states in relation to extradition proceedings as a result of Article 8 of the 2003 Treaty. Article 8(3)(c) provides that where the UK requests from the United States the extradition of a person sought for prosecution, the request shall be supported by "such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested". Therefore while the US is not required to supply evidence to the UK in order to secure extradition, the UK is required to supply this information to the US.

6.2.5.3.5 The European Arrest Warrant Procedure

On 13 June 2002, the EU Council of Ministers adopted a Framework Decision on the European arrest warrant and the surrender procedures between Member States of the European Union. The member states of the EU were then required to introduce legislation to bring the European arrest warrant procedures into force by

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[283] See the comment in Nicholls, Montgomery and Knowles *The Law of Extradition and Mutual Assistance* (2nd ed., OUP, 2007) p. 85, footnote 71.

[284] [2006] EWHC 280 (Admin) para. 34.

1 January 2004. By April 2005 all member states had transposed the Framework Decision into their national laws. However, this process did not go smoothly in all cases. In Germany the implementing legislation was struck down by the Federal Constitutional Court in a decision of 18 July 2005[285] as violating Articles 16II and 19IV of the *Grundgesetz*. New legislation which took effect on 25 January 2006 laid down the conditions under which German nationals and those with rights of residence in the country could be extradited and required that an assessment of the proportionality of the request be assessed in each case.

The EAW Framework Decision prescribes a form of arrest warrant which can be issued in one member state and executed in any other member state of the EU. Its purpose is to replace extradition proceedings between member states with a system of surrender between judicial authorities and it was designed to speed up and simplify the process of returning an individual to another state for trial.

A European arrest warrant may be issued by a national court for acts punishable by the law of the issuing state by a custodial sentence or detention order for a maximum period of at least 12 months or where the person has been sentenced, for sentences of at least four months.[286] The EAW Framework Decision also dispenses with the requirement of double criminality in respect of certain listed offences if these are punishable by a sentence of a maximum period of three years.[287] The State in which the person sought is required to return him to the State where the European arrest warrant was issued within a maximum period of 90 days of the arrest. If the person gives his consent to the surrender, the decision to return the person shall be taken within 10 days.

The judicial authority of a member state shall refuse to execute a European arrest warrant in three mandatory situations. First, if an amnesty covers the offence in its national legislation, secondly, where the *ne bis in idem* or double jeopardy principle applies, and thirdly where the person who is the subject of the warrant is a minor and has not reached the age of criminal responsibility under the national law of the executing state.[288] In addition, there are a number of optional grounds for refusing execution of a European arrest warrant, including violation of fundamental rights and that the offence in question is extra-territorial in nature.[289]

A considerable amount of domestic litigation has ensued in many of the member states concerning the interpretation of the procedural requirements in the Framework Decision and enacting legislation. However, the introduction of the system has undoubtedly gone some way towards achieving the aim of streamlining and speeding up the mechanism for the return of offenders. Perhaps most significantly under this new procedure the execution of warrants is now solely a matter for the national judicial authority and not part of any political process.

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[285] BVerfG 2 BvR 2236/04.

[286] Article 2(1) of the EAW Framework Decision.

[287] Article 2(2).

[288] Article 3.

[289] Article 4.

6.2.6 Suing Foreign States Before a National Forum

6.2.6.1 The US Alien Tort Claims Act 1789

"[T]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[290] The US Congress enacted the US Alien Tort Claims Act (ATCA) as early as 1789. Based on the crucial passage of the ATCA just quoted the Act confers jurisdiction on US courts over violations of the law of nations irrespective of the nationality of the perpetrator. Having been neglected and almost forgotten for about two centuries, the US legal community witnessed the resurrection of the ATCA in *Filártiga*.[291]

The Filártigas were a family of political opponents of the military dictatorship that ruled Paraguay in the 1970s. Having been threatened several times by officials over the years, in 1976 their son, Joelito Filártiga, was tortured to death by America Pena-Irala, a high-ranking Paraguayan police officer and the neighbour of the Filártigas. Notwithstanding repeated appeals, the struggle to bring Pena-Irala to justice before Paraguayan courts proved unsuccessful. Subsequently, when the Filártigas learned that the officer was in the United States, Dolly Filártiga, the family's daughter followed and, advised by the American Centre of Constitutional Rights, sued Pena-Irala for a breach of international law, namely torture, under the Alien Tort Statute before the US courts. While the District Court held against Filártiga arguing that international law did not apply to a government's treatment of its own citizens, two years later Filártiga's appeal succeeded. The Court of Appeal rejected the District Court's argument, as it was based on an outdated concept of international law and instead stated: "[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[292] With regard to the prohibition of torture the court held, having extensively examined international state practice: "[O]fficial torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."[293] It summed up its view in the following terms:

> "Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but impor-

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[290] 28 USC § 1350.

[291] *Filártiga v Pena-Irala* 630 F 2d 876 (2nd Cir 1980). Among the ATCA cases this is probably the one that the academic debate has paid most attention to, see, *e.g.*, the discussion in the Symposium on the case published in (2006) 37 Rutgers LJ 623 *et seq*.

[292] 630 F2d 876, 881 (2nd Cir 1980).

[293] *Ibid.* at 884.

> tant step in the fulfilment of the ageless dream to free all people from brutal violence."[294]

The Filártiga judgment found the torturer liable for violations of international law. In the aftermath of the Filártiga decision US courts reactivated the long neglected and rarely used Alien Tort Statute. Besides violations of the international law prohibition of torture, claims based on further human rights abuses, such as genocide, crimes against humanity, summary execution and disappearance have also been allowed.[295] In later cases it was not always the direct perpetrator who was held responsible, but also commanding officers, government officials or even private corporations.[296] However, the most recent case law seems to show a restriction both of the entities that can be held responsible and of the violations of international law that trigger civil liability under the Alien Tort Statute.

The US Supreme Court decision in *Sosa v Alvarez-Machain*[297] provides authority for the latter restriction. Humberto Alvarez-Machain was a Mexican doctor who was believed by the US government to have participated in the torture and murder of a Federal Drug Enforcement Administration agent in Mexico. In order to prosecute him the US sought the extradition of Alvarez-Machain to the United States. As the application failed the US hired a group of Mexicans, among them Jose Francisco Sosa, to kidnap the alleged offender and abduct him to the US. Alvarez-Machain was handed over to the US authorities, but when it came to the trial he was found innocent. In return Alvarez-Machain brought proceeding against the US under the Alien Tort Statute and the Federal Tort Claim Act for damages. He argued that the abduction constituted a violation of international law and that thus he should be entitled to compensation. The lower courts allowed his claims although the Supreme Court reversed the decisions and held that the claim for damages under the Alien Tort Statute was ill-founded. More clearly than in *Filártiga,* the US Supreme Court held that the Alien Tort Statute itself did not provide any cause of action and that its nature was merely "jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a

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[294] *Ibid.* at 890.

[295] See *e.g.*, *Arce v Garcia* 434 F 3d 1254 (11th Cir 2006) (torture); *Cabello v Fernandez-Larios* 402 F 3d 1148 (11th Cir 2005) (extrajudicial killing, torture, crimes against humanity, cruel, inhuman or degrading punishment); *Wiwa v Royal Dutch Petroleum Co* 226 F 3d 88 (2nd Cir 2000) (summary execution, torture, arbitrary detention); *Abebe-Jira v Negewo* 72 F 3d 844 (11th Cir 1996) (torture); *Hilao v Estate of Marcos* 103 F 3d 767 (9th Cir 1996) (summary execution, torture, disappearance); *Kadic v Karadzic* 70 F 3d 232 (2nd Cir 1995) (genocide, war crimes, summary execution, torture).

[296] See *e.g.*, *Wiwa v Royal Dutch Petroleum Co.* 226 F 3d 88 (2nd Cir 2000) (two private holding companies); *Martinez v City of Los Angeles* 141 F 3d 1373 (9th Cir 1998) (local government officials); *Hilao v Estate of Marcos* 103 F 3d 767 (9th Cir 1996) (former head of state); *Kadic v Karadzic* 70 F 3d 232 (2nd Cir 1995) (head of de facto state); *Jama v INS* 22 F Supp 2d 353 (DNJ 1998) (US officials and private corporation).

[297] 542 US 692 (2004).

certain subject."[298] The contrary claim of Alvarez-Machain, namely "that the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law" was rejected as "implausible".[299] The necessary consequence was a narrowing of the possible bases for tort claims under the ATS. It was not simply every violation of international law that entitled the victim to damages, but it was only where "the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability"[300] that an action would be successful. Based on the conviction that the ATS at the time it was enacted was intended to have practical effect, the court held that such common law causes of action existed, although were very limited in number: "violation of safe conducts, the infringement of the rights of ambassadors, and piracy".[301] Even under modern international law, the court argued, this limitation is reasonable:

> "Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms we have recognised. This requirement is fatal to Alvarez's claim."[302]

The claim was dismissed accordingly. For the private enforcement of international law this was a major set-back. After the encouraging holding in *Filártiga*, the Supreme Court limited the violations of international law that could be enforced against foreign states through the domestic courts considerably.

With the American military campaign in the Iraq theatre of war and the US torture in the Iraqi prison Abu Ghraib, the Alien Tort Statute gained new importance, both political and judicial, for the US itself. In two almost identical cases, *Saleh v Titan Corporation*[303] and *Ibrahim v Titan Corporation,*[304] the Columbia District Court narrowed the ATS's scope of application further, holding that, contrary to former rulings,[305] private actors cannot be held responsible under the Alien Tort

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[298] *Ibid.* at 714. However, even in *Filártiga* the court hinted at this conclusion see 630 F 2d 876, 889.

[299] *Ibid.* at 713.

[300] *Ibid.* at 724.

[301] *Ibid.*

[302] *Ibid.* at 725.

[303] 436 F Supp 2d 55.

[304] 391 F Supp 2d 10.

[305] See *e.g.*, *Wiwa v Royal Dutch Petroleum Co.* 226 F 3d 88 (2nd Cir 2000) (two private holding companies) and *Jama v INS* 22 F Supp 2d 353 (DNJ 1998) (U.S. officials and private corporation).

Statute.[306] In the earlier *Ibrahim* case the applicants, a number of Iraqi nationals who had been detained by the US military at the Abu Ghraib prison in Iraq, brought a tort claim, relying, *inter alia*, on the Alien Tort Statute. They alleged that they had been tortured, beaten, deprived of food, water and sleep, urinated on, exposed to extremely loud music and mistreated in various other ways. The proceedings were brought against two private government contractors which had provided interpreters and interrogators for the prison and it was alleged that by participating in the mistreatment they had violated the law of nations. With regard to the Alien Tort Statute, however, Judge Robertson in the District Court dismissed the claim. Acknowledging the landmark decision in *Filártiga* that torture, when committed by officials, is the subject of ATS liability, Judge Roberston distinguished *Filártiga* as the defendants were private contractors. Recalling the judgments in two other cases,[307] he held that actions of private contractors are "not actionable under the Alien Tort Statute's grant of jurisdiction, as a violation of the law of nations."[308]

Based on the same facts *Saleh* tried to claim damages shortly after *Ibrahim* had been decided. Arguing that Judge Edwards in *Tel-Oren*, one of the precedents Judge Robertson had cited for the exclusion of claims against private parties under the ATS, had conceded that private responsibility under the ATS might arise if the defendant acted "under the color of law" and thus was not "separate from any state authority or discretion" Saleh hoped to persuade Judge Robertson. However, he failed and Judge Robertson rejected the argument holding that there was "no middle ground between private action and government action, at least for purposes of the Alien Tort Statute".[309]

6.2.6.2 Tort and Torture

Outside the US there is little case law establishing that foreign states can be sued in tort proceedings. While eventually overruled by a House of Lords decision one interesting claim was granted by the English Court of Appeal in *Jones v Saudi Arabia*[310] against the Kingdom of Saudi Arabia. The applicant in this case, Mr Jones, claimed to have suffered severe, systematic and injurious torture by state agents of the Kingdom of Saudi Arabia in Riyadh's Ministry of the Interior. He

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[306] See 391 F Supp 2d 10, 14 *et seq*; 436 F Supp 2d 55, 57 *et seq*.

[307] Namely *Tel-Oren v Libyan Arab Republic* 726 F 2d 774 (DC Cir 1984) and *Sanchez-Espinoza v Reagan* 770 F 2d 202 (DC Cir 1985).

[308] 391 F Supp 2d 10, 15.

[309] 436 F Supp 2d 55, 58.

[310] See *Jones v Ministry of the Interior of the Kingdom of Saudi-Arabia* [2004] EWCA Civ 1394; [2005] 2 WLR 808 (Court of Appeal); for the later House of Lords decision, see *Jones v Ministry of the Interior of the Kingdom of Saudi-Arabia* [2006] UKHL 26; [2007] 1 AC 270.

brought civil proceedings for damages against both the Kingdom of Saudi-Arabia itself as a state entity and against Colonel Abdul Aziz as a servant or agent of the Kingdom. The issue at the heart of these proceedings was whether service out of jurisdiction to the defendant officials of Saudi Arabia should be allowed or, as Lord Bingham put it at a later stage to the House of Lords,

> "whether the English court has jurisdiction to entertain proceedings brought here by claimants against a foreign state and its officials at whose hands the claimants say that they suffered systematic torture, in the territory of the foreign state."[311]

This in turn required the courts to address issues of state immunity for acts of torture, which led to a disagreement between the Court of Appeal and the House of Lords. In the Court of Appeal Mance LJ made an extraordinary distinction: in his opinion the acts of the Kingdom of Saudi Arabia enjoyed absolute immunity *ratione personae*, although the acts of defendant agents of the Ministry of the Interior who had allegedly tortured Jones were held not to be covered by immunity *ratione materiae*:

> "There are important distinctions between the considerations governing (a) a claim to immunity by a state in respect of itself and its serving head of state and diplomats and (b) a state's claim for immunity in respect of its ordinary officials or agents generally (including former heads of state and former diplomats)."[312]

Whereas the former were held to enjoy personal immunity because of their "very special status", with regard to the immunity of the latter it was held to "no longer be appropriate to give blanket effect to a foreign state's claim to state immunity *ratione materiae* in respect of a state official alleged to have committed acts of systematic torture."[313] The main reasons for this holding were threefold: first, as torture was an international crime, states were obliged to offer legal redress to the victims under Article 14 (1) of the Torture Convention. Secondly, mainly based on the reasoning in *ex parte Pinochet*,[314] it was argued that torture could not be treated as the exercise of a state function and thirdly, proceedings against the individual official were not capable of indirectly implicating the state as the torture was within the individual responsibility of the individuals.[315] Accordingly, Jones'

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[311] [2006] UKHL 26, para 1.

[312] [2005] 2 WLR 808, 823 *et seq*.

[313] *Ibid.* at 855.

[314] *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No.1)* [2000] 1 AC 61, 108 *per* Lord Nicholls of Birkenhead and at 115 *per* Lord Steyn; *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No.3)* [2000] 1 AC 147, 203 *et seq*. *per* Lord Browne Wilkinson, at 252 *et seq*. *per* Lord Hutton.

[315] See the summary of the holding at [2005] 2 WLR 808, 809 *et seq*.

claim seeking permission to serve proceedings out of jurisdiction was dismissed in relation to the Kingdom of Saudi-Arabia but it was allowed in as much as it concerned Colonel Aziz, the individual official who could not raise the preliminary objection of immunity.

The decision of the Court of Appeal caused hostile comment amongst academics[316] and from the House of Lords, where the judgment was reversed in June 2006. Considering the judgment of the lower court flawed by a misreading of the *Pinochet* case, the Law Lords applied a more conservative concept of immunity. According to the House of Lords there was "a wealth of authority" which revealed the distinction introduced by Mance LJ in the Court of Appeal as incorrect and instead suggested that "the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents."[317] The opposing arguments put forward in the Court of Appeal were rejected altogether. On the one hand Article 14 of the Torture Convention was held not to provide for universal civil jurisdiction. What was, according to the House of Lords, required was rather a private right of action against acts of torture committed in the forum state. On the other hand Lord Bingham found it "difficult to accept that torture cannot be a governmental or official act, since under Article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity."[318] Given this reasoning it would have violated the sovereign immunity of Saudi Arabia and all its officials to allow for the proceedings to be served out of jurisdiction. Both the Kingdom of Saudi-Arabia and Colonel Aziz had a valid objection in their claim to immunity. Consequently, the Court of Appeal decision was reversed and Jones' tort claim dismissed

While the Court of Appeal, in the words of Lord Bingham, "asserted what was in effect a universal tort jurisdiction in cases of official torture"[319] and thus made way for an ATCA-like possibility of tort claims against foreign states under English common law, the House of Lords nipped this attempt in the bud. As the final decision in *Jones* clearly illustrates, there is no way under international law that foreign states can be sued before the courts of other countries unless the issue of immunity is ignored or purposely denied. Private enforcement of international obligations before domestic courts is thus limited to both the obligations of the forum state and sometimes, as was submitted above, even to the private citizens of

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[316] See *e.g.* Hazel Fox, "Where does the Bucket Stop? State Immunity From Civil Jurisdiction And Torture" (2005) 121 LQR 353; Xiaodang Yang, "Case and Comment – Universal Tort Jurisdiction Over Torture?" (2005) 64 CLJ 1; see for an assessment of both *Jones* decisions Ed Bates, "State Immunity for Torture" (2007) 7 Human Rights Law Review 651; Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 217 *et seq*.

[317] [2006] UKHL 26, para. 10.

[318] *Ibid.* at para. 19.

[319] *Ibid.* at para. 34.

the forum state. That tort claims for acts of torture committed by foreign states before a national forum are quite exceptional and face almost insurmountable hurdles is well-illustrated by the House of Lords judgment in *Jones* and by the fact that it is only in very exceptional cases that proceedings like this are possible under domestic law.

It was exactly this lack of civil remedies against foreign states under the Canadian legal order that the Ontario Court of Appeal had to discuss in *Bouzari v Islamic Republic of Islam*.[320] The applicant, Houshang Bouzari, was an Iranian citizen who secured a deal between a consortium of companies which were interested in participating in the development of the South Pars oil and gas field in Iran and the National Iranian Oil Company. Under this contract it was the obligation of the former to provide oil and gas exploration, offshore drilling, and platform and pipeline construction. When in November 1992 Bouzari went on a trip to Tehran, one of the sons of the Iranian President contacted him to offer Bouzari his father's help to guarantee the implementation of the South Pars contract. In return Bouzari was supposed to pay a commission of US$50 million. Even though this offer was repeated several times Bouzari continued to refuse. In June 1993 Iranian government agents broke into Bouzari's apartment, robbed him and abducted him to a place where he was held for several months without due process and was tortured repeatedly. About one year later Bouzari was released and managed to escape Iran by paying a ransom. After emigrating to Canada he instituted civil proceedings for damages against Iran which eventually ended up in the Ontario Court of Appeal. There he submitted, *inter alia*, that international custom and treaty law obliged Canada to provide a civil remedy for acts of torture committed abroad. Specifically, he argued that, if the prohibition of torture was to have meaning, it could not be considered a state function deserving of immunity. Goudge JA, who delivered the judgment in the Court of Appeal, dismissed the claim and rejected Bouzari's argument. Notwithstanding his view that the prohibition of torture was a rule of *ius cogens*, he had doubts about the exact scope of that prohibition and wondered: "In particular, does it extend to a requirement to provide the right to a civil remedy for torture committed abroad by a foreign state?"[321] Basically affirming what the judge in the lower court had found, the Court of Appeal advanced a twofold argument:

> "As a matter of *principle*, providing a civil remedy for breach of the prohibition of torture is not the only way to give effect to that prohibition. The criminal prosecution of individual torturers who commit their acts abroad (which is expressly sanctioned by the Convention against Torture) gives some effect to the prohibition without damaging the principle of state sovereignty on which relations between

[320] *Bouzari v Iran (Islamic Republic)* (2004) 243 DLR (4th) 406; also reported in ILDC 175, which will be referred to here.

[321] ILDC 175, para. 87.

> nations are based.[322]…[A]s a matter of *practice*, states do not accord a civil remedy for torture committed abroad by foreign states. The peremptory norm of prohibition against torture does not encompass the civil remedy contended for by the appellant."[323]

The applicant's claim that where there is a right there must be a remedy failed accordingly on grounds of international law.

[322] *Ibid.* at para. 93 (italics added).

[323] *Ibid.* at para. 94 (italics added).