

## VIII International Disputes and the Maintenance of International Peace and Security

### § 1. Dispute settlement

THE PROBLEM of effecting the peaceful settlement of a dispute is addressed through two methods; we may either induce the disputing parties to accept terms of settlement dictated to them by some third party, or we may persuade them to come together and agree on terms of settlement for themselves. In the international field, the former method takes the form either of arbitration or of judicial settlement; the latter method takes the form of negotiation, good offices, mediation, or conciliation.

As we saw in the previous chapter, the methods of peaceful settlement arise against a background of the possibility of countermeasures. In the past, and in previous editions of this book, these countermeasures were referred to under the headings reprisals and retorsion; and these topics were included in the chapter on the use of force. Today, war and the use of force are not permitted as responses to violations of international law.<sup>1</sup>

1. The exceptions are when a state is the object of an armed attack and acts in self-defence or when states are authorized to use force by the Security Council, see Ch. IX below.

We have also seen how countermeasures, in the form of a peaceful reprisal, may be used in response to the breach of a treaty in order to bring the other party back into compliance with its international obligations.<sup>2</sup> It was explained that the legality of such countermeasures demands that they be proportionate, and not affect particular obligations such as those which protect fundamental human rights or certain categories of persons under humanitarian law. The regime of state responsibility for internationally wrongful acts, and the rights of other states to respond to such wrongful acts, covers not just violations of treaties but also all violations of customary international law. It is bound up with questions of dispute settlement and so we will consider these issues here. Let us examine first the rules for attribution of conduct to a state, and then look at reprisals, retorsion, and countermeasures before considering dispute settlement more generally.

### § 2. Attribution of conduct to a state

We have already seen, in the context of the treatment of foreigners, that a state will be internationally responsible for the conduct of any of its organs, executive, legislative, or judicial.<sup>3</sup> We now look at questions of *attribution* in more detail. It is clear that the conduct of any organ acting in exercise of governmental authority is attrib-

2. For a detailed review of the law and practice in this area see the seminal article by B. Simma 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law', 20 *Österreichische Zeitschrift für öffentliches Recht* (1970) 5-83.

3. See above Ch. VI § 10 on a state's treatment of foreigners.

utable to the state: 'even if it exceeds its authority or contravenes instructions'.<sup>4</sup> So, where two officers unsuccessfully tried to extort money from a French citizen, took him to a military barracks, and then later drove him to a village and shot him, the state of Mexico was held responsible, since: 'the murderers had acted in their capacity of military officers and had taken advantage of the power and compulsory means at their disposal by reason of that very capacity'.<sup>5</sup> In times of armed conflict all the actions of the persons forming part of the armed forces of a state party to the conflict will be attributed to the state.<sup>6</sup>

The conduct of persons or entities that are not organs of the state may nevertheless be considered an act of the state where the law of that state has empowered them 'to exercise elements of governmental authority'.<sup>7</sup> Brigitte Stern suggests that 'any institution which fulfils one of the traditional functions of the State, even if such functions have been privatized, should be considered as an organ of the State from the point of view of international law and for the purposes of the law of responsibility'.<sup>8</sup> This idea is reflected in the ILC's commentaries, a distinction being drawn between governmental activity and commercial activity: 'Thus, for example,

4. Art. 7. International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001) (hereafter ARSIWA).

5. *Caire Case (France v United Mexican States)* Case No. 91 5 ILR 146, at 149; for the full original award see 5 RIAA (1929) 516–34.

6. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Rep. (2005) paras 213–14.

7. ARSIWA Art. 5.

8. B. Stern, 'The Elements of an Internationally Wrongful Act', in J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of International Responsibility* (Oxford: OUP, 2010) 193–220, at 204.

the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock).<sup>9</sup> Stern offers us the following contemporary explanation: 'the mere fact that a State confers management of its prisons or control of immigration in its airports, or even certain police functions to private entities, does not mean that the State can absolve itself from all international responsibility when those entities commit acts contrary to the State's international obligations'.<sup>10</sup>

Conduct can also be attributed to a state where the persons or group are 'acting on the instructions, or under the direction or control, of the State in carrying out the conduct'.<sup>11</sup> Disputes before international tribunals will often centre on whether particular acts can be attributed to a state in this way. The International Court of Justice examined this question in some detail when it found that the acts of the *contras* in Nicaragua could not be attributed to the United States in the 1980s.<sup>12</sup> It held 'that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself'.<sup>13</sup> The Court

9. ILC Commentary, UN Doc. A/56/10, at p. 43 para. 5.

10. 'The Elements of an Internationally Wrongful Act' (above) at 204.

11. Art. 8 ARSIWA.

12. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, ICJ Rep. (1986) at para. 109ff.

13. *Ibid* para. 115.

concluded on this point: 'For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.'<sup>14</sup>

More recently, in the context of claims by Bosnia and Herzegovina that the acts of the 'Scorpions', with regard to Srebrenica, be attributed to the Federal Republic of Yugoslavia, the Court reinforced its approach stating that it would have to be shown that: "effective control" was exercised, or that the State's instructions were given, in respect of *each operation* in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations'.<sup>15</sup>

Other situations where the conduct of non-state actors will be attributed to the state include: the situation where non-state actors are in fact exercising elements of governmental authority (for example in times of natural catastrophe or some other break-down in normal government), the situation where insurgents become the new government (or establish a new state)—at this point their conduct as insurgents is attributed to the state they newly govern—and lastly, situations where the state adopts the conduct in question as its own.<sup>16</sup>

14. Ibidem.

15. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* judgment of 26 February 2007, at para. 400 (emphasis added).

16. ARSIWA Arts 9, 10, 11. For a full discussion of the theory and practice of attribution (or imputation) see Crawford et al (above) at 187–315.

### § 3. Retorsion, reprisals, and countermeasures

*Retorsion* is a measure of self-help taken in response to an illegal or unfriendly act, where the self-help measure itself is within the law. It differs therefore from the reprisals (countermeasures) we have already considered in the previous chapter;<sup>17</sup> those measures would be illegal *but for* the fact that they fall within the conditions for a legitimate countermeasure as a response to an internationally wrongful act committed by a state. The following examples of retorsion are familiar: breaking off diplomatic relations; imposing visa restrictions on nationals from the other state; withdrawing aid; and downgrading diplomatic relations. These actions are legal as such but taken in response to illegal acts committed by states. This form of self-help is not covered by the rules relating to state responsibility for internationally wrongful acts, but it is sometimes suggested that such retaliation should be proportionate and should be discontinued as soon as the other state's behaviour ceases.<sup>18</sup>

*Reprisal* is a word with a long history. Literally and historically it denotes the seizing of property or persons by way of 'retaking', and formerly it was not uncommon for a state to issue 'letters of reprisal' to their subjects, who may have met with a denial of justice in another state, authorizing them to redress the wrong for themselves by forcible action (retaliation), such as the seizure of the property of subjects of the delinquent state. The practice was called 'special' or 'private' reprisals, but it has long been obsolete.<sup>19</sup>

17. § 11(b).

18. See A. Cassese, *International Law*, 2nd edn (Oxford: OUP, 2005) at 310.

19. For a detailed examination of the history and the law of private and public reprisals as well as retaliation in war see E.S. Colbert, *Retaliation in International Law* (New York: King's Crown Press, 1948).

We might also note the practice of issuing 'letters of marque' which authorized a 'privateer' in time of war to seize enemy public and private ships. In these cases there was no issue of the privateer having suffered any previous wrong; the letters of marque authorized privateers to use force thereby distinguishing them from pirates.<sup>20</sup>

Reprisals when they are taken today are taken by a state as such. Nowadays the preference is to refer to reprisals as *countermeasures*, reserving the expression reprisals for particular countermeasures taken in times of armed conflict.<sup>21</sup>

*Countermeasures*, as we have seen in the context of responses to breach of treaty, are a form of legitimate non-forcible self-help, to which states may resort in order to bring another state back into compliance with its international obligations. As long as the international legal system does not provide an organized machinery for coercing a delinquent state to conform to all its international obligations,<sup>22</sup> self-help remains an option for states, albeit, as we shall see, in quite circumscribed circumstances.

20. The practice, which operated from the thirteenth century through to the nineteenth century, was applied by several naval and other powers. In French the equivalent was a *lettre de course* generating the term *corsair* for those engaging in such reprisals. The practice was abolished by the Paris Déclaration réglant divers points de droit maritime (1856) Art. 1: 'La course est et demeure abolie'. The US Constitution still states in Art. I(8) that Congress has the power '[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water'. For an interesting set of studies see D.J. Starkey, E.S. van Eyck van Heslinga, and J.A. de Moor (eds), *Pirates and Privateers: New Perspectives on the War on Trade in the Eighteenth and Nineteenth Centuries* (Exeter: University of Exeter Press, 1997).

21. On the lexicon of terms used in this context and their etymology see D. Alland, 'The Definition of Countermeasures', in J. Crawford et al (above) 1127–36.

22. The term sanctions is increasingly reserved for collective action determined by the relevant organ of an international organization. Whether or not such sanctions can relieve

The conditions of a legal resort to reprisals were discussed in the *Naulilaa* arbitral award in 1928, and certain principles, which had previously depended for their authority on academic writing, were accepted and applied by the tribunal.<sup>23</sup> In 1915, while Portugal was still neutral in the First World War, an incident took place at Naulilaa, a Portuguese post on the frontier between Angola and what was then German South-West Africa. Three Germans were killed. On the evidence it was clearly established that the incident arose out of a pure misunderstanding.<sup>24</sup> The Germans, however, as a measure of reprisals, had sent an expedition into Portuguese territory, attacked several frontier posts, and drove out the garrison from Naulilaa. A local uprising took place which was then suppressed by the Portuguese.

states of their obligations to the targeted state depends on the constituent treaty of the organization and the relationship between the state and the organizations and its members. See for a full account V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (The Hague: Kluwer, 2001).

23. *Portugal v Germany (The Naulilaa case)*, vol. 2 RIAA (1928) 1011–33; summary 4 ILR 526.

24. The incident is nicely captured by Julia Pfeil: 'On 19 October 1914, the German governor, who was accompanied by 20 soldiers and an interpreter, approached the border at the Portuguese fort of Naulilaa. Negotiations were difficult, however, because the Germans did not speak or understand any Portuguese and the Portuguese did not speak or understand any German. Due to several misunderstandings caused by the German interpreter's manifest ignorance of Portuguese, the Portuguese were led to believe that the German governor had the secret intent of commencing an invasion into Angola. The German side, however, believed that the Portuguese lieutenant and captain had entrapped the German governor and his officers in an ambush. When the Germans decided to leave Fort Naulilaa and mounted their horses, the Portuguese tried to keep them from leaving. The Germans then drew their firearms; at that moment, the Portuguese fired several shots and killed the German governor and two of his officers. The interpreter and a soldier were interned.' *Naulilaa Arbitration (Portugal v Germany)*, <mpepil.com>.

The arbitrators laid down three conditions for the legitimacy of reprisals: (a) there must have been an illegal act on the part of the other state; (b) reprisals must be preceded by a request for redress of the wrong, for the necessity of resorting to force cannot be established if the possibility of obtaining redress by other means is not even explored; and (c) the measures adopted must not be excessive, in the sense of being out of all proportion to the provocation received; they are limited by: 'les expériences de l'humanité et les règles de la bonne foi'.<sup>25</sup> In this case Portugal had committed no illegal act; Germany had made no request for redress; and the disproportion between the German action and its provocation was evident. The award was therefore given in favour of Portugal.

The principles remain relevant, even if today reprisals involving the use of force are forbidden and the preferred terminology is countermeasures. Several treaties played a role in limiting reprisals and we might briefly refer here to the so-called *Drago doctrine*. In 1902, when Great Britain and Germany were conducting a pacific blockade of Venezuela in the interests of her British and German creditors, Luis María Drago, then the Argentinean Foreign Minister, put forward the contention that the failure of a state to pay its debts does not justify the use of force against it. There may have been good reasons even at that date from a domestic point of view against employing the British fleet as a debt-collecting agency on behalf of British subjects who had made risky investments abroad, but there was then little authority in international law for Drago's contention. It led, however, in 1907 to a Hague Convention (No. II) 'respecting the limitation of the employment of force for the

25. *Naulilaa* (above) at 1026 (requirements of humanity and rules of good faith).

recovery of contract debts', whereby the signatory states agreed not to use force for that purpose unless, in effect, the debtor state had refused to submit to arbitration, or having agreed to do so, had failed to obey the award.

At least since 1928, the date of the Pact of Paris (or General Treaty for the Renunciation of War), it has been clear that reprisals which involve the use of force are no longer legal. By Article 2 the 'High Contracting Powers' agreed 'that the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise between them, shall never be sought except by pacific means'. This prohibition is reaffirmed in the UN Charter of 1945.<sup>26</sup>

The modern conditions for peaceful countermeasures build on the principles outlined in the *Naulilaa* case and have been elaborated by the International Law Commission.<sup>27</sup> They can be summarized as follows. First, countermeasures must be aimed at the state that has violated its obligations towards the injured state.<sup>28</sup> Second, they are limited to the temporary non-performance of the obligations of the injured state and should as far as possible be reversible so as to allow for the resumption of the performance of the original obligation.<sup>29</sup> Third, they have to be terminated when the wrongdoing

26. See Art. 2(3) 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' See also Arts 33 and 37, and the Manila Declaration on the Peaceful Settlement of International Disputes annexed to the GA Resolution of 15 November 1982, A/RES/37/10.

27. For a full discussion see Crawford et al (above) at 1127-214.

28. See ARSIWA Art. 49(1).

29. Ibid Art. 49(2)(3).



ing state has complied with its obligations (including the obligation to provide reparation).<sup>30</sup> Fourth, they should be commensurate with the injury suffered and have as their purpose to induce the wrongdoing state to comply with its obligations under international law.<sup>31</sup> Fifth, they cannot involve the use of force or affect peremptory norms (*jus cogens*), fundamental human rights obligations,<sup>32</sup> humanitarian obligations prohibiting reprisals,<sup>33</sup> or obligations to respect the inviolability of diplomatic and consular agents, premises,

30. Ibid Arts 53, 28–41, 52(3).

31. Ibid Art. 51, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. (25 September 1997) at paras 85–7; Thomas Franck suggests: 'In assessing the acceptability of a response, the principle of proportionality allows those affronted by unlawful conduct to respond by taking into account the level of response necessary to prevent recurrences.' 'On Proportionality of Countermeasures in International Law', 102 *AJIL* (2008) 715–67, at 765–6; in the same vein see Omer Yusuf Elagab: 'the motivation for resorting to counter-measures, namely self-protection, reciprocity, and a desire to achieve a speedy settlement may be used as the main criteria for determining proportionality. Thus, in cases of unusual danger such as when the nationals of the aggrieved State are seized as hostages, that State will be entitled on the ground of self-protection to employ countermeasures of extreme severity in order to secure their release.' *The Legality of Non-Forcible Counter-measures in International Law* (Oxford: Clarendon Press, 1988) at 216. See also Cassese (above) at 305–7.

32. Ibid Art. 50(1)(b); see further S. Borelli and S. Olleson, 'Obligations Relating to Human Rights and Humanitarian Law', in J. Crawford et al (above) 1177–96; R. Provost, *International Human Rights and Humanitarian Law* (Cambridge: CUP, 2002) at 182–227.

33. Ibid Art. 50(1)(c). The prohibition refers to humanitarian obligations forbidding reprisals in armed conflict; these obligations are dealt with in the relevant treaties: reprisals against protected persons under the 1949 Geneva Conventions are forbidden (the wounded, shipwrecked, prisoners of war, and certain internees). So, for example mistreatment of prisoners of war cannot be met with mistreatment of the other side's prisoners of war. Protocol I of 1977 to the Conventions expands these protections from reprisal, covering *inter alia* the sick, wounded, shipwrecked, hospital ships, medical vehicles (Art. 20); civilians, the civilian population, and civilian objects; cultural objects and places of worship; objects indispensable to the civilian population; the natural environment;

archives, and documents. Lastly, the state resorting to countermeasures may have to comply with certain dispute settlement procedures and other preliminary procedural requirements.

Certain treaties provide that states parties will be obliged to take their dispute to a dispute settlement body rather than engaging in unilateral countermeasures.<sup>34</sup> For example there are provisions to this effect for members of the European Union, the World Trade Organization, and the North Atlantic Free Trade Association.<sup>35</sup> The preliminary procedural conditions, according to the ILC Articles on State Responsibility (ILC Articles), are that, before taking countermeasures, the injured state shall: call on the responsible state to fulfil its obligations, notify any decision to take countermeasures, and offer to negotiate.<sup>36</sup>

and installations containing dangerous forces (Arts 51–6). The customary law prohibiting belligerent reprisals is outlined in J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law—Volume 1: Rules* (Cambridge: CUP, 2005) at 513–29. See also the prohibition on reprisals in Protocol II on Restrictions on the Use of Mines to the UN Conventional Weapons Convention (1980). For a detailed discussion of the controversy surrounding reprisals against the civilian population see F. Kalshoven 'Reprisals and the Protection of Civilians: Two Recent Decisions of the Yugoslavia Tribunal' in L.C. Vohrah et al (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer, 2003) 481–509.

34. These are sometimes referred to as 'self-contained regimes'. In addition the state taking countermeasures has to comply with any obligations which flow from an applicable dispute settlement procedure, ARSIWA Art. 50(2)(a); see also Art. 52(3)(4).

35. See further D.W. Bowett, 'Economic Coercion and Reprisals by States', 13 *Virginia Journal of International Law* (1972) 1–12.

36. ARSIWA Arts 52(1) and 43. The obligations to notify the responsible state and offer to negotiate may not apply where urgent countermeasures are necessary to preserve the injured state's rights. The example given by the ILC is the temporary freezing of assets without notice in order to prevent a state from withdrawing its assets from the banks in the injured state. ILC Commentary A/56/10 at 136 para. 6.

This framework does not necessarily capture all restrictions on countermeasures. It remains rather state-centric, and Laurence Boisson de Chazournes asks whether we should not also consider, first, the effects of economic and political coercion, and secondly, the effects on the environment and community interests more generally. She suggests that: 'economic and political countermeasures may be illegal if they are aimed at coercing a State to subordinate the exercise of its sovereign rights or its independence'.<sup>37</sup> Her point is that fairness, the non-abuse of rights, and good faith should all be taken into account in evaluating economic countermeasures that might have long-term consequences for the population.<sup>38</sup> With regard to the environment she states:

Scientific uncertainty in environmental matters makes it necessary to rethink the criteria of validity or legality of countermeasures according to different paradigms. One is led to the conclusion that the uncertainty which might surround the risk and effects of a countermeasure on the environment could be a factor in assessing the inadmissibility of a countermeasure. In this context the precautionary principle could act as a framework norm which would oblige all States to refrain from adopting in any significant way countermeasures which would threaten the environment and human health.<sup>39</sup>

37. 'Other Non-derogable Obligations', in J. Crawford et al (above) 1205–14, at 1211.

38. The example of Cuba is given to illustrate how temporary measures can be renewed exacerbating the gap between unequal partners. Eadem 'Economic Countermeasures in an Interdependent World' *ASIL Proceedings* (1995) 337–40.

39. 'Other Non-Derogable Obligations' (above) at 1212 (footnotes omitted); see further L. Boisson de Chazournes, 'New Technologies, the Precautionary Principle and Public Participation', in T. Murphy (ed.), *New Technologies and Human Rights* (Oxford: OUP, 2009) 161–94.

So far we have only dealt with countermeasures undertaken by an *injured* state. Controversy remains with regard to other *non-injured* states, and whether such states may take such countermeasures against a state that has violated an obligation owed to the international community as a whole (*erga omnes*). It is clear that collective measures taken through an international organization against a member (sanctions) will be governed by the constituent instrument of that organization. In this case the Charters of the United Nations, the Organization of American States, the African Union, or the Arab League will provide the legal framework.<sup>40</sup> But what is less clear is the right of states (individually or collectively) to apply countermeasures under the general rules of international law outlined above. This can in particular arise in the context of responses to grave violations of human rights where those immediately affected are individuals rather than other states.

The ILC concluded that there did not appear to be a 'clearly recognized entitlement' for non-injured states to take countermeasures in the collective interest, leaving the matter 'to the further development of international law'.<sup>41</sup> Article 54 of the ILC Articles simply refers to the right of a non-injured state to take 'lawful measures' against the state in breach of these community obligations. The Commission's hesitation on this point has been criticized by scholars,<sup>42</sup> although those who propose that non-

40. See further Gowlland *United Nations Sanctions* (above).

41. ILC Commentary (above) at 139, para. 6.

42. C. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: CUP, 2005) who after a study of state practice concludes that Art. 54 'is unduly restrictive and unfortunate' at 311; 'Obligations *erga omnes*' J.A. Frowein <mpepil.com>; Cassese (above) at 262–77, 306–7.

injured states should be able to take countermeasures usually present this as a last option, to be used after there have been failed attempts to achieve sanctions or collective action through the United Nations and other international organizations.<sup>43</sup> The Institute of International Law has contributed to the debate by adopting a Resolution stating that those states that are owed *erga omnes* obligations are entitled to take countermeasures where there was a 'widely acknowledged grave violation of an *erga omnes* obligation.'<sup>44</sup>

Views are divided over whether non-injured third parties should be entitled to ensure respect for international law through countermeasures. It might be tempting to see this division as the distinction between those scholars who see international law as a series of bilateral (contractual) relationships between states, and those who see international law as something aimed at protecting community interests. But this would be to miss the particular underlying concern. The issue is only partly about larger states coming to the rescue of helpless smaller states or peoples faced

43. L.-A. Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community', in Crawford et al (above) 1137–48; Cassese (above) at 310–13. N. White and A. Abass, 'Countermeasures and Sanctions', in M. Evans (ed.), *International Law*, 3rd edn (Oxford: OUP, 2010) 531–58.

44. 'Obligations and rights *erga omnes* in international law', Resolution of the Fifth Commission (2005), Art. 5 (Rapporteur Gaja), (emphasis added). Although the Resolution does not detail which specific obligations should be considered in this context, its preamble includes the following two paragraphs: 'Considering that under international law, certain obligations bind all subjects of international law for the purposes of maintaining the fundamental values of the international community; Considering that a wide consensus exists to the effect that the prohibition of acts of aggression, the prohibition of genocide, obligations concerning the protection of basic human rights, obligations relating to self-determination and obligations relating to the environment of common spaces are examples of obligations reflecting those fundamental values.'

with violations of international law. The fear of those resisting this development is that powerful states will engage in countermeasures to the detriment of smaller states (and their population) with little outside control over the legality of such countermeasures. Michael Akehurst explored this paradox in depth and concluded in part:

In international disputes of a legal character, *both* sides usually accuse each other of breaking international law; if third States were able to intervene, there is a serious danger that they would be biased and that they would tend to support their allies, rather than the side which was objectively in the right. The result would be more likely to weaken international law than to strengthen it; and it would certainly cause a very disturbing increase in international tension.<sup>45</sup>

It is suggested that the real significance of the ILC's conclusions with regard to the rights of non-injured states facing violations of such *erga omnes* obligations lies in the ILC's stated principles that the non-injured state has a legal interest in such violations and can invoke the violation of international law before an international tribunal.<sup>46</sup> It is to this type of dispute settlement that we now turn.

45. M. Akehurst, 'Reprisals by Third States', 44 *BYBIL* (1970) 1–18, at 15–16; although he finally concludes that the rules on the use of force, war crimes, and crimes against humanity are so important that they could justify every state in taking countermeasures.

46. J. Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles of Responsibility of States for Internationally Wrongful Acts', in U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. Von Schorlemer, and



## § 4. Arbitration and judicial settlement

### (a) Arbitration

*Arbitration* and judicial settlement are closely allied; indeed the former is only a species of the latter. For arbitrators are judges, although they differ from the judges of a standing court of justice in two respects. First, they are chosen by the parties,<sup>47</sup> and second, their judicial functions end when the particular case for which they were appointed has been decided. The distinction is important, because a standing court is able to build up a judicial tradition, and so develop the law from case-to-case. A standing court with a body of judges is therefore, not only a means of settling disputes, but to some extent a means of preventing them from arising.<sup>48</sup>

C. Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: OUP, 2011) 224–40. See also the 2005 Resolution of the *Institut de droit international* (above) Arts 3 and 4. See also the argument that non-injured states should be able to claim reparation, including restitution on behalf of individuals where there have been violations of *erga omnes* obligations, P. Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?', in O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford: OUP, 2011) 305–27, at 317–18.

47. The International Court of Justice has since 1972 offered the parties the chance to have their dispute settled by a Chamber rather than the full Court. In effect, this has meant that states can now choose from among the Judges on the Court, see the explanation by J.G. Merrills, *International Dispute Settlement*, 5th edn (Cambridge: CUP, 2011) at 137–41.

48. For an examination of the work of the different international courts and tribunals that operate at the international level see R. Mackenzie, C. Romano, and Y. Shany, with P. Sands (eds), *Manual on International Courts and Tribunals*, 2nd edn (Oxford: OUP, 2010). In this chapter we will only examine the jurisdiction of the International Court of Justice.

But so far as the parties are concerned, they are as likely to get a satisfactory decision from a court of arbitration as from a court of justice, and there may even be special circumstances which make the former a preferable tribunal.<sup>49</sup> For example, some special technical skill in the members of the court of arbitration may be more important than a profound knowledge of law possessed by the judges in a standing court of justice; or arbitration may offer a more private way to settle the dispute as, unlike the International Court of Justice, the proceedings will not necessarily be public; or the special subject-matter may warrant a whole new arrangement—as was provided for in the Iran-US Claims Tribunal arising out of the US Teheran Embassy Hostages Crisis and the freezing of Iranian assets in the United States.<sup>50</sup>

Arbitrators and judges alike are bound to decide according to rules of law; neither possess a discretionary power to disregard the law and to decide according to their own ideas of what is fair and just. Of course the parties, if they so choose, may confer such a power on an arbitrator, or they may agree on special rules which are to be applied to the exclusion of the ordinary rules of law, but they may also confer such a special power of this kind on judges, as is expressly provided in Article 38(2) of the Statute of the International Court of Justice and Article 293(2) of the Law of the Sea Convention.

49. The UN Convention on the Law of the Sea 1982 offers states parties a choice between judicial settlement (by the Law of the Sea Tribunal or the ICJ) or arbitration; where no choice is made the state is deemed to have accepted arbitration (Art. 287).

50. For details see D. Müller, 'The Iran-US Claims Tribunal', in J. Crawford et al (above) 843–8.

This purely judicial character of an arbitrator's function was not always recognized. This is because arbitrators in the past sometimes claimed and exercised a discretionary power to give what they regarded as a just, rather than a strictly legal, decision; and courts of arbitration have not always given the reasons for their decisions. Indeed, arbitration was a fairly frequent method of settling international disputes in medieval times, but with the rise of the modern state system it fell into disuse until its revival in the nineteenth century, largely through the example of Great Britain and the United States in submitting the *Alabama* Claims to arbitration in 1871.<sup>51</sup>

This dispute concerned complaints by the United States that Great Britain had violated international law on neutrality by allowing ships to be built and sold to the Confederate States during the American Civil War. The Confederate Government had announced in April 1861 that 'letters of marque and reprisal' would be issued to privateers to enable them to seize goods from Federal merchant ships. In turn President Lincoln announced a blockade of Confederate ports. In May 1861, the British Government recognized the Confederates as belligerents and declared that Great Britain was neutral. Lord Bingham's very engaging account sets the scene:

The Northern blockade was a real threat to the Confederacy, which had no navy, no merchant marine and no private ship-

51. For a detailed look at the background see T. Bingham, 'The *Alabama* Claims Arbitration', 54 *ICLQ* (2005) 1–25. The synopsis which follows relies heavily on this account.

building capacity to speak of. The problem was not, to begin with, to export its cotton, since the 1860 crop had been largely exported and it was believed that denial of cotton would force Britain and France to recognize the Confederacy. But there was an urgent need to obtain military armaments and supplies, which required ships to break (the admittedly not very effective) Northern blockade, and there was a strategic need, if possible, to cripple Northern commerce. To this end Confederate agents were sent to Europe, particularly Britain and France, to buy or procure ships to prey on Northern merchant vessels.<sup>52</sup>

The *Alabama* was built in Birkenhead. It was known in the Laird shipyard as '290', as it was the 290th ship they had built, and later renamed *Enrica* as it set sail. It was re-equipped with coal, guns, ammunition, uniforms and supplies in the Azores by a ship (the *Aggrapina*) that had sailed from London Docks. Captain Raphael Semmes of the Confederate Navy boarded in the Azores with Confederate officers and crew. The Confederate flag was run up, and the *Alabama* 'embarked on her voyage of destruction during which she preyed on US merchantmen wherever she could find them: in the Atlantic, off Newfoundland and the New England coast, the West Indies, Brazil, South Africa, Singapore, Capetown, and back to Europe. During this period she burned or sank 64 US vessels.'<sup>53</sup> She sank only one warship. She was eventually sunk, hav-

52. Ibid 3–4 (footnotes omitted).

53. Ibid 6–7.

ing been challenged to a battle by the USS *Kaersage* in 1864 near Cherbourg.<sup>54</sup>

Attempts by US diplomats to prevent the *Alabama* (or '290' as she was then known) leaving Britain had failed, in part, due to the inadequacy of the national law which prohibited the fitting out of ships for war, but did not explicitly cover the situation where a ship could be adapted for war outside the jurisdiction.<sup>55</sup> The *Alabama* claims by the United States remained a point of friction and the negotiation of the Treaty of Washington (1871) finally allowed for an arbitration to 'provide for the speedy settlement of such claims'.<sup>56</sup> The Arbitrators met in the Geneva Town Hall, in what is now known as the *Salle Alabama*, and determined the liability of Great Britain under three rules that had been agreed to, but which the British Government did not consider to represent principles of international law at the time the claims arose. The Arbitrators were to be governed by these three rules and 'such principles of international law not inconsistent therewith as the Arbitrators shall determine to have been applicable to the case'.<sup>57</sup> This then was the *applicable law* for the arbitration. The first rule stated in part that a neutral government is bound 'to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace'. The rules also contained obligations for states related to prevent-

54. Manet's famous painting of the battle is part of the collection of the Philadelphia Museum of Art.

55. Foreign Enlistment Act 1819, s. 7; cf the 1870 Act s. 8.

56. Art. I.

57. Ibid Art. VI.

ing such vessels leaving their jurisdiction and prohibiting belligerents to use their ports for the renewal of military supplies.

The arbitrators' award with regard to the *Alabama* found that Great Britain had failed in her obligations, as she had omitted to take timely effective measures of prevention, and the measures she took after the escape of the *Alabama* were insufficient to release Great Britain from the responsibility already incurred. The Tribunal explicitly stated that 'the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed'.<sup>58</sup> Compensation of \$15.5m was awarded and later paid to the United States. *The New York Times* reported the *London Times* as saying 'willingly we consent to pay this sum to improve the law of nations'.<sup>59</sup>

The significance of the arbitration has often been noted as it spawned an enthusiasm for the peaceful settlement of disputes as well as treaties providing for such arbitration. Although states continue to resort to arbitration, the major development has in recent times been the use of arbitration between states and companies in international investment disputes. And in such cases, treaties now facilitate enforcement of such awards.<sup>60</sup> For present purposes we

58. J.B. Moore (ed.), vol. 1, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington: Govt Printing Office, 1898) at 657.

59. 15 September 1872.

60. See below Art. 54 of the Washington Convention on the International Settlement of Investment Disputes (1965); see also the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958); and at the regional level: the Geneva Convention on the Execution of Foreign Arbitral Awards (1927); the Amman Arab Convention on Commercial Arbitration (1987); the Inter-American Convention on International Commercial Arbitration (1975); and the European Convention on International Commercial Arbitration (1961).

will simply consider those basic issues that distinguish all sorts of arbitration from judicial settlement. First, the parties choose the arbitrators or how they are to be appointed; second, the parties choose the applicable law; third enforcement may depend on resort to a regular national legal order and forms of judicial settlement.

(i) Choosing the arbitrators

In the *Alabama* claims the Treaty provided that five arbitrators were to be chosen by the President of the United States, the British Government, the King of Italy, the President of Switzerland, and the Emperor of Brazil.<sup>61</sup> Many different ways of constituting the arbitral court or finding an 'umpire' have been used. Sometimes the head of some foreign state has been appointed, and the award is given in their name, though they are not expected to act personally; sometimes the arbitrators have consisted of representatives of the disputing states, with or without the addition of other members.

The Permanent Court of Arbitration was created by the Hague Convention for the Pacific Settlement of International Disputes, adopted in 1899, and revised in 1907. But the name 'Permanent Court' is a misnomer. There is a *permanent panel of arbitrators*, but the Court itself has to be constituted anew for each case. An arbitral award is final unless the parties have otherwise agreed. Since 1962 the Court has allowed for arbitrations between states and non-state entities, and it has since then also developed rules for such arbitrations as well as for those involving international organ-

61. Treaty of Washington 1871 Art. I.

izations and private parties.<sup>62</sup> Despite a period of relative inactivity in the second half of the twentieth century, the Court is now attracting important disputes and has a full docket. An award in 2009 was decided under the rules for arbitrations between states and non-state entities and concerned a dispute over the borders of the Abyei Area submitted by Sudan and the Sudan People's Liberation Movement/Army.<sup>63</sup>

Where there is more than one arbitrator it is normal for each side to agree to one or two arbitrators each, and then, either agree on an 'umpire' or further 'neutral' arbitrators. Where they cannot agree, the arbitral agreement may provide for a third party to appoint the necessary arbitrator.<sup>64</sup> Under different regimes for international commercial arbitration this may be done by the institutional authority designated under the arbitration rules agreed to by the parties or by an 'appointing authority' designated by the Secretary-General of the Permanent Court of Arbitration.<sup>65</sup> In the case of disputes brought to the International Centre for the Settlement of Investment Disputes this deadlock can be broken by the President of the World Bank.<sup>66</sup>

62. Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State; Optional Rules for Arbitration Involving International Organizations and States; and Optional Rules for Arbitration between International Organizations and Private Parties.

63. *Abyei Arbitration*, 22 July 2009, <<http://www.pca-cpa.org>>.

64. See, e.g. European Convention for The Peaceful Settlement of Disputes (1957) Art. 21; American Treaty on Pacific Settlement 'Pact of Bogotá' (1948) Art. XL; Revised General Act for the Pacific Settlement of International Disputes (1949).

65. ICC Rules for Arbitration (1998) Rule 8; UNCITRAL Arbitration Rules (2010) Art. 6.

66. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) Arts 5, 37-40.

## (ii) Choosing the applicable law

The law the arbitrator is to apply is chosen by the parties. As we saw in the *Alabama* claims states may choose rules which are not necessarily binding rules of international law. In some cases, such as that submitted to the UN Secretary-General with regard to the sinking of the Greenpeace Ship *Rainbow Warrior*, the terms may be rather vague. It has been suggested that in that case the parties were 'more concerned with finding an acceptable solution to the dispute than with justifying their past actions'.<sup>67</sup> The Secretary-General explained that he sought to give a ruling that was both 'equitable and principled',<sup>68</sup> and ruled *inter alia* that: France should convey to New Zealand a formal and unqualified apology for the attack which was contrary to international law; that France should pay New Zealand \$7m compensation; and that the French agents (who had been sentenced by a New Zealand Court for manslaughter) be transferred to the French military authorities and then 'to a French military facility on an isolated island outside of Europe for a period of three years'.<sup>69</sup> The Secretary-General also built in a provision for further binding arbitration should a dispute arise with regard to any agreements arising from his ruling. When France evacuated her agents without the consent of the New Zealand

67. Merrills (above) at 91.

68. *New Zealand v France* 74 ILR 256, at 271.

69. Ibid 272. In a separate arbitration between France and Greenpeace an arbitral tribunal in Geneva awarded Greenpeace \$5 million for the loss of the *Rainbow Warrior*, \$1.2 million aggravated damages, plus expenses, interest and legal fees. English law was used as the *Rainbow Warrior* was a British-flagged ship. Philip Shabecoff, *New York Times*, 3 October 1987.

authorities the arbitral tribunal was established and ruled on the dispute.<sup>70</sup>

The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) provides that: 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.'<sup>71</sup>

## (iii) Enforcement of arbitral awards

The Washington Convention also addresses the problem of enforcement. States parties to the Convention are obliged 'to recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State'.<sup>72</sup>

70. *Rainbow Warrior (New Zealand v France)* 82 ILR 499; the award was referred to in Ch. VII § 11 above as an example of a state invoking distress and necessity in the face of accusations of breach of treaty (one agent was ill and the other pregnant); the Tribunal found that breaches had occurred with regard to the removal of both agents and recommended a friendship fund be established with France paying an initial instalment of \$2m. The Fund continues to distribute small grants totalling about €200,000 per year.

71. Art. 42(1) for detail on this regime and commercial arbitrations more generally J. Collier and V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford: OUP, 1999) chs 3, 4, and 8.

72. Art. 54(1) for more detail on this regime and the suggestion that the investor/state regime be considered a 'sub-system' of state responsibility; see Z. Douglas, 'Investment Treaty Arbitration and ICSID', in J. Crawford et al (above) 815-42.



The enforcement of awards against foreign states will of course be more problematic as we could run into questions of state immunity. But this is to miss the point; once states have decided to submit their dispute to arbitration they are likely to be prepared to abide by the award; and this is what generally happens. The basis of obligation for states to abide by the award is the original will of the states to submit to arbitration.<sup>73</sup>

An arbitral award is final unless the parties have otherwise agreed. But arbitrators have only such powers as the parties have conferred upon them in the *compromis*, the document by which the dispute is referred to the arbitral court, and if the arbitrators should depart from the *compromis*, for example, by purporting to decide some question which was not submitted to them, or by not applying the rules of decision agreed to by the parties, it follows that the award is a nullity without binding force. It is, in fact, not an award at all. After the award has been given, one of the parties might allege that it is null and void on this ground, for *excès de pouvoir* as it is commonly called. In international commercial arbitrations there may be national legislation giving jurisdiction to the national courts over these and other questions. This is known as the *lex arbitri*.<sup>74</sup> Occasionally the departure from the terms of the *compromis* has been so evident that the states parties have agreed to

73. See further Waldock, *General Course on Public International Law*, 106 *RCADI* II (1962) 1–251, at 88–90; see also *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*, ICJ Rep. (1960) p. 192.

74. See the UNCITRAL Model Law on International Commercial Arbitration (2006); see also the Arbitration Act 1996 and the Arbitration (Scotland) Act (2010). Note under the ICSID Convention Arts 50–2 include international procedures for interpretation, revision and annulment of the Award.

regard the award as null,<sup>75</sup> and sometimes they have agreed to refer the question of nullity itself to a further arbitration,<sup>76</sup> or even for judicial settlement before the International Court of Justice.<sup>77</sup> Let us now consider the work of this Court.

### (b) *Judicial settlement and the International Court of Justice*

The Permanent Court of International Justice was created by a treaty, generally called the 'Statute' of the Court, in 1921. Under the Charter of the United Nations it is now replaced by the International Court of Justice, but the Statute of the new Court, which forms part of the Charter, is identical with that of the old, except for a very few and not very important changes. Both Courts have been referred to as the 'World Court'; this expression, according to Georges Abi-Saab, suggests that the International Court of Justice: 'is expected to be universalist in its composition, outlook and vocation, truly representing and at the service of the international community in its entirety, and not dominated by the legal or social culture of special interests of any segments thereof'.<sup>78</sup> Vera Gowlland-Debbas consid-

75. E.g. the award of the King of Holland in the *Maine Boundary* dispute between Britain and the United States in 1831.

76. E.g. in the *Orinoco Steamship Co. Case (United States v Venezuela)* xi RIAA (1910) 227–41.

77. *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*, Judgment ICJ Rep. (1960) p. 192; *Arbitral Award of 31 July 1989*, Judgment, ICJ Rep. (1991) p. 53.

78. 'The International Court as a world court', in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings* (Cambridge: CUP, 1996) 3–16, at 3. Note the Statute demands that at every election for the judges the electors bear in mind 'that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured'. Art. 9.

ers that the specificity of the International Court of Justice 'lies in the fact that it does not merely offer States another choice of means of settlement, but that it is an international judicial body of general competence open to all States and as a court of the United Nations, it is conceived to be a world court serving the international community'.<sup>79</sup>

The judges of the World Court are appointed by the following procedure: each of the national groups of members of the Permanent Court of Arbitration nominates not more than four persons.<sup>80</sup> From these lists the Security Council and the General Assembly each separately choose 15 judges. Any person who is chosen by a majority vote in both bodies is elected (the veto does not apply), except that, if two persons of the same nationality are chosen, only the elder becomes a member of the Court.

A judge of the same nationality as one of the parties to a dispute before the Court retains the right to sit, but if a party has no judge of its nationality on the Court, it may nominate one for the particular case. This provision for *ad hoc* 'national' judges is explained by the fact that cases before the Court may raise complex questions of national law, and in this way the *ad hoc* judge can not only explain the law to the other judges, but in some sense

'represent' the relevant party during the judges' private deliberations.<sup>81</sup>

The Court is open to all the states which are parties to its Statute (this automatically includes all UN member states), and to others on conditions laid down by the Security Council.<sup>82</sup> Its jurisdiction covers 'all cases which the parties refer to it'.<sup>83</sup> Jurisdiction arises therefore when the parties have agreed to submit a particular dispute to it through what is called a *compromis* (or special agreement); but the Court also possesses a quasi-compulsory jurisdiction which applies in two ways. First, a large number of treaties (over 300) have included a compromissory clause allowing states to submit to the Court disputes arising under these treaties.<sup>84</sup> Secondly, Article 36(2) of the Statute contains an 'Optional Clause', whereby states may declare that they recognize as compulsory the jurisdiction of the Court in all legal disputes in relation to any other state accepting the same obligation. But neither the treaties providing for jurisdiction through such a compromissory clause,

79. 'Article 7 UN Charter', in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford: OUP, 2006) 79–105, at 101.

80. For a detailed look at the background, selection and approach of judges in this Court and a dozen other international Courts and Tribunals see D. Terris, C.P.R. Romano, and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford: OUP, 2008).

81. See further P. Kooijmans, 'Article 31', in A. Zimmermann et al (above) 495–506; see also the American Convention on Human Rights Art. 55 which has a similar rule; compare Art. 19 of the Regulations of the Inter-American Commission on Human Rights which precludes a Commissioner who is a national from the state involved from taking part in the discussion, investigation, deliberation or decision. The practice for UN human rights treaty bodies is for a national to recuse themselves from the public discussion or decision making in the case of individual complaints. The situation in the WTO is dealt with below.

82. See Art. 93 UN Charter, Art. 35(2) Statute of the Court.

83. Art. 36(1) of the Statute.

84. The ICJ's jurisdiction covers these disputes by virtue of the reference in Art. 36(1) to 'all matters... in treaties and conventions in force'. Such a compromissory clause was the basis of the *Georgia v Russia* case before the ICJ discussed above in Ch. VII § 9.

nor the 'Optional Clause', affects the voluntary basis of the Court's jurisdiction; they merely make it possible for states to accept the Court's jurisdiction in anticipation of their being involved in a dispute.

The 'Optional Clause' has been accepted by only about a third of states, and many have attached reservations to their acceptances. The British acceptance of the clause, which was first given in 1929, now applies only to disputes arising after 1 January 1974, and further excludes, *inter alia* 'any dispute with the government of any other country which is or has been a Member of the Commonwealth'. The acceptance by Switzerland contains no reservations and took effect from 1948. Australia's 2002 Declaration excludes *inter alia*: 'any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation'. Pakistan's Declaration of 1960 excludes *inter alia* '[d]isputes relating to questions which by international law fall exclusively within the domestic jurisdiction of Pakistan'.

This last type of reservation can be found in multiple declarations and is worth reflecting on. This concept of a domain which is exclusive and protected from international dispute settlement mechanisms dates to the time of the League of Nations.<sup>85</sup> At the time it seemed fair to refer to domestic jurisdiction as a 'new fetish,

85. 'If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.' Art. 15 para. 8 of the Covenant of the League of Nations (1919); see also Art. 5 from the defunct Geneva Protocol on the Peaceful Settlement of

about which, however, little seems to be known except its extreme sanctity'.<sup>86</sup> States may continue to wish to prevent interference in their domestic affairs by other states and international organizations,<sup>87</sup> but if a dispute is to be settled according to international law then what is a matter of exclusive domestic jurisdiction is the same as a matter that is outside the scope of international law. What was said in 1925 remains true today: 'international law can adopt only one of two alternative attitudes towards any action by a state out of which an international dispute has arisen; it may say that the action in question falls under some rule of law by which its legitimacy ought to be tested; or it may say that no rule of law is applicable, and this, it is submitted, is equivalent to saying that the matter is one which it leaves solely within the domestic jurisdiction of the state concerned'.<sup>88</sup> In any event, Article 36(6) of the Statute goes on to provide that 'in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court'.<sup>89</sup>

The limiting effect of these reservations is multiplied by the fact that acceptance of the optional clause is on a reciprocal basis,

International Disputes (1924) which read in part: 'If in the course of an arbitration ... one of the parties claims that the dispute, or part thereof, arises out of a matter which by international law is solely within the domestic jurisdiction of that party, the arbitrators shall on this point take the advice of the Permanent Court of International Justice through the medium of the Council.'

86. Brierly, 'Matters of Domestic Jurisdiction', 6 *BYBIL* (1925) 8–19, at 8.

87. See further M. Jamnejad and M. Wood, 'The Principle of Non-intervention', 22 *Leiden Journal of International Law* (2009) 345–81.

88. Brierly, 'Domestic Jurisdiction' (above) at 10–11.

89. The situation becomes more complex where a reservation states that jurisdiction is excluded for matters within domestic jurisdiction as 'understood' by the relevant government. See *Case of Certain Norwegian Loans*, ICJ Rep. (1957) p. 9 esp. the separate and dissenting opinions. On the effect of reservations to the compromissory clause in

each state only accepting compulsory jurisdiction vis-à-vis another state to the extent that the obligations undertaken in their mutual declarations mutually correspond. This means that for the Court to have compulsory jurisdiction over any given dispute, both states, plaintiff and defendant, must have made declarations which comprise that dispute within its scope.<sup>90</sup> It also means that a defendant state, even when its own declaration includes the dispute within its scope, is always entitled to invoke a reservation in its opponent's declaration for the purpose of seeking to exclude the Court's jurisdiction in the case.<sup>91</sup> In other words, a reservation may have a boomerang effect on the state which makes it, defeating its own attempt to bring another state before the Court. To illustrate the point: if the United Kingdom were to bring a claim against Switzerland with regard to a hypothetical dispute which arose in 1970, Switzerland would be able to point to the British reservation (which, as we saw, excludes disputes which arose before 1974) and successfully claim that the Court had no jurisdiction. The wider the scope of the reservation, the more difficult it will be for the reserving state to ever use the World Court to settle its disputes.<sup>92</sup>

the Genocide Convention see *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)*, ICJ Rep. (2006) p. 6, compare the Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma which suggests the validity of reservations to the jurisdiction of the Court under the compromissory clause in the Genocide Convention may have to be revisited (at para. 29).

90. *Anglo-Iranian Oil Co. case (jurisdiction)*, ICJ Rep. (1952) p. 93.

91. See *Norwegian Loans* (above).

92. See C. Tomuschat, 'Article 36', in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford: OUP, 2006) 589–657, esp. 632–40.

We have mentioned three ways to ground jurisdiction (1) a *compromis* agreed between the parties, (2) a compromissory clause in a treaty, (3) overlapping declarations under the optional clause. For completeness we should now include a fourth possibility (4) *forum prorogatum*. In this last instance one state unilaterally applies to the Court and the other respondent state accepts jurisdiction explicitly or through its actions. So when the Republic of Congo filed a case against France in 2002 it was enough that France simply informed the Court that it consented to the jurisdiction of the Court.<sup>93</sup>

The law that the Court is to apply is, as already explained in chapter II, laid down as follows: (1) international conventions, (2) international custom as evidence of a general practice accepted as law, (3) the general principles of law recognized by civilized nations, (4) judicial decisions and teachings of publicists as subsidiary means for the determination of the law, and (5) if the parties agree, the Court may decide *ex aequo et bono* (finding a just and equitable solution irrespective of the applicable law).<sup>94</sup>

Besides the Court's contentious jurisdiction over disputes referred to it by states, the Court, under Article 96 of the UN Charter, may be requested by the UN General Assembly or the Security Council 'to give an advisory opinion on any legal

93. Letter of 3 April 2003 from the Minister of Foreign Affairs accepting jurisdiction according to Art. 38(5) of the Rules of Court. See also *Corfu Channel case*, ICJ Rep. (1949) p. 4; C.H.M. Waldock, 'Forum Prorogatum or Acceptance of a Unilateral Summons to Appear before the International Court', 2 *ILQ* (1948) 377–91.

94. For a detailed study of the Court's use of these sources see A. Pellet, 'Article 38', in A. Zimmermann et al (above) 677–792.

question.<sup>95</sup> Other UN organs and Specialized Agencies may also request advisory opinions 'on legal questions arising within the scope of their activities', if authorized to do so by the General Assembly.<sup>96</sup> The Court has consistently treated this advisory jurisdiction as a judicial function, and it has assimilated the proceedings in most respects to those used in the contentious jurisdiction.<sup>97</sup>

Indeed in certain cases the advisory opinion may actually resolve a dispute by decisively applying the law.<sup>98</sup> So, in the context of a dispute between the United Nations and a member state over the immunity of its officials, the opinion of the Court can be decisive for the UN and the state in question. The dispute between the UN and Malaysia was settled in this way by the Court's Advisory Opinion, which declared that Malaysia must respect the immunity of the UN Special Rapporteur on the Independence of Judges and Lawyers

95. Recent Advisory Opinions have generated considerable interest; see the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. (1996), p. 226; the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, ICJ Rep. (2004) p. 136; and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010.

96. ECOSOC and the International Atomic Energy Agency are also authorized to request advisory opinions, as are the following specialized agencies: ILO, FAO, UNESCO, WHO, IBRD, IFC, IDA, IMF, ICAO, ITU, IFAD, WMO, IMO, WIPO, and UNIDO. The ICJ held that the question of the legality of nuclear weapons was outside the scope of the World Health Organization's activities in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Rep. (1996) p. 66.

97. *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, ICJ Rep. (1989) p. 177.

98. Although the Opinion as such has no binding force, a treaty between the parties may state that the Opinion is decisive for the parties; see, e.g. Convention on Privileges and Immunities of the United Nations (1946) Art. VIII Section 30.

(Param Kumaraswamy, a Malaysian lawyer).<sup>99</sup> The Malaysian Courts had accepted jurisdiction over defamation suits demanding a total of \$112m in response to an interview the Rapporteur had given to the magazine *International Commercial Litigation*. The UN Secretary-General considered that the interview had been given in the Rapporteur's official function as a UN expert appointed by the UN Human Rights Commission. The World Court held that the Rapporteur had immunity from legal process for the words spoken by him in the published interview, that the Malaysian courts were under an obligation to deal expeditiously with the immunity issue as a preliminary question, and that no costs should be imposed on the Rapporteur.<sup>100</sup> The issue was henceforth settled.

Other points of interest in the Statute of the Court include: that cases must be heard in public unless the Court decides otherwise or the parties demand a private hearing; that reasons for the decision are to be stated, and dissenting judgments may be given; that the official languages are French and English, but the Court may authorize other languages; that the Court may order binding interim measures;<sup>101</sup> that third states may apply

99. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Rep. (1999) p. 62.

100. For detailed examination of the Opinion see H. Fox, 'The Advisory Opinion on the Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission of Human Rights: Who Has the Last Word?' 12 *Leiden Journal of International Law* (1999) 889-918.

101. Art. 41 of the Statute, and see *LaGrand (Germany v USA)* (2001) for the conclusion that such Orders are binding. Orders can be quite simple, e.g. 'The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings' (*LaGrand*, Order of 3 March



to intervene;<sup>102</sup> that there is no appeal but states can request an interpretation or revision of the judgment;<sup>103</sup> and that decisions are only binding between the parties and for the particular case.<sup>104</sup> This last provision merely means that the binding authority which Anglo-American law attaches to precedents does not apply to the decisions of the Court; it does not mean that the decisions may not be quoted as precedents, or that the Court will not strongly incline to follow them, for no court can be indifferent to its own previous decisions.<sup>105</sup>

1999); or more complex: 'Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security... Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect.' *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* Order 8 March 2011.

102. See Arts 62 and 63 of the Statute; see, e.g. *Territorial and Maritime Dispute (Nicaragua v Colombia) Application by Costa Rica for Permission to Intervene*, Judgment 4 May 2011; note that where a third state's legal interests constitute the very subject-matter of the dispute, the Court will decline jurisdiction over the whole case on the grounds that the consent of the third state is indispensable. See C. Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press, 1983) 198–212; *East Timor (Portugal v Australia)*, ICJ Rep. (1995) p. 90; Collier and Lowe (above) 158–68.

103. Arts 60 and 61 of the Statute.

104. Art. 59 of the Statute.

105. We have only considered the work of the ICJ, for an introduction to the work of Courts such as the International Tribunal on the Law of the Sea, the European Court of Justice, and the regional human rights courts see Mackenzie et al (above).

## § 5. The limits of arbitration and judicial settlement

It has been a common assumption among international lawyers that not all disputes between states are 'justiciable', that is to say, susceptible of decision by the application, in an arbitral or judicial process, of rules of law. This is a mere truism in one sense—no dispute is 'justiciable' unless the parties have made it so by undertaking an obligation to treat it as such. But the distinction between 'justiciable' and 'non-justiciable' disputes usually implies more than this; it implies the belief that international disputes are of two distinct kinds, one of which, the justiciable or legal, is inherently susceptible of being decided on the basis of law, while the other, the non-justiciable or political, is not.

International lawyers have generally agreed that this distinction exists, but they have not always agreed on its content. One commonly held view has been that a justiciable dispute is one where there exists a rule of law applicable to the dispute. This implies that for other disputes, the non-justiciable disputes, no applicable rules exist in the law, and accordingly that a court of law called upon to deal with such a dispute would find itself unable to pronounce a decision. We have seen that this difficulty may be imaginary.<sup>106</sup> It is a corollary of the extreme positivist view of the nature of international law, according to which, since nothing is law except the rules that states have consented to, the number of legal rules is necessarily finite. It overlooks the dynamic element,

106. Above, Ch. II § 4(e).

which international law, like every other system of law, reveals as soon as it ceases to be a merely academic study, and begins to be applied to factual situations by the accepted processes of judicial reasoning.

International law, then, is never formally or intrinsically incapable of giving a decision, on the basis of law, on the respective rights of the parties to any dispute, and if that is so, we must look for the difference between justiciable and non-justiciable disputes elsewhere than in some assumed specific quality which distinguishes international law from other legal orders. Probably today all we can say is that it depends upon the attitude of the parties: if whatever the subject-matter of the dispute may be, what the parties seek is their legal rights, the dispute is justiciable.<sup>107</sup>

It is certain that many serious disputes between states are demands for satisfaction of some interest—rather than a demand based on existing legal rights, and we should bear this in mind. But this fact does not mean that we can predict, merely from knowledge of the subject-matter of a dispute, that it will be justiciable or that it will be non-justiciable; it merely reminds us that states do sometimes regard a decision on the basis of law as a satisfactory method of disposing of their disputes, and that sometimes, for whatever reason, good or bad, at least one of the states concerned does not.<sup>108</sup>

107. Cf H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933) 'the only decisive test of the justiciability of the dispute is the willingness of the disputants to submit the conflict to the arbitrament of law.' At 164.

108. See further Collier and Lowe (above) at 10–16.

Most lawyers would agree that it would be better if states were more willing to accept the settlement of their disputes on the basis of law. The present freedom of states to reject that method of settlement is entirely indefensible; it makes possible the grossest injustices, and it is a standing danger to the peace of the world by encouraging the habit of states regarding themselves each as a law unto itself. But the solution is not as easy as it looks, and we cannot simply pretend that existing law is the applicable basis for the settlement of all disputes.<sup>109</sup> A declaration of their legal rights, when states are quarrelling about something other than their legal rights, is not in any true sense a 'settlement' of their dispute.<sup>110</sup> It may occasionally facilitate a settlement by subsequent agreement, but it may have exactly the opposite effect—by making a compromise seem unnecessary to the party that is satisfied with the declaration of its rights.

The dissatisfaction of a state with the *status quo* raises a question which is not always a juridical one, and cannot be turned into

109. This was the aim of the General Act of Geneva (Pacific Settlement of International Disputes) (1928); see further Brierly 'The General Act of Geneva, 1928', 11 *BYBIL* (1930) 119–33 and 'British Reservations to the General Act', 12 *BYBIL* (1931) 132–5. See also the discussion in the first edition of this book of the abortive Geneva Protocol of 1924 'which professed, in the words of the official General Report, to create "a system of arbitration from which no international dispute, whether juridical or political, could escape"'. At 187.

110. Alan Boyle emphasizes how environmental disputes maybe better tackled through non-compliance committees in a multilateral forum more appropriate to the protection of common interests. Moreover traditional dispute settlement mechanisms may not allow for technical or third party input. 'Environmental Dispute Settlement' <mpepil.com>. For an analysis of the vast array of environmental treaties see P. Sands, *Principles of International Environmental Law*, 2nd edn (Cambridge: CUP, 2003).

a juridical question by adopting judicial methods of procedure. The state's dissatisfaction may raise a question which is essentially *political*, susceptible of amicable settlement no doubt, but only by appropriate *political* methods, by negotiation, by compromise, by mediation, or conciliation.<sup>111</sup> It is to some of these political methods of dispute settlement that we now turn.

### § 6. Good offices, mediation, commissions of inquiry, conciliation

In these modes of dispute settlement, the intervention of a third party aims, not at *deciding* the quarrel for the disputing parties, but at inducing them to *decide it for themselves*. The difference between *good offices* and *mediation* is not so important. Strictly speaking, a third party is said to offer 'good offices' when it tries to induce the parties to negotiate between themselves, and it 'mediates' when it *takes a part* in the negotiations itself; but clearly the one process merges into the other. Both, moreover, are political processes, rather than judicial settlements, which are only based on international law to the extent that the parties so choose, and these political processes may be chosen precisely because there is no agreement to settle the dispute according to the legal rights and obligations of the parties.<sup>112</sup> The Hague Con-

111. For a detailed consideration see Office of Legal Affairs—Codification Division, *Handbook on the Peaceful Settlement of Disputes* (New York: UN, 1992) (*UN Handbook*).

112. Consider the mediations by the Pope Jean Paul II and Vatican Secretary of State Cardinal Agostino Casaroli in the 1980s for the dispute between Argentina and Chile concerning the Beagle Channel, which came in the wake of the rejection by Argentina of an arbitral award based on law.

ventions for the Pacific Settlement of International Disputes recommend that states that are strangers to a dispute offer their good offices and mediation (even during the course of hostilities), and state that such an offer can never be regarded as an unfriendly act. A number of treaties now provide for good offices and mediation, and, while it is 'generally understood that the proposals made by the mediator for a peaceful solution of a dispute are not binding on the parties', the final results could be 'embodied in such instruments as an agreement, a protocol, a declaration, a communiqué, an exchange of letters or a "gentleman's agreement" signed or certified by a mediator'.<sup>113</sup>

The same Conventions also introduced a new device for the promotion of peaceful settlements: *Commissions of Inquiry*, whose function was simply to investigate the facts of a dispute and to make a report stating them. This report would not have the character of an award, and the parties were free to decide what effect, if any, they would give it. The Commission would be constituted for each occasion by agreement between the parties.<sup>114</sup> This machinery was used with good effect in the Dogger Bank dispute between Great Britain and Russia in 1904.<sup>115</sup> The Russian navy had fired on

113. *UN Handbook* (above) para. 138, for the treaties which refer to good offices and mediation see paras 123–37.

114. Such Commissions are rather different from the Commissions of Inquiry presently established by the UN and other international organizations in the context of allegations of war crimes and human rights violations (see Ch. VI § 8 above) as the latter Commissions would not normally include a national from the relevant state, see also Art. 90(3) of the 1977 Protocol I to the 1949 Geneva Conventions which foresees that none of the members of the Commission of Inquiry should be a national of the states concerned (unless the states agree otherwise).

115. For detailed examination see N. Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry* (London: OUP, 1974).

a fishing fleet from Hull, sinking one vessel and killing two persons. Tensions were running high, in the context of the war between Russia and Japan, and the Russian explanation that the fishing boats must have been considered Japanese torpedo boats did not defuse the situation. The establishment of the International Commission of Inquiry, based on the mechanism in the Hague Convention, was seen at the time as 'appeasing the conflicting national susceptibilities' and ensuring that the 'acute character of crisis would disappear'.<sup>116</sup>

The idea underlying these Commissions, that if resort to war can only be postponed and the facts clarified and published, war will probably be averted altogether, inspired the so-called 'Bryan treaties', the first of which was concluded between Great Britain and the United States in 1914. Under these treaties the parties agreed to refer 'all disputes of every nature whatsoever' which cannot be otherwise settled to a standing 'Peace Commission' for investigation and report, and not to go to war until the report was received, which had to be within a year. The Commission consisted of one national and one non-national chosen by each party, and a fifth, not a national of either party, chosen by agreement. No disputes whatsoever were excluded from the operation of these treaties.

This arrangement was used much later in 1990 to settle the dispute over the compensation to be paid by Chile concerning the 1976 car bomb that exploded in Washington DC killing Orlando Letelier, the Chilean former foreign Minister, and Mrs Moffitt (a

116. Ibid 87. The report did not suggest any discredit on the Russian side and £65,000 damages were paid by Russia to Britain.

US national). Although the US courts had awarded the claimants approximately \$5m in damages, this was unenforceable against Chile due to the rules of sovereign state immunity, and the United States relied on the 1914 Agreement to Settle Disputes that May Occur Between the United States and Chile (Bryan-Suárez Mujica Treaty) to 'determine the amount of the payment to be made by the Government of Chile in accordance with applicable principles of international law, as though liability were established'. The five-member Commission of Inquiry established under the terms of the treaty used legal methods and fixed the sum for the *ex gratia* payment at \$2,611,892.<sup>117</sup>

The methods first suggested in the 'Bryan treaties' have been adapted to what is now known as *conciliation*. Conciliation involves an individual or commission proposing the settlement of the dispute in a report which is not binding on the parties. Conciliation, therefore, differs from arbitration; the terms of the settlement are merely proposed and not dictated to the disputing states. The conciliator 'attempts to define the terms of a settlement susceptible of being accepted' by the parties.<sup>118</sup>

In the period between the two World Wars conciliation machinery was set up by multiple treaties between particular states. It was usual to set up a conciliation commission of five persons, consisting of one national of each of the signatory states and three non-nationals. But these treaties setting up conciliation commis-

117. 31 ILM 1, at para. 4 of the *compromis* and para. 43 of the Decision; see further Merrills (above) at 51-3.

118. See the definition of conciliation proposed by the Institute of International Law, Regulations on the Procedure of International Conciliation (1961) Art. 1.

sions hardly fulfilled the hopes that were placed in them, and very few of the commissions ever had occasion to meet.<sup>119</sup> Conciliation is now more likely to be used in international commercial disputes, but certain key multilateral treaties have also made conciliation an essential step for dispute settlement.<sup>120</sup> Again, it is clear that the parties are not bound by the result, but under these treaties they may be bound to submit to conciliation before resorting to judicial settlement or countermeasures. So far these and other conciliation mechanisms remain rather underutilized.<sup>121</sup> The friendly settlement procedure found in human rights treaties such as the European Convention on Human Rights means that the Court automatically places itself at the disposal of the parties in order to secure a settlement on the basis of respect for human rights. In this

119. The OSCE Stockholm Convention on Conciliation and Arbitration (1992) provides for a Court of Conciliation and Arbitration (which is based in Geneva). It has yet to be used; <<http://www.osce.org/cca>>. The Geneva General Act (revised 1949), the European Convention for the Peaceful Settlement of Disputes 1957; the Pact of Bogotá (1948); and the Protocol on the Commission of Mediation, Conciliation and Arbitration (1964) (African Union) all include provisions for conciliation. The Treaty Establishing the Organisation of Eastern Caribbean States (1981) establishes a conciliation procedure whose decisions and recommendations are binding on the parties.

120. See, e.g. Vienna Convention on the Law of Treaties (1969) regarding claims for invalidity, termination, withdrawal from or suspension of the operation of a treaty Arts 65–6 and Annex; Vienna Convention on Succession of States in Respect of Treaties (1978); UN Convention on the Law of the Sea (1982); Vienna Convention on the Protection of the Ozone Layer (1985). For a full discussion see Merrills (above) ch. 4; *UN Handbook* (above) paras 14–67.

121. Some UN human rights treaties allow for inter-state disputes to be settled through conciliation. These mechanisms have never been triggered. See Convention on the Elimination of All Forms of Racial Discrimination (1965) Arts 11–13; International Covenant on Civil and Political Rights Arts 41–42.

case the complaining party might be a state but in the vast majority of cases it is an individual or a non-state legal entity. Hundreds of cases are settled this way and these can be seen as a form of conciliation.<sup>122</sup>

## § 7. Dispute settlement at the World Trade Organization

The World Trade Organization (WTO) has over 153 members from all regions.<sup>123</sup> The WTO provides an institutional framework for the settlement of disputes among its members relating to specific agreements annexed to the WTO Agreement (referred to as the 'covered agreements').<sup>124</sup> The Organization's dispute settlement mechanism contains elements of all forms of dispute settlement discussed above. The starting point includes non-judicial

122. See Art. 39 European Convention on Human Rights (1950); for a recent study see H. Keller, M. Forowicz, and L. Engi, *Friendly Settlement before the European Court of Human Rights* (Oxford: OUP, 2010); similar arrangements exist in the American Convention on Human Rights (1969) and the African Charter of Human and Peoples' Rights (1981).

123. Note some members such as the EU and Hong Kong (China) are not states, but are admitted as customs unions or customs territories.

124. We should also note that the complaint need not necessarily allege a violation of international law contained in the treaties covered by the WTO; 'non-violation complaints' may allege that benefits that a member could reasonably have expected to accrue to it under particular covered agreements are being 'nullified or impaired' or the attainment of an objective of such an agreement is being impeded by conduct of a member or existence of a situation, even if there is no conflict with provisions of the agreement. See Art. 26 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Art. XXIII GATT (1994).



forms of dispute settlement such as consultations, as well as optional good offices, mediation, and conciliation.<sup>125</sup> Arbitration and judicial settlement are available through recourse to a kind of arbitration panel, with the possibility of appeal on points of law to the Appellate Body. The mechanism also includes multilateral supervision of the implementation of recommendations, and should implementation not occur in a timely manner, the mechanism sets a level and form of compensation for the successful party. All these steps are supervised by the WTO membership acting as the 'Dispute Settlement Body' (DSB). Let us look at the process more closely.

The Dispute Settlement Understanding (DSU) sets out in detail how each phase should operate according to a strict timetable. A WTO member is under an obligation to enter into consultations with another member requesting such consultations pursuant to one or more of the WTO 'covered agreements'. Consultations are a compulsory preliminary step before resorting to other forms of dispute settlement under the Understanding. If consultations are unsuccessful the complaining party has the right to demand the establishment of a panel by the DSB. In the same way: 'Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.'<sup>126</sup>

125. DSU Arts 4 and 5.

126. Art. 5(3) DSU; Art. 5(6) states that the Director General of the WTO may offer these types of dispute settlement in an *ex officio* capacity.

A panel of three (or exceptionally five) experts is established by the DSB. They must be 'well-qualified governmental and/or non-governmental individuals', and should not be citizens of the parties or third parties to the dispute, unless the parties to the dispute agree otherwise. Where customs unions or common markets are parties to a dispute, this rule applies to citizens of all member countries of the customs union or common market. So, for example, an EU national cannot serve on a panel involving a dispute between the EU and another member of the WTO (unless the parties agree otherwise). Even where panellists are government officials, they have to serve in a personal capacity and do not represent their government. Should the parties fail to agree on the membership of a panel, there is a provision for the WTO Director-General to appoint appropriate panellists.

In proceedings before both the panel and the Appellate Body, the parties make their submissions orally and in writing as they would in the context of any arbitration. Other WTO members with a substantial interest in the matter before the panel have the right to be heard and make submissions. A panel's report is produced in three steps. The parties are first asked to comment on a draft which contains only a description of the facts and the arguments of the parties. In the second phase the parties receive, not only this description (revised as appropriate), but also a confidential interim version of the panel's findings and conclusions, on which again the parties may comment. Eventually the final report is issued to the parties and, after translation into the WTO official languages, the WTO membership and the public.<sup>127</sup>

127. By contrast, there is no interim review stage with respect to the issuance of reports of the Appellate Body.

This final panel report is then considered by the membership of the WTO. All members have an opportunity to comment on the report, but it will be automatically adopted unless one of the parties to the dispute decides to appeal on a point of law (rather than a finding of fact) to the Appellate Body, or if there should be, what is confusingly called, 'reverse consensus' in the DSB.<sup>128</sup> Reverse consensus requires that every WTO member agree that a panel report should *not* be adopted. This is unlikely in practice as the 'winning' party would not normally want to reject the report; but it is at least theoretically possible that the implications of a report are so unacceptable that all WTO members would all vote in the DSB *not* to adopt a report.

Recommendations and rulings of panels, as modified by the Appellate Body, have to be implemented within a tight timeframe, and the party concerned has to inform the DSB what it intends to do in this regard. The DSB monitors this implementation and may take into account the effects on the economy of developing countries. If there is no implementation within a reasonable time, negotiations have to start with regard to mutually acceptable compensation. If there is no agreement on compensation, the complaining party can ask the DSB for authorization to suspend trade concessions to the non-implementing party (i.e. to engage in certain countermeasures).

The level of suspension of concessions that may be authorized should be equivalent to the disadvantage suffered by the complaining party due to the non-implementing party's failure to implement the recommendations and rulings of the DSB. Such

128. Also called 'negative consensus'.

countermeasures, sometimes referred to as retaliation, should first aim at obligations or trade concessions in the same industrial sector.<sup>129</sup> So a failure by the United States to bring cotton subsidies into compliance with its obligations under WTO rules could lead to Brazilian retaliation including 100 per cent tariffs on imports of cotton trousers and shorts from the United States.<sup>130</sup> If suspension of concessions or obligations with respect to the same sector is not practicable or effective, the complaining party may be authorized to suspend concessions or obligations in other sectors under the same WTO Agreement or under a different WTO Agreement.<sup>131</sup> Where retaliation was authorized against the European Communities for discrimination with regard to banana imports, the United States chose to impose 100 per cent tariffs on a list of luxury items from Europe, targeted for the most part at European states that the US considered supported the European banana regime. 100 per cent tariffs were thus proposed on items such as bath preparations produced by the United Kingdom and France, pecorino cheese from Italy, and cashmere from Scotland.<sup>132</sup>

129. Art. 22(3) DSU.

130. In 2010, Brazil and the United States entered into a bilateral agreement under which the United States would pay an annual sum to the Brazil Cotton Institute (a technical fund to assist Brazilian farmers) in exchange for Brazil delaying its planned retaliation until 2012.

131. Art. 22(3) DSU. Authorization for cross-agreement retaliation was first granted to Ecuador in the long-running *Bananas* dispute against the European Communities.

132. In 1999, the US Congress implemented the 'carousel' provision which required the US Trade Representative to revise its retaliation list every 180 days; section 407 of Public Law 106-200. The intent behind this provision was to exert additional pressure on a non-implementing party to comply with WTO rulings by changing the domestic industries of the non-implementing party that would be adversely affected by the retaliation. This provision was controversial, both within the United States and among WTO members. As it turned out, the United States did not change the products on the final retaliation list.

Opinion is divided over whether the purpose of WTO trade retaliation is to redress the imbalance in benefits arising from the non-implementing party's breach, or to induce compliance. Parties have sought to design retaliation measures that maximize the domestic political pressure on the non-implementing party to comply with its WTO obligations. The potential effects of such retaliatory trade measures on third parties can be dramatic; the proposed US tariffs on luxury goods apparently threatened the existence of particular small cashmere enterprises in Scotland, generating a series of bilateral discussions aimed at reversing retaliation in this area.<sup>133</sup> Countermeasures against a state will nearly always affect the population of the state in some concrete way and in this way they must be seen as a rather crude form of law enforcement. It is worth noting, however, that although Ecuador, Brazil, Antigua, and Barbuda have been authorized to engage in certain retaliations, none of them have gone ahead.

For smaller partners however, trade retaliation may not be particularly effective in inducing a larger trading partner to comply. Where the smaller trading partner's imports represent only a small percentage of the non-implementing parties' trade, then suspension might have little impact on the larger party, and inflict potentially significant costs on the smaller partner.<sup>134</sup> As a group of developing

133. Some of the politics surrounding such choices and the impact in Scotland are recounted in C. Meyer, *DC Confidential* (London: Weidenfeld and Nicolson, 2005) ch. 15 'The Great Banana War'.

134. This was the case in relation to Antigua and Barbuda's threatened retaliation against the United States, where the arbitrators agreed with Antigua that if it were to suspend concessions to the United States in respect of its most important service sectors (travel, transportation, and insurance), such suspension would have little impact on

country members explained: "The economic cost of withdrawal of concessions in the goods sector would have a greater adverse impact on the complaining developing-country Member than on the defaulting developed-country Member and would only further deepen the imbalance in their trade relations already seriously injured by the nullification and impairment of benefits."<sup>135</sup>

Trade disputes now benefit from this multifaceted dispute settlement mechanism. Unlike many of the regimes we have considered, the WTO system provides for compulsory settlement through an enforceable binding award. The prospect of being subjected to these compulsory procedures may induce members to comply with their international obligations. However, as we have seen, problems of access to justice remain. These problems are due to: the prospective nature of the remedies, the complexity of the proceedings, and the limited possibilities for small developing states to deploy effective retaliatory measures against larger states.

## § 8. Settlement under the UN Charter

The good offices and mediation functions outlined above have been fulfilled by the UN Secretary-General in contexts such as

US service providers while forcing Antiguan consumers to find replacement services at an uncertain cost; Decision by the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS285/ARB, 21 December 2007, DSR 2007:X, 4163, para. 4.59.

135. 'Special and Differential Treatment for Developing Countries', proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/19, 9 October 2002, at 1.

the Congo in the 1960s, Afghanistan in the 1980s, the Iran–Iraq war in the 1980s, the peace accords finalized in the 1990s for Guatemala and El Salvador, and Cyprus to the present day.<sup>136</sup> The General Assembly is given a role under the Charter to recommend measures for the peaceful adjustment of situations impairing friendly relations, and may discuss any questions relating to the maintenance of international peace and security brought before it by any member state.<sup>137</sup> Furthermore, in addition to these good offices roles, the UN Declaration on Fact-finding has reinforced this role for the UN stating: ‘Fact-finding missions may be undertaken by the Security Council, the General Assembly and the Secretary-General, in the context of their respective responsibilities for the maintenance of international peace and security in accordance with the Charter.’<sup>138</sup>

The Security Council is given particular responsibilities under the Charter. Articles 24 and 25 of the UN Charter (reproduced in Chapter III § 5) confer on the Security Council primary responsibility for the maintenance of international peace and security, and bind member states to accept and carry out the Security Council’s

136. For a review of the Good Offices function exercised by the UN Secretary-General see T. Whitfield, ‘Good offices and “groups of friends”’, in S. Chesterman (ed.), *Secretary or General? The UN Secretary-General in World Politics* (Cambridge: CUP, 2007) 86–101; T.M. Franck and G. Nolte, ‘The Good Offices Function of the UN Secretary-General’ in A. Roberts and B. Kingsbury (eds), *United Nations, Divided World*, 2nd edn (New York: OUP, 1993) 143–82; see also *UN Handbook on the Peaceful Settlement of Disputes* (above) at paras 367–81.

137. For details as this relates to the settlement of disputes see *UN Handbook* *ibid* at paras 352–62.

138. Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, A/RES/46/59, 9 December 1991, para. 7.

decisions. Later articles of the Charter refer to certain ‘specific powers’ which are granted to the Security Council ‘for the discharge of these duties.’

The Charter contains no specific programme for the exercise of the powers of the Security Council, and the Council has established good offices missions, commissions of inquiry, criminal tribunals, and in the case of Iraq, a Compensation Claims Commission.<sup>139</sup> But the Charter makes an important distinction between powers relating to the Security Council’s function of promoting pacific settlement of disputes (Chapter VI) and those relating to enforcement action (Chapter VII). In relation to the former it may call upon the parties to any dispute ‘the continuance of which is likely to endanger the maintenance of international peace and security’ to settle it by some peaceful method of their own choice.<sup>140</sup> It may ‘investigate any dispute, or any situation which might lead to international friction or give rise to a dispute’ in order to determine whether its continuance is likely to endanger peace and security.<sup>141</sup> And, at any stage of such a dispute or situation, it may ‘recommend appropriate procedures or methods of settlement.’<sup>142</sup> In an underused provision, the Charter also states that: ‘[i]n making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the Interna-

139. For an overview see D. Petrović, ‘The UN Compensation Commission’, in J. Crawford et al (above) 849–59.

140. Art. 33.

141. Art. 34.

142. Art. 36(1).

tional Court of Justice in accordance with the provisions of the Statute of the Court'.<sup>143</sup> If the Council should decide that the continuance of the dispute is, in fact, likely to endanger peace and security, it may go farther than this and 'recommend such terms of settlement as it may consider appropriate'.<sup>144</sup> But it cannot dictate such terms.

When, however, the decisions of the Security Council involve action for the maintenance of peace, they may be more than recommendations; they may be directions which the members of the United Nations are bound to carry out.<sup>145</sup> The Council must determine 'the existence of any threat to the peace, breach of the peace, or act of aggression', and 'make recommendations, or *decide* what measures shall be taken' to maintain or restore international peace and security.<sup>146</sup> Before making such a recommendation or decision it may call upon the parties, in order to prevent an aggravation of the situation, to comply with any necessary provisional measures

143. Article 36(3) was applied by the Security Council in the dispute between the UK and Albania when in Resolution 22 (1947) it recommended that the two governments immediately refer the dispute to the ICJ. The Court later considered the two states had themselves accepted the jurisdiction of the Court. With regard to the argument that the Security Council may be able to generate the conditions for compulsory jurisdiction see *Corfu Channel case, Judgment on Preliminary Objection*, ICJ Rep. (1948) p. 15 at 31, Separate Opinion by Judges Basdevant, Alvarez, Winiarski, Zoričić, De Visscher, Badawi Pasha, and Krylov; see further T. Stein and S. Richter, 'Article 36', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1995) 534-46.

144. Art. 37(2).

145. It has been suggested that there may be limited cases where a binding decision may be taken under Chapter VI: R. Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?' 21 *ICLQ* (1972) 270-86.

146. Art. 39 (emphasis added).

without prejudice to their rights or claims, and it 'shall duly take account of failure to comply with such provisional measures'.<sup>147</sup> When it has decided that action is called for, the Security Council may direct measures not involving the use of armed force, such as sanctions,<sup>148</sup> and if it considers such measures inadequate, 'it may take such action by air, sea, and land forces' as may be necessary to maintain or restore the peace.<sup>149</sup>

All the members of the United Nations have bound themselves under the Charter to make available to the UN for this purpose 'on its call and in accordance with a special agreement or agreements' armed forces and other forms of assistance and facilities, and these agreements are to specify the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided;<sup>150</sup> and in order to enable 'urgent military measures' to be taken, the members are to 'hold immediately available national air force contingents for combined international enforcement action'.<sup>151</sup> Although the UN has around 100,000 peacekeeping personnel deployed on peace operations around the world at the time of writing, the major problem is that the so-called additional 'standby' troops are not really at the disposal of the UN. A decision by the Security Council to create a new peace-keeping operation requires the consent of each individual troop contributing state before those troops

147. Art. 40.

148. For some of the other measures see Ch. III § 5.

149. Art. 42.

150. Art. 43.

151. Art. 45.



can be deployed.<sup>152</sup> As we know, with regard to the tragic case of Rwanda in 1994, and more recently with regard to Darfur in Sudan, such consent may not be immediately forthcoming when it is most needed.

This rather elaborate schema for UN enforcement action remained rather underutilized until the end of the cold war. The 1991 Security Council authorization of the use of force by a coalition (albeit outside UN command and control) to liberate Kuwait from the Iraqi invasion radically changed how the Security Council was seen. These forces were not fighting under a UN flag, but were authorized by the Security Council to use force to restore the peace and the international rule of law. The Security Council, acting under Chapter VII, subsequently authorized member states, their coalitions, and regional organizations,<sup>153</sup> to use force (outside a UN command and control) on a number of occasions including with regard to Somalia, Bosnia and Herzegovina, Haiti, Rwanda, Sierra Leone, Côte d'Ivoire, Liberia, East Timor, Kosovo, Afghanistan, the Democratic Republic of Congo, Iraq, Central African Republic, and Libya.

The ability of the Security Council to authorize such a variety of operations is clearly linked to the end of the cold war antagonism which had paralysed the Council. Action is still dependent

152. The *United Nations Standby Arrangements System Military Handbook* (2003) reinforces the point in explaining the concept: 'One of the most important conditions is that the final decision whether to actually deploy the resources or not remains a national decision.' At 4.

153. For an analysis of Security Council authorization of regional peacekeeping operations see C. Gray, *International Law and the Use of Force*, 3rd edn (Oxford: OUP, 2008) ch. 9.

on the absence of disapproval of any of the permanent members, but the threshold for action may have been adjusted now, as the focus is less on breaches of the peace and acts of aggression and more on general threats to international peace and security. In its landmark 1992 Summit the Council stated:

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.<sup>154</sup>

154. UN Doc. S/23500, 31 January 1992.