

INTERNATIONAL LAW ASSOCIATION, VICTORIAN CHAPTER

News Bulletin

President's Report

By *Molina Asthana*

It's a pleasure to welcome you to the July edition of the International Law Association, Victorian Chapter News Bulletin.

I have taken over from Kelly Forbes as President of the Victorian Chapter and am very excited and pleased to be leading the vibrant chapter of such a prestigious organisation.

This was a very eventful quarter for our chapter as we successfully conducted the 2014 Public International Law Moot Competition. This is the first year that the competition was opened to students and a record 20 teams entered the competition. After the preliminary rounds, Kristyn Mealing of Herbert Smith Freehills was declared Best Speaker.

Two student teams and two junior lawyers' teams progressed to the semi-finals. The student team from Monash won the Grand Final. We were honoured to have on the panel the Honourable Justice Michelle Gordon, Hon. Catherine Branson, and Dr Andrew Coleman. The prizes for the Grand Final were given at the Federal Court directly after the moot. This was followed by a grand final celebration at the Mint Bar where the rest of the presentations were made. The celebration gave the contestants, the Committee and other ILA members a chance to mingle and relax after all their hard work.

I would also like to thank the Committee for their tremendous effort in making this moot successful. Most importantly I would like to express my great appreciation to Dr Fiona Lander, the Moot Coordinator, and her assistant Kelsey Ippolito, who with their dedication, hard work, long nights and perseverance made the 2014 ILA Public International Moot possible.

We are very grateful to Dr Coleman and Ms Marie Aronsson for drafting the moot problem. We are also very grateful to our Sponsors Herbert Smith Freehills who are our principal sponsor, Hein Online (sponsor) and Melbourne University Law School who very generously provided us with the venue for the preliminary rounds and the semi-final rounds.

After all the frantic activity that went into making our moot successful, the Committee will be concentrating its efforts on planning events for the rest of the year. If you would like to assist us in the organisation of any events or you have ideas for other events or activities you think the ILA Vic should become involved in please contact our secretary, Georgina Wu: georginawu@gmail.com.

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<http://www.ila.org.au>

International Economic Law Update

Harmonising the WTO Public Morality Exceptions and the *Seals* Dispute

By Kyle Dickson-Smith, FCI Arb.¹



How does international law define a State's margin of appreciation or discretion in regulatory policy? In the last five years, have we come any closer to setting a reasonably flexible, but predictable, limit?

Granted, the determination of a State's margin of appreciation is usually highly dependent on the applicable legal and regulatory framework. That much is readily apparent when we compare the recent decisions of the World Trade Organization ('WTO') – in *EC-Seal Products*² – and the International Court of Justice ('ICJ') in *Australia v Japan*.³

¹ Kyle Dickson-Smith FCI Arb., is an international lawyer and arbitration counsel at Appleton & Associates International Lawyers, who specialises in trade law and investment treaty disputes, such as those under the NAFTA. The views expressed in this article are those of Kyle Dickson-Smith and are not attributable to Appleton & Associates. See www.kyledickson-smith.com.

² Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* WTO Docs WT/DS400/R and WT/DS401/R (25 November 2013); Appellate Body Reports, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (22 May 2014).

³ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 1.

The WTO Appellate Body ('AB') recently attempted to define the scope, under the WTO framework, of how a State may regulate for public moral concerns.

Ultimately, the AB concluded that the ban on seal products was justified under the right to protect public morals (specifically the protection of seal welfare), but that the ban was arbitrary in the way it was applied.

Similarly, the ICJ determined that Japan's hunting of whales, which that State argued was carried out for scientific purposes, was not in accordance with the *International Convention for the Regulation of Whaling* ('ICRW').⁴ The ICJ found (by 12 votes to four) that the granting of permits and the killing, taking and treating of whales under the Japanese Whale Research Program under Special Permit in the Antarctic II ('JARPA II') could not be justified as being for the purposes of scientific research under the ICRW.

While these disputes employed different legal tests, there were thematic similarities. That is, the decision-makers in both cases looked at the *design* and the *application* of the measure in dispute and, in particular, whether the measure was applied appropriately in order to meet its stated objectives. This past March, the ICJ stated that the design and implementation of Japan's Antarctic whaling program must be reasonable in relation to its stated scientific objectives.⁵ In a similar vein, the AB considered

⁴ *Ibid*; *International Convention for the Regulation of Whaling*, signed 2 December 1946, (entered into force 10 November 1948).

⁵ In particular, the Court held that the whaling program constituted both 'scientific research' and 'for purposes of'. The Court concluded that 'JARPA II involves activities that can broadly be characterised as scientific research'. The Court applied a very similar test as that part of GATT Article XX 'weighing and balancing' analysis, in deciding whether a program was 'for purposes of'

whether the EU's restriction on the import and sale of seal products was necessary for the protection of public morals,⁶ and how that restriction was applied.⁷

EC - Seal Products - The Facts

The *Seals* case focused on a 2009 European Commission regulation that bans the import and sale of seal products ('EU Seal Regime').⁸ Norway and Canada claimed that the ban unfairly discriminated against their industries, when compared to the market access enjoyed by Greenland, Sweden and Finland. The EU supported the ban on the basis of the inhumane nature of seal hunting. It was claimed that the EU violated both the WTO's *General Agreement on Tariffs and Trade* ('GATT')⁹ and the *Agreement on Technical Barriers to Trade* ('TBT').¹⁰

Panel Decision

In November 2013, the WTO dispute settlement panel determined that, while the EU Seal

scientific research; stating that the design and implementation of the program must be reasonable in relation to its stated scientific objectives. The Court ultimately concluded that the design and implementation of JARPA II was not reasonable in achieving the stated objectives.

⁶ Pursuant to the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('General Agreement on Tariffs and Trade 1994') art XX(a) ('GATT').

⁷ Pursuant to the chapeau of GATT art XX.

⁸ *Regulation (EC) No 1007/2009 of the European Parliament and of the EC Council of 16 September 2009 on trade in seal products, and subsequent related measures* [2009] OJ L 286/36.

⁹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('General Agreement on Tariffs and Trade 1994') ('GATT').

¹⁰ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('Agreement on Technical Barriers to Trade') ('TBT').

Regime restricts international trade under the GATT, the measure was necessary for the protection of 'public morals' under both the GATT Article XX(a) and the TBT Agreement.¹¹

While the Panel did make a point that the GATT and the TBT Agreement should be interpreted in a 'consistent and harmonious manner', the Panel did not elaborate on how that should be achieved. It would have been helpful for the Panel to have provided detailed guidance as to how the obligations under these two agreements relate. The question remains as to how the legal standard of a State's right to regulate in the interest of 'public morals' under the GATT XX can be applied under the TBT Agreement, and vice versa.

Appellate Body Decision

The Appellate Body also determined that, while the EU Seal Regime was necessary to protect public morals under GATT art XX(a),¹² it found that the ban was arbitrary in the way it was applied, in accordance with the chapeau of GATT art XX. The AB found that the EU failed to demonstrate how an exception under the seal ban (namely, products derived from indigenous communities) could be applied consistently and without ambiguity, when compared to other, commercial, hunts.

As the Appellate Body determined that the Seal Regime was not a 'technical regulation' invoking the EU's obligations under the TBT Agreement, it did not analyse whether the measures were necessary to protect public morals under art 2.2 of the TBT. While the Appellate Body expressed that 'there are important parallels' between GATT art XX and

¹¹ For a further examination of the Panel's decision, please refer to Kyle Dickson-Smith, FCI Arb, 'Beyond Bali, "Justified Morality" and Seals', *International Law Association (Victoria Chapter) News Bulletin* (March 2014) <ila.org.au/wp-content/uploads/2013/06/Mar-2014-ILA-News-Bulletin.pdf>.

¹² That is, after conducting a review of the 'weighing and balancing' factors for the necessity analysis.

the TBT Agreement,¹³ and clarified that the TBT standard could not be simply transposed to the GATT, it did not clarify how the tests of necessity under each of the TBT and GATT, which conceptually overlap, could be applied to each other. In particular, the AB did not clarify how an analysis of whether a measure is necessary under the TBT art 2.2 could be applied to GATT XX(a), and vice versa.

Given that GATT XX-like exceptions have found their way into investment agreements,¹⁴ including the Australia-Korea FTA,¹⁵ and the China-ASEAN Investment Agreement,¹⁶ and are proposed for inclusion in the Transatlantic Trade and Investment Partnership ('TTIP'),¹⁷ the Appellate Body's interpretation of such clauses is relevant for these investment treaties.

Conclusion

The message of both the WTO and ICJ is consistent and clear. When addressing conduct relating to the killing and taking of animals that is declared by the State to be for humane purposes (scientific research or to protect a humane method of killing), the justification of these measures is not solely dependent on that State's subjective standard. Rather, it must be tested against an objective benchmark.



Finalists and judges from the 2014 Public International Law Moot Competition. Front row, from left to right: Jane Gregory (Allens), Justice Michelle Gordon, Stephen Moore (Monash), Gabriella Bornstein (Monash). Back row, from left to right: Paul Annabell (Allens), William Thomas (Allens), Dr Andrew Coleman, The Hon. Catherine Branson QC, James Beavis (Monash).

¹³ The Appellate Body in this case, was referring only to the *Agreement on Technical Barriers to Trade*, opened for signature 12 April 1979, 1186 UNTS 276 (entered into force 1 January 1980) art 2.1.

¹⁴ Simon Lester, 'An Investment Exception in the Australia - Korea FTA' on *International Economic Law and Policy Blog* (17 February 2014) <worldtradelaw.typepad.com/ielpblog/2014/02/an-investment-exception-in-the-australia-korea-fta.html>.

¹⁵ *Australia-Korea Free Trade Agreement*, signed 8 April 2014.

¹⁶ *ASEAN-China Investment Agreement*, signed 15 August 2009, (entered into force 1 January 2010).

¹⁷ European Commission, 'Public consultation on modalities for investment protection and ISDS in TTIP' (Consultation Document, March 2014) <trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf>.

Mothers of Srebrenica v The Netherlands: Increased Legal Risk for States Who Contribute Troops to Peacekeeping Operations

By Harry Aitken¹⁸



The Netherlands has been held liable for failing to protect Bosnian Muslim men and boys from being killed by Serbian forces during the 1995 genocide¹⁹ in Srebrenica.²⁰ In a ground-breaking decision, the Rechtbank Den Haag (a Dutch District Court) determined that Dutch peacekeepers (the ‘Dutchbat’) stationed outside the town of Srebrenica acted unlawfully by handing over Bosnian Muslim males under their protection.

¹⁸ Harry Aitken is a member of the executive committee of the International Law Association (Victoria) and works for a top tier Australian law firm. The views expressed in this article are solely his own.

¹⁹ See, eg, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 4; *Prosecutor v Krstić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004), in which it was held that the Srebrenica massacre constituted genocide.

²⁰ *Mothers of Srebrenica v The Netherlands* [2014] (Unreported, District Court of the Netherlands, L Alwin, DR Glass and JW Bockwinkel, 16 July 2014) (‘the case’). The case used for the purposes of this article was a translation and is not the official version of the judgment.

The decision follows a landmark ruling against the Netherlands by the Dutch Supreme Court (the ‘Nuhanović case’) last year which marked the first time a State has been held liable for the actions of its troops operating under a United Nations (‘UN’) mandate in a peacekeeping mission.²¹ The latest ruling exposes the Netherlands to a greater scope of liability and is likely to have wider ramifications for States that contribute troops to peacekeeping operations.

Background

The tragedy which befell the residents of Srebrenica in July 1995 has been the backdrop to litigation spanning from the International Court of Justice (‘ICJ’) and international criminal courts and tribunals to domestic courts.

Srebrenica, which was classified as a UN safe area, came under attack from Serb forces led by General Ratko Mladić on 6 July 1995. By 11 July, Serb forces had captured the town, prompting thousands of refugees to flee. Some 20,000–25,000 refugees sought shelter in a nearby ‘mini safe area’ set up by Dutch forces. This consisted of a Dutch military compound and nearby factory spaces in Potočari. Of these refugees, approximately 5,000 were held in the compound itself whilst the remainder were contained in adjoining factories. Between 12 July and 13 July all refugees from the mini safe area were ‘evacuated’

²¹ *Nuhanovic v The Netherlands* [2013] (Unreported, Supreme Court of the Netherlands, FB Bakels, CA Streefkerk, MA Loth, CE Drion and MV Polak, 6 September 2013).

by bus. However, the evacuation was organised by Serb forces and the Dutch peacekeepers had little control over the process. During the evacuation, Serb forces put able-bodied men on separate buses under the false justification that they were to be screened for war crimes. In practice, these buses were routed to separate locations and the men were executed. Serb forces killed approximately 7,000 men from the safe area in the short period after the fall of Srebrenica.

In the Nuhanović case, the Supreme Court determined that the Dutchbat acted unlawfully by evicting from its compound a local employee of the Dutchbat and his family, as well as the family of a local UN employee, all of whom were subsequently killed by Serb forces.

The present suit was brought by ten claimants as well as the Mothers of Srebrenica – a victims group that represents approximately 6,000 relatives of victims of the Srebrenica genocide. The case concerns the same Dutch battalion but pertains to a much broader scope of conduct and class of victims. Unlike the Nuhanović case, the plaintiffs sought to ascribe responsibility to the Netherlands for the actions of the Dutchbat leading up to the fall of Srebrenica as well as the ensuing evacuations. Further, the case concerned the Netherlands' liability with respect to all refugee males within their protection and not just local staff affiliated with the UN.

Initially, the plaintiffs sought to attribute responsibility to the UN as well as the Netherlands. However, it was held in related decisions by the Dutch Supreme Court²² and the European Court of

²² *Mothers of Srebrenica v The Netherlands* [2011] (Unreported, Supreme Court of the Netherlands, JB Fleers, AMJ van Buchem-Spapens, FB Bakels, CA Streefkerk and WDH. Asser, 13 April 2012) .

Human Rights²³ that the UN enjoys immunity from the jurisdiction of national courts.

The case

The claim

The plaintiffs argued that the Netherlands failed to protect the refugees in the mini safe area from execution in violation of its obligations under Dutch law and international law (including international humanitarian law, human rights law and the UN Charter).²⁴ These violations, it was alleged, stemmed from the failure of the Dutchbat, inter alia:

- a) to guarantee the provision of humanitarian aid;
- b) to deter the advances of the Serb forces sufficiently;
- c) to allow refugees to enter the compound after a certain time;
- d) to report the war crimes it had observed; and
- e) to prevent the evacuation of refugees in the mini safe area, including the compound.²⁵

The court evaluated the claim by, first, determining whether the above acts were attributable to the Netherlands and second, establishing whether the acts were unlawful.

Attribution

As the Dutchbat were peacekeepers, they operated under the command and control of the UN. Accordingly, the first issue for the court was whether the acts of the Dutchbat could be attributed the Netherlands.

²³ *Stiching Mothers of Srebrenica & Ors v Netherlands* (European Court of Human Rights, Third Section, Application Number 65542/12, 11 June 2013).

²⁴ Case, para 3.2.

²⁵ *Ibid*, para 3.2.1.

The court adopted the recent test from the Nuhanović case, according to which the acts of the Dutchbat would be attributable to the Netherlands if the State exercised ‘effective control’ over its soldiers.²⁶ The test for effective control is derived from art 7 of the *Draft articles on the responsibility of international organizations*²⁷ and ‘means the actual say or factual control’ over the conduct.²⁸ Under the principle of ‘dual attribution’, effective control may be exercised simultaneously by both the UN and the Netherlands.²⁹

The court found that the Netherlands exercised effective control over the mini safe area after the fall of Srebrenica because Dutch officials and UN leadership had decided, in ‘mutual consultation’, how the Dutchbat should handle the unfolding humanitarian crisis.³⁰ The plaintiffs, however, were generally unable to establish effective control by Dutch authorities during the siege on Srebrenica. This meant that certain allegations – such as the Dutchbat’s failure to deter Serb advances – could not be attributed to the Netherlands.

Legal framework

The court next had to determine the applicable legal framework with which to assess the lawfulness of the Netherlands’ actions.

The plaintiffs charged the Netherlands with violating the right to life and prohibition against torture contained in arts 2 and 3 of the *European Convention on Human Rights* (‘ECHR’)³¹ and arts 6 and 7 of the

International Covenant on Civil and Political Rights (‘ICCPR’).³² As contracting States are only bound to uphold these obligations within their jurisdiction, the first issue for the court was whether the Dutchbat was subject to these obligations when operating in the mini safe area in Potočari. Adopting the ‘effective control’ test from *Al-Skeini v UK*,³³ the court determined that the Netherlands was bound by the ECHR and ICCPR with respect to the acts of the Dutchbat within the compound, but not in the wider mini safe area which included the factories.³⁴

The court also determined that the Netherlands was subject to the obligation to prevent genocide.³⁵

The applicable standard by which to determine liability for violations of the above principles is contained in art 6.162 of the Dutch Civil Code, which governs tortious acts.³⁶ Under this framework, the plaintiffs had to establish a causal link between the unlawful acts of Dutchbat and the murder and inhuman treatment of male refugees by Serb forces to establish the Netherlands’ liability.³⁷

Unlawfulness

The court determined that the majority of the acts attributed to the Netherlands were not in violation of the aforementioned legal principles. After the fall of Srebrenica, the Dutchbat was outnumbered by Serb forces and was forced to comply with the orders of General Mladić. As the Dutchbat was required, under its mandate, to prioritise its own safety over the

²⁶ Case, para 4.33.

²⁷ International Law Commission, *Draft articles on the responsibility of international organizations*, 63rd sess, 2011.

²⁸ *Ibid* para 4.34.

²⁹ *Ibid*.

³⁰ *Ibid* paras 4.83 and 4.87.

³¹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

³² *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³³ *Al-Skeini & Ors v The United Kingdom* (European Court of Human Rights, Grand Chamber, Application Number 55721/07, 7 July 2011).

³⁴ Case, para 4.161.

³⁵ *Ibid* para 4.179.

³⁶ *Ibid* paras 4.171-4.172.

³⁷ *Ibid* para 4.182.

refugees, it did not act unlawfully in the circumstances.

The court did find that Dutchbat ought to have reported the full extent of the war crimes it observed in the mini safe area.³⁸ However, as the reporting of these crimes would not have prevented the Serb forces from engaging in them, the plaintiffs failed to establish the required causal nexus under Dutch law.³⁹

The Netherlands was, however, held liable for handing over 320 refugee men housed within the compound to Serb forces to be ‘evacuated’.⁴⁰ These men were later executed. The Dutchbat had participated in the evacuation of refugees housed outside the compound on 12 and 13 July 1995, and knew, or ought to have known, that Serb forces in separating able-bodied males, were planning to execute them. Moreover, the Dutch maintained a high degree of control over the compound and they would not necessarily have jeopardised their safety by refusing to hand over able-bodied men. The causal nexus was established because the continued cooperation of the Dutchbat in the Serb evacuation resulted in the death of the 320 men.⁴¹

The court held the Netherlands liable for the deaths of the men in the compound and ordered that it pay damages to the victims’ relatives.

Implications

The Netherlands is the first State to have been held liable for the actions of its soldiers operating under a UN peacekeeping mandate. Other troop-contributing countries will now be considering the extent of their exposure to liability in their respective jurisdictions. With victims often unable to seek effective redress in international courts and tribunals, and prevented from

suing the UN, States may represent the last possible defendant.

The liability of states will, of course, be difficult to establish and depend on a range of factors including standing, jurisdiction and the applicability of relevant legal principles.

Troop-contributing countries can, nevertheless, draw some lessons from the Dutch line of cases. The most obvious amongst these is to not interfere in the operational command of the UN in a peacekeeping operation. To do so could result in the acts of national troops being attributed to the State rather than solely the UN. The second lesson is to operate strictly within the parameters of the relevant mandate. This means, for example, that protection obligations should not be abandoned unless peacekeepers face a genuine threat. The third lesson is to exercise particular caution when soldiers maintain effective control over a geographical area. When a high degree of control and authority exists, a State’s jurisdiction may be invoked extra-territorially, expanding the scope of potential liability.

³⁸ Ibid para 4.269.

³⁹ Ibid para 4.273.

⁴⁰ Ibid para 4.330.

⁴¹ Ibid.

The Law of the Sea Convention and Coastal States’ Right to Prevent Oil Pollution

By Captain Francis Lansakara, LLM,
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Introduction

Increases in global shipping movements have led to concerns about the threat oil pollution poses to environmental security. These concerns have been borne out in many oil pollution disasters and ever increasing risk of pollution since every year more than three billion tons of oil cargo are transported between ports around the world. In an attempt to counter these threats international organisations such as the United Nations and the International Maritime Organization have adopted a number of conventions that consider the issue of oil pollution and that establish best practice prevention measures. These conventions are, however, of general application to marine health and life and do not specifically address the issue of coastal environmental security; in order to secure the environment of the coastal State recourse to more specific legal tools is necessary.

The Convention on the Law of the Sea and Security

There can be no doubt that the direct impacts of oil pollution on the marine environment and its ecosystem threaten environmental security. The central international instrument safeguarding the maritime environment is the *United Nations Convention on the Law of the Sea* (the ‘Convention’, ‘UNCLOS’),⁴² to which most States are signatories.⁴³ Art 19(1) of UNCLOS states that the passage of a foreign vessel through the territorial sea of a coastal State ‘is innocent so long as it is not prejudicial to the peace, good order or security of [that] State’. Art 19(2) then sets out a non-exhaustive list of those activities that are deemed to be prejudicial to peace, security and good order with respect to the Convention. These include ‘any act of wilful and serious pollution contrary to this Convention ... any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State ... any other activity not having a direct bearing on passage’.⁴⁴ Without a clearer definition of what constitutes ‘innocent’ sea passage a littoral State has to consider a wide range of matters in order to determine whether a foreign vessel is a pollution hazard prejudicial to its environmental security.

In order to take advantage of the enforcement provisions provided for in the Convention, including

⁴² *The United Nations Convention on the Law of the Sea* (‘UNCLOS’), opened for signature 10 December 1982, 1833 UNTS 3, (entered into force 16 November 1994).

⁴³ As at 9 July 2014 there are 157 signatories and 166 parties to UNCLOS.

⁴⁴ UNCLOS arts 19(2)(h), (k) and (l) respectively.

the boarding and/or inspection of a vessel, the arrest of crew or commencement of judicial proceedings,⁴⁵ this determination must be done in accordance with the Convention. A failure to interpret the Convention correctly could see the coastal State face sanctions such as payment of compensation for wrongful detention. On the other hand, a failure to engage the rights provided for in the Convention will compromise a coastal State's environmental security.

The Definition of 'Serious' Oil Pollution

Any act of wilful and serious pollution will be a threat to the environmental security of a littoral State. In order to establish such a threat, what constitutes 'serious' pollution will need to be determined. This will most likely differ from one coastal State to another and even between regions within a coastal State. Therefore, 'serious' needs to be interpreted in the context of the circumstances of a particular case; for example, even a minor oil spill will be serious if it occurs in a heritage or conservation site, such as Australia's Great Barrier Reef, whereas the same spill level may not amount to 'serious pollution' if it occurs on coastal waters facing an ocean. To use the examples given earlier, the oil pollution from both the *Exxon Valdez* and *Hebei Spirit* spills were 'serious' despite the fact that the former was ten times greater in volume. Whilst the domestic context may be important in establishing the impact of pollution, the provisions of the Convention must be applied to determine whether the coastal State's environmental security is at stake or not.

Enforcement of International Conventions

Where a coastal State can find no grounds for declining 'innocent' sea passage to a foreign vessel

under the Convention, other options available to it in instances of a suspected threat of pollution might be found in the enforcement and compliance measures specified in other international instruments with respect to internationally agreed standards during innocent sea passage. These measures are, however, generally limited to information gathering, not physical inspections. Two particular examples of other international instruments are the *International Convention on the International Regulations for Preventing Collisions at Sea*, ('COLREGS')⁴⁶ and the *International Convention for the Prevention of Pollution from Ships*.⁴⁷

The Convention requires that '[a] coastal State shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage'.⁴⁸ However, it is likely that any physical inspection of a foreign vessel by a coastal State would indeed be considered to have the practical effect of impairing the right of innocent passage unless the coastal State can establish good grounds for the disruption. Such grounds will, however, be very difficult, if not almost impossible, to establish except by way of inspection on the basis of 'reasonable suspicion'⁴⁹ and would therefore only be permissible in accordance with the Convention itself. The Convention is silent about what constitutes 'reasonable suspicion'.

Even if it harbours a reasonable suspicion, the coastal State is not likely to interfere because in case of wrongful detention coastal State will become liable in

⁴⁶ *International Convention on the International Regulations for Preventing Collisions at Sea*, ('COLREGS') 20 October 1972.

⁴⁷ *International Convention for the Prevention of Pollution from Ships*, (entered into force 2 October 1983).

⁴⁸ UNCLOS art 24.

⁴⁹ Whilst inspection on the grounds of 'reasonable suspicion' would allow the coastal State a free hand it is a controversial solution.

⁴⁵ UNCLOS art 73.

damages. Even if a court were to develop a particular test for the detention of ships on reasonable suspicion since it would not have universal effect.

For these reasons it is unlikely that other international instruments could be used to justify physical intervention that would not be permitted under the Convention itself.

Traffic Regulatory Measures and their Contribution to Oil Pollution Prevention

Although they are not explicitly mentioned in the Convention, traffic separation schemes established by the International Maritime Organization⁵⁰ might provide coastal States with an alternative avenue for managing oil pollution risks, as an organised traffic system will result in fewer accidents and thereby reduce the risk of oil pollution. In particular, the Convention supports the application of these schemes as it requires that foreign vessels comply with all international rules relating to the prevention of collisions at sea.⁵¹ In utilising these traffic separation schemes, however, the question will be whether sea traffic lanes may cover more than one State's territorial sea as introducing such control measures will require multinational agreements.⁵² The International Tribunal of Law of The Sea is the relevant dispute settlement body. Regional mechanisms such as maritime agreements between

Australia, Indonesia and other Pacific Nations and ASEAN Chapter 8 could also be considered with regard to disputes or negotiations on regulatory measures to prevent pollution.

Could Oil Pollution Prevention be Achieved through the Convention?

It seems premature to suggest that there is any satisfactory protection from oil pollution in the current international legal framework. Two main issues need to be addressed: in what conditions is it permissible for coastal States to deny or impair innocent sea passage; and what preventive measures are available to coastal States to address threats to their environmental security. None of these issues are fully addressed by the Convention or other international legal instruments and the available domestic remedies are limited. There is a need for further research and development to obtain a clearer understanding of what constitutes 'serious pollution' and how the individual circumstances of different States can be taken into account in establishing its existence.

⁵⁰ Pursuant to Chapter V of the *International Convention for the Safety of Life at Sea* (as amended), opened for signature 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980).

⁵¹ Art 21(4) of the Convention states that '[f]oreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea' and art 39(a) provides that 'ships in transit passage shall comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea'.

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Ewens, at bcewens@gmail.com

Vladimir Putin's 'Law Talk', Crimea, and the Crime of Aggression



Introduction by Bronwen Ewens, News Bulletin editor

On 1 March 2014 Vladimir Putin submitted an appeal to the Council of the Russian Federation for authorisation to use armed force '[i]n connection with the extraordinary situation that has developed in Ukraine and the threat to citizens of the Russian Federation, our compatriots, the personnel of the military contingent of the Russian Federation Armed Forces deployed on the territory of Ukraine (Autonomous Republic of Crimea)'. The very same day the Council granted the requested authorisation to deploy forces in Ukraine, to which Crimea still belonged.

Many international lawyers have felt dismayed over the failure of international law to prevent Russia's use of armed force in Crimea, and Eric Posner went so far as to hold international law up to mockery for its impotence in the face of 'the most important geopolitical event so far this year'. More hopefully, Nico Krisch saw Russian rhetoric about the right to protect as evidence of international law's exercising a 'constraining effect' on Putin's ambitions. Chris Borgen, conversely, wrote that the official Russian

'law talk' was mainly for domestic consumption, to reassure Russians of the rightness of the cause.

Professor Ben Saul of the University of Sydney, a former member of the ILA's International Committee for the Compensation of Victims of War, explored the legality of the right to protect and reached an unequivocal conclusion:

Is Russia's military deployment in the Crimea region of Ukraine illegal under international law? Russia claims to be protecting Russians at risk there. NATO and US president Barack Obama say it is an aggressive invasion in violation of international law.

Under the international law on the use of force, encoded in Article 2(4) of the United Nations Charter of 1945, countries are generally prohibited from using military force against other countries. There are narrow exceptions where a country uses force in self-defence against an armed attack, or where the UN Security Council has explicitly authorised the use of force to restore international peace and security.

Ukraine has not attacked Russia so Russia is not acting in self-defence as it is conventionally understood. The Security Council also has not authorised the Russian action. This is not, however, the end of the legal question.

In the first place, Russia claims to be protecting ethnic Russians, or Russian citizens, at risk in the Crimea. Some countries, including the United States, United Kingdom and Israel, have historically argued that the right to use force in self-defence includes the right to protect citizens at risk overseas, even when a

country's own territory, military or government has not been attacked.

Most countries have never accepted this expansive legal argument. For most countries, danger to foreign citizens is not serious enough to equate to an 'armed attack', which is the legal threshold triggering the right to self-defence. Military force is only considered justified where the country itself is under attack. In policy terms, lowering the threshold of self-defence to protect nationals at risk overseas is thought to dangerously escalate international violence. Claims to protect 'ethnic' nationals (as opposed to 'legal' citizens) are even more dubious.

History also suggests that claims to protect nationals at risk overseas are also frequently abused, and become a pretext for other ambitions, such as the seizure of territory or wider political or strategic goals. There are, admittedly, some examples where actions have not been abusive, such as when Israel rescued hostages from a hijacked civilian aircraft at Entebbe in 1976, where Idi Amin's Uganda was harbouring terrorists. Even that example was controversial and said to be a violation of Uganda's sovereignty by many at the time.

In the view of most countries and international lawyers, there is no international legal right of self-defence to protect citizens in danger overseas. Even if there were, the Russian action in Crimea would not qualify. An armed attack requires actual military violence to be committed. Speculation that the unstable political climate in the Ukraine might endanger Russian nationals is not sufficient. If

anything, the Russian intervention magnified the dangers for ethnic Russians or Russian nationals there.

Russia also had no right to forcibly assist an ethnic minority inside the independent country of Ukraine to secede pursuant to any purported right of self-determination.

A second legal question is whether Russian forces were legitimately "invited" into the Crimea by Ukraine. Under international law, the lawful government of one country is entitled to request military assistance from a foreign country to restore law and order or stabilise domestic political unrest. This was, for instance, one legal basis of Australia's deployments in places like Afghanistan, the Solomon Islands, or East Timor in recent years.

It is clear that the agreement between Russia and Ukraine to allow Russian military bases in the Crimea did not permit wider Russian deployments in Ukraine without Ukraine's consent.

Even if Viktor Yanukovich had remained the lawful president of Ukraine and had invited Russian forces, it is extremely unlikely that he would have controlled the terms of Russia's engagement in the Crimea. This fact then provides the clearest legal answer. Russia unilaterally invaded Ukraine's territory, and not by invitation, in self-defence, or with UN blessing. That is contrary to international law and the UN Charter, and amounts to the international crime of aggression.



On Twitter?

Stay up to date with international law news by following the Australian Chapter's new International Law Association Twitter Account.

International Law Events, Opportunities and Conferences

By Bronwen Ewens

2015 ESIL Annual Conference Oslo, 10 – 12 September 2015

The 2015 European Society of International Law (ESIL) Annual Conference will be held in Oslo. The event, hosted by the PluriCourts Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, will take place at the University of Oslo.

The Conference will focus on the legitimacy of international courts and tribunals and, in particular, on how such legitimacy is affected by the origins of these bodies, their work and outcomes. Contributions will be welcome in the areas of international law, political science and political theory.

The programme will include plenary sessions, fora, agorae and poster presentations.

<http://www.esil-sedi.eu/node/494>

Call for Applications: 2015 Peter Nygh Hague Conference Internship

The Australian Institute of International Affairs and the Australian Branch of the International Law Association call for applications for the 2015 Peter Nygh Hague Conference Internship. Each year, the internship provides a graduate or post graduate student with the rare opportunity to travel to The Hague in the Netherlands and work in the area of Private International Law. Successful applicants receive a contribution towards their living expenses for the duration of the internship. Applications for the 2015 Nygh Internship close on 30 September.

<http://ila.org.au/news/call-for-applications-2015-peter-nygh-hague-conference-internship/>

ASIL Annual Meeting, Washington DC, April 8-11, 2015

At its 2015 Annual Meeting, the American Society of International Law (ASIL) will ask how international law is adapting to a rapidly changing world. For example: Are the existing international legal regimes capable of meeting these challenges or will new regimes be required? Through what processes can we expect international law to adapt, and how might new norms emerge in the face of persistent disagreements or holdout problems? How is the legal order responding as the world moves from a unipolar system dominated by the United States to a more multipolar system? And what is the role or relevance of international law where it might be unable to resolve global issues?

<http://www.asil.org/annualmeeting>

From Principles to Practice: Securing compliance with the laws of war, Perth, 5-6 November 2014

The conference will focus on improving compliance with International Humanitarian Law (IHL), exploring themes such as prevention of breaches of IHL through dissemination and other means, determining individual criminal responsibility for breaches, experiences from the field and strengthening compliance mechanisms for IHL.

Speakers include Mr Serge Brammertz, Prosecutor of the ICTY and former Deputy Prosecutor in the ICC.

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The editor's blog roll of recent commentary on topical international legal issues

By Bronwen Ewens

Conflict of Laws

<http://conflictoflaws.net/>

This website is intended as a news and discussion portal for those interested in the conflict of laws (private international law). Its international focus is reflected by the team of editors, representing scholars from most major jurisdictions around the world.

China Law Blog

<http://www.chinalawblog.com/>

This blog discusses practical aspects of Chinese law and their impact on business, especially such matters as forming companies in China, drafting international contracts with Chinese companies (in English and in Chinese), intellectual property protection and international litigation and arbitration.

Opinio Juris

<http://opiniojuris.org/>

Opinio Juris is an online forum of discussion and debate about international law and international relations. The site includes regular posts by academics on a range of international law issues as well as on-line symposia, book discussions and guest-posts from government staff, private practice lawyers and those for working international organisations.

The International Economic Law and Policy Blog

<http://worldtradelaw.typepad.com/ielpblog/>

The IELP blog contains a wide range of commentary on recent case law and scholarship in international economic law and policy, including in relation to World Trade Organization law and practice, free trade agreements and investor-state arbitration.

Lawfare

<http://www.lawfareblog.com>

Published by the not-for-profit Lawfare Institute in conjunction with the Brookings Institution, this blog covers the intersection between US national security and US law. Examples of subjects include cybersecurity, Guantánamo habeas litigation, targeted killing, biosecurity, and universal jurisdiction. Recent commentary has covered the ICJ's decision on provisional measures in the case that Timor-Leste has brought against Australia as well as Russia's international legal justifications for its military incursion into Ukraine. Topical and professional, this blog is highly recommended.

International Law Observer

<http://www.internationallawobserver.eu/>

This blog is the brainchild and work of a group of international law researchers. It features reports and commentary of topical issues of public international law and EU law.

Kluwer Arbitration Blog

<http://kluwarbitrationblog.com>

Kluwer Arbitration Blog (KAB) is a publication of Kluwer Law International providing information and news on international arbitration. It features input from experts from law firms, arbitration institutions, and academia to report on the latest developments. The result is a fresh, high-quality, and timely examination of the world of international arbitration.

