

International Law in Diplomacy, Some Reflections

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When a well known and articulate American Ambassador finished his speech, an enthusiastic lady in the audience walked up to him to congratulate him and said: "Oh Mr. Ambassador, this speech was superfluous!" Realising her mistake, he replied tongue in cheek, "Perhaps I should publish it posthumously," to which she immediately responded "Oh yes! The sooner the better."

It is a great pleasure for me to be addressing a concerned and knowledgeable audience such as you. I realise that the topic I selected is very broad, but I hope it will give me the opportunity of summarising certain views – of necessity, not in depth - distilled over several decades, on a number of subjects of international law of topical importance.

While in my professional life I have been primarily a diplomat, and less so an arbitrator and a banker, I have over the years been, by conviction and training, an international lawyer, genuinely concerned with the need and desirability of the observance of the rules of international law, and have done – if I may say - my modest best to contribute to this end.

Allow me to recall, as an illustration of this position, that in my first statement in the Sixth Committee as a very green 23 year old delegate of Cyprus (Cyprus became independent in 1960 and was admitted to the United Nations in September of that year), I said that I "viewed with some apprehension... the suggestion that new States need not be bound by rules of international law which they had not helped to create and which ran counter to their interests"¹ and stressed that the right view is that "national interests could not be allowed more weight than international legal obligations."²

Perhaps before I go any further, I should caution you on a couple of points. I was once described as a "warm" speaker and I was pleased to hear it until the awful truth

¹ Official Records of the General Assembly, fifteenth session (Part I), Sixth Committee, Summary Records of Meetings 21 September-14 December 1960, 668th meeting, U.N. Doc. A/C.6/SR.668 para. 19

² Id.

dawned on me that what was meant by “warm” was "not too hot!" The other is that currently I am in this country as a visitor, or non-resident alien, and I would not want to, and I presume you would not want me to, say or do anything that would make me an undesirable alien... There is another saying – attributed to a Japanese Ambassador - that a diplomat is someone who thinks twice before saying nothing. But if I applied this here literally it would not help much for, if it were so, what business do I have to be giving the C.V. Starr Lecture today?

So I shall proceed with the subject which, let me remind you, is Some Reflections on International Law in Diplomacy.

The old fashioned definition of international law is "the body of rules and principles of action which are binding upon civilised States in their relations with each other." Diplomacy has been described as "the application of intelligence and tact to the conduct of foreign relations." Indeed, other definitions exist, and other epithets have been applied to diplomats and to lawyers, but this may not be the appropriate time or occasion to go into...

What role does international law play in the conduct of diplomacy? This was one of the main subjects of the 1983 Annual Meeting of The American Society of International Law (ASIL), to which I, as the Ambassador of Cyprus to the United States at the time, participated as a panellist, together with the Ambassadors of Canada and of Venezuela, who were prominent international lawyers. The discussion elicited the conclusion that international law rules were invoked and relied upon in a great variety of situations, especially in negotiations which were juridical in nature.³ For my part I observed that, in my experience, international law principles and rules played a substantial role in my diplomatic work, more particularly in presenting, bilaterally and in international forums, aspects of the Cyprus question, couched in legal terms. It would go beyond the time limit of this lecture to expand, but this might be pursued in the Q and A

³ AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE 77TH ANNUAL MEETING (Washington D.C., 1963), pp. 100-102.

period.

In subsequent years I had the occasion, time and again, to invoke rules such as diplomatic and consular privileges and immunities and the observance of the provisions of the United Nations Headquarters Agreement of 1947,⁴ as the Deputy Dean and later the Dean of the Diplomatic Corps in Washington, and as Chairman of the Host Country Relations Committee at the United Nations in New York. Each case provided many instances where diplomacy was exercised on the basis of the applicable international law rules.

It would perhaps be relevant to remind you of the very recent publication of ASIL "International Law: 100 Ways it Shapes Our Lives,"⁵ which lists 100 tangible examples to demonstrate that "international law not only exists, but also penetrates much more deeply and broadly into every life than the people it affects may generally appreciate,"⁶ ranging from health, to telecommunications, to labour relations, etc, etc. This goes way beyond the normal range of diplomacy. ASIL's activities in educating federal and other national judges on international law through its programme of judicial outreach, could be usefully supplemented by similar outreach exercises by foreign diplomats in national capitals, as we did in Washington, through an informal group of Ambassadors who had previously served at the United Nations, on such topics as the U.S. ratification of the 1982 Law of the Sea Convention⁷ or the U.S. contribution to U.N. financing.

Now, going into the main part of my presentation, international terrorism, and international law aspects of combating it, is not a subject that lends itself to easy treatment. I recall that, back in 1972, the Sixth (legal) Committee of the U.N. General Assembly attempted and failed to achieve an agreed definition of terrorism.⁸ As the Vice-Chairman of the Committee at the time, I had the unenviable task of explaining, in a lecture at the Council on Foreign Relations in New York, the circumstances which

⁴ United Nations Headquarters Agreement of 26 June 1947, 11 U.N. Treaty Series 11.

⁵ This interactive project can be found on <http://www.asil.org/asil100/ways.html>.

⁶ See <http://www.asil.org/Centennial/100Waysfront.html>.

⁷ United Nations Convention on the Law of the Sea, 1982, 1833 U.N. Treaty Series 3.

⁸ U.N. G.A.O.R., 29th Sess., 6th Comm., U.N. Doc. A/9619, 14 December 1974.

prevented agreement. There was much argument over the root causes of terrorism, the right of liberation movements and of people under foreign occupation or alien domination to use force to achieve freedom, and also of State terrorism. The basic difficulty was then, and continues to be now, that one's terrorist is someone else's freedom fighter (including, perish the thought, George Washington and Archbishop Makarios!)

In the wake of the universal condemnation of the atrocious attacks of 11 September, 2001, and following the unanimous adoption by the Security Council of S.C. Resolution 1373 (2001),⁹ there was a new impetus in the Sixth Committee to get over the hurdle of the definition, with substantial input by Secretary-General Kofi Annan, in which I tried to play my modest best as the Cyprus delegate. Alas, the opportunity was again missed, primarily because the Islamic group at the U.N. took a firm stand which prevented consensus and the utilisation of the existing momentum. A contributory factor to the lack of progress was also the divergence of positions on activities of military forces of a State during peacetime. Thus, there has yet to be achieved a universal convention against terrorism, including an acceptable definition, despite intensive efforts in various forums, including the High Level Panel on Threats, Challenges, and Change (paras. 157 to 164),¹⁰ and the Secretary-General's far reaching report "In Larger Freedom"¹¹ (as well as other efforts at various forums, among other WFUNA, ASIL, the Stanley Foundation, and Georgetown University's Institute for the Study of Diplomacy, etc.)

In his most recent Report on the Work of the Organisation (A/61/1),¹² the Secretary-General underlines that in the past 10 years, the threat of terrorism to international peace, security and development, has taken on new importance.¹³ The international community has taken a number of important steps to provide a solid legal

⁹ U.N. Doc. S/RES/1373, 28 September 2001.

¹⁰ High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565, 1 December 2004.

¹¹ Secretary-General, *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, U.N. Doc. A/59/2005, 21 March, 2005.

¹² Secretary-General, *Report of the Secretary-General on the work of the Organization*, U.N. Doc. A/61/1 (Supp.), 16 August 2006.

¹³ *Id.* para 84.

basis for common action against terrorism, including the adoption of 13 universal instruments, the latest of which - the Convention for the Suppression of Acts of Nuclear Terrorism¹⁴ - was opened for signature at the 2005 World Summit. At the summit, world leaders resolved to take concerted action and strongly condemned, for the first time, terrorism in all its forms and manifestations, committed by whomever, wherever, and for whatever purpose.¹⁵

United Nations counterterrorism activities expanded dramatically through the adoption of the milestone Security Council resolutions 1267 (1999),¹⁶ 1373 (2001),¹⁷ 1540 (2004),¹⁸ 1624 (2005),¹⁹ and through the setting up of three counterterrorism subsidiary bodies,²⁰ making States more responsible for taking practical measures to prevent terrorist financing, travel, and access to weapons of mass destruction, as well as incitement to terrorism - remarkable instances of the exercise of legislative power by the Security Council. Additionally, many departments and agencies of the United Nations system are actively involved in their respective areas of competence.

In his latest report, the Secretary-General specifies additional steps he proposed based on the conviction that no cause, no matter how just, can excuse terrorism.²¹ The last chapter of this systematic effort is the adoption by the General Assembly on 8 Sept, 2006, of the "United Nations Global Counterterrorism Strategy" and its annexed Plan of Action.²² It was ceremoniously launched on 19 September, 2006, by the President of the General Assembly and the Secretary-General, with the participation of many foreign ministers. The Foreign Minister of Finland, speaking for the European Union, stressed that for the first time, the efforts of Member States, the United Nations system, and other

¹⁴ Convention for the Suppression of Acts of Nuclear Terrorism, draft resolution, U.N. Doc. A/RES/59/290, 13 April 2005.

¹⁵ 2005 World Summit Outcome, U.N. G.A.O.R., 60th Sess., U.N. Doc. A/RES/60/1, para. 81.

¹⁶ U.N. Doc. S/RES/1267, 15 October 1999.

¹⁷ U.N. Doc. S/RES/1373, 28 September 2001.

¹⁸ U.N. Doc. S/RES/1540, 28 April 2004.

¹⁹ U.N. Doc. S/RES/1624, 14 September 2005.

²⁰ The Security Council Committee Established Pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities, the 1540 Committee, and the Counter Terrorism Committee.

²¹ *Supra* note 12, para. 88.

²² U.N. Doc. A/Res/60/288, 8 September 2006.

relevant actors in the field of counterterrorism were highlighted in a single document, and urged all Member States to ratify or accede to all counterterrorism conventions and protocols, which formed - as he rightly stressed - the solid legal basis of the counterterrorism measures.

It remains to be seen whether the comprehensive convention of international terrorism will be achieved in light of all this.

It also remains a big question to what extent all this activity will achieve its purpose. But I believe it is correct to say that, in the area of international law, very important steps have been taken to effectively combat international terrorism to the extent political realities allow.

Passing on now to international criminal jurisdiction, perhaps I might be allowed some satisfaction by the fact that in the Sixth Committee, in the International Law Commission (ILC), and in the 1993 Commonwealth Heads of Government Conference (CHOGM), Cyprus, and if may say so, I personally, were among the pioneers favouring the establishment of an international criminal code and an international criminal tribunal as an instrument of deterrence and punishment, long before it became fashionable and acquired momentum through its espousal by the NGOs and was established in its present form, through the 1998 Rome Statute²³ (with currently 104 Member State Parties). I realise this is a politically sensitive subject, especially in the United States but also in Russia and China, and perhaps I should hasten to add that the ICC and its Statute might have been different and more effective than in its present form in meeting the objective requirements of justice in any given situation. As to how effective the ICC as it is under the Rome Statute will prove to be, the jury is still out but some positive steps have already been taken.

Let me add parenthetically that, even though the Rome Statute does not place "terrorism" within the jurisdiction of the ICC, I have no doubt that actions such as those

²³ Rome Statute of the International Criminal Court, 2187 U.N. Treaty Series 90.

of September 11 would come squarely within the jurisdiction of the ICC under "crimes against humanity." Also that an agreed definition of the crime of aggression is still pending (as distinct from the definition in GA Resolution 3314, 1974²⁴).

I would also suggest that international criminal jurisdiction, as we originally proposed it in the ILC ("Code of Crimes Against the Peace and Security of Mankind"²⁵), in such conferences as at Talloires (1990) and Courmayeur (1991) and in the 1993 CHOGM, serves the requirements of justice in preference to *ad hoc* tribunals, in that it was not based on victors' law as in the Nuremberg and Tokyo tribunals or tailored to the occasion as in the former Yugoslavia and Rwanda tribunals. This does not mean that these tribunals have not served a useful purpose, only that a standing tribunal, based on objective notions of justice and of universal individual criminal liability, is preferable.

International criminal liability of individuals is the other side of the coin of the much wider concept of State Responsibility. Under customary international law, as articulated in the landmark case of the *Factory at Chorzów* (Germany v. Poland)²⁶ by the Permanent Court of International Justice (1928), holding States responsible for damages caused by their unlawful actions, the governing principle is that damages should be awarded that are sufficient to wipe out the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not have been committed. This was the principle on which the U.N. Compensation Commission²⁷ (on which I served as a Commissioner for four years) operated in awarding to the government of Kuwait and other claimants, many billions of dollars as compensation for Iraq's illegal invasion and occupation of Kuwait in 1990, under S.C. Resolution 687 (1991).²⁸

Perhaps I could parenthetically observe that one can envisage many other situations in which unlawful acts generally, and unlawful invasion and occupation in

²⁴ U.N. Doc. A/RES/3314, 14 December 1974.

²⁵ International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind, U.N. Doc. A/CN.4/L.532, 8 July 1996 and corr. 1 and 3. Reprinted in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1996, vol. II (Part Two), para. 50.

²⁶ *Factory at Chorzów* (Germany v. Poland), P.C.I.J., Series A, No. 13, 1928.

²⁷ U.N. Doc. S/RES/692, 20 May 1991.

²⁸ U.N. Doc. S/RES/687, 3 April 1991.

particular, have occurred without the victim State obtaining any remedy. Indeed, it was a rare convergence when unanimous support in the Security Council for the adoption of Chapter VII binding resolutions occurred simultaneously with the availability of resources, in this case Iraqi oil, to satisfy the resultant claims. In a world where the rule of law applies, this exceptional situation ought to be the rule rather than the exception.

State Responsibility, this major topic of international law, was examined for many years by the ILC (of which I was a member for 15 years), having been progressively developed from a relatively narrow base of remedying injury to aliens. With the development of the notion of *jus cogens* and its acceptance in the 1969 Vienna Convention of the Law of Treaties,²⁹ and the existence of hierarchically higher rules as set out in the U.N. Charter³⁰ (articles 2(4), 51, 103 and also 2(6)) the topic of State Responsibility was put on a much broader foundation. It was also recognised by the International Court of Justice, that there exist obligations *erga omnes*, and that the interests of the whole international community, and of international public order, need to be taken into account.³¹ My own view, in the ILC and in the Sixth Committee, was strongly in favour of this transformation of State Responsibility as a proper expression of the application of progressive development. I urged that the Commission must ensure that the expectations of the international community, and of the new States in particular which came into existence after the classical rules of international law on this topic were formulated, not be disappointed.³² I also urged that the Commission must keep up with contemporary notions of international law such as international crimes, and not shirk from providing an effective and expeditious third-party dispute settlement system in the convention under elaboration. The Commission did produce a draft convention on State Responsibility in 2001,³³ as a result primarily of the efforts of Professor James Crawford

²⁹ Vienna Convention on the Law of Treaties, 1155 U.N. Treaty Series 311, 1969.

³⁰ Charter of the United Nations and Statute of the International Court of Justice, 1945.

³¹ Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain), 1970 I.C.J. Reports 3.

³² International Law Commission, Summary record of the 2265th meeting, U.N. Doc. A/CN.4/SR.2265 (1992), para. 11, Summary record of the 2289th meeting, U.N. Doc. A/CN.4/SR.2289 (1992), para. 61. Also printed in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1992, VOL. I.

³³ International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session, U.N. G.A.O.R., 56th Sess, Supp. No. 10, p 43, U.N. Doc. A/56/10 (2001).

– the last of a long series of Special Rapporteurs-, and this was noted and approved in principle by the General Assembly and will be taken up for further consideration and decision in 2007. It was a fine effort to finalise the project by the ILC but, perhaps unavoidably in order to reach consensus, it involved substantial surgery on some of the long-standing points of disagreement, and thus fell short of an ideal solution. But it did rely, in several respects, on the recognition of the validity of *jus cogens*, and in my view, this was a very positive contribution.

This leads me to a brief examination of the legal issues involved in this important topic of *jus cogens*, or peremptory norms of international law. This is a topic to which, over the years, I devoted a considerable amount of work, beginning in 1966 with a major paper at the Dag Hammarskjöld Seminar in Uppsala,³⁴ continuing in the Vienna Convention on the Law of Treaties 1968-69, and in the Sixth Committee, including a paper submitted to the ILC proposing that it be taken up by the Commission.³⁵ Very briefly, *jus cogens* or peremptory norms of international law are rules from which the law does not permit any derogation by agreement between the parties *inter se* as distinct from *jus dispositivum*, i.e., rules which the parties may freely regulate by such agreement. First incorporated into international law by the Vienna Convention on the Law of Treaties in 1969 (articles 53, 64, and 66), it has had considerable historical background and was preceded by substantial preparatory work in the ILC and the Sixth Committee. While it has been frequently referred to in debates in the United Nations, including in the Security Council (e.g. on Cyprus in 1964), has been the subject of in-depth studies by scholars,³⁶ has been raised in the proceedings of learned societies, has been alluded to by the International Court of Justice (with explicit reference most recently in its judgment of 3 February, 2006, *Judgment on Preliminary Objections in Armed Activities on the*

³⁴ ANDREAS J. JACOVIDES, TREATIES CONFLICTING WITH PEREMPTORY NORMS OF INTERNATIONAL LAW AND THE ZURICH-LONDON 'AGREEMENTS' (Nicosia, 1966).

³⁵ International Law Commission, Programme, Procedures and Working Methods of the Commission, and its Documentation, Outlines prepared by members of the Commission on selected topics of international law, Mr. Andreas Jacovides, *Jus Cogens*, A/CN.4/454 (1993), p. 213.

³⁶ TOMUSCHAT, C. AND THOUVENIN, J.M. (EDS.), THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER (Martinus Nijhoff Publishers, Leiden, Boston, 2006).

Territory of the Congo (DR Congo/Rwanda on genocide),³⁷ and is often referred to in debates and documents of the ILC (particularly in relation to the topic of State Responsibility as I indicated earlier), there exists no definitive statement of what norms are peremptory, or where they may be found.

It is frequently said, in my view correctly, that the principle against the use of force in international relations as set out in Article 2(4) of the U.N. Charter, is *jus cogens*. Other principles and rules of international law exist for which the same status may be claimed (genocide, now recognised to be so by the ICJ, and slave trade, among others). Evidently there is need to define the content, i.e., the exact parameters of what comes under the rubric of *jus cogens* since the situation as it now stands is not conducive to the objectivity, transparency, and predictability which should characterise a legal principle. As it now stands, *jus cogens* can mean a great deal to some, and very little to others.

As I indicated earlier, during the 1993 session of the ILC, I took the initiative to propose that the selection of topics for inclusion in the Commissions long-term programme of work should include *jus cogens*. This would have given the opportunity to this highly qualified body of experts (which can be credited with progressively developing and codifying the concept in the first place, prior to the 1968-9 Vienna Conference) to study the subject, with a view of establishing which rules of international law are indeed peremptory. On the basis of the ILC's findings, States would then have the opportunity, through their representatives in the Sixth Committee and through written comments, to express their views, thereby carrying forward the process of giving exact legal meaning to *jus cogens* and filling in the legal vacuum on this topic. There was some support expressed in the Commission for the proposal, but not sufficient for its adoption, for reasons which are understandable, but, to me at least, not entirely convincing.

The current topic on the ILC's agenda of "Fragmentation of International Law" could have provided another channel to confront the problem, together with the notion of

³⁷ *Case concerning Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), 2006 I.C.J. Reports, www.icj-cij.org.

erga omnes and Article 103 of the Charter, but it appears from its latest reports³⁸ that this was a challenge not taken up by the present membership of the ILC, and so the situation remains far from satisfactory.

This leads me to the next stage of our inquiry, which is the relationship between Article 2(4) and Article 51 of the U.N. Charter, and their application to recent trouble spots in the world.

Article 2(4) reads that "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."³⁹

Article 51 states, in part that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council..."⁴⁰

All Member States are legally bound by their signature to the United Nations Charter. This having been said, as in most legal situations, much depends on the interpretation of the law, as well as on the facts. Justice Sandra O'Connor once told me, only half in jest: "If you are strong on the law, argue the law; if you are strong on the facts, argue the facts; and if you are weak on both the law and the facts, cry a lot..!" Coming from a small State which has been the object of invasion and occupation by a much bigger and militarily stronger neighbour, my own inclination has been to interpret strictly Articles 2(4) and 51 and state, in the words of Sir Humphrey Waldock, the British member of the ILC, soon after the Charter was adopted:

³⁸ International Law Commission, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, part of the *Report on the work of its fifty-eighth session*, U.N. G.A.O.R., 58th Sess, Supp. No. 10, para. 251, U.N. Doc. A/61/10 (2006), to be reprinted in *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION*, 2006, vol. II, Part Two.

³⁹ *Supra* note 30, Article 2(4).

⁴⁰ *Supra* note 30, Article 51.

"The net result is that Article 2(4) prohibits entirely any threat or use of force between independent States except in individual or collective self-defence under Article 51 or in execution of collective measures under the Charter for maintaining or restoring peace. Armed reprisals to obtain satisfaction for an injury, or armed intervention as an instrument of national policy otherwise than for self-defence, is illegal under the Charter."⁴¹

The ICJ also tended toward a strict interpretation (in cases such as Nicaragua/US (1976);⁴² Iran/USA (2004);⁴³ the Wall Advisory Opinion (2004);⁴⁴ and most recently Congo/Uganda (2005)⁴⁵) and so did the General Assembly of the U.N. (through its Resolutions 2625 (1970)⁴⁶ on Friendly Relations, and 3314 (1974)⁴⁷ on the Definition of Aggression).

However, there have been other interpretations supported by not inconsiderable arguments that, for instance, "if an armed attack occurs" is broad enough under the evolving rules of warfare, or in the new circumstances brought about by international terrorism, that a strict interpretation is no longer applicable, thus allowing for preventive or pre-emptive action, even before "an armed attack" occurs; and there has long been the concept of anticipatory self-defence under The Caroline doctrine (in the words of Secretary of State Daniel Webster: "necessity of self-defence instant, overwhelming and leaving no choice of means and no moment for deliberation").

The facts of the first Gulf War (1990-91) were such that there was no doubt as to

⁴¹ C.H. Waldock, The regulation of the use of force by individual States in international law, *Recueil des cours de l'Academie de droit international de La Haye, 1952-11*, Paris, Sirey, 1953, vol. 81, p. 493.

⁴² *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), 1984 I.C.J. Reports 392

⁴³ *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America) 2004 I.C.J. Reports 12.

⁴⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Reports 131.

⁴⁵ *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda) 2005 I.C.J. Reports 216.

⁴⁶ U.N. Doc. A/RES/2625 (XXV), 24 October 1970.

⁴⁷ U.N. Doc. A/RES/3314 (XXIX), 14 December 1974.

the illegality of the Iraqi invasion and occupation of Kuwait, hence, the Security Council's unanimous reaction. The 2003 action against Iraq was supported by legal arguments based on the non-implementation by Iraq of existing Security Council Resolutions; the 1998 Kosovo military action was rationalised by the emergent doctrine of "responsibility to protect" (the scope of which remains disputed and controversial); while the recent involvement of Israel in Lebanon, which invoked self-defence against Hezbollah, was questioned as disproportionate. It is not my intention to go into the merits of these disputed arguments which are predicated on the distinction between what is new but permitted, and what has to be deemed unlawful, except to underline that the rule of law is essential for international legal order. In case of a disputed rule, the machinery provided first and foremost by the UN principal judicial organ, the International Court of Justice, but also by other means of third-party dispute settlement, including the Secretary-General's good offices should be resorted to, if we are to apply the rule of law and not the law of the jungle. Clarifying authoritatively by the ICJ, by its advisory jurisdiction, of the legal aspects of pending international political disputes- as proposed by successive Presidents of the ICJ Jennings, Schwebel and Shi - can go a long way towards lastingly resolving such disputes in a way consistent with the applicable rules of international law. Cyprus is one instance in point.

In the distant past, the world experienced *Pax Romana*, more recently it experienced *Pax Britannica*, currently there is talk of *Pax Americana*. Perhaps, to coin a phrase, what we should look for is *Pax Unitarum Nationum* based on the democratic exercise of rights and duties, equally by all Member States, under the principles and rules of the U.N. Charter, a treaty binding on all 192 Member States (and which indeed under Article 2(6), goes beyond the U.N. membership "so far as may be necessary for the maintenance of international peace and security."). Whether this is a realistic expectation, under the presently existing conditions in the world, is of course open to doubt – one could even describe it as mere wishful thinking..

On occasion, one can notice a tendency, even from unexpected quarters, of downgrading or even completely ignoring the relevance and applicability of international

law rules. Perhaps I might cite the case of an article by a prominent personality in international affairs, who, in advocating a diplomatic solution to the current Iran situation (Financial Times, 12 April, 2006) cited a number of cogent relevant arguments in support of his position, but was totally silent on the applicable rules of international law. This was criticised in a letter published on the 17 April, 2006 in the same newspaper by Mr. Howard Mayer of New York, who considered it "striking, dismaying, and, sadly, not surprising that this failure even to consider the law that forbids such threats, agreed upon by our nation in the U.N. Charter, comes from the President of the Council on Foreign Relations, whose membership must be more familiar with our treaty obligations than the average American."

There is indeed another school of thought which proclaims that decisions involving the use of force in international relations are taken by politicians on political grounds and the function of the lawyers is "to be called in afterwards to provide arguments to justify these decisions." I recall that private admission of a very prominent British international lawyer who, in the context of the action taken by British Prime Minister Margaret Thatcher on the Falklands/Malvinas in 1982, said to her: "Prime Minister, you do what you think is right and international law will provide the arguments to support it." It so happens that, in this case, there were substantial legal arguments supporting the British use of military force. I would submit however, that the proper role of the legal adviser to a Foreign Ministry is to be consulted in advance and for the decisions, especially those involving the use of armed force, to be made taking fully into account the legal advice received before such decisions are taken, not afterward. Here, I am reminded that when a Cambridge don, lecturer in law died, they found in the margin of his lecture text, the notation "Argument weak. Raise voice!" Also of the reply of Senator Dirksen when accused of being unprincipled: "Me, unprincipled? Why, I am firmly wedded to the principle of utter flexibility.."

We now pass to another field to which I have been exposed since leaving the Foreign Service. It involves such areas as arbitration, mass claims processes and corporate governance.

My experience with arbitration has been partly as an arbitrator at the International Centre for the Settlement of International Disputes (ICSID) at the World Bank in Washington, D.C.

The rationale behind the 1965 ICSID Convention⁴⁸ was to provide potential prospective investors with the assurance that legal disputes arising out of investments, primarily in developing countries, could be adjudicated before an international tribunal rather than the courts of country of the State concerned, as an incentive for making such an investment. The existence of such a facility, and the assurance of predictability and impartiality, equally in relation to both parties, works correspondingly also to the benefit of the State concerned since it can thereby attract foreign investment needed for its economic development.

It is a key element in international arbitrations in general, and ICSID arbitrations no less, that, short of deciding *ex aequo et bono*, there is a greater latitude than in proceedings before national or international courts, enabling the tribunal to look at the broad picture in order to reach a just and fair result, beyond narrow legalism and technicalities - whether this is always observed in practice is another matter.

The role of ICSID and of bilateral investment treaties – many of which incorporate the “fair and equitable” standard - have lately become more significant and the Centre's jurisdiction substantially expanded, taking also into account its role under NAFTA. While it is essential for all of the players to have confidence in the fairness of any decision, unavoidably there is an element of subjectivity and unpredictability in international arbitral awards, depending on the tribunal making the decision. In my view, it would help to reduce this element of unpredictability if the critical element of "investment" were clarified. It was not defined, intentionally, in the ICSID Convention although, admittedly, there exist several other terms in legal nomenclature such as

⁴⁸ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965, 575 U.N. Treaty Series 159.

"terrorism" – as we have already seen - , “aggression” and "pornography" (not to mention also "sin" which may or may not be a legal term...) which do not readily lend themselves to definition and yet are recognised and given legal effect when they occur.

Besides ICSID at the World Bank, international arbitrations are being carried out under the auspices of the Permanent Court of Arbitration (The Hague) and by other international, regional or national bodies such as the International Chamber of Commerce (ICC, in Paris), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), and the Swiss Arbitration Association (ASA), among others, which also flourish.

An important, relatively recent, development has been the coming into existence of several mass claims tribunals. These include the Iran-United States Tribunal in The Hague, the United Nations Compensation Commission (UNCC) in Geneva - to which I alluded earlier in the context of State Responsibility -, the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT I, II in Zurich), the Commission for Real Property Claims in Bosnia and Herzegovina (CRPC) in Sarajevo, the German Slave Labour programme, the Eritrea-Ethiopia Claims Commission, the Housing and Property Claims Commission in Kosovo, and the International Commission on Holocaust Era Insurance Claims. For those who are interested to pursue the subject there have been several publications⁴⁹ and a new major book⁵⁰ will come out under the auspices of the Permanent Court of Arbitration, through a steering committee appointed by its Secretary-General, in which I participated.

I have already referred to the workings of the United Nations Compensation Commission, a subsidiary organ of the U.N. Security Council established by Security

⁴⁹ Pierre A. Karrer, *Mass Claims Proceedings in Practice, A Few Lessons Learned*, Issues in Legal Scholarship, Symposium: Richard Buxbaum and German Reintegration [2006], Article 9, available through The Berkeley Electronic Press, <http://www.bepress.com/cgi/viewcontent.cgi?article=1083&context=ils>. [If you have names of authors or journals in mind, please let me know so I can look further accordingly]

⁵⁰ HOWARD M. HOLTZMANN AND EDDA KRISTJÁNSDÓTTIR (EDS.), *INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES* (Oxford University Press, 2007).

Council Resolution 692 (1991)⁵¹ which, through Panels of Commissioners processed claims for compensation for damages resulting from Iraq's invasion and occupation of Kuwait. I was with the F-3 Panel dealing with the Kuwait Government claims and we recommended the award of 8.5 billion dollars after thorough examination of claims amounting to over 100 billion dollars.

I also had the unique experience of serving for four years under the Volcker Process with the Claims Resolution Tribunal for Dormant Accounts in Switzerland as an Arbitrator for CRT I, and as a senior judge with CRT II (one of sixteen, the others being Americans, Israelis, Swiss, one Canadian and one British). It was a challenging and daunting assignment to resolve all claims to dormant accounts opened by non-Swiss nationals in Swiss banks in the period prior to and during the Second World War, many of them holocaust-related. The tribunal completed its work, using relaxed rules of evidence and other rules adjusted to the uniqueness of the situation, in a way which satisfied, by and large, both the account holders and their heirs and also the Swiss Banks, the reputation of which was in jeopardy as a result of negative publicity internationally.

It is a fact that in recent years there has been a proliferation (my friend, Judge Rosalyn Higgins prefers to call it "burgeoning") of international courts, tribunals, and commissions. This in general is good news for the profession, but there are risks. For instance, different tribunals might take different positions on the same issue of international law. For example, the Strasbourg European Court of Human Rights took a position different from that of the International Court of Justice on the question of territorial reservations in declarations of compulsory jurisdiction in the *Loizidou v. Turkey*⁵² case before ECHR - a case which can be explained as due to *lex specialis*. There should be no doubt that, especially when it comes to questions of public international law, the ICJ is the principal judicial organ of the United Nations and its decisions are, in the vast majority of cases, cited and followed. While international law remains more centralised than ever, the number of actors and arbitrators continues to

⁵¹ U.N. Doc. S/RES/692, 20 May 1991.

⁵² *Loizidou v. Turkey* (1997) 23 E.H.R.R. 513.

increase. But the gap is not as great as it might appear. For instance, some of the same lawyers serve as counsel and judges in ICJ, ICSID and private commercial arbitrations, applying a combination of public and private international law. Indeed, the exposure to private international law principles, procedures and substantive legal doctrines has had an effect on the jurisprudence of the ICJ, just as the jurisprudence of the ICJ has had an effect on arbitral decisions. Cross fertilisation and proliferation of courts and tribunals can be useful elements in the progressive development of international law, provided they are approached wisely and with caution.

In my most recent incarnation, that of a banker back home on the Board of the Bank of Cyprus (in Cyprus itself and also in the United Kingdom and in Australia), I have been exposed to the current notions of corporate governance, of which there is awareness of, and compliance with, as much as in the United States. There is enhanced recognition that the Board of Directors, particularly its independent non-executive members, are under the obligation to effectively exercise checks and balances and to question the actions and proposals of the executives, bearing in mind primarily the interests of the shareholders, and also of the need and the responsibility to guide management on matters involving general policy and direction. Cyprus having become a European Union member as of 1 May, 2004, the boards of public companies are subject to the regulation not only of the Central Bank of Cyprus, but also of the European Central Bank. Our bank retained McKinsey and Co. to advise on restructuring so as to comply fully with current notions of corporate governance and have not been insensitive to the concerns of corporate abuse, which led to the adoption in the United States of the Sarbanes-Oxley Act.⁵³ While I think that the corporate regulation under the Act, brought about after the Enron, WorldCom and other scandals, was necessary, it may well be that there is some room for reform so as to lighten the burden, especially for smaller companies, and to avoid the emigration of American corporations to other jurisdictions, such as in the United Kingdom, which have less stringent requirements. While it seems there is an emerging consensus in the United States that the law needs some change in

⁵³ Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002, PL 107-204, 116 Stat 745.

this direction, a full-scale repeal is quite unlikely since it is recognised that its adoption resulted in improvement in corporate accounting and control.

This leads me to the last part of my presentation, dealing very briefly with some aspects of the Law of the Sea.

This is a very broad subject, developed over centuries as customary law, since the time of Grotius (and earlier, in the Rhodian Code) and codified with new features such as the Exclusive Economic Zone (EEZ), and the common heritage of mankind, in the landmark 1982 U.N. Convention of the Law of the Sea, the veritable constitution of the oceans (which I had the honour to sign in Montego Bay in Dec 1982 having participated in its various phases since 1973, and earlier in the Preparatory Committee.) The large majority of the international community (149, as of now) are States Parties to the convention, and it is expected that the United States will do likewise as soon as it is ratified by the U.S. Senate which hopefully will happen soon (successive administrations, including the present one, are in favour of the convention, and it has been approved by the Senate's Foreign Relations Committee.)

During the Conference, the Cyprus delegation strongly supported the 12-mile limit for the territorial sea and advocated that enclosed or semi-enclosed seas, such as the Mediterranean, should be regulated by the same basic rules as those applicable to other seas and oceans, and also for the protection of archaeological objects found at sea. Beyond these, we concentrated on certain key issues of primary concern to Cyprus. These were first, the Regime of Islands and their undiminished entitlement to the zones of maritime jurisdiction (territorial sea, contiguous zone, exclusive economic zone, and continental shelf) which was achieved through the adoption of Article 121; secondly, the question of the delimitation of these zones of maritime jurisdiction between States the coasts of which are opposite or adjacent to each other on the basis of the median or equidistance line, to some extent achieved, but in some other respects left ambiguous (articles 15, 74, 83); and thirdly, the question of settlement of disputes (Part XV Articles 274-99 and Annexes VI, VII, VIII). During the intervening years, as a result of decisions

of the ICJ in the *Libya v. Malta* case (1985),⁵⁴ the *Jan Mayen* case (Denmark/Norway, 1993);⁵⁵ the *Qatar/Bahrain* case (2001);⁵⁶ and, most recently, the *Bakassi Peninsula* (Cameroon/Nigeria, 2002)⁵⁷ and also as a result of decisions of arbitral tribunals in the *Eritrea/Yemen* (1999)⁵⁸ and *Barbados/Trinidad and Tobago* (2006)⁵⁹ cases, the court "first determines provisionally the equidistance/median line and then asks itself whether there are any special circumstances or relevant factors requiring this initial line to be adjusted with a view to achieving equitable results." (Judge R. Ranjeva on behalf of the ICJ, in the 1982 Convention's 20th anniversary event.). This is a fair and reasonable solution, clarifying the vagueness in the wording of Articles 74 and 83 of the Convention.

It might interest you to know that very recently, Cyprus concluded an agreement with Egypt on the delimitation of the EEZ between the two countries⁶⁰ (signed in 2003 and ratified in 2004), a significant event in that, apart from its practical aspects (fisheries, potential oil and natural gas deposits, etc.) it is the first such agreement by Cyprus with one of its major neighbours on the basis of the pure median line, which had been our position in the Conference all along, hopefully to be followed by other such agreements with other neighbours in the eastern Mediterranean. Another positive feature of this agreement is that, under its Article IV, any dispute which might arise and not be settled within a reasonable time with diplomatic means, should be referred to arbitration.

Indeed, the consistently held position, which I articulated since 1976 in the Law of the Sea Conference and which, in my opinion, is applicable also to the dispute settlement systems of all other multilateral law-making treaties, is that the substantive provisions of each such treaty (be it the Law of the Sea, State Responsibility, or any

⁵⁴ *Continental Shelf* (Libya v. Malta), 1985 I.C.J. Reports 13.

⁵⁵ *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), 1993 I.C.J. Reports 38.

⁵⁶ *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain), 2001 I.C.J. Reports 40.

⁵⁷ *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria, Equatorial Guinea Intervening), 2002 I.C.J. Reports 303.

⁵⁸ *Eritrea-Yemen Arbitration* (Award Phase II: Maritime Delimitation), Permanent Court of Arbitration, 17 December 1999, <http://pca-cpa.org/PDF/EY%20Phase%20II.PDF>. Printed in ILM 2001, 983.

⁵⁹ *Barbados-Republic of Trinidad and Tobago Arbitration*, Permanent Court of Arbitration, 11 April 2006, <http://www.pca-cpa.org/ENGLISH/RPC/BATRI/BATRI%20Award.pdf>.

⁶⁰ *Maritime Boundary Agreement* of 17 February 2003.

other) ought to be accompanied by "an effective, comprehensive, expeditious and viable dispute settlement system entailing a binding decision regarding all disputes arising out of all substantive provisions of the Convention."⁶¹ This position was dictated both by reason of attachment to the general principle of equal justice under the law, and by national self-interest, as representing a small and militarily weak State, which needs the protection of the law, impartially and effectively administered, in order to safeguard its legitimate rights under the convention.⁶²

I still maintain this is a right and defensible position, but whether it is achievable in practice is another question. Progress has been made in this direction during the Law of the Sea Conference, and there is currently a wide variety of tribunals, the Law of the Sea Tribunal (which has just celebrated the 10th anniversary of its establishment in Hamburg), the International Court of Justice, which over several years has dealt with several aspects of Law of the Sea, and *ad hoc* arbitral tribunals, some of which have made major contributions to the development of the subjects they dealt with (*Barbados/Trinidad Tobago* of April 2006 being the most recent example.)⁶³

This concludes my reflections on International Law in Diplomacy. If I tired you, I apologise, but the intention was to try to educate rather than to entertain.

It was said, at a time when it was safe to make such observations without being considered a sexist, that a speech should be like a lady's skirt; long enough to cover all the essential parts, and short enough to be interesting.. In this case, I am afraid the skirt may have gone all the way to the floor! So let me finish where I began: if you feel that my lecture was superfluous, shall I consider publishing it posthumously?

⁶¹ Third United Nations Conference on the Law of the Sea, Official Records, Volume V, Summary Records of Meetings, New York 1976, U.N. Doc. A/CONF.62/WP.8, WP.9 and Add. 1, para. 43.

⁶² *Id.* para. 44.

⁶³ Ambassador Andrew J. Jacovides, *Some Aspects of the Law of the Sea: Islands, Delimitation and Dispute Settlement Revisited*, published in: ASLAK SYSE, HENNING JAKHELLN, OLE KRISTIAN FAUCHALD (EDS.), *FESTSKRIFT TIL CARL AUGUST FLEISCHER* (Oslo, 2006), pp. 331-355.