Interest Group on International Organizations

The American Society of International Law Spring 1998 Newsletter

A Message from the Chair

It is a pleasure to present the Spring Issue of the Newsletter of the ASIL International Organizations Interest Group. Thanks to the efforts of our officers (listed below), it has been a very productive year for our Interest Group.

For the first time, we established Committees tasked with sponsoring international organizations-related programs throughout the year and with contributing to the newsletter.

We also established an Internet Webpage containing the text of our newsletters: http://www.nesl.edu, then click on Center for International Law, then click ASIL International Organizations Interest Group. In coming months, we plan to add a Listserve for the members of the Interest Group (an electronic chatroom on international organizations-related issues). If you are interested in participating in the Listserve, please send me your E-mail address by May.

In October 1997, we co-sponsored an international conference in Boston about the China/Taiwan situation (including the issue of U.N. membership). An Op-Ed piece describing the results of the conference, which appeared in the *Christian Science Monitor*, is reproduced on page 8.

For the 1998 ASIL Annual Meeting, the Interest Group will present a special two-hour program on Thursday evening. The program simulates a proceeding before the Yugoslavia War Crimes Tribunal, featuring an all star cast playing the judges, prosecutors, and defense counsel.

A breakfast meeting (with complementary coffee, bagels, and pastries) will be held for the members of our Interest Group during the ASIL Annual Meeting to elect officers for 1998-1999 (Paul Williams and I would be happy to serve another term if no one else steps forward), develop a work plan for the upcoming year, and discuss topics for our program at the 1999 ASIL Annual Meeting. The meeting is scheduled for 8:00 am on Saturday, April 4. We hope you will be able to attend.

If you want to play a more active role in our interest group, please contact me at:

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1998 ASIL Annual Meeting Panel:

Simulated Appeal of the Karadzic Case

The International Organizations Interest Group has put together a unique panel for the Annual Meeting of the American Society of International Law (8:00-10:00 pm on Thursday, April 2). The panel simulate a proceeding before the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia and Rwanda concerning a (fictional) appeal brought by counsel for Radovan Karadzic.

The three judges will be played by Prof. Bartrum Brown of Chicago Kent College of Law (Judge McDonald's former Law Clerk at the Hague); Prof. Cherif Bassiouni of DePaul Law School (former Chair of the U.N. Commission of Experts for the Former Yugoslavia); and Prof. Paul Williams of American University and the Carnegie Endowment for International Peace. The prosecution team will be played by Prof. Ruth Wedgwood of Yale Law School and Prof. Geoff Watson of Catholic University Law School. Mr. Mark Ellis, Director of the American Bar Association's CEELI Program and Mr. Mark Zaid, Managing Director of the Public International Law and Policy Group will play the defense counsel.

Karadzic's counsel in the simulation are appealing three aspects of a decision rendered by the Trial Chamber at the conclusion of the Rule 61 proceeding (where the prosecutor presents evidence to confirm the indictment and obtain an international arrest warrant), namely:

(1) That defense counsel is to be excluded from a Rule 61 proceeding. (Karadzic's counsel takes the position that by excluding defense counsel, the Rule 61 proceeding violates Article 21 of the Tribunal's Statute and Article 14 of the Covenant on Civil and Political Rights).

(2) That Karadzic can be held criminally responsible for the acts of Bosnian Serb forces in the 1993 Srebrenica massacre. (Karadzic's counsel takes the position that the principle of command responsibility does not apply to civilian political leaders with no direct control of the responsible armed forces).

(3) That Karadzic can be found guilty of Article 2 of the Tribunal's Statute (Grave Breaches of the Geneva Convention) for the Srebrenica massacre. (Drawing on the Trial Chamber's controversial *Tadic* opinion, Karadzic's counsel contends that the persons killed at Srebrenica were not protected persons under the Geneva Convention because the massacre did not occur as part of an international armed conflict).

World Conferences

Michael G. Schechter, Chair

International Conferences Committee

As those who attended last year's Annual meeting or read the most recently published edition of the *Proceedings* know, I organized and chaired a panel at last year's meeting on the topic of the implementation of results from UN-Sponsored Global Conferences. Papers were delivered by Rebecca Cook (Beijing), Masumi Ono (UN's role in implementation), Michael Posner (Vienna) and Thomas Yongo (Rio). As a follow-up to that panel, I have been working with the United Nations University Press in publishing a related edited volume. Its working title is: The *Value of UN-Sponsored Global Conferences: An Analysis of the Implementation of Global Conferences of the 1990s*. The table of contents, as of now, follows:

Introduction--The Proliferation of Global Conferences in the 1990s, Michael G. Schechter.

The Beijing Conference, Rebecca Cook, Assoc. Professor (Research) & Director, International Human Rights Programme, Faculty of Law, University of Toronto.

The Vienna Conference, Clarence J. Dias, President, International Center for Law and Development.

The World Summit for Children, Richard Jolly, Special Advisor to the UNDP Administrator (formerly with UNICEF).

Rio Conference (Biodiversity), Thomas Yongo, Barrister working for the Secretariat of the Convention on Biological Diversity, UNEP.

Rio Conference (Climate Change), Jo Butler, Lawyer for UNCTAD (previously worked on the climate change convention).

Conclusions--(1) NGOs in the Implementation Phase, Michael G. Schechter; (2) The UN and Implementation, Masumi Ono (economist working for the Department of Policy Coordination and Sustainable Development, UN, New York).

Appendix--Researching UN Conferences, Debbi Schaubman, Head, International Documents Collection, Michigan State University

Related to this last activity (and a course I teach on International Law and Organization) interested members' attention is drawn to the following URL that Ms. Schaubman has recently developed: http://www.lib.msu.edu/publ_ser/docs/igos/unconfs.htm

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To the Editor:

I have rarely read anything so ridiculous and patently false as the statement that the United States did not create the Contras [Michael Scharf, *Yugoslavia Tribunal Issues First Judgment and Sentence*, Fall 1997 Newsletter, page 6]. This has been admitted by CIA witnesses in hearings all through the late 1980s and 1990s.

Charles Maechling, Jr.

Former Director for Internal Def. Programs, Dept. of State & Staff Director NSC Special Group.

Editors Note: Although it is clear that the United States did provide extensive financial and logistical support to the Contras, it was the finding of the ICJ that the United States did not "create" the Contras in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States* (June 26, 1986). Reasonable people may differ as to whether the distinction the ICJ drew between creating and supporting the Contras was a valid one. Certainly, Prof. Scharf is correct that there are significant differences between the Nicaraguan and Bosnian situations.

Progress on the International Criminal Court

Steven Gerber & John L. Washburn, Co-Chairs

International Criminal Courts Committee

The year 1997 was a watershed for the attempt to establish a permanent International Criminal Court to try individuals accused of committing genocide, war crimes and crimes against humanity. Fulfilling the mandate given to it by the U.N. General Assembly in December 1996, the Preparatory Committee to Establish an International Criminal Court (PrepCom) met for three two-week sessions in 1997 "to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries." G.A. Res. 51/207. The high quality of the negotiations has made it seriously possible that a treaty establishing the court could come into force in this century.

The PrepCom created working groups to focus on various parts of the draft statute. At the end of each PrepCom session the working groups would present their work to the plenary of the PrepCom which would then decide if the text was appropriate to forward to a diplomatic conference. On some occasions, the working groups were unable to finish debating their issues or failed to reach consensus on draft language for the diplomatic conference. When no consensus could be reached on particular language, that language was placed in brackets. In these instances, more time was assigned for the working group at a future PrepCom session.

The following describes the working groups and their areas of debate. There is one last PrepCom from March 15 to April 3, 1998. The diplomatic conference, where the treaty will, hopefully, be finalized, is scheduled for June 15 - July 17, 1998 in Rome, Italy.

Working Group 1 -- Definition of Crimes.

In the February PrepCom, this working group largely agreed upon the definition of *genocide* and of *crimes against humanity*. Both definitions have bracketed language where the delegates could not agree. These definitions, with brackets, will be included as text to be submitted to the Diplomatic Conference in 1998.

The working group also debated text for the definition of *serious war crimes*, often using the proposals of the International Committee of the Red Cross (ICRC) and of the United States as model drafts.

The final outcome of the debate on war crimes is a comprehensive document that includes more options than the original text. It reflects the view of many delegates that the original working paper had failed to include certain vital provisions. One issue on which there was near unanimous agreement was to refer to the crimes of rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization and other forms of sexual violence separately from the crime of committing outrages upon personal dignity.

There are still several issues to be resolved in the definition of war crimes. Must crimes meet a jurisdictional threshold of being committed as part of a plan or policy to be within the Court's jurisdiction? Will certain provisions from the 1977 Protocol Additional 1 to the Geneva Conventions of 12 August 1949 be included such as the crimes of "unjustifiable delay in repatriation of prisoners of war" and "the launching of attacks against works or installations containing dangerous forces (materials) in the knowledge that such attack will cause excessive loss of life"? Would the Weapons Clause contain an exhaustive list of illegal weapons (possibly containing nuclear weapons and landmines) or a generic statement prohibiting the use of

weapons that "are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate"? What will be the minimum age for involvement in hostilities? What distinction, if any, will there be between international armed conflicts and non-international armed conflicts?

Despite indications in the debate in 1996 that *aggression* would not be likely to come under the ICC's jurisdiction, during the February PrepCom many of the States spoke in favor of its inclusion. Germany's proposal on aggression was particularly helpful because it clarified that aggression as an act is necessarily by a state (an army is necessary), but that the planning, directing, and leading a war of aggression is as much an individual act as ordering the establishment of a concentration camp. The working group recommended the resulting text be reconsidered by the PrepCom at a future time. The working group made the same recommendation for the crimes of *terrorism, drug trafficking,* and *attacks against U.N. and associated personnel.* Unfortunately, there was even less consensus on these crimes than there was on war crimes.

Working Group 2 -- General Principles of Criminal Law.

This working group had the complicated task of synthesizing principles of criminal law from different legal systems, and is scheduled to meet again in March 1998. The working group recommended text on the following principles: *nullum crimen sine lege* (no crimes without law), non-retroactivity, individual criminal responsibility (personal jurisdiction), irrelevance of official position as a defense, individual criminal responsibility, command responsibility, *mens rea* (mental aspect of crime), *actus reus* (physical aspect of crime), mistake of fact or of law, age of responsibility, and statute of limitations. Possible defenses were discussed and consensus reached on the defenses of insanity and involuntary intoxication. However, work still remains on the definition of self-defense, duress, and sudden or extraordinary events.

Working Group 3 -- Complementarity and Trigger Mechanisms.

"Complementarity" is the idea that the ICC will not supersede national courts, but rather complement them. Although the concept of complementarity runs throughout the proposed Statute, it is principally applicable to article 35, Issues of Admissibility. Surprisingly, the working group succeeded in drafting an article without brackets. Although several states insisted on including a special note that preserves other possible positions on article 35, an unbracketed complementarity article that enjoys widespread support is a key building block for other parts of the statute.

Article 35 lays out several grounds on which the Court shall rule a case inadmissible: a State is genuinely investigating or prosecuting the case, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; the case was investigated by a State which decided not to prosecute, unless the decision resulted from the unwillingness or inability of the state to genuinely prosecute; or the case is not of sufficient gravity for the Court to take further action. The article also provides criteria for determining unwillingness and inability of a state.

Working Group Three also dealt with *trigger mechanisms*, specifically articles 21 through 25. These articles, unfortunately, retain many brackets. Several important decisions must be made before many of these brackets can be removed: Will the prosecutor be able to initiate cases on his or her own initiative or will only states party to the treaty and the U.N. Security Council be

allowed this power? Will states accept the jurisdiction of the court by virtue of their ratification of the treaty? Will there be a complicated state consent regime required for each case? Will the Security Council be able to block cases arising from situations it is dealing with under Chapter VII of the U.N. Charter? There is a real possibility that some of these issues may prevent the United States from participating in the Court, at least initially.

Working Group 4 -- Procedural Matters.

The issues addressed were notification of the indictment, trials in absentia, admissions of guilt, investigations of alleged crimes, functions and powers of the trial chamber, commencement of prosecution, rights of the accused, and protection of the accused, victims and witnesses.

Unfortunately, progress was extremely slow during the August session and those articles that were discussed still contain either brackets or alternative options. How to accommodate the procedures and/or preferences of different legal systems into one international court remained a problem. Several delegations proposed that the statute contain only general principles of procedure. Detailed rules would be written, at a later date, by the judges and approved by the states. Many delegations agreed with this proposal, but found it difficult to close the debate.

Working Group 5 -- International Cooperation and Judicial Assistance.

Working Group 5 addressed: the general obligation of states to cooperate with the ICC, requests for cooperation, grounds for refusal, surrender or transfer of suspects, requests for assistance, channels of communication for transmitting requests, language of the request, failure to cooperate, provisional arrest, other forms of cooperation, and enforcement of sentences. As a basis for its work, the Working Group used an abbreviated compilation from informal meetings outside the PrepCom of governments and private experts. Much text remains bracketed.

Working Group 6 -- Penalties.

The working group approved the text of several provisions on penalties for inclusion in the draft statute to be presented at the diplomatic conference, but many still include bracketed language. The issues addressed include: imprisonment, fines, disqualification, forfeiture, reparations, aggravating and mitigating circumstances, prior detention, applicable national legal standards, sentences of imprisonment for multiple crimes, legal persons and fines and assets collected by the Court. Although a few states called for the death penalty due to the horrendous nature of the crimes involved, there was general agreement that life imprisonment would be the maximum sentence. There are two possible scenarios involving prison facilities: the host state may provide prison facilities or states party to the treaty may volunteer to host convicted individuals in their national prisons. There was also a discussion regarding reparations for the victims, but no consensus was reached on how, or even whether, to deal with this issue.

The Prosecutor v. Slavko Dokmanovic:

Irregular Rendition and the Yugoslavia Tribunal[1]

Michael P. Scharf

In the summer of 1997, Kevin Curtis, a member of the Office of the Prosecutor of the Yugoslavia Tribunal, met with Slavko Dokmanovic in Serbia to lure Dokmanovic into Croatia, where he was arrested by U.N. Peacekeeping personnel. Unknown to Dokmanovic, he had been charged in a sealed indictment with six counts of grave breaches of the Geneva Conventions, violations of the laws or customs of war and crimes against humanity for his role in the greatest single massacre of the 1991 war in Croatia, that of the execution of 261 people forcibly taken out of a hospital in Vukovar, eastern Croatia.

Shortly after Dokmanovic was surrendered to the Yugoslavia Tribunal, his counsel filed a pretrial motion. He argued that the manner of his arrest was illegal because it violated the sovereignty of the FRY (Serbia and Montengro) and international law. Trial Chamber II of the ICTY (then composed of Gabrielle Kirk McDonald of the United States, Elizabeth Odio Benito of Costa Rica, and Saad Saood Jan of Pakistan) rejected Dokmanovic's arguments, concluding that "the means used to accomplish the arrest of Mr. Dokmanovic neither violated principles of international law nor the sovereignty of the FRY."[1] In doing so, the Trial Chamber focused on the distinction between "luring" and "forcible abduction," reckoning that the former was acceptable while the latter might constitute grounds for dismissal. Dokmanovic's trial before Trial Chamber II, consisting of Antonio Cassese (Italy), Richard George May (U.K.), and Florence Ndepele Mwachande Mumba (Zambia), began on 19 January 1998.

This casenote examines the validity of the distinction the Trial Chamber drew between abductions and luring. The basis for Dokmanovic's challenge is the principle that states and international organizations may exercise police powers inside the territory of another state only with the consent of the host state. The unconsented exercise of such powers constitutes an infringement of the sovereignty and territorial integrity of the host state in violation of the U.N. Charter and customary international law. This principle finds support in several decisions of the International Court of Justice (ICJ), the Restatement (Third) of the Foreign Relations Law, a recent resolution adopted by the U.N. Sixth (Legal) Committee, and a resolution adopted by the Working Group on Arbitrary Detention of the U.N. Commission on Human Rights.

While recognizing that some unconsented law enforcement activities (i.e., abductions) would violate the principle of territorial integrity, the Trial Chamber in the *Dokmanovic case* held that luring does not do so. As the Trial Chamber noted, "the Prosecution freely concedes that it 'used trickery, it was a ruse" and that "it was the intention of the Prosecution from day one to arrest Mr. Dokmanovic." However, the Trial Chamber found "that such luring is consistent with principles of international law and the sovereignty of the FRY." In so finding, the Trial Chamber stressed that "there was no actual physical violation of FRY territory in gaining custody of Mr. Dokmanovic."

As an extraterritorial law enforcement practice, luring is much more common, and apparently somewhat less objectionable, than abductions. Unlike abduction by force, weapons are not used to induce the suspect to go to the location where the arrest will occur. Therefore, the risk of injury or damage in the host state is minimized. This does not mean, however, that there was no physical violation of FRY territory as the Trial Chamber concluded. The Trial Chamber's conclusion would only have been correct if the communications between law enforcement officials and the target of the luring were conducted exclusively over the phone, radio, e-mail, or fax. In contrast, an agent of the Office of the Prosecutor (Kevin Curtis) did physically enter FRY territory for a law enforcement purpose (the luring) without the FRY's permission. Furthermore, while the Trial Chamber found that Dokmanovic's decision to leave the FRY and enter Croatia in response to the OTP's deceit was voluntary, a decision based on

misrepresentation cannot truly be characterized as a choice made by free will.

There are numerous cases in which states have protested luring as a violation of their territorial integrity and international law. In contrast to the Trial Chamber, most countries do not distinguish between abduction by fraud and abduction by force. In recognition of this trend, in September of 1994, the XVth Congress of the International Penal Law Association adopted a resolution which stated: "Abducting a person from a foreign country *or enticing a person under false pretenses* to come voluntarily from another country in order to subject such a person to arrest and criminal prosecution is contrary to public international law and should not be tolerated and should be recognized as a bar to prosecution."

Unfortunately, the Trial Chamber's decision on the Motion for Release of the Accused, which rests on an artificial distinction between luring and abductions, may needlessly discourage future apprehensions by NATO and U.N. troops in the territory of the former Yugoslavia, especially in the FRY and Croatia. Instead, the Trial Chamber should have focussed on the authorization of law enforcement activities by the Security Council and the ICTY. There is no violation of international law where the law enforcement activities in question have been so authorized, where the state has consented, or where such activities are necessary under the principle of self-defense.

The Dayton Peace Accords, Security Council Resolutions 1031, and the subsequent agreement of the Bosnian Government permit NATO forces to lawfully exercise police powers in Bosnia. Similarly, Security Council Resolutions 1037, which with the consent of Croatia and the FRY temporarily placed the administration of Eastern Slavonia under UNTAES, gave the U.N. peacekeeping force the right to exercise police powers in that region of Croatia. Consequently, there is no violation of territorial integrity or the rights of the accused where NATO or U.N. personnel apprehend indicted war criminals in Bosnia or the region of Eastern Slavonia, Croatia. Similar activities within the FRY and other regions of Croatia, however, are another matter.

Yet, even without the consent of the FRY or Croatia, the principle of territorial integrity is not absolute. International law permits a state, for instance, to enter another's territory in self-defense. Thus, a state may justifiably engage in an unconsented abduction or luring operation in another state against terrorists which pose a continuing threat and which are being given sanctuary in the latter state. To the extent indicted war criminals located in the FRY or Croatia constitute a threat to the NATO or U.N. troops stationed in the territory of the former Yugoslavia, there is justification for abducting or luring them for purposes of arrest. Moreover, under the U.N. Charter, a state may enter another's territory when specifically authorized by the Security Council pursuant to its Chapter VII powers. Thus, the coalition forces that invaded Iraq during the Gulf War were acting in accordance with international law. Several Security Council Resolutions may be read together as authorizing the NATO force to enter the FRY to apprehend persons wanted by the ICTY.

Notes:

1. An expanded version of this casenote will be published in the upcoming issue of the *Leiden Journal of International Law*.

2. Prosecutor v. Slavko Dokmanovic, Decision on the Motion for Release by the Accused Slavko Dokmanovic, No. IT-95-13a-PT, T. Ch. II, 22 October 1997.

Publications & Other News About Members

Bamidele A. Ojo, Professor of Politics & International Studies, Fairleigh Dickinson University.

Publication -- Human Rights and the New World Order: Universality, Acceptability and Human Diversity. Nova Science Publishers (1997).

Current Research -- Humanitarian Law and the New World Order: Precepts, Interpretations, and Enforcement.

Sam Daws, University of Oxford.

Co-convener of the U.N. Working Group of the British International Studies Association. He is conducting a one-year audit of British research resources on the United Nations.

Publications -- The Procedure of the United Nations Security Council, Oxford University Press (3rd. ed. 1997) (co-authored with the late Sydney D. Bailey). Documents on Reform of the United Nations, Dartmouth Publishing (1997) (co-edited with Aul Taylor & Ute Adamczick-Gerteis).

Marjoleine Zieck, University of Amsterdam, Dept. of International Law.

Publication -- UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis, Martinus Nyhoff Publishers (1997).

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Recent Developments at the ICJ

Ingrid Persaud & Richard M.J. Thurston

Co-Chairs, ICJ Committee

Lockerbie Case: The eagerly awaited judgment of the ICJ on preliminary objections to its jurisdiction in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom)* was handed down on 27 February 1998. The Court found in favor of Libya on all questions before it. The case arose out of the destruction of Pan Am Flight 103 over Lockerbie in Scotland. The Court had previously decided in 1992 that provisional measures under Article 41 of its Statute were not applicable.

The Court first concluded that the dispute could not be resolved either by negotiation or by arbitration as provided for in Article 14 of the Montreal Convention. The ICJ noted that there exists a difference of opinion as to the interpretation and application of the Montreal Convention that is right and proper for the Court to decide. Furthermore, there are specific disputes as to the interpretation and application of two Articles of the Convention-- Article 7 (the obligation to extradite) and Article 11 (assistance with criminal proceedings). In addition, it is for the Court to decide on any questions of the lawfulness of the actions criticized by Libya where it is at odds with the Montreal Convention.

The U.K. had contended that even if the Montreal Convention did confer the rights Libya claimed, those rights were superseded by Security Council Resolutions 748 (1992) and 883 (1993), and that by virtue of Articles 25 and 103 of the U.N. Charter, the Security Council resolutions took precedence over the Montreal Convention. The ICJ found that the date the Application was filed (3 March 1992) was crucial. Both resolutions were adopted subsequent to this date and could not affect the ICJ's jurisdiction once established.

The Court then considered the U.K.'s objection that the case was inadmissible irrespective of any rights Libya may have under the Montreal Convention, as the matter is regulated by Chapter VII of the U.N. Charter. The Court again emphasized the crucial date of filing of the Application and further noted that Security Council resolution 748 was a mere recommendation without binding effect.

The U.K. also maintained that Security Council resolutions had effectively "rendered the Libyan claims without object." The Rules of the Court, the U.K. argued, allow the Court not to

proceed to judgment on the merits where any such objection of a preliminary nature is found (Article 79). Libya argued that the objection of the U.K. properly fell within one of the exceptions to the rule, *viz*., that the objection was not of a preliminary nature. The Court, by ten votes to six, found that to accept the U.K.'s argument would not merely affect Libya's rights on the merits but would itself constitute a decision on the subject matter of merits. Indeed, the U.K. had admitted that the objection raised and the merits of the case were "closely interconnected".

It is clear that there is tension in the Court with regard to its judicial review role in relation to the Security Council. Judges Koojimans and Rezek in their separate opinions found that the ICJ had a proper role regardless of the decisions of the Security Council. Judges Guillaume and Fleischhauer, in a joint declaration, found this decision to be counter to the aim of Article 79 of the Court's rules. Judge Schwebel, who voted against all of the Court's findings, provided a strong argument against a judicial review role for the ICJ, finding that the U.N. Charter in Article 103 clearly superseded any rights under the Montreal Convention and noting the Court's consistent refusal to exercise a power of judicial review, a power, he asserted, that the Court now appears to be forging for itself.

Other Recent Developments: In the latest round of the continuing legal dispute between Bosnia and Herzegovina and Yugoslavia (Proceedings instituted on 20 March 1993), the President of the ICJ, Judge Schwebel, issued an order on 22 January 1998 extending the time-limits for the filing of pleadings in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. The pleadings were requested by Court in its order of 17 December 1997 on the Yugoslavian counter-claim of Bosnia and Herzegovina's responsibility for acts of genocide committed against Serbs in Bosnia and Herzegovina and its request to the Court that Bosnia and Herzegovina be bound to take necessary measures so that such acts not be repeated. Judge Schwebel extended to 23 April 1998 the time-limit for the filing of the Reply of Bosnia and Herzegovina and to 22 January 1999 the time-limit for the filing of the Rejoinder of Yugoslavia. Given the intense political undertone of this dispute, the Court is likely to be dealing with it for a long time to come.

On 11 March 1998, public hearings in the present phase (Nigeria's preliminary objection to the Court's jurisdiction) of the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* were concluded, permitting the judges to start their deliberations. Pursuant to Article 79 of its Rules, the Court has to decide on Nigeria's preliminary objection prior to proceeding to the merits of the case. This dispute arises out a question of sovereignty over two areas, the Bakassi Peninsula in the Gulf of Guinea and over a part of Lake Chad. However, Cameroon has asked the Court to engage in a far more geographically significant decision process, namely, specifying definitively the frontier between itself and Nigeria from Lake Chad to the Atlantic Ocean. Depending on the Court's response to Cameroon's request, this case could evoke issues similar to those included in *The Indo-Pakistan Western*

Boundary (Rann of Kutch) Case (India v. Pakistan) of 1968 and/or in the more recent 1994 case concerning *The Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* [See 33 I.L.M. 571 (1994)].

On 27 February 1998, the Court fixed a time-limit of 27 November 1998 for the filing of further written pleadings in the case concerning Kasikili/Sedudu Island (Botswana/Namibia). In an agreement reached on 15 February 1995, the Parties asked the Court to determine, on the

basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law, the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island. This observer (Thurston) wonders if this case will evolve along lines similar to those of the 1962 case of Temple of Preah Vihear (Thailand v. Cambodia).

Bridging the Taiwan Strait*

Michael P. Scharf

Of all the issues raised during the visit of China's President, Jiang Zemin, to the United States in November 1997, none is as potentially explosive and far reaching as the issue of Taiwan.

An island about twice the size of the state of Massachusetts, Taiwan has its own democratically elected government and free enterprise-based economy, which is the twenty-first largest in the world. Its population of 21.5 million is greater than that of Australia or Venezuela, and it is the world's fourteenth largest trading nation. And yet, the government of Mainland China (the PRC), which views Taiwan as a renegade province, has blocked Taiwan from joining international organizations and from conducting official diplomatic relations with most of the nations of the world.

With Hong Kong now under Chinese rule, the PRC has begun to press Taiwan to accept a similar one-country, two-system formula for reunification. But, according to opinion polls, the people of Taiwan prefer independence to reunification by 43 percent to 34 percent. [And last week, the Democratic Progressive Party, which advocates Taiwan's independence, swept local elections on the Island]. China, in turn, has made clear that it would use force if Taiwan were to make a formal declaration of its independence from China. As the American show of force in the Taiwan Strait last year demonstrated, a Chinese attack on Taiwan could quickly escalate into a war between China and the United States. Thus, Taiwan is considered one of the world's foremost potential nuclear flashpoints.

On the occasion of Jiang Zemin's visit, the collective wisdom of internationally recognized experts on this topic can provide the basis for a new perspective on how it might be resolved. A group of these experts gathered in October to consider the Taiwan/China issue at a conference co-sponsored by the ASIL International Organizations Interest Group, the Public International Law & Policy Group, and the Center for International Law and Policy at New England School of Law. Among the conference participants were two former U.S. Ambassadors, a former Special Assistant to President Bush, three former State Department lawyers, a high level official from Taiwan, an unofficial representative of the PRC, and a dozen of the leading academicians in the field.

What emerged from this conference was a possible framework which could simultaneously meet the needs and aspirations of both Taiwan and China. This new approach involves neither incorporation of Taiwan into the PRC nor the challenging step of a declaration of independence as a Republic of Taiwan.

The key to the new approach is recognizing that the concepts of sovereignty and independence have changed radically in the last few years as the United Nations has admitted several new members which do not meet the traditional criteria of independent statehood. For

example, Liechtenstein and Monaco were recently admitted into the United Nations despite the fact that they had ceded their foreign affairs powers to Switzerland and France, respectively. Similarly, Micronesia, the Marshal Islands, and Palau have become members of the United Nations despite relinquishing much of their national security powers to the United States in a "Compact of Free Association." The United Nations admitted these three islands as new members, while specifically recognizing that their status was "legally distinguishable from independence."

Thus, at the same time Taiwan has been moving toward de facto (though not de jure) "independence," the world has been moving toward a far less rigid understanding of the meaning of the term. Building upon these developments, a framework for resolving the China/Taiwan issue could encompass the following elements:

establishment of a loose power-sharing arrangement between China and Taiwan (along the lines of a compact of free association), which does not erode Taiwan's autonomy, but which relieves China's security concerns.

continuation of Taiwan's international relations through quasi-official diplomatic means.

admission of Taiwan into the United Nations, the World Trade Organization, and other international

organizations without a formal declaration of independence by Taiwan.

Putting a new spin on the "if it looks like a duck ..." analogy, one of the conference participants succinctly summed up the proposed solution as follows: "The key is for Taiwan to look like a state, act like a state, carry on diplomacy like a state, join international organizations like a state, but not to formally declare its independence, lest it become a target of the PRC's hunting season."

It is most unfortunate that during Jiang Zemin's visit, the White House reportedly did not see fit to engage the Chinese leader vigorously on the issue of Taiwan. This was a missed opportunity, for it is in the United States interests to play an active role in the resolution of the China/Taiwan situation. A resolution of the situation based on the above framework would promote democracy, human rights, and international trade on both sides of the Taiwan Strait. More importantly, it would help ensure that the United States is not drawn into a military conflict in the region.

Note:

* This Op/Ed Piece was originally published with minor variations in the *Christian Science Monitor* (Dec. 3, 1997).

We Want to Hear from You!

This newsletter's success depends upon material being submitted by our membership. We encourage submission of any items of interest to members, including articles, letters to the editor, announcements of events, employment opportunities (paid or volunteer) in international

law, positions sought, etc. Submission by June 1, 1998 will ensure full consideration for inclusion in the next issue. Submit material for publication at the address listed below. Please contact me before submitting articles. If possible, longer works should be submitted by e-mail or on IBM compatible disk. For anything sent by e-mail, do not assume I have received it unless you receive a confirmation. We also wish to publish news of our members' activities. Please let us know what you have been doing by completing the following form and sending it to me (or sending me an e-mail message containing the information).

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