

INDEX

Abbreviations used in the index

- AI (Amnesty International)
- AIRE (Advice on Individual Rights in Europe)
- AP I (Geneva Conventions (1949), First Additional Protocol (international armed conflicts) (1977))
- AP II (Geneva Conventions (1949), Second Additional Protocol (non-international armed conflicts) (1977))
- BNA (British Nationality Act)
- Bogotá (American Treaty on Pacific Settlement (1948) (Pact of Bogotá))
- CAAT (Campaign Against Arms Trade)
- CIL (customary international law)
- CLCS (Commission on the Limits of the Continental Shelf)
- Common Position (Common Rules Governing the Control of Exports of Military Technology and Equipment (European Council Common Position 2008/944/CFSP))
- Consolidated Criteria (Consolidated EU and National Arms Export Licensing Criteria)
- CRC (UN Convention on the Rights of the Child (1989)/Child Rights Committee)
- CRCPA (Constitutional Review Court Procedure Act)
- CREAA (Constitution of the Republic of Estonia Amendment Act)
- CSPA (Early Reception and Aid Centre (Contrada Imbriacola))
- ECO (Export Control Organization)
- ECRE (European Council on Refugees and Exiles)
- ESM (Treaty Establishing the European Stability Mechanism (2012))
- FRCP (US Federal Rules of Civil Procedure)
- FSIA (US Foreign Sovereign Immunities Act)
- FTCA (Federal Tort Claims Act)
- GC (1949) (Geneva Conventions (1949))
- Guidance Circular (1969) (FCO (UK) Circular Note (1969) giving guidance on “permanent residence”)
- HoC (House of Commons)
- HQA (Headquarters Agreement)
- HRC GC (UN Human Rights Committee General Comment)
- ICCPR (International Covenant on Civil and Political Rights (1966))
- ICJ (International Court of Justice)/(ICJ Statute)
- IFC (International Finance Corporation)
- IHL (international humanitarian law)
- ILC(EA) (ILC Draft Articles on the Expulsion of Aliens (2014))
- ILC(SR) (International Law Commission Articles on State Responsibility for Internationally Wrongful Acts)
- IMO (International Maritime Organization)
- IMO Order (International Maritime Organization (Immunities and Privileges) Order 2002)
- IMO Procedures (Annex 3 to IMO Assembly Resolution A.908(22) of 5 June 2002)
- IOA (International Organizations Act 1968 (UK))

IOIA (International Organizations Immunities Act 1945) (22 USC 288)
 LIBOR (London Interbank Offered Rate)
 McGill Centre (Centre for Human Rights and Legal Pluralism of McGill University)
 MENAD (Middle East and North African Directorate (FCO))
 OAS (Organization of American States/OAS Charter)
 PACE (Parliamentary Assembly of the Council of Europe)
 PQ (Parliamentary question)
 Return Directive (EU Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals)
 ROP Rules of Procedure
 RSC (Convention on the Reduction of Statelessness (1961))
 SAPI/SAPI Regulations (Specialized Agencies (Privileges and Immunities) Regulations (Cth))
 SAPIC (Convention on Privileges and Immunities of Specialized Agencies (1947))
 SIAC (UK Special Immigration Appeals Commission)
 SoS (Secretary of State)
 TFEU (Lisbon Treaty on the Functioning of the European Union (2007))
 UG (User's Guide (Common Position 13))
 UNSG (UN Secretary-General)
 VCDR (Vienna Convention on Diplomatic Relations (1961))
 VCLT (Vienna Convention on the Law of Treaties (1969))
 VCRS/Vienna Convention on the Representation of States (Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975))

abortion restrictions: *see* Ireland, Republic of, abortion-related legislation; reproductive rights; *Whelan*

access to the courts/effective remedy in case of State immunity (including ECHR 6(1), ICCPR 14 and UDHR 8)

Al Malki v. Reyes 431-2

Al-Juffali 423-4, 431-2

Empson 423-4

Mothers of Srebrenica 431-2

accreditation/presentation of credentials as date of taking up functions (VCDR 13)
 426

act of State (foreign State acts), international law/human rights violations (public policy exception)

Belhaj 492-6

Ukraine v. Law Debenture 492-9

admissibility (ECtHR), timeliness of objection 209-10

***Al-Juffali* (immunity of IMO Member's representative)**

applicable law/extracts 418-20

background

appellant's family status 417

applicable law: *see* IMO (immunity from jurisdiction of representatives accredited to (IMO V/IMO HQA 13 bis))

High Court decision 417

Court's conclusions

appellant's entitlement in principle to immunity 435

- conclusiveness of executive certificate (IOA 8) 430-1
- ECHR 6 considerations/compatibility of IMO Order 15 with international law 431-5
- overall conclusion 444
- permanent residence issue 442-4
- entitlement to immunity
 - ECHR 6 (access to a court) considerations 423-4, 431-5
 - “entitled”/“enjoy” (VCDR 39(1)), distinguishability 426-7
 - functional review by Court, scope/obligation of sending State to waive immunity (SAPIC V:16) 425-31
 - status of appellant
 - appointment/notification to IMO and UK FCO/appearance on the diplomatic list 422
 - executive certificate (IOA 8), conclusiveness 422-3, 430-1
 - VCDR provisions not included in DPA, binding effect on UK under international law/as aid to interpretation 426
 - VCRS 30 433-4
- parties’ arguments
 - appellant/Secretary of State as intervener (entitlement to immunity) 424
 - respondent (ECHR 6 considerations) 432-3
- permanent residence issue (VCDR 38(1)/HQA 13 *bis*/IMO Order 15) 435-44
 - evidence of appellant’s residential status 438-41
 - Court’s analysis 441-2
 - “permanent residence” 435-8
- Amnesty International (AI)**, reports, findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo (21 April 2011) (extracts) 207-9
- annexation**
 - see also Crimea Annexation Case*
 - of Crimea (2014) 352-5
 - treaty succession in case of non-recognition of 352-5
- arbitrary arrest or detention:** *see Khlaifia* (ECtHR); liberty and security of person, right to (ECHR 5)
- Arctic Sunrise (compensation)**
 - background
 - Award on Jurisdiction (26 November 2014) 134
 - Award on Merits (14 August 2015) 134-6
 - ITLOS ROP 20(3) (preliminary objections: joinder to merits/bifurcation) 141
 - procedural history following Award on Merits 136-9
 - Russian measures giving rise to the arbitration proceedings 133-4
 - Russia’s non-participation in the arbitration 134, 136
 - deposits for the costs of arbitration, Russia’s obligation to reimburse the Netherlands the amounts of Russia’s share paid by the Netherlands 162
 - heads of damages A: damage to the *Arctic Sunrise*
 - Netherlands’ claim/entitlement to damages 139
 - itemized claim (Table A) 139-41
 - Tribunal’s analysis and conclusion 150
 - claims audited by WEA Accountants (compensability of claims/award of 98.6% of compensable claims) 145-8
 - costs of mobilizing public support for the release of the *Arctic Sunrise* (non-compensable) 141, 158
 - other items included in Table A (compensability/adjustments of amount claimed) 148-50

Arctic Sunrise (compensation) (*cont.*)

- replacement of RHIBs (disproportionate claim/entitlement to “reasonable and well-founded” damages) 141-5
- heads of damages B: non-material damage to the Arctic 30
 - Netherlands’ claim/entitlement to damages 150
 - Tribunal’s analysis and conclusion
 - conclusion 154
 - consistency and coherence of decisions on, importance/lack of 151, 153-4
 - ECHR proceedings/risk of double recovery 154
 - per diem* vs lump sum calculation 154
 - Tribunal’s analysis and conclusion (jurisprudence considered)
 - Chukayev* 153
 - Diallo* 151-3
 - Frumkin* 153
 - Lusitania* 154
 - Saiga (No 2)* 153-4
- heads of damages C: damage resulting from measures taken against the Arctic 30
 - Netherlands’ claim/entitlement to damages 155
 - itemized claim (Table B) 155-6
 - Tribunal’s analysis and conclusion (compensable/partially compensable claims)
 - claims audited by WEA Accountants (compensability of claims/award of 98.6% of compensable claims) 160-1
 - other items included in Table B (compensability/adjustments of amount claimed) 161
 - request for a lump sum in compensation for personal objects 159-60
 - Tribunal’s analysis and conclusion (non-compensable/partially compensable claims (ILC(SR) 31 limitation of compensation to direct damages)) 156-9
 - costs incurred for contact with/visits by next of kin 159
 - Netherlands’ failure to provide specific breakdown of costs and allocation 158-9
 - salary costs related to emergency response team/emergency global response 157-9
 - salary costs related to Murmansk emergency support/global costs of mobilizing support 158
 - Tribunal’s conclusion 161
- heads of damages D: costs incurred by the Netherlands for the issuance of the bank guarantee to Russia
 - Netherlands’ claim 163-4
 - absence of agreed rules on/as matter of discretion (ILC(SR) 38(10)) 164
 - on arbitration costs 166
 - [commercially] reasonable 165
 - factors for determination 164
 - full reparation for injury suffered as objective/determination of rates and mode of calculation in accordance with (ILC(SR) 38(1)) 164-6
 - in case of material damage 165
 - in case of non-material damage 165
 - LIBOR 165-6
 - material and non-material damage, possibility of differentiation 165
 - payment from date of award 166
 - payment from date of reimbursable arbitration costs 166
 - Netherlands’ claim/entitlement to damages 161
 - Tribunal’s conclusion 162
 - simple interest, Tribunal’s award of 166
 - Tribunal’s decision (amounts) 167

arms dealing, human rights and: *see* *CAAT*

arrest or detention, right to take proceedings to establish lawfulness (ECHR 5(4) and ECHR 6(1)) (judicial review/appeal)

authority of review body to *decide* lawfulness/order release 229-30

review by advisory panel, sufficiency 229-30

delays (“shall be decided speedily”) (ECHR 5(4)) 230-1

effective remedy requirement including reviewing body’s power to order release 230

“lawful” (ECHR 5(1)) as applicable standard 229-30

scope/extent of right

consideration of all conditions essential for “lawful” detention 229-30

dependence on the type of deprivation of liberty in issue 230

substitution of reviewing body’s discretion for that of the decision-making authority, exclusion 229-30

arrest or detention, right to take proceedings to establish lawfulness (ECHR 5(4) and ECHR 6(1)) (judicial review/appeal), jurisprudence

A v. UK 229-30

Abdolkhani and Karimnia 230-1

Baranowski 230-1

Bubullima 230-1

Chahal 229-30

Delbec 230-1

E v. Norway 229-31

Fuchser 230-1

Hutchison Reid 230-1

Ireland v. UK 229-30

Khlaifia 228-32

Lavrentiadis 230-1

Luberti 230-1

S.D. 231

Shamayev 231

Shtukaturo 230

Stanev 230

Vachev 230

Weeks 229-30

Austria

Constitution 1920 (*B-VG*), Article 9(1) (customary international law/generally

recognized rules as integral part of law of Austria) 353-4

extradition: *see* *Crimea Annexation Case*

CAAT: *see* *CAAT* (background including facts, legal framework and procedural matters);

CAAT (Court of Appeal); *CAAT* (High Court)

CAAT (background including facts, legal framework and procedural matters)

facts (conflict in Yemen) 567-8, 623-4

legal framework

Consolidated Criteria (2000) 557

Consolidated Criteria (2014) 557-8

Criterion 2 (respect for human rights and IHL in country of final destination) 558-9, 625-7

evidence for purpose of applying 559, 627

EU Code of Conduct on Arms Exports (1998) 557

EU Common Position (2008)

- CAAT (background including facts, legal framework and procedural matters)** (*cont.*)
- adoption as guidance under Export Control Act s 9 557-8
 - economic, social, commercial and industrial interests, applicability 626
 - status as agreement between member States 557-8
 - Export Control Act 2002 by section
 - 1(1) (SoS's power to impose export controls) 624-5
 - 5(2) (controls to give effect to UK's EU/international obligations) 624-5
 - 9(2) (on the exercise of licensing power) 624-5
 - 9(3) (SoS's obligation to give guidance about the general principles to be followed when exercising licensing powers) 557, 624-5
 - 9(8) (Consolidated Criteria: treatment as guidance for the purposes of s 9 unless varied or withdrawn) 557
 - Export Control Order 2008 by article
 - 3 (military goods) 624-5
 - 26 (licences) 557, 624-5
 - 32 (amendment, suspension and revocation of licences) 557, 624-5
 - IHL (international humanitarian law) 561-3, 629-30
 - burden of proof in context of weapons being used for internal repression (UG 2.7) 562
 - main principles (GC (1949), AP I/AP II and CIL) 563
 - main principles (UG 2.10) 562-3, 627-9
 - mens rea* (recklessness) 562
 - principle of distinction 563, 630
 - principle of proportionality 563, 630
 - "serious violations", classification as (UG 2.6) 562
 - "serious violations" (UG 2.11) 561
 - war crimes (ICC 8) 561-2
 - relevant principles of domestic law
 - rationality/reasonableness 564-6
 - Tameside* duty 566-7
 - User's Guide (UG) (Common Position 13) 559-61, 627-9
 - clear risk (UG 2.13) 560
 - procedural matters
 - challenge 568-9, 630-1
 - grounds 569
 - High Court open judgment (Appeal Court summary of) 631-7
 - permission to intervene (Amnesty International, Human Rights Watch and Rights Watch (UK)) 631
 - relief claimed 631
 - CAAT (Court of Appeal)**
 - background (Court of Appeal proceedings)
 - see also* CAAT (background including facts, legal framework and procedural matters)
 - grounds of appeal (closed) 638
 - third-party interveners 638
 - grounds of appeal (open) 637-8
 - judicial review, general principles 638-41
 - appeal distinguished 639
 - Court's preference for a different choice, exclusion 639-40
 - legality of government actions, limitation to 639
 - reasonableness/rationality (*Wednesbury/Tameside* principles) 639-40
 - Court's decision (allowal of appeal on ground 1/remittal to SoS for reconsideration) 671

- ground 1: fundamental deficiency of SoS's consideration of Saudi Arabia's respect for IHL
 - Court's conclusion
 - closed evidence, treatment of 662
 - evidence of NGOs/UN Panel of Experts, treatment by UK analysts/advisers 662
 - evidence of NGOs/UN Panel of Experts vs information available to SoS 662
 - failure to address question of historic pattern of IHL breaches 663-4
 - importance attached by SoS's advisers to IHL considerations 662-3
 - irrationality of SoS actions 664
 - quality of analysis undertaken by MoD/FCO 662
 - government statements on process in date order
 - ECO letter (9 December 2016) 645
 - Elwood MP's written answer to PQ (4 January 2016) 645
 - ECO submission to BIS SoS (4 February 2016) 646-7
 - Elwood MP's written answer to PQ (12 February 2016) 647
 - Elwood MP's written answer to PQ (24 February 2016) 647
 - Elwood MP's written answer to PQ (27 July 2016) 647
 - Special Advocates' OPEN submissions (17 January 2017) 647-8
 - defendant's information 648
 - High Court decision 642-5
 - interveners' submissions 648-51
 - parties' arguments (CAAT) 642
 - central contention (failure to address historic pattern of breaches) 641-2
 - Part 1 651
 - Part 2 653-8
 - parties' arguments (SoS)
 - Part 1 651
 - Part 2 658-61
- ground 2: error in relation to failure to ask questions in User Guide (UG)
 - Court's conclusion
 - rationality/*Tameside* duty 666-7
 - status of User Guide 665-6
 - parties' arguments (CAAT) 664
 - parties' arguments (SoS) 665-6
- ground 4: failure to rule on the meaning of "serious violations" of IHL
 - Court's conclusion
 - alleged error of approach in SoS's decision-making process 670
 - CAAT's request for definition of IHL 671
 - High Court's alleged limitation of "IHL" to cases of individual criminal responsibility 669-70
 - High Court's alleged misunderstanding of "IHL" 669
 - rejection of appeal 671
 - parties' submissions (CAAT) 667
 - parties' submissions (SoS) 668-9
- CAAT (High Court)**
 - Court's analysis of the evidence (CAAT's) 573-81
 - chronology of reports
 - Human Rights Watch Report (*Targeting Saada*) (June 2015) 574
 - European Parliament Resolution P8_TA-PROV (2015)0270 (9 July 2015) (Yemen) 574
 - Human Watch Report (*What Military Target Was in My Brother's House?*) (November 2015) 574

CAAT (High Court) (*cont.*)

- UN Experts' Report on Yemen (UNSCR 2149 (2014)) (January 2016) 575
- European Parliament Resolution P8_TA-PROV (2016)0066 (25 February 2016) (Yemen) 575
- UNSG's Report on *Children and Armed Conflict* (20 April 2016) 575-6
- Amnesty International Report on *Yemen: "Nowhere Safe for Civilians"* (August 2015) 576
- HoC Business, Innovation and Skills and International Trade Committees Joint Report on "use of UK-manufactured arms in Yemen" (HC 679) (14 September 2016) 576
- HoC Foreign Affairs Committee Report on "use of UK-manufactured arms in Yemen" (HC 688) (14 September 2016) 576-7
- CRC, Concluding observations on the combined third and fourth periodic reports of Saudi Arabia (25 October 2016) 577
- witness statement (Ann Feltham) 578-9
- Court's analysis of the evidence (interveners')
 - Court's observations on 581
 - Human Rights Watch, Amnesty International and Rights Watch (UK) 579-80
 - Oxfam 580-1
- Court's analysis of the evidence (SoS's)
 - defendant's case 581-2
 - defendant's open evidence 582
 - Department for International Trade's role 585
 - FCO's role 583-4
 - MoD's role 584-5
 - SoS's role 582-3
- Court's analysis of the evidence (SoS's) (six strands of information relied on)
 1. MoD's methodology and analysis of allegations of IHL violations 585-9
 - claimant's list of 72 incidents 587-8
 - Court's general observation on 589
 - qualitative analysis/sources of information 588-9
 - quantitative analysis 586-7
 - sources 585
 - the "Tracker" 586
 2. UK knowledge of Saudi Arabia's military processes and procedures 589-90
 3. UK engagement with Saudi Arabia 590-1
 4. Saudi investigations into incidents and establishment of JIAT 591-3
 - claimant's criticisms of Saudi Arabian investigations/Court's comments 592-3
 5. public statements by Saudi Arabian officials and post-incident dialogue 593-5
 - claimant's observations on/Brigadier General Assiri's statements 595-8
 - statements on "cluster" munitions 598
 6. role of the Foreign Office and MENAD, including IHL updates 598-605
 - October 2015 update 599-600
 - November 2015 update 600
 - January 2016 update 601-2
 - March 2016 update 602-3
 - May 2016 update 603
 - June 2016 update 603
 - July 2016 update 603
 - October 2016 update 603-4
 - December 2016 update 604
 - January 2017 update 604

- ad hoc updates 604
- Great Hall and other incidents (closed judgment) 604-5
- Court's conclusions
 - closed material, justification for/value of 622
 - a "finely balanced" decision for the SoS requiring judicial caution 620-1
 - rational national nature of SoS's conclusion 621-2
- Court's decision 622
- Ground 1: failure to ask correct questions and make sufficient enquiries (Court's summary) 611
- Ground 1(1): failure to ask questions identified in the User's Guide (UG)
 - claimant's submission 605-6
 - Court's analysis
 - compliance with *Tameside* duty 606-7
 - indicative nature of suggested "relevant questions" of the User's Guide 606-7
 - "isolated incidents" vs "pattern of violations" as test (UG 2.13) 606-7
 - key matters suggested by User's Guide for "thorough assessment of the risk" 606-7
 - properly and lawfully inherent flexibility of inquiry process 606-7
 - relevant question (Criterion 2c: clear risk of serious violation of IHL) 606-7
 - User's Guide as non-binding guidance 606-7
- Ground 1(2): failure to investigate every incident
 - claimant's submission 607
 - Court's analysis
 - Criterion 2c, dependence on prospective risk assessment taking account of a wide range of factors 607-8
 - inherent difficulty for non-party to conflict to reach reliable view on compliance of sovereign State with IHL 607-8
 - limited nature of information available to claimant and sources relied on by claimant 608-9
 - semi-judicial inquiry into every past incident as impractical and unnecessary 607-8
- Ground 1(3): limitations of the Tracker
 - claimant's submission 609
 - Court's analysis
 - absence of reference to a "legitimate military target", significance 609
 - removal of column headed "International Humanitarian Law Breach", significance 609
- Ground 1(4): failure to make position clear to Parliament
 - claimant's submission 609-10
 - Court's views 609-10
- Ground 1(5): risk of diversion of weapons not sufficiently considered (breach of Criterion 7)
 - claimant's submission 610
 - Court's assessment 610-11
- Ground 2: failure to apply the "suspension mechanism"
 - claimant's submission 611-12
 - Court's conclusion 612-13
 - relevant policy 611-12
- Ground 3: irrationality of no "clear risk" conclusion under Criterion 2c
 - claimant's argument 617
 - Court's analysis
 - complexity of determining breaches of IHL following civilian casualties 618
 - FCO/MoD action following receipt of UN Experts Report 619

CAAT (High Court) (*cont.*)

- government's response to Parliamentary committees' September 2016 reports 619-20
- relationship between civilian casualties and a breach of IHL 617-18
- significance of isolated IHL violations (UG 2.13) 618
- SoS's consideration of third-party reports 618
- SoS's decision on Criterion 2c 620
- third-party reports, recognition of need to take into account 617
- UN Experts Report, evaluation 618-19
- Court's general observations
 - gaps in FCO/MoD analysis of the situation 614
 - governmental decision-making as a highly sophisticated, structured and multifaceted process 613
 - governmental risk analysis and NGO/press reports of incidents distinguished 613-14
 - seriousness of approach of officials advising Ministers/February 2016 documents 614-17
 - swiftness of reaction to major incidents of concern recorded on the Tracker 614
- issue (clear risk of licensed goods being used to commit serious violation of IHL)/
 - Court's approach to 572-3
- parties' submissions
 - claimant 569-70
 - defendant 571-2
 - interveners 570-1

causation/causal link as requirement for finding of breach of State responsibility/liability for reparation (ILC(SR) 31(2))

- direct/indirect loss distinguished 156-9
- jurisprudence, *Arctic Sunrise* 156-9

CoE/PACE ad hoc Sub-Committee's report on visit to Lampedusa (30 September 2011) (extracts) 200-6**collective/mass deportation/expulsion**

- "collective expulsion"
 - ECHR Protocol 4:4
 - absence of examination of individual circumstances as indicator of 265-6
 - "collective" 304-9
 - "expulsion of aliens, as a group" (ILC(EA) 9) 197-9
- ECHR Protocol 4:4
 - background to expulsion orders/context, relevance 265-6
 - problems of managing migration flows/reception of asylum-seekers, relevance 266
 - culpable conduct of the person concerned, relevance 266
 - examples of a finding of a breach 266-7
 - lawfulness of residence, relevance 304-9
 - means of implementation of expulsion decision, relevance 311-13
 - purpose of provision (examination of individual circumstances/opportunity to challenge proposed measure) 265-6
 - reasonable and objective examination of each case on individual basis requirement 265-6, 283-4, 290-8
 - right to individual interview vs genuine opportunity to challenge decision 269-71, 284, 290-304, 311-13
 - travaux préparatoires* 307, 309-10
- jurisprudence
 - Andric* 265-6

Berisha 266
Čonka 265-7, 312
Davydov 265
Dritsas 266
Georgia v. Russia (No 1) 265-7
Ghulami 265
Jamaa 265-7
Khlaifia 257-71, 282-4, 287-316
M.A. v. Cyprus 266
M.S.S. 266
Sharifi 265-6
Sultani 265-7

numbers involved, relevance 266, 309

compensation/damages, risk of double recovery 154

Continental Shelf, Commission on the Limits of (UNCLOS Annex II) (CLCS)

functions (UNCLOS 76(1)/UNCLOS Annex II:9 (delineation of outer limits (UNCLOS 76) and delimitation (UNCLOS 83) distinguished) 47-8
 functions (UNCLOS 76(8)) (coastal State's right to establish final and binding continental shelf limits beyond 200 nautical miles)
 "appurtenance test" (UNCLOS 76(4)(a)/CLCS Guidelines) 68-9
 dependence on submission of information to Commission 46-8, 64-7, 98-9, 109-16
 delimitation, applicability to 47-8, 110-12
 necessity for/CLCS as legitimator 69
 overlapping entitlements, applicability to 69
 "preliminary information" 67-8
 relationship with international courts and tribunals 112-16
 relevance where a party to the dispute is not party to UNCLOS 84-6, 116-22

ROP 46 (consideration of submissions to CLCS in case of an UNCLOS 83 delimitation dispute) 47-8

continental shelf (definitions/concept), UNCLOS 76, customary international law status 85-6

contracts

implied factors, identified risk factors, relationship with 521
 implied terms

caution, need for 514-15
 conditions/criteria 515-21
 clarity and certainty of proposed implied terms 520
 clarity and practical coherence 519-20
 "necessities of the contract" test 517
 "obviousness" 520-1
 tradeable nature of contract, relevance 517-19

jurisprudence

BP Refinery (Westernport) 515-16, 520-1
CEL 516
James McCabe 516-17
Mackay v. Dick 516
Marks and Spencer 514-17
Philips Electronique Grand Public 514-15
Swallowfalls 516
Ukraine v. Law Debenture 514-21

term prohibiting "prevention" of contract, absence of general rule 516

countermeasures (including ILC Articles on), as international law doctrine 501-2

Crimea Annexation Case

- background (facts and procedural history) 352-3
- Court's analysis and decision (Austria's ECE 1 obligation to extradite) 353-5
 - Crimea–Russia Treaty on the Accession of Crimea to Russia (18 March 2014), status 355
- dismissal of appeal 352
- incorporation of Crimea into the Russian Federation
 - as breach of obligation not to recognize effects of wrongful act (ILC(SR) 41(2)) 354
 - as breach of UNC 2(4) 354
 - call upon States not to recognize any alteration of the status of Crimea (UNGA Res. 68/262) 354
 - non-applicability of treaties including ECE 1 consequent on 355
 - non-recognition of/as “attempted” annexation 354-5

damages for

- non-pecuniary loss/non-material damage including moral injury/intangible loss
 - consistency and coherence of decisions on, importance 151
 - lack of 153-4
 - loss of reputation, relevance 152
 - per diem* vs lump sum calculation 154
- non-pecuniary loss/non-material damage including moral injury/intangible loss, jurisprudence
 - Arctic Sunrise* 150-4
 - Diallo* 151-3
 - Frumkin* 153
 - Lusitania* 154
 - Saiga (No 2)* 153-4

democracy

- definition 372-3
- rule of law, need for 372-3

deportation/expulsion of alien (ILC(EA))

- “collective expulsion” (ILC(EA) 9) 197-9, 268
- extracts 197-9

deportation/expulsion/refusal of admission of alien, definitions

- “to drive away from a place” (*Jamaa*) 267, 287
- “formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State” (ILC(EA) 2) 197-9, 267

differential treatment, justification/requirements (ICCPR 26), *Wheeler* 347-9

diplomatic premises, inviolability (including VCDR 22), service of process and 709-10, 713-15, 717-18

diplomatic privileges and immunities

- duration (VCDR 39)
 - Al-Juffali* 420-1, 425-35
 - “entitled”/“enjoy” (VCDR 39(1)), distinguishability 426-7
 - entry into/notification to receiving State (VCDR 39(1)) as trigger 425-35
- entitlement of nationals of receiving State (VCDR 38)
 - Al-Juffali* 435-44
 - “permanent residence”, definition
 - absence of judicial authority (UK) 435

- Guidelines Circular (1969) (“but for” test) 435-8
- Satow* 436
- waiver of immunity from jurisdiction (Member State representatives to international organizations (SAPIC V(16))) 425
- diplomatic status, evidence of/requirements**
 - functional review by Court 425-31
 - jurisprudence
 - Al Attiyah* 427-8
 - Al-Juffali* 425-31
 - Apex Global* 429-30
 - Bagga* 429
 - Engelke* 428
 - Teja* 428-9
- ECtHR Rules of Court (1998-2013)**
 - 52(1) (allocation of cases) 180
 - 55 (pleas of inadmissibility) 209-10
- ECtHR Rules of Court (2016)**
 - 24 (composition of the Grand Chamber) 180-1
 - 44(3)(a) (third-party intervention: participation in written/oral hearing) 181
 - 52(1) (allocation of cases) 180
 - 55 (pleas of inadmissibility: timeliness) 209-10
 - 59(3) (public hearing) 181
 - 73 (referral of the case to the Grand Chamber) 180-1
 - 74(2) (separate opinions) 280
- effective remedy before national authority, need for (ECHR 13/ICCPR 2(3)), jurisprudence**
 - Chahal* 273
 - Čonka* 276, 314-15
 - De Jong, Baljet and Van den Brink* 273
 - De Souza Ribeiro* 271-2, 276-8, 284-5, 314-15
 - Jamaa* 274, 276
 - Khlaifia*, 271-8: *see also Khlaifia* (ECtHR) (alleged violation of ECHR 13 (right to an effective remedy in conjunction with ECHR 3, ECHR 5 and ECHR Protocol 4:4))
 - Kudla* 274
 - Nikolova* 273
 - Ruiz Rivera* 273
- effective remedy before national authority, need for/examples (ECHR 13/ICCPR 2(3))**
 - “arguable complaint” as trigger 274
 - ECHR 5(4) as *lex specialis* 273
 - “effective remedy”
 - aggregate of remedies as 274
 - “effective” 274
 - suspensive effect, need for (ECHR Protocol 4:4 (collective expulsion)) 275-8
 - real risk of breach of ECHR 2/ECHR 3 requirement 276-8
 - judicial vs non-judicial remedies 274
 - legislative changes to ensure conformity with obligations 344
 - measures to ensure non-repetition (ICCPR 2(3)(a)) 344
- equality of parties (municipal law/general), respondent’s right to defend itself using any permissible defence (*Ukraine v. Law Debenture*) 500-1**

- ESM Case:** *see* *ESM Case* (constitutional complaints (Estonia)) (Court's analysis and decision); *ESM Case* (constitutional complaints (Estonia)) (dissenting opinions)
- ESM Case (constitutional complaints (Estonia)) (Court's analysis and decision)**
- Chancellor of Justice's competence to carry out a preliminary review of an international agreement
 - Chancellor's compliance with Constitution 139(1)/Constitution 142 procedures 368-9
 - purpose of preliminary review (Constitution 123(1)) 368
 - Chancellor of Justice's warning to Minister of Finance of risk of Constitutional incompatibility of Treaty (26 January 2012) 369
 - Court's overview of judgment 363
 - ESM Treaty
 - status as international agreement independent of EU primary and secondary law 366-7
 - amendment of TFEU 136 (euro) (European Council Decision 2011/199) 390-1
 - non-applicability of CREEA 2003 366-7
 - possibility of integration into EU institutional framework 391
 - status as treaty for the purposes of VCLT 2(1)(a) and Constitution 123(1) 366
 - summary of provisions 363-6, 391
 - principles of the Constitution/interference with (Court's position)
 - "democratic State based on the rule of law" (Constitution 10) 372-3
 - applicability in Estonia of the general principles of law recognized in EU legal space 372
 - Estonian membership of EU: respect for fundamental principles of the Estonian Constitution (CREEA 1)
 - as authorization to ratify the Treaty of Accession and to be part of the changing EU 390-2
 - continuing obligation of Parliament to assess future amendments to EU Treaties/new treaty obligations for serious interference with Constitutional principles (CREEA 1) 391-2
 - Parliament's budgetary powers (Constitution 115/Constitution 65.6) as core competence 370, 373-4
 - referendum, exclusion 374
 - sole authority of Parliament to decide on State's financial sovereignty 374
 - risk to democracy of extensive financial obligations restricting Parliament's budgetary rights 375-8
 - sovereignty principle (Constitution 1(1)) 371-2
 - treaties, compatibility with 371-2, 408
 - treaties as inevitable limitation of sovereignty 372
 - treaty interpretation, presumption against restrictions on 371-2
 - VCLT, absence of rule on 372
 - principles of the Constitution/interference with Parliament's budgetary powers (Chancellor of Justice's position) 370-1
 - Estonia's ESM 4(4) obligations and obligations under the State Budget Act relating to State guarantees (reservation) compared 370-1
 - Parliament's budgetary powers (Constitution 115/Constitution 65.6) as core competence 370
 - relationship with Constitution 14 (fundamental rights) 370
 - relationship with Constitution 65.10/Constitution 121.4 (Parliament's budgetary powers/reservation) 370
 - risk to democracy of extensive financial obligations restricting Parliament's budgetary rights 370-1

- proportionality of interference 382-90
 - appropriateness, necessity and reasonableness requirement 383-4
 - appropriateness and necessity 383-6
 - Court's conclusion 385-6
 - appropriateness test 384-5
 - Case 3-4-1-8-09* (Constitution 154 (autonomy of local authorities)) compared 382
 - constitutional review, scope/separation of powers considerations 383
 - Supreme Court's right to review treaty after Parliament's decision on ratification 383
 - interference with fundamental rights and constitutional principles distinguished 382
 - necessity and 385
 - absence of alternative 385
 - reasonableness of interference 386-90
 - seriousness of interference with constitutional principles/with Parliament's financial competence 386-90
- purpose/legitimacy of ESM 4(4) 378-82
 - ESM 4(4) as interference with financial competence of Parliament/democracy/State's financial sovereignty 379
 - legitimacy 379-82
 - compatibility with democracy (Constitution 14/preamble) 381-2
 - elimination of threat to the economic and financial sustainability of the euro area
 - compatibility with principles and values of the Constitution 380-2
 - restriction of sovereignty (Constitution 1/preamble) or democracy (Constitution 10), absence of grounds for 380
 - purpose
 - as emergency procedure 378-9
 - "expedited procedure" (ESM 4(4)) (Estonian) vs "emergency voting" (ESM 4(4)) (non-Estonian versions) 378-9
 - as guarantee of the ESM in case of failure to reach a unanimous decision 379-80
 - request (for declaration of incompatibility of ESM 4(4) with Constitution 1(1), 10, 65.10 and 115) 362
 - admissibility 369
 - limitation of request and Court's judgment to ESM 4(4) (emergency voting procedure) 369
- ESM Case (constitutional complaints (Estonia)) (dissenting opinions)***
 - Ilvest J* (waiver of sovereignty) 394-6
 - Jóks, Järvesaar, Kergandberg, Kivi, Kull, Laarmaa JJ* 396-404
 - Chancellor's powers to challenge treaty, scope (CRCPA 6(1)(4)) 396-7
 - Court's view, points of concern
 - Case 3-4-1-8-09* (Constitution 154 (autonomy of local authorities)), inappropriateness as precedent 401
 - constitutional review, separation of powers considerations/Supreme Court's right to review treaty after Parliament's decision on ratification 400-2
 - determination of purpose of interference with principles of the Constitution 400
 - limitation of review to EMS 4(4)/need for review of provisions relating to Estonia's maximum financial obligations 400
 - risks to constitutional principles from implementation of EMS/Estonia's limited options 402-4
 - seriousness of interference with constitutional principles, inadequacy of analysis 401-2
 - ESM Treaty, status
 - as treaty "deemed as" an EU matter 397-8
 - as treaty for the purposes of VCLT 2(1)(a) and Constitution 123(1) 397-8

ESM Case (constitutional complaints (Estonia)) (dissenting opinions) (cont.)

- Estonia's accession to the EU (CREA 1)
 - as authorization to ratify the Treaty of Accession and to be part of the changing EU 398-400
 - continuing obligation of Parliament to assess future amendments to EU Treaties/new treaty obligations for serious interference with Constitutional principles 398-400
- Kõve J (principles of constitutional review) 392-4
 - Chancellor's powers to challenge treaty, scope (CRCPA 6(1)(4)) 392-3
 - legal certainty and clarity as objective 396-7
 - limitation of review to EMS 4(4)/need for review of provisions relating to Estonia's maximum financial obligations 393
 - risk to democracy of extensive financial obligations restricting Parliament's budgetary rights 394
- Luik J 406-14
 - amendment of the Constitution, Chapters I and XC, need for referendum 411
 - application of the Constitution without prejudice to the rights and obligations of EU membership (CREAA 2) 409
 - Court's failure to address compatibility of EMS Treaty with the principle of parliamentary democracy 411
 - "democratic State based on the rule of law" (Constitution 10), consequences of Estonia's status as 408-9
 - elimination of threat to the economic and financial sustainability of the euro area, compatibility with principles and values of the Constitution 411-14
 - Estonian membership of EU: respect for fundamental principles of the Estonian Constitution (CREAA 1) 409
 - risk to democracy of extensive ESM financial obligations restricting Parliament's budgetary rights 409-11
 - sovereignty of Estonia, inalienability (Constitution 1) 407-8
- Tampuu J 404-5
 - continuing obligation of Parliament to assess future amendments to EU Treaties/new treaty obligations for serious interference with Constitutional principles (CREAA 1) 405-6
 - EMS Treaty, status 405-6
 - relevance of proportionality test 404
 - seriousness of interference with constitutional principles, inadequacy of analysis 406
 - waiver of sovereignty (ESM 4(4)), constitutional issues 404-5
- ESM Treaty (2012)**
 - see also ESM Case*
 - decision-making/voting rules, concerns 403
 - object and purpose (elimination of threats to financial stability of the euro area (preamble 6)) 391, 411-14
 - status
 - "deemed as" an EU matter 397-8
 - as international agreement independent of EU primary and secondary law 366-7, 405-6
 - amendment of TFEU 136 (euro) (European Council Decision 2011/199) 390-1
 - possibility of integration into EU institutional framework 391, 405-6
 - as treaty for the purposes of VCLT 2(1)(a) and Constitution 123(1) 366, 397-8
 - summary of provisions 363-6
- Estonia (1991-)**
 - Constitution 1992 by article
 - 1 (Estonia's independence and sovereignty) 379-80

- preamble 380-2
- 1(1) (Estonia as an independent and sovereign democratic republic/parliamentary democracy) 362, 369, 371-2, 379, 407-8
 - treaties as inevitable limitation of sovereignty 371-2, 394-6
 - treaty interpretation, presumption against restrictions on 371-2
- 1(2) (Estonian independence and sovereignty: inalienability) 408
- 3(1) (obligation to exercise State authority in accordance with the Constitution/international law as part of the law of Estonia) 372-3, 408-9
- 4 (separation and balance of powers) 382-3
- 10 (rights, freedoms and duties in accordance with the Constitution, human dignity, social justice, democracy and the rule of law) 362, 369, 372-3, 380, 403, 408-9
 - “democratic State based on the rule of law” 372-3
- 14 (guarantee of rights and freedoms) 370-1, 381-3, 396-7
- 28 (social security) 403
- 40(2) (freedom to belong to a church or religious society) 381-2
- 65.4 (Parliament’s role: ratification and denunciation of treaties) 382-3
- 65.6 (Parliament’s role: approval of the budget and report on its implementation) 370-1, 373-4, 378-9, 382-3
- 65.10 (Parliament’s role: decision on borrowing by State/assumption of proprietary obligations) 362, 369-71, 373-4, 378-9, 382-3, 411
- 115 (Parliament’s budgetary responsibilities) 362, 382-3
- 115(1) (Parliament’s role: enactment of budget) 370-1, 373-4, 378-9
- 121 (Parliament’s role: ratification and denunciation of treaties) 382-3
- 121.4 (Parliament’s role: treaties involving military or proprietary obligations) 370-1, 373-4, 378, 386
- 123(1) (treaties in conflict with Constitution, prohibition) 366, 368-9, 394, 408
- 139(1) (Chancellor of Justice: review role) 367-8
- 139(2) (Chancellor of Justice’s role: analysis of proposals concerning amendment/new law and activities of State agencies) 367-8
- 142 (obligation to bring legislation into conflict with the Constitution into conformity) 368-9
- 152 (courts’ responsibilities in respect of legislation in conflict with the Constitution) 383
- 154 (autonomy of local authorities) 382
- 162 (Chapter I (general provisions) and chapter XV (amendment of the Constitution): referendum requirement for amendment) 411
- Constitution Amendment Act (CREAA)
 - 1 (Estonian membership of EU: respect for fundamental principles of the Estonian Constitution) 391-2, 409
 - as authorization to ratify the Treaty of Accession and to be part of the changing EU 390-2, 398-400
 - continuing obligation of Parliament to assess future amendments to EU Treaties/new treaty obligations for serious interference with Constitutional principles 390-2, 398-400
 - 2 (application of the Constitution without prejudice to the rights and obligations of EU membership) 391-2, 409
- constitutional review
 - as guarantee of legal certainty and clarity 396-7
 - scope/separation of powers considerations 383, 400-2
- Constitutional Review Court Procedure Act (CRCPA) by article
 - 6(1)(4) (request for declaration of conflict of signed treaty with the Constitution) 367-9
 - Chancellor’s powers to challenge treaty, scope 392-3, 396-7

Estonia (1991-) (cont.)

- 15(1)(3) (declaration of conflict) 369
- 15(1)(6) (Supreme Court's right to give opinion on interpretation of the Constitution in conjunction with EU law) 390
- 15(3) (steps to be taken in event of finding of conflict of treaty with the law) 368-9
- "democracy" 372-3
- ESM: *see* *ESM Case*
- necessity, absence of alternative 385
- proportionality 382-90
 - appropriateness test 384-5
 - interference with fundamental rights and constitutional principles distinguished 382
 - reasonableness 386-90
 - seriousness of interference 386-7
 - separation of powers as constitutional principle 382-3
- sovereignty: *see* Constitution 1992 by article, 1(1) (Estonia as an independent and sovereign democratic republic/parliamentary democracy) *above*
- treaty interpretation, sovereignty, presumption against restrictions on 371-2

EU Directives, 2008/115/EC (Return Directive): *see* Return Directive (EU Directive 2008/115/EC)**European citizenship, non-discrimination obligation (TFEU 18 [TEC 12])**

- EU proportionality test, relevance 540-1
- ECHR test, distinguishability 540-1

European Parliament resolutions

- 2015/0270 P8_TA-PROV (2015)0270 (9 July 2015) (Yemen) 574
- 2016/0066 P8_TA-PROV (2016)0066 (25 February 2016) (Yemen) 575

expulsion of alien: *see* collective/mass deportation/expulsion; deportation/expulsion of alien**fair hearing/trial (EU) (right to be heard/judicial review)**

- justifiable restrictions 196-7
 - disproportionate and intolerable interference infringing on substance of the right 196-7
- Return Directive and 195-7
- scope of right 196

force, prohibition of the threat or use of (UNC 2(4))

- customary international law/*jus cogens* 490-9
- Ukraine v. Law Debenture* 490-9

freedom of movement (ECHR Protocol 4:2), restrictions on/restrictions on liberty of person (ECHR 5) compared 213**FSIA 1608(a)(3) (service: in case of failure of other prescribed methods)**

- "to the head of the ministry of foreign affairs", acceptability of service through diplomatic channels 700-18
- Harrison*, 700-18: *see also* *Harrison*
- "to the head of the ministry of foreign affairs", acceptability of service through diplomatic channels
 - "address[ed]" 703-4
 - "despatched" 704-5
 - inviolability of diplomatic premises (VCDR 22) and 709-10, 713-15, 717-18
 - "mailbox rule" 705

plain/natural language 703-5
 signed receipt requirement, relevance 705
 statute as a whole/comparable provisions 705-8
fundamental rights within the EU, right to be heard (CFR 441, CFR 47 and CFR 48) 196

General Assembly resolution 68/262 (territorial sovereignty of Ukraine) 354
General Comments (HRC)

16 (ICCPR 17 (right to privacy)) 342-3
 18 (ICCPR 26 (non-discrimination)), differential treatment, requirements
 (HRC GC 18:13) 643-4
 20 (ICCPR 7 (torture/cruel, inhuman or degrading treatment))
 non-derogation principle 341-2
 State's duty to protect against torture by both officials and private person 331
 28 (ICCPR 3 (equality of rights between men and women)) 342-3
 34 (ICCPR 19 (freedoms of opinion and expression)) 335-6

Harrison (FSIA 1608(a)(3)) (26 March 2019) (Supreme Court)

background/overview
 facts (bombing of USS *Cole*) 701
 FSIA 1608(a)/FSIA 1608(d) provisions 700-1
 procedural history in date order
 service of process to Sudanese Embassy (FSIA 1608(a)(3))/default judgment 701-2
 issue of turnover orders 702
 Sudan's appearance to contest jurisdiction and appeal against turnover orders 702
 Court of Appeals confirmation of turnover orders and endorsement of chosen
 method of service 702
 Sudan's petition for rehearing/Court's affirmation of endorsement of chosen
 method of service 702-3
 conflicting decision (*Kumar*) 703
 summary of issue and decision 700
 Court's analysis (interpretation of FSIA 1608(a)(3))
 "address[ed]" 703-4
 "despatched" 704-5
 "mailbox rule" 705
 natural meaning (direct mailing to foreign minister's office in the foreign State) 703-5
 avoidance of conflict with FRCP 4(i) (alternative provisions for service in a foreign
 country) 709
 avoidance of conflict with VCDR 22(1) (inviolability of diplomatic premises)
 709-10
 statute as a whole/comparable provisions 705-8
 FSIA 1608(a)(4) (service: mail with translation for transmission through
 diplomatic channels) 711
 FSIA 1608(b)(2) (delivery of a service packet to . . . an agent authorized . . . to
 receive service of process in the US) 707
 FSIA 1608(b)(3)(B) (service on an agency or instrumentality of a foreign state) 706
 FSIA 1608(c) ("service shall be deemed to have been made") 707-8
 Court's decision 712
 dissenting opinion (Thomas J) 712-18
 absence of indication in FSIA 1608(a)(3) as to method of service 712-13, 715
 embassy as appropriate place for service/VCDR 22(1) implications 713-15, 717-18

ICJ judgment

- dispositif*/operative clause, reasoning distinguished 35, 53
 - finality/*res judicata* (ICJ 60/PCIJ 60)
 - “between the parties”/“in respect of that case” (ICJ 59/PCIJ 59) 33-4
 - “cannot uphold” (inclusion in *dispositif* as decision to reject vs decision not to decide)
 - Frontier Dispute* 55
 - Nicaragua v. Colombia (Delimitation of the Continental Shelf)* 38-42, 53-7, 89-96
 - Oil Platforms* 54-5
 - Tunisia/Libya* 55-6
 - dispositif* and reasons distinguished 35, 53
 - essential elements of reasoning/“reasoning inseparable from the operative part”, relevance 35, 39, 41-2, 75-6, 91-2, 97-8, 103
 - finality without appeal/“Court shall construe it on the request of any party” (ICJ 60/PCIJ 60) 33-4, 38
 - Court’s obligation to determine precise content of issue allegedly determined 37-42, 73-6, 87-8, 108
 - preclusion on grounds of exhaustion of treaty processes/*épuiement des recours prévus dans le traité (Barcelona Traction)* alternative 70-1
 - identity of parties, subject matter and legal cause, need for (*personae, petitem* and *causa petendi*) 33-4, 52, 57, 87-9, 108
 - in municipal courts 88-9
 - jurisprudence
 - Application of the Genocide Convention* 34-5, 38, 73, 87
 - Application of the Genocide Convention (Request for Revision)* 34, 38, 52-3, 71-2, 74-6, 87-9
 - Asylum Case* 73-4
 - Barcelona Traction* 53, 70-1
 - Corfu Channel* 34-5
 - Interpretation of Judgments 7 and 8 (Factory at Chorzów)* 38, 52-3, 87
 - Land and Maritime Boundary (Cameroon/Nigeria) (Request for Interpretation)* 33-5, 53, 87
 - Legality of the Use of Force* 74-6
 - Nicaragua v. Colombia (Delimitation of the Continental Shelf): see Nicaragua v. Colombia (Delimitation of the Continental Shelf beyond 200 Nautical Miles from the Nicaraguan Coast)*, preliminary objection 3 (third) (Court’s 2012 judgment as *res judicata*)
 - Polish Postal Service in Danzig* 39
 - South West Africa* cases 52
 - Temple of Preah Vihear* 38, 53
 - Temple of Preah Vihear (Request for Interpretation)* 39
 - Tunisia/Libya* 55-6
 - principle/object and purpose 71-2
 - request for interpretation (ICJ 60 and ROC 98/PCIJ 60 and ROC 79), jurisprudence, *Interpretation of Judgments 7 and 8 (Factory at Chorzów)* 72-3
- ICJ jurisdiction**
- basis (ICJ 36(1)/PCIJ 36) (“matters specially provided for . . . in treaties and conventions in force”)
 - compulsory jurisdiction (Optional Clause) declaration distinguished 30
 - denunciation of agreement, effect on existing jurisdiction, 18-32: *see also Nicaragua v. Colombia (Delimitation of the Continental Shelf beyond 200 Nautical Miles*

- from the Nicaraguan Coast*), preliminary objection 1 (first) (*ratione temporis*/effect of Colombia's denunciation of the Pact of Bogotá), Court's analysis and conclusions
 - multilateral agreements, examples, Pact of Bogotá (1948): *see* Pact of Bogotá (1948) (pacific settlement)
 - termination/unilateral denunciation
 - see also* *Nicaragua v. Colombia* (Delimitation of the Continental Shelf beyond 200 Nautical Miles from the Nicaraguan Coast)
 - treaty provisions as applicable law 30
 - date of filing of Application as date of establishment of jurisdiction 22-4
 - jurisprudence
 - Application of the Genocide Convention* 22-4
 - Nicaragua v. Colombia* (Delimitation of Continental Shelf) 18-32
 - Nottebohm* 22-4
- ICJ Rules of Court (1978 as variously amended) by rule**
 - 43 (construction of a convention to which States not party to proceedings are party: Court's directions to Registrar) 13-14
 - 53(1) (copies of pleadings to State entitled to appear) 14
 - 69(3) (observations by international organization) 13-14
 - 79 (preliminary objections) 13
 - 79(5) (preliminary objections: suspension of proceedings on the merits and time limits for written observations) 13
- IHL (international humanitarian law) (*jus in bello*)** *see* CAAT
- IMO (immunity from jurisdiction of representatives accredited to (IMO V/IMO HQA 13 bis))** 417-44: *see also* *Al-Juffali*
 - applicable law
 - customary international law 433
 - HQA 13 (*bis*) as amended 20 January 1982/4 January 2001 (HQA 13 *bis* (2A)) 418, 432-3
 - text 418-19
 - IMO Order 15 418
 - compatibility with ECHR 6 (access to a court) 431-5
 - "the like immunity from suit and legal process as is accorded to the head of a diplomatic mission" (IMO Order 15(1)(a)), extent of alignment with VCDR 420-1
 - text 419-20
 - IMO V 418-19
 - State practice 434
 - VCDR, relevance 418-19, 420-2
 - VCRS (1975) 433-4
- functional basis/functional review by Court 425-31
- IMO status/powers 418
- Member State representatives
 - abuses of privilege/declaration as *persona non grata* (SAPIC VII:25) 421-2
 - accreditation (IMO Procedures) 421
 - sending State's freedom of choice subject to the HQA/IMO Procedures 421-2
 - host government's right to express views on/raise an objection (IMO procedures 2) 421-2
- privileges and immunities
 - duration (VCDR 13/VCDR 39(1)/VCDR 39(2)/VCDR 43) 420-1, 425-31
 - executive certificate as conclusive evidence of entitlement (IOA 8) 421, 430-1

inhuman or degrading treatment (ECHR 3/ICCPR 7)

- benchmark/threshold 239-40
- absolute vs relativist approach 239-40
- factors of possible relevance
 - context/circumstances at the time 240
 - duration of impugned treatment 239-40, 252-3
 - intention to humiliate 240
 - sex, age and state of health 239-40
 - vulnerability of victim 240-1, 246-7, 252
- burden/standard of proof, “beyond reasonable doubt” 243, 254-7
- detention conditions as
 - cumulative effect 241
 - degrading nature 241-2
 - overcrowding 241-3
 - exacerbating factors 242-3
 - minimum space standards 242
- as fundamental/non-derogable right 239
 - HRC GC 20 331, 341-2
- human dignity, link with 239
- nature of obligation, as positive duty to protect against/proactive obligation 240-1

inhuman or degrading treatment (ECHR 3/ICCPR 7), jurisprudence relating in particular to detention of a minor/vulnerable person

- Aarabi* 246-7, 282
- Kanagaratnam* 241
- Mahdid* 241
- M.S.S.* 241
- Mubilanzila Mayeka* 240-1
- Rahimi* 240-1, 245-6
- Riad and Idiab* 241
- Sharifi* 241
- Z v. UK* 240-1

inhuman or degrading treatment (ECHR 3/ICCPR 7), jurisprudence relating in particular to detention/detention conditions

- A.A. v. Greece* 245
- A.F. v. Greece* 245
- Alver* 241
- Ananyev* 241-2
- Babushkin* 242-3
- Belevitskiy* 242-3
- B.M. v. Greece* 245
- Brega* 252-3
- Cășuneanu* 252-3
- C.D. v. Greece* 245
- Dougoz* 241
- Efremidze v. Greece* 245
- F.H. v. Greece* 245
- Frolov* 242
- Gavrilovici* 252-3
- Ha.A. v. Greece* 245
- István Gábor Kovács* 242-3
- Kadikis* 242
- Kalashnikov* 241

Kantjrev 242
Karalevičius 241-2
Kebayov 241
Khlaifia, 232-57, 281-2: *see also* *Khlaifia* (ECtHR) (alleged violation of ECHR 3 (inhuman or degrading treatment))
Khudoyorov 242-3
Koktysh 252-3
Moiseyev 242-3
M.S.S. 244
Mursić 241-3
Novoselov 242-3
R.U. v. Greece 245
S.D. 245
Sulejmanović 242
T. and A. v. Turkey 246, 252-3
Tabesh 245
Tarakbel 244-5
Torreggiani 242-3
Vlasov 242-3

inhuman or degrading treatment (ECHR 3/ICCPR 7), jurisprudence relating in particular to evidence/burden of proof

Aksoy 254-5
Bouyid 243, 254-5
El-Masri 254-5
Gäfgen 243, 254-5
Georgia v. Russia 243
Ireland v. UK 243
Jalloh 243
Khlaifia, 254-7: *see also* *Khlaifia* (ECtHR)
Labita 243
Metz 254-5
Ramirez Sanchez 243
Ribitsch 254-5
Rivas 254-5
Selmouni 254-5
Svinarenko 243
Tomasi 254-5
Turan Çakır 254-5
Tyler 243

inhuman or degrading treatment (ECHR 3/ICCPR 7), jurisprudence relating in particular to non-derogation principle/nature of the State's obligation

Bouyid 239
Chahal 239
El-Masri 239
Gäfgen 239
Georgia v. Russia 239
Jamaa 249
Labita 239
Mocanu 239
M.S.S. 249
Mubilanzila Mayeka 240-1
Rahimi 240-1

inhuman or degrading treatment (ECHR 3/ICCPR 7), jurisprudence relating in particular to non-derogation principle/nature of the State's obligation (cont.)

Selmouni 239
Svinarenko 239
Whelan 341-2
Z v. UK 240-1

inhuman or degrading treatment (ECHR 3/ICCPR 7), jurisprudence relating in particular to qualification as/threshold

Bouyid 240
El-Masri 239-40
Gäfgen 239-40
Ireland v. UK 239-40
Jalloh 239-40
Kudla 240
Mouisel 239-40
Naumenko 239-40
Peers 240
Price 239-40
Rahimi 240
Salman 240
Svinarenko 239-40
V v. UK 240

interest

absence of agreed rules on/as matter of discretion (ILC(SR) 38(10)) 164
 on arbitration costs 166
 date of commencement
 date of award 166
 date of reimbursable arbitration deposits 166
 full reparation for injury suffered as objective/determination of rates and mode of calculation in accordance with (ILC(SR) 38(1)) 164-6
 factors for determination 164
 jurisprudence
 Arctic Sunrise 162-6
 Iran v. US (1987) 164
 Saiga (No 2) 165
 material and non-material damage, possibility of differentiation 165
 rate
 [commercially] reasonable 165
 in case of material damage 165
 in case of non-material damage 165
 LIBOR 165-6
 simple 166

International Finance Corporation (IFC)

immunity from suit (IOIA 288a(b)) (*JAM*), 674-97: *see also JAM*
 performance standards, imposition of 677
 role 677

international humanitarian law (IHL) (*jus in bello*): *see CAAT*

international officials, privileges and immunities, entitlement

abuse of privileges (including *persona non grata*) (SAPIC VII:24-5) 421-2, 425
 functional review by Court, scope 425-31
 immunity from jurisdiction, obligation of sending State to waive immunity (SAPIC V:16) 425-31
 VCDR, applicability 435-44

International Organizations Immunities Act 1945 (22 USC 288) (IOIA)

absolute nature of immunity/developments in State immunity doctrine since enactment of IOIA 676-7

immunity from search of property and assets/inviolability of archives (IOIA 288a(c)) 675

“international organization” (IRC as) 677

international organizations, their property and assets “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments” (IOIA 288a(b)), whether static or dynamic FSIA link relationship

dynamic link provisions in Civil Rights Act 1866 (42 USC 1981(a), 1982) and FTCA (28 USC 2674) compared 679-80

jurisprudence

Atkinson 683

Jam 674-97

purpose of international organizations’ immunity, relevance 680

reference canon, applicability 680-2

presidential authority to withhold, withdraw, condition, or limit privileges and immunities (IOIA 288), relevance 682-3

restrictive immunity, special problems posed for international organizations/alleviating factors 683-5

qualification of development banks’ lending activity as “commercial” within the meaning of the FSIA 684

requirements for suit (FSIA 1603/FSIA 1605(a)(2)) 684-5

specific provisions of foundation charter, possibility of 684

State Department’s views 683

static language of IOIA 288a(c)/Energy Policy Act 1992 (30 USC 242(c)(1)) compared 679-80

presidential authority to withhold, withdraw, condition, or limit IOIA privileges and immunities in light of the functions of a given organization (IOIA 288) 676, 682-3

State immunity as basis for immunity of international organizations (IOIA 288a(b)),

Jam: see *JAM*

taxes and internal revenues, entitlement to the privileges, exemptions, and immunities accorded to foreign governments (IOIA 288a(d)) 675-6

international organizations, personality and capacities, international legal personality and capacity to operate in domestic law distinguished 464-5

International Organizations, Vienna Convention on the Representation of States (1975) (VCRS)

definitions

“head of mission” (VCRS 1(1)(1)) 433-4

“permanent representative” (VCRS 1(1)(18)) 433-4

entry into force/ratifications 433-4

immunity from jurisdiction of head of mission and members of the diplomatic staff (VCRS 30) 433-4

specialized agencies, applicability to (VCRS 1(1)(2)/VCRS 2(1)) 433-4

Ireland, Republic of

abortion-related legislation

see also *Whelan*

Constitution 40.3.3 (personal rights: guarantee of protection of the foetus) 324, 329, 334-5, 338-40, 342-3

Offences Against the Person Act 1861 (s 58 (criminalization of abortion)) 324, 334-5, 338-40, 342-3

Italy

- Constitution 1948 (with amendments) by article, 13 (right to personal liberty/freedom from arbitrary arrest or detention) 187, 224
- Criminal Code 1930 by article, 54(1) (necessity: non-liability for acts necessary to save the perpetrator or a third party from instant danger of serious bodily harm) 189
- immigration-related legislation
 - see also Khlaifia* (ECtHR)
 - Consolidated text of provisions concerning immigration regulations and rules on the status of aliens (Legislative Decree 286 of 1998 as amended) by article
 - 10 (refusal of entry) 187-9, 222
 - 13 (administrative deportation) 187-9
 - 14 (execution of removal measures) 187-9, 222

JAM (immunity of IFC under IOIA 288a(b))

- background (factual)
 - IFC loan to Coastal Gujarat Power/problems 677-8
 - IFC, role 675, 677
 - performance standards, imposition of 677
 - IOIA enactment/summary of IOIA 288 provisions 675-6
 - State immunity doctrine, developments since enactment of IOIA 676-7
- background (procedural)
 - District Court proceedings 678
 - issue for determination 675
 - parties' arguments 678, 680
- Court's analysis ("same immunity as is enjoyed by foreign governments" as dynamic FSIA link)
 - continuing link provisions in Civil Rights Act 1866 (42 USC 1981(a), 1982) and FTCA (28 USC 2674) compared 679-80
 - purpose of international organizations' immunity, relevance 680
 - as natural meaning 679-82
 - reference canon, applicability 680-2
 - restrictive immunity, special problems posed for international organizations/
 - alleviating factors 683-5
 - IFC's arguments 683-4
 - qualification of development banks' lending activity as "commercial" within the meaning of the FSIA 684
 - requirements for suit (FSIA 1603/FSIA 1605(a)(2)) 684-5
 - specific provisions of foundation charter, possibility of 684
 - static language of IOIA 288a(c)/Energy Policy Act 1992 (30 USC 242(c)(1)) compared 679-80
 - dissenting opinion (Breyer J) 685-97
- judge ad hoc (ICJ 31(2) and (3)), appointment, *Nicaragua v. Colombia*** 13
- judicial economy** 347
- judicial review/justiciability (act of foreign State/foreign relations or prerogative power/recognition and enforcement of foreign law), jurisprudence**
 - see also* United Kingdom, judicial review
 - A v. Home Secretary* 564-5
 - Balajigari* 640
 - Bank Mellat* 564-5
 - CAAT* 564-6
 - Hoareau and Bancoult* 639

- Kennedy* 564
Lord Carlile 564-5
Lyons 489-90
Rehman 564-5
Tameside 566-7, 640
- jus cogens*/peremptory norm (VCLT 53) including torture/inhuman treatment (State/head of State/diplomatic immunity considerations), jurisprudence**
- Khlaifia* 278-9, 286
Ukraine v. Law Debenture 490-9
- just satisfaction obligation (ECHR 41 [50]), Court's indication to respondent government of the need to improve the quality of the law as 286**
- justiciability, domestic foothold requirement**
- duress as 487-90
- involvement of issues of international law, examples
- AG v. Guardian Newspapers (No 2)* 489-90
Corner House Research 489-90
Derbyshire County Council v. Times Newspaper 489-90
Freedom and Justice Party 489-90
Kebilene 489-90
Keyu 489-90
Kuwait Airways (Nos 4 and 5) 489-90
Launder 489-90
Lyons 489-90
Re H 489-90
Salomon 489-90
Serdar Mohammed 489-90
Shergill 484-6, 489-90
Ukraine v. Law Debenture 487-90
- involvement of issues of international law, relevance 489-90
- Khlaifia* (ECtHR): see *Khlaifia* (ECtHR) (background); *Khlaifia* (ECtHR) (alleged violation of ECHR 3 (inhuman or degrading treatment)); *Khlaifia* (ECtHR) (alleged violation of ECHR 5(1) (right to freedom from arbitrary deprivation of liberty)) (jurisdiction *ratione materiae*); *Khlaifia* (ECtHR) (alleged violation of ECHR 5(1) (right to freedom from arbitrary deprivation of liberty/exceptions)) (merits); *Khlaifia* (ECtHR) (alleged violation of ECHR 5(2) (prompt notification of reasons for arrest and any charge)); *Khlaifia* (ECtHR) (alleged violation of ECHR 5(4) (arrest or detention, right to take proceedings to establish lawfulness)); *Khlaifia* (ECtHR) (alleged violation of ECHR 13 (right to an effective remedy in conjunction with ECHR 3, ECHR 5 and ECHR Protocol 4:4)); *Khlaifia* (ECtHR) (alleged violation of ECHR Protocol 4:4 (collective expulsion of aliens)); *Khlaifia* (ECtHR) (Court's final decision and separate opinions); *Khlaifia* (ECtHR) (just satisfaction (ECHR 41))**
- Khlaifia* (ECtHR) (background)**
- facts
- applicants 181-2
 applicants' arrival on the Italian coast/transfer to Lampedusa 182
 refusal-of-entry orders (27-29 September 2011) 183
 riot in Lampedusa/transfer of applicants to Lampedusa airport 182
 transfer to Palermo (22 September 2011)/detention on ships (*Vincent/Audace*) 182-3
 transfer to Palermo airport/removal to Tunisia (27/29 September 2011) 183

***Khlaifia* (ECtHR) (background) (cont.)**

- procedural history in date order
 - legal proceedings in Italy
 - annulment of refusal-of-entry orders (4 July 2011/30 October 2011) 186-7
 - preliminary investigations into criminal complaint about the treatment on board the ships, dismissal of charges (1 June 2012) 184-6
 - ECtHR application (9 March 2012) 180
 - decision of Chamber of the Second Section (1 September 2012) 180
 - preliminary objection (exhaustion of local remedies) (timeliness of objection) (9 July 2013) 209-10
 - referral to the Grand Chamber (1 February 2016) 180-1
 - composition of Grand Chamber 180-1
 - written comments from third parties 181
 - Grand Chamber hearing (22 June 2016) 181
- relevant legal materials (EU) (Return Directive)
 - extracts 191-5
 - right to be heard 185-7
 - annulment of administrative procedure decision in case of failure to observe right 196
 - applicability as a fundamental principle of EU law 196
 - justifiable restrictions 196-7
 - scope of right (*Khaled Boudjlida*) 196
- relevant legal materials (international)
 - AI report on findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo (21 April 2011) (extracts) 207-9
 - ILC(EA) (extracts) 197-9
 - PACE ad hoc Sub-Committee's report on visit to Lampedusa (30 September 2011) (extracts) 200-6
- relevant legal materials (Italian)
 - bilateral Italy–Tunisia agreements in date order
 - Italy–Tunisia Agreement (Ministries of the Interior) on measures to control the flow of irregular migrants from Tunisia (1998) (published in the Official Gazette No 11 of 15 January 2000) 190-1
 - note verbale* (6 August 1998) appended to request for referral to the Grand Chamber 190-1
 - Italy–Tunisia (Ministries of the Interior) on measures to control the flow of irregular migrants from Tunisia (5 April 2011) (unpublished) 190
 - Constitution 13 (right to personal liberty/freedom from arbitrary arrest or detention) 187
 - Criminal Code 54(1) (necessity: non-liability for acts necessary to save the perpetrator or a third party from instant danger of serious bodily harm) 189
 - Legislative Decree 286 of 1998 as amended (consolidated text of provisions concerning immigration regulations and rules on the status of aliens) by article
 - 10 (refusal of entry) 187-9
 - 13 (administrative deportation) 187-9
 - 14 (execution of removal measures) 187-9
 - Senate's Special Commission's report on human rights in prisons and reception and detention centres in Italy (6 March 2012) 189-90
- Khlaifia* (ECtHR) (alleged violation of ECHR 3 (inhuman or degrading treatment))**
 - 232-57
 - Chamber decision 232-3
 - Court's analysis of the principles
 - absolute vs relativist approach 239-40

- benchmark/threshold 239-40
 - factors of possible relevance 240
- burden/standard of proof 243
- detention conditions (cumulative effect) 241
- detention conditions (overcrowding) 241-3
 - degrading nature 241-2
 - minimum space standards 242
- fundamental/non-derogable nature of the right 239, 241
- positive duty to protect against/proactive obligation 240-1
- protection of vulnerable persons 240-1
- Court's application of the principles
 - comparable cases
 - A.A. v. Greece* 245
 - Aarabi* 246-7
 - A.F. v. Greece* 245
 - Aksoy* 254-5
 - B.M. v. Greece* 245
 - Bouyid* 254-5
 - Brega* 252-3
 - Cășuneanu* 252-3
 - C.D. v. Greece* 245
 - Efremidze v. Greece* 245
 - El-Masri* 254-5
 - F.H. v. Greece* 245
 - Gäfgen* 243, 254-5
 - Gavrilovici* 252-3
 - Ha.A v. Greece* 245
 - Koktysh* 252-3
 - Mete* 254-5
 - M.S.S.* 244
 - Rahimi* 245-6
 - Ribitsch* 254-5
 - Rivas* 254-5
 - R.U. v. Greece* 245
 - Selmouni* 254-5
 - T. and A. v. Turkey* 246, 252-3
 - Tabesh* 245
 - Tarakbel* 244-5
 - Tomasi* 254-5
 - Turan Çakır* 254-5
 - conditions in the Contrada Imbriacola CSPA 249-54
 - comparable cases 251
 - Court's conclusion 253-4
 - duration of stay 252-3
 - Italian Senate's Special Commission report (2011) 249-50
 - overcrowding 251-2
 - PACE ad hoc Sub-Committee's report on visit to Lampedusa (2011) 250-1
 - vulnerability of detainees 252
 - conditions on the *Vincent and Audace*
 - burden of proof 254-7
 - Court's conclusion 257
 - fundamental/non-derogable nature of the right 249

***Khlaifia* (ECtHR) (alleged violation of ECHR 3 (inhuman or degrading treatment))**
 (*cont.*)

- humanitarian emergency and its consequences 247-9
- submissions (applicants)
 - conditions in the Contrada Imbriacola CSPA 233-5
 - conditions on the *Vincent* and *Audace* 235-6
 - humanitarian emergency and its consequences 233
- submissions (government)
 - conditions in the Contrada Imbriacola CSPA 237-8
 - conditions on the *Vincent* and *Audace* 238
 - humanitarian emergency and its consequences 236-7
- submissions (third-party interveners) (*Coordination Française pour le droit d'asile*) 238-9

***Khlaifia* (ECtHR) (alleged violation of ECHR 5(1) (right to freedom from arbitrary deprivation of liberty)) (jurisdiction *ratione materiae*)**

- Court's analysis
 - "deprived of"/arbitrary deprivation (ECHR 5(1)), criteria for classification as 213-15
 - object and purpose of provision 213
 - restrictions on movement (ECHR 5 and ECHR Protocol 4:2) compared 213
- Court's conclusion 215
- submissions
 - applicants 212-13
 - government 211-12
 - third-party interveners (*McGill Centre*) 213

***Khlaifia* (ECtHR) (alleged violation of ECHR 5(1) (right to freedom from arbitrary deprivation of liberty/exceptions)) (merits) 210-25**

- Chamber's finding of unlawfulness 211
- Court's analysis of principles
 - "in accordance with procedure prescribed by law" (ECHR 5(1)) requirement/"lawful detention", certainty of the law requirement 220-1
 - interpretation, freedom from arbitrary interference with liberty as fundamental human right as constraining factor 220
 - "law"
 - domestic law as default 220-1
 - rule of law, need for compatibility with 220-1
 - lawful arrest or detention to prevent unauthorized entry or with a view to deportation/extradition of alien (ECHR 5(1)(f))
 - due diligence requirement 220
 - "reasonably necessary" requirement, relevance 220
 - "with a view to deportation or extradition" as test of lawfulness 220
- Court's application of principles 221-5
 - applicability of ECHR 5(1)(f) 221-2
 - "in accordance with procedure prescribed by law" (ECHR 5(1)) requirement, compliance with
 - Constitution 13 (*habeas corpus*) 224
 - decision of the Palermo preliminary investigations judge (1 June 2012) 224
 - Italian Senate's Special Commission report (2011) 223-4
 - Italy-Tunisia Agreements on measures to control the flow of irregular migrants from Tunisia (1998/2011) 223-4
 - Legislative Decree No 286, Article 10 (refusal of entry) 222
 - Legislative Decree No 286, Article 14 ("detention as long as is strictly necessary") 222

- PACE ad hoc Sub-Committee's report on visit to Lampedusa (2011) 223-4
- Court's conclusion 224-5
- submissions
 - applicants 215-17
 - government 217-18
 - third-party interveners
 - AIRE Centre and ECRE 218-19
 - McGill Centre 219
 - text (ECHR 5(1)) 210-11
- Khlaifia* (ECtHR) (alleged violation of ECHR 5(2) (prompt notification of reasons for arrest and any charge))**
 - Chamber's finding of breach 225
 - Court's analysis of principles
 - autonomous nature of obligation/applicability to non-criminal law measures 227
 - compliance as basis for challenge to lawfulness of arrest or detention (ECHR 5(4)) 226-7
 - sufficiency of information 226-7
 - Court's application of principles
 - impossibility of compliance in view of finding that there was no clear and accessible legal basis for detention 227-8
 - applicants' knowledge of illegality of their situation, relevance 227-8
 - non-compliance of refusal-of-entry orders 228
 - "promptly" 228
 - Court's conclusion 228
 - submissions
 - applicants 225-6
 - government 226
 - third-party interveners (McGill Centre) 226
- Khlaifia* (ECtHR) (alleged violation of ECHR 5(4) (arrest or detention, right to take proceedings to establish lawfulness))**
 - Chamber's finding of violation 228-9
 - Court's analysis of principles
 - authority of review body to *decide* lawfulness/order release requirement
 - consideration of all conditions essential for "lawful" detention 229-30
 - review by advisory panel, sufficiency 229-30
 - delays ("shall be decided speedily") (ECHR 5(4)) 230-1
 - effective remedy requirement including reviewing body's power to order release 230
 - Court's application of principles/finding of violation 231-2
 - refusal-of-entry orders 231-2
 - scope/extent of right
 - consideration of all conditions essential for "lawful" detention 229-30
 - substitution of reviewing body's discretion for that of the decision-making authority, exclusion 229-30
 - submissions (parties)
 - applicants 229
 - government 229
- Khlaifia* (ECtHR) (alleged violation of ECHR 13 (right to an effective remedy in conjunction with ECHR 3, ECHR 5 and ECHR Protocol 4:4))** 271-8
 - Chamber's decision 271-2
 - Court's analysis of "effective remedy" principles established by ECtHR jurisprudence
 - aggregate of remedies as 274
 - "arguable complaint" as trigger 274

***Khlaifia* (ECtHR) (alleged violation of ECHR 13 (right to an effective remedy in conjunction with ECHR 3, ECHR 5 and ECHR Protocol 4:4)) (cont.)**

“effective” 274

Court’s application of principles

arguability of complaint 274

ECHR 13 in conjunction with ECHR 3

Court’s conclusion 274-5

failure of government to indicate any available remedies 274-5

ECHR 13 in conjunction with ECHR 5(4)

ECHR 5(4) as *lex specialis* 273

sufficiency of Court’s decision on the substance of ECHR 5(4) 273

ECHR 13 in conjunction with ECHR Protocol 4:4

Court’s conclusion 278

De Souza Ribeiro 271-2, 276-8

lack of suspensive effect, whether constituting a violation of effective remedy requirement 275-8

real risk of breach of ECHR 2/ECHR 3 requirement 276-8

refusal of addressees to acknowledge receipt of information about right to challenge 275

right to challenge refusal-of-entry orders 275

submissions (parties)

applicants 272-3

government 273

submissions (third-party interveners) (AIRE Centre and ECRE) 273

***Khlaifia* (ECtHR) (alleged violation of ECHR Protocol 4:4 (collective expulsion of aliens)) 257-71**

Chamber’s decision 257

Court’s analysis of the principles established in ECtHR jurisprudence

cases considered

Andric 265-7

Berisha 266

Čonka 265

Davydov 265

Dritsas 266

Georgia v. Russia 265-7

Ghulami 265

Jamaa 265-7

M.A. v. Cyprus 266

M.S.S. 266

Sharifi 265-7

Sultani 265-6

“collective expulsion” 265-71

“expulsion of aliens, as a group” (ILC(EA) 9) 197-9, 268

numbers involved, relevance 266

“expulsion”

“to drive away from a place” (*Jamaa*) 267

“formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State” (ILC(EA) 2) 267

“removal against their will” (*Khlaifia*) 267

purpose of provision (examination of individual circumstances/opportunity to

challenge proposed measure) 265-6

requirements/relevant factors

- background to expulsion orders/context 265-6
- culpable conduct of person concerned 266
- examples of a finding of a breach of Protocol 4:4 266-7
- problems of managing migration flows/reception of asylum-seekers 266
- reasonable and objective examination of each case on individual basis requirement 265-6
- right to individual interview vs genuine opportunity to challenge decision 269-71
- Court's application of the principles 267-71
- Court's conclusion 270-1
- submissions (parties)
 - applicants 258-61
 - government 261-3
- submissions (third-party interveners)
 - AIRE Centre and ECRE 264-5
 - Coordination Française pour le droit d'asile 263
 - McGill Centre 263-4
- Khlaifia* (ECtHR) (Court's final decision and separate opinions)**
 - Court's decision 279
 - "deprived of"/arbitrary deprivation (ECHR 5(1))/legal certainty 285-6
 - just satisfaction (ECHR 41), Court's indication to respondent government of the need to improve the quality of the law, sufficiency 286
 - separate opinion (Dedov J, partly dissenting) (alleged violation of ECHR 5(1) (right to freedom from arbitrary deprivation)) 285-6
 - separate opinion (Raimondi J, concurring) 281-5
 - alleged violation of ECHR 3 (inhuman or degrading treatment) in respect of conditions in the Contrada Imbriacola CSPA 281-2
 - Chamber's decision 281-2
 - humanitarian emergency, effect on government's responsibility 281-2
 - vulnerable persons (*Aarabi*) 282
 - alleged violation of ECHR 13 in conjunction with ECHR Protocol 4:4 284-5
 - alleged violation of ECHR Protocol 4:4 (collective expulsion of aliens) 282-4
 - Chamber's decision 282-3
 - reasonable and objective examination of each case on individual basis requirement 283-4
 - right to individual interview vs genuine opportunity to challenge decision 284
 - suspensive effect requirement (*De Souza Ribeiro*) 284-5
 - separate opinion (Serghides J, partly dissenting) (alleged breach of ECHR Protocol 4:4 (collective expulsion)) 287-316
 - alleged violation of ECHR 13 in conjunction with ECHR Protocol 4:4, suspensive effect requirement (*De Souza Ribeiro*) 313-16
 - Chamber's decision 287
 - "collective" 304-9
 - "expulsion" ("to drive away from a place" (*Jamaa*)) 287
 - just satisfaction obligation (ECHR 41) 316
 - lawfulness of residence, relevance 304-9
 - means of implementation of expulsion decision, relevance 311-13
 - right to individual interview vs genuine opportunity to challenge decision 290-304, 311-13
 - simplified procedure (Italy–Tunisia bilateral agreements), Italy's compliance with 287-90
 - compliance of agreements with ECHR Protocol 4:4 289-90

***Khlaifia* (ECtHR) (just satisfaction (ECHR 41))** 278-9
 compensation for non-pecuniary damage 278
 costs and expenses 278-9
 default interest 279

legal dispute, definition

Mavrommatis 49
Nicaragua v. Colombia (Delimitation of the Continental Shelf beyond 200 Nautical Miles) 49
Northern Cameroons 49

legal personality (State) 456-65

Ukraine v. Law Debenture 456-65

liberty and security of person, right to (ECHR 5)

“deprived of”/arbitrary deprivation (ECHR 5(1))

criteria for classification as 213-15
 domestic law, relevance 215

jurisprudence

see also Khlaifia (ECtHR)
Abdolkhani and Karimnia 215
Amuur 213
Guzzardi 213
Khlaifia 210-25, 285-6
Stanev 213

measures intended for the good of the detained person 215

freedom of movement (ECHR Protocol 4:2) compared 213

prompt notification of reasons for arrest and any charge (ECHR 5(2))

autonomous nature of obligation/applicability to non-criminal law measures 227

as basis for challenge to lawfulness of arrest or detention (ECHR 5(4)) 226-7

detainees’ knowledge of illegality of their situation, relevance 227-8

jurisprudence

Conka 226-7
Fox, Campbell and Hartley 226-7
Khlaifia 225-8
L.M. 226-8
Shamayev 228
Van der Leer 226-7

“promptly” 228

sufficiency of information 226-7

release pending trial, right to (ECHR 5(3)), jurisprudence

Blokhin 215
De Wilde, Ooms and Versyp 215
D.L. 215
Winterwerp 215
Witold Litwa 215

liberty and security of person, right to, exceptions (ECHR 5(1))

“in accordance with procedure prescribed by law” (ECHR 5(1)) requirement
 certainty of the law requirement 220-1

domestic law as default 220-1

ECHR requirements, need for compliance with 229-30

rule of law, need for compatibility with 220-1

“in accordance with procedure prescribed by law” (ECHR 5(1)) requirement,
 jurisprudence

- Baranowski* 220-1
Del Río Prada 220-1
Herczegfalvy 220-1
Ječius 220-1
Khlaifia 220-5
L.M. 220-1
Medvedyev 213
Mooren 220-1
Paladi 220-1
Stanev 220-1
Steel 220-1
- interpretation/object and purpose
 as fundamental human right 220
- jurisprudence
Blokhin 220
Khlaifia 220
Labita 220
Manzoni 220
Velinov 220
- narrow interpretation 220
- lawful arrest or detention to prevent unauthorized entry or with a view to deportation/
 extradition of alien (ECHR 5(1)(f))
- due diligence requirement 220
- jurisprudence
see also Khlaifia (ECtHR)
A v. UK 220
Abdolkhani and Karimnia 220
Khlaifia 220-5
Saadi 220
 “reasonably necessary” requirement 220
- measure of damages/compensation including valuation of company/property/assets**
 Contract of Guaranty 161-2
 loss of personal property 159-60
Arctic Sunrise 159-60
Chaparro Alvarez and Lapo Iñiguez 159-60
Lupsa 159-60
 “reasonable and well-founded” 141-5
- mens rea* (crimes against humanity/war crimes), recklessness** 562
- nationality, loss or deprivation other than by renunciation/expatriation**
 arbitrary deprivation, prohibition, RSC (1961) 540
 grounds/relevant factors
 disloyalty 528, 534-8
 jurisprudence
Pham, 524-43: *see also Pham* (deprivation of nationality) (UK Court of Appeal) (2018)
Rottman 536-8
 proportionality 532-4, 540-1
 risk of current harm, whether necessary 534-5, 538-41
 UNHCR Guidelines (*Preventing and Reducing Statelessness*) 532, 541

necessity/duress as defence/justification

- absence of alternative, relevance 385
- as contract claim defence (English law) 487-90
 - jurisprudence
 - CTN Cash* 487
 - Progress Bulk Carriers* 487
 - Ukraine v. Law Debenture* 487-90
- as domestic foothold for purposes of justiciability 487-90

Nicaragua v. Colombia (Delimitation of the Continental Shelf beyond 200 Nautical Miles from the Nicaraguan Coast)

- background (facts/relevant law)
 - denunciation (Colombia) of the Pact of Bogotá (27 November 2012) 19
 - treaty provisions (Bogotá XXXI/Bogotá LVI) (text) 18
- background (parties' positions) (general)
 - Colombia
 - oral proceedings 16
 - written proceedings 15
 - Court's summary of
 - Colombia's objections to jurisdiction 17
 - Nicaragua's claim to jurisdiction 16
 - Nicaragua
 - Application 15
 - oral proceedings 16
 - written proceedings 15
- background (procedural history) 12-16
 - appointment of judges ad hoc 13
 - Nicaragua's Application (16 December 2013) 12-13, 19
- Court's decision 49-51
- preliminary objection 1 (first) (*ratione temporis*/effect of Colombia's denunciation of the Pact of Bogotá), Court's analysis and conclusions 18-32
 - Court's conclusion 31-2
 - date of filing of Application as date of establishment of jurisdiction 22-4
 - denunciation (Bogotá LVI)/interrelationship with Bogotá XXXI ("so long as the present Treaty is in force") 18-32
 - State practice 30-1
 - "[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the . . . notification" (Bogotá LVI, para. 2) 23-32
 - ICJ jurisdiction, basis (ICJ 36(1)) ("matters specially provided for . . . in treaties and conventions in force")
 - compulsory jurisdiction (Optional Clause) declaration distinguished 30
 - denunciation, treaty provisions as applicable law 30
- interpretation of Pact of Bogotá
 - a contrario* principle 24-6
 - abundance of caution principle 28-9
 - applicability of VCLT 31-3 as customary international law 24
 - effectiveness (*ut res magis valeat quam pereat*) (*effet utile*) 28-30
 - every element of treaty to be given effect 28-30
 - object and purpose (peaceful settlement of disputes) 26-8
 - travaux préparatoires* 31
- parties' positions
 - Colombia 19-21
 - Nicaragua 21-2

- preliminary objection 1 (first) (*ratione temporis*/effect of Colombia's denunciation of the Pact of Bogotá), declaration (Brower, Judge ad hoc) 122-4
 - interpretation of Pact of Bogotá
 - abundance of caution principle 124
 - effectiveness (*ut res magis valeat quam pereat*) (*effet utile*) 122-4
 - travaux préparatoires* 122-4
- preliminary objection 2 (second) (continuing jurisdiction established in Court's 2012 judgment), Court's analysis and conclusions 18, 43-4
 - Court's conclusion 44
 - partial inadmissibility of Nicaragua's first request 108-9
 - parties' positions
 - Colombia 33, 43-4
 - Nicaragua 43-4
- preliminary objection 3 (third) (Court's 2012 judgment as *res judicata*), Court's analysis and conclusions 32-43
 - classification
 - Court's right to determine 32
 - as objection to admissibility 32
 - Court's conclusion 42-3
 - finality/*res judicata* principle (ICJ 59)
 - "between the parties"/"in respect of that case" (ICJ 59/PCIJ 59) 33-4
 - Court's obligation to determine precise content of issue allegedly determined 37-42
 - essential elements of reasoning/"reasoning inseparable from the operative part", relevance 35, 39, 41-2, 75-6
 - finality without appeal/"Court shall construe it on the request of any party" (ICJ 60/PCIJ 60) 33-4, 38
 - as general principle of law 34-5
 - identity of parties, subject matter and legal cause, need for 33-4
 - finality/*res judicata* principle (ICJ 59) (Court's analysis of 2012 decision) 38-42
 - "cannot uphold" 38-42
 - parties' positions
 - Colombia 32, 33-4, 36-7
 - Nicaragua 34, 37-8
- preliminary objection 3 (third) (Court's 2012 judgment as *res judicata*), declaration (applicability of UNCLOS 76 to non-parties) (Robinson J) 116-22
 - in case of treaty reflecting customary international law 118-22
- preliminary objection 3 (third) (Court's 2012 judgment as *res judicata*), dissenting opinion (Donoghue J) 96-111
 - analysis of Court's 2012 decision 101-8
 - CLCS 76(8) procedures 98-9, 109-11
 - parties' arguments 99-101
 - res judicata* principle
 - burden of proof considerations 103-4
 - "cannot uphold" 102-3
 - Court's obligation to determine precise content of issue allegedly determined 108
 - essential elements of reasoning/"reasoning inseparable from the operative part", relevance 97-8, 103
 - identity of parties, subject matter and legal cause, need for 108
- preliminary objection 3 (third) (Court's 2012 judgment as *res judicata*), dissenting opinion (Yusuf VP, Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Brower, Judge ad hoc) 51-72

Nicaragua v. Colombia (Delimitation of the Continental Shelf beyond 200 Nautical Miles from the Nicaraguan Coast) (cont.)

- analysis of Court's 2012 reasoning 57-64
- basis for Court's 2012 rejection of Nicaragua's request (failure to prove overlap) 57-64
- "cannot uphold" 53-7
 - review of the jurisprudence 54-6
- non bis in idem* principle 70-1
 - res judicata* distinguished 70
- procedural requirement (2012 judgment) for submission of information to CLCS under UNCLOS 76(8)
 - "appurtenance test" (UNCLOS 76(4)(a)/CLCS Guidelines) 68-9
 - incoherence of Court's position 64-7
 - necessity for/CLCS as legitimator 69
 - overlapping entitlements, applicability to 69
 - "preliminary information" 67-8
- res judicata* principle 52-3, 71-2
 - conclusion 56-7
 - identity of parties, subject matter and legal cause, need for 52, 57
 - preclusion on grounds of exhaustion of treaty processes/*épuiement des recours prévus dans le traité (Barcelona Traction)* alternative 70-1
- preliminary objection 3 (third) (Court's 2012 judgment as *res judicata*), separate opinion (Greenwood J) 86-96
 - "cannot uphold"/analysis of 2012 *dispositif*, para. 3 89-96
 - burden of proof considerations 92-4
- res judicata* principle 87-9
 - identity of parties, subject matter and legal cause, need for 88-9
- preliminary objection 3 (third) (Court's 2012 judgment as *res judicata*), separate opinion (Owada J) 72-86
 - analysis of Court's 2012 judgment/whether "final and binding" 78-83
 - burden of proof considerations 82-3
 - conclusion 83
 - Court's decision not to engage in thorough investigation necessary for a final determination 78-81
 - structure of judgment/distinction between Part IV (continental shelf beyond 200 nautical miles) and Part V (overlapping entitlements) 81-2
- res judicata* principle, definition and scope 72-6
 - Court's obligation to determine precise content of issue allegedly determined 73-6
 - essential elements of reasoning/"reasoning inseparable from the operative part", relevance 75-6
 - identity of parties, subject matter and legal cause, need for 72-3
- UNCLOS 76(8) obligation to submit information to CLCS, relevance where a party to the dispute is not party to UNCLOS 84-6
- UNCLOS 76, customary international law status 85-6
- preliminary objection 4 (fourth) (Nicaragua's Application as appeal/request for revision), Court's dismissal of 43
- preliminary objection 5 (fifth) (inadmissibility of Nicaragua's first request (determination of continental shelf beyond 200 nautical miles)), Court's analysis and conclusion 45-8
- CLCS ROP 46 (consideration of submissions to CLCS in case of an UNCLOS 83 delimitation dispute) 46-8
 - Court's conclusion 48

- delimitation, applicability to 47-8
 - parties' arguments
 - Colombia 45
 - Nicaragua 46
- preliminary objection 5 (fifth) (inadmissibility of Nicaragua's first request (determination of continental shelf beyond 200 nautical miles)), declaration (Bhandari J) 112-16
 - State's right to establish continental shelf limits beyond 200 nautical miles dependence on submission of information to Commission 112-16
- preliminary objection 5 (fifth) (inadmissibility of Nicaragua's first request (determination of continental shelf beyond 200 nautical miles)), declaration (Gaja J) 111-12
 - CLCS relationship with international courts and tribunals 112-16
- preliminary objection 5 (fifth) (inadmissibility of Nicaragua's second request (determination of principles and rules of international law relating to rights and duties pending the delimitation of the maritime boundary beyond 200 nautical miles)), Court's analysis and conclusion 48-9
 - Court's conclusion 49
 - "dispute as a disagreement on a point of law or fact, a conflict of legal views or interests between two persons" (*Mavrommatis*), need for 49
 - parties' arguments
 - Colombia 48
 - Nicaragua 48-9
- non-disclosure/use of "closed material" (national security considerations) 622**
- non-discrimination obligation/equality before the law (ICCPR 26)**
 - "discrimination" 348
 - exhaustive nature of ICCPR 26 criteria 348-9
 - Whelan* 343-4, 347-9
- Pact of Bogotá (1948) (pacific settlement)**
 - denunciation (Bogotá LVI)
 - Colombia 18-32
 - El Salvador 30-1
 - denunciation (Bogotá LVI)/interrelationship with Bogotá XXXI ("so long as the present Treaty is in force") 18-32
 - "[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the . . . notification" (Bogotá LVI, para. 2) 23-32
 - interpretation
 - applicable law (VCLT 31-3 as customary international law) 24
 - travaux préparatoires* 31, 122-4
 - judicial procedure/ICJ and (Bogotá XXXI-XXXVII), denunciation of Pact (Bogotá LVI), effect: *see* denunciation (Bogotá LVI)/interrelationship with Bogotá XXXI ("so long as the present Treaty is in force") *above*; *Nicaragua v. Colombia (Delimitation of the Continental Shelf beyond 200 Nautical Miles from the Nicaraguan Coast)*
 - object and purpose (peaceful settlement of disputes)
 - Bogotá I 26-8
 - Bogotá II 26-8
 - Border and Transborder Armed Actions (Nicaragua v. Honduras)* 26-8
 - Preamble/OAS 27 26-8
 - title 26-8

- pacta sunt servanda* (VCLT 26)**, municipal/internal law as justification for non-observance, exclusion (VCLT 27) 340, 342-3
- permanent representatives**: see *Al-Juffali*; IMO (immunity from jurisdiction of representatives accredited to (IMO V/IMO HQA 13 *bis*)); International Organizations, Vienna Convention on the Representation of States (1975) (VCRS)
- persona non grata* (international officials/representatives of Member States (SAPIC VII:25))** 421-2, 425-6
- Pham* (deprivation of nationality) (UK Court of Appeal) (2018)**
 background
 BNA 40 (extracts) 543-7
 Deprivation Order (22 December 2011) 524-5
 issues for decision 526, 529
 prosecution and imprisonment in the US 526
 serious criminal conduct of appellant, appellant's admission of 526
 SIAC judgment (Mitting J) (2012) 527-9
 SIAC ROP 11B (text) 541
 Supreme Court's decision on statelessness/remittal to SIAC (2015) 525-6
 UN Convention on the Reduction of Statelessness (1961) (RSC) and related legislation 530-1
 Court's overall conclusion 543
 issue 1: repudiation of obligation of loyalty
 Court's analysis and conclusion 536-8
 parties' submissions (respondent) 534-5
 SIAC (Mitting J) 528
 issue 2: risk of current harm to national security
 Court's analysis and conclusion 538-41
 arbitrary deprivation of nationality, RSC (1961) as protection against 540
 Bouchereau 539-40
 "conducive to the public good" test (BNA 40) 538
 parties' submissions (appellant) 531
 parties' submissions (respondent) 534-5
 SIAC (Mitting J) 528-9
 issue 3: proportionality
 Court's analysis and conclusion 536-8, 540-1
 EU proportionality principle, applicability 540-1
 UNHCR Guidelines (*Preventing and Reducing Statelessness*) 532, 541
 parties' submissions (appellant) 532-4
 parties' submissions (respondent) 535-6
 issue 4: applicability of EU law
 Court's conclusion 540-1
 parties' submissions (appellant) 531-4
 parties' submissions (respondent) 535
 issue 5 (striking out (SIAC 11B))
 Court's conclusions 542-3
 parties' positions (appellant) 541-2
 parties' positions (respondent) 542
- preliminary objections (ICJ) (ICJ ROC 79)**
 characterization as objection to jurisdiction vs admissibility, Court's right to determine 32
 jurisprudence
 Application of the Genocide Convention 32

Interhandel 32
Oil Platforms 32

proportionality

appropriateness test 384-5
 EU and ECHR test, distinguishability 540-1
 interference with fundamental rights and constitutional principles distinguished 382
 necessity and 385
 reasonableness test compared 386-90
 seriousness of interference 386-7

reproductive rights, jurisprudence (including abortion and related issues)

A, B and C 329-30, 332-3
K.N.L.H. v. Peru 331, 333, 342-3
L.M.R. v. Argentina 333
Mellet 342-3

res judicata non bis in idem principle

decisions liable to consideration as
 international court/tribunal decision as *res judicata* in municipal courts 88-9
 res judicata distinguished 70
 definition 52
 as general principle of law 34-5, 87
 ICJ 59/ICJ 60 as reflection of 33-4, 52, 88-9
 identity of parties, subject matter and legal cause, need for 33-4, 52, 57, 72-3, 88-9, 108
 international and municipal practice distinguished 87-8
 jurisdiction and 88-9
 jurisprudence
 Dallal 88-9
 Orinoco 88-9
 Trail Smelter 87
 substantive vs procedural consequences 88-9

Return Directive (EU Directive 2008/115/EC)

extracts 191-5
 jurisprudence
 Khaled Boudjlida 195-6
 Khlatifa: see *Khlatifa* (ECtHR)
 M.G. and N.R. 196-7
 Sophie Mukarubega 196-7
 right to be heard 195-7
 annulment of administrative procedure decision in case of failure to observe right 196
 applicability as a fundamental principle of EU law 196
 justifiable restrictions 196-7
 scope of right (*Khaled Boudjlida*) 196

separation of powers 382-3**service of process on diplomatic agent/consular officer (inviolability of person (VCDR 29/VCCR 41))**

see also FSIA 1608(a)(3) (service: in case of failure of other prescribed methods)
 inviolability of premises of mission (VCDR 22(1)) and 709-10

sovereignty, effect of treaty on

inevitable limitation of 372, 394-6, 408

sovereignty, effect of treaty on (*cont.*)

- presumption against restrictions on
ESM Case 371-2
- VCLT, absence of rule from 372

Special Immigration Appeals Commission (SIAC)

- Pham* 541-3
- striking out (ROP 11B) 541-3

specialized agencies: *see* *Al-Juffali*; IMO; International Organizations, Vienna Convention on the Representation of States (1975) (VCRS)**State responsibility for serious breaches of peremptory norms/*jus cogens* (ILC(SR) 40-1),**
obligation not to recognize effects of wrongful act (ILC(SR) 41(2)) 354***travaux préparatoires* as supplementary means of interpretation (VCLT 32)**

- Bogotá LVI 31, 122-4
- ECHR Protocol 4:4 (collective expulsion) 307, 309-10

treaties, third parties and (VCLT 34-8)

- jurisprudence
 - Certain German Interests in Upper Silesia* 84, 117
 - Nicaragua v. Colombia (delimitation of continental shelf)* 84-6, 116-22
 - North Sea Continental Shelf* cases 84
 - Wimbledon* 117
- treaties reflecting customary international law 116-22

treaty interpretation

- multilingual treaties (VCLT 33), “expedited procedure” (ESM 4(4)) (Estonian) vs “emergency voting” (ESM 4(4)) (non-Estonian versions) 378-9
- object and purpose (VCLT 31(1))
 - a contrario* principle 24-6, 122-4
 - effectiveness (*ut res magis valeat quam pereat*) (*effet utile*)
 - abundance of caution principle 28-9, 124
 - every element of treaty to be given effect 28-30
 - jurisprudence
 - Border and Transborder Armed Actions (Nicaragua v. Honduras)* 26-8
 - Corfu Channel* 28-9
 - Georgia v. Russia* 28-9
 - Nicaragua v. Colombia (Delimitation of the Continental Shelf)* 24-30, 122-4
 - Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Request to intervene) 24-5
 - Wimbledon* 24-5
 - preamble as evidence of 26-8
 - titles/subtitles as guide to 26-8
- points to be taken into account (VCLT 31(3)), subsequent practice in application of treaty establishing agreement between the parties regarding its interpretation (VCLT 31(3)(b)), common practice of parties, need for, silence or inaction/absence of challenge 30-1

***Ukraine v. Law Debenture* 484-99**

- background (political) 449
- background (procedural)
 - Law Debenture’s position (summary) 452
 - Ukraine’s defences/High Court’s findings 449-50

- background (Trust Deed/Notes) 447-9
 - choice of law/choice of forum (English law/English courts) 448
 - Law Debenture as trustee 449
 - Law Debenture's right to require payments in respect of the Notes to Law Debenture instead of the Principal Paying Agent 448
 - Russia as beneficial owner 449
 - direction to Law Debenture to take enforcement proceedings against Ukraine 449
 - retention of Notes 448
 - Russia as sole subscriber/retention of the Notes 448
 - Ukraine's alleged affirmation of the Notes 502-5
 - Ukraine's default on final instalment of interest and payment of the principal 448
 - Ukraine's waiver of sovereignty 448
- Court's disposition 521-2
- ground 1: capacity and authority 450-83
 - apparent validity of issue of Notes by Ukraine 452-4
 - authority
 - Court's analysis and decision 465-83
 - expert view/Law Debenture's position 455-6
 - Blair J's conclusion (rejection of Ukraine's case) 457-8
 - legal capacity 456-65
 - as derivative of legal personality without prerogative or statutory constraint 462-4
 - expert view/Law Debenture's position 455-6
 - international law compared 464
 - under Ukrainian law 456
 - legal personality of sovereign State (English law)
 - as consequence of recognition as State 461-2
 - recognition/legal personality of foreign corporations distinguished 461-2
 - republics vs monarchies, distinguishability 459-61
 - Wagner* 459-61
 - parties' arguments (Law Debenture)
 - applicability of English and international law to capacity to borrow 457
 - Lotus* principle 458
 - parties' arguments (Ukraine)
 - allegations of lack of capacity and authority rendering the issue of Notes voidable 454-5
 - applicability of Ukrainian law to Ukraine's capacity and powers 456-7
 - personality and capacity as independent issues 458-9
- ground 2: duress 451, 483-99
 - justiciability 484-99
 - for purposes of 487-90
 - jus cogens*/prohibition of force (UNC 2(4)) considerations 490-9
 - public policy exception 492-9
 - Shergill* 484-6, 489-90
 - procedural considerations
 - alternative fora 484
 - Ukraine's claim 483-4
 - unjust enrichment suit as alternative 484
- ground 3: stay 451
 - Russia's denial of Ukraine's right to defend itself using any permissible defence (*Ukraine v. Law Debenture*) 500-1
- ground 4: implied terms 451, 505-7
 - Blair J's conclusion 506-7

Ukraine v. Law Debenture (cont.)

- Court's analysis and conclusion 514-21
 - caution, need for 514-15
 - clarity and certainty of proposed implied terms 520
 - commercial and practical coherence 519-20
 - conditions for 515-16
 - identified risk factors, relationship with 521
 - "necessities of the contract" test 517
 - "obviousness" criterion 520-1
 - term prohibiting "prevention" of contract, absence of general rule 516
 - tradeable nature of the Notes 517-19
- implied terms alleged by Ukraine 505-6
- Law Debenture's arguments 512-14
- Ukraine's submissions: ground 4(a): implied terms if Russia prevented or hindered performance 507-9
 - clarity and certainty 510
 - commercial and practical coherence 510
 - inconsistency with the "no set-off" clause 510-11
 - tradeable nature of the Notes 507-9
- Ukraine's submissions: ground 4(b): implied term that no enforcement while in breach of public international law 511-12
- ground 5: countermeasures 451
 - scope of doctrine/non-applicability 501-2
- ground 6: compelling reasons for trial 451-2

United Kingdom

- contracts, implied terms, 514-21: *see also* contracts, implied terms; *Ukraine v. Law Debenture*, ground 4: implied terms
- Diplomatic Privileges Act 1964 (DPA)
 - common law, effect on 428
 - VCDR provisions not included in DPA, binding effect on UK under international law/as aid to interpretation 426
- diplomatic privileges and immunities (entitlement of nationals of receiving State) (VCDR 38), 435-44: *see also Al-Juffali* (immunity of IMO Member's representative), permanent residence issue (VCDR 38(1)/HQA 13 *bis*/IMO Order 15); diplomatic privileges and immunities, entitlement of nationals of receiving State (VCDR 38)
- duress/necessity (including war-related situations, war crimes or crimes against humanity)
 - as contract claim defence 487-90
 - as domestic foothold for purposes of justiciability 487-90
- executive certificate/statement, conclusiveness in relation to foreign relations matters, IOA 8 421, 430-1
- export controls legislation
 - Export Control Act 2002 by section
 - 1(1) (SoS's power to impose export controls) 624-5
 - 5(2) (controls to give effect to UK's EU/international obligations) 624-5
 - 9(2) (on the exercise of licensing power) 624-5
 - 9(3) (SoS's obligation to give guidance about the general principles to be followed when exercising licensing powers) 557, 623-4
 - 9(8) (Consolidated Criteria: treatment as guidance for the purposes of s 9 unless varied or withdrawn) 557
 - Export Control Order 2008 by article

- 3 (military goods) 624-5
- 26 (licences) 557, 624-5
- 32 (amendment, suspension and revocation of licences) 557, 624-5
- IMO: *see Al-Juffali*; IMO (immunity from jurisdiction of representatives accredited to IMO V/IMO HQA 13 *bis*)
- international organizations, international legal personality and capacity to operate in domestic law distinguished 464
- IOA 8 (executive certificate: conclusiveness) 421, 422-3, 430
- judicial review/justiciability
 - appeal distinguished 639
 - “considerable respect should be accorded to the decision-maker” 564-6, 664
 - judicial caution, need for 620-1
 - legality of government actions, limitation to 639
 - reasonableness/rationality (*Wednesbury* principle) 564-6
 - high threshold/Court’s preference for a different choice, exclusion 639-40
 - Tameside* duty 566-7, 640
 - “rigorous and intensive standard of review” 564
- jus cogens*/peremptory norm, State immunity from jurisdiction and, *Ukraine v. Law Debenture* 490-9
- justiciability, domestic foothold requirement, 487-90: *see also* justiciability, domestic foothold requirement
- nationality, loss or deprivation
 - arbitrary deprivation, prohibition (RSC (1961)) 540
 - British Nationality Act 1981, s 40 (deprivation of citizenship) (extracts) 543-7
 - grounds/relevant factors
 - “conducive to the public good” test (BNA 40) 538
 - disloyalty 528, 536-8
 - risk of current harm to national security 534-5, 538-41
 - stateless persons (UN Convention on the Reduction of Statelessness (1961) (RSC)) 530-3, 540
- United States of America (USA)**
 - diplomatic premises, inviolability (including VCDR 22), service of process and 709-10, 713-15, 717-18
 - Federal Rules of Civil Procedure (FRCP), 4(i) (alternative provisions for service in a foreign country) 709
 - legislation, interpretation, aids
 - comparable language in a different statute 679-80
 - comparable language in same statute 679-80
 - legislation, interpretation, guidelines
 - ordinary [and natural] meaning 679-82, 703-5
 - reference canon 680-2
 - statute as a whole [including amendment] 705-8
- Vienna Convention on the Law of Treaties (1969) (VCLT), customary international law (CIL) and**
 - Avena* 24
 - Guinea–Bissau/Senegal* 24
 - LaGrand* 24
 - Nicaragua v. Colombia (Delimitation of the Continental Shelf)* 24
 - Oil Platforms* 24
 - Territorial Dispute (Libya/Chad)* 24

Whelan

- see also* Ireland, Republic of, abortion-related legislation
 admissibility/exhaustion of local remedies (ICCPR OP 1:5(2)(b))
 Committee's views 339
 "not being examined under another procedure of international investigation or settlement" (OP 1:5(2)(a)) 339
 Seibert-Fohr (exhaustion of local remedies) 349
 State party's position 329
 background (evolution of Irish law on abortion) (State party's observations on)
A, B and C approach as preferred model 329-30
 Constitution 40.3.3, Supreme Court's interpretation of 329
 evolution as a balance between constitutional rights of the unborn and those of the mother 330-1
 Protection of Life During Pregnancy Act 2013 330
 author's comments on 335
 as reflection of the Irish people's moral choices established through a democratic process 329
 author's comments on 335
 background (facts as presented by the author) 321-4
 claims under ICCPR 2(1) (compliance obligation), ICCPR 3 (equal treatment of men and women) and ICCPR 26 (non-discrimination)
 Committee's views 343-4
 conclusion (ICCPR 26) 343-4
 decision not to examine separately allegations under ICCPR 2(1), ICCPR 3 and ICCPR 19 344
 HRC GC 16 (privacy) 343-4
 HRC GC 18 (differential treatment, requirements (HRC GC 18:13)) 343-4
 complaint 328-9
 State party's observations 334-5
 author's comments on 338-9
 claims under ICCPR 7 (inhuman or degrading treatment)
 Committee's views 340-2
 aggravating factors 340-1
 conclusion 341-2
 legality of conduct under domestic law, relevance 340
 non-derogation principle 341-2
 complaint 324-5
 State party's observations 331-2
 author's comments on 335-6
 claims under ICCPR 17 (respect for family/private life)
 Committee's views
 conclusion 342-3
 legality of conduct under domestic law, relevance 341-2
 Meller 342-3
 complaint 325-6
 State party's observations 332-3
 author's comments 336-7
 claims under ICCPR 19 (freedom of expression/right to information) 337-8
 complaint 326-7
 State party's observations 333-4
 individual opinions
 Ben Achour (concurring) (ICCPR 2(1) and 3) 345-6

- Cleveland (concurring) 346-7
- de Frouville (concurring) 347
- Seibert-Fohr (partly dissenting) (ICCPR 26 (non-discrimination)) 347-9
 - “discrimination” 348
 - fundamental difference between women carrying pregnancy to term and those seeking abortion 348
 - judicial economy (finding of breach of ICCPR 7/ICCPR 17 rendering otiose consideration of ICCPR 26) 347
 - qualification as differential treatment, limitation to grounds specified in ICCPR 25 348-9
- obligation to provide author with effective remedy (ICCPR 2(3)(a)) (Committee’s views)
 - adequate compensation 344
 - legislative changes to ensure conformity with obligations 344
 - measures to ensure non-repetition 344
 - remedies requested 329

Yemen, Arab Republic of, human rights: *see* *CAAT*