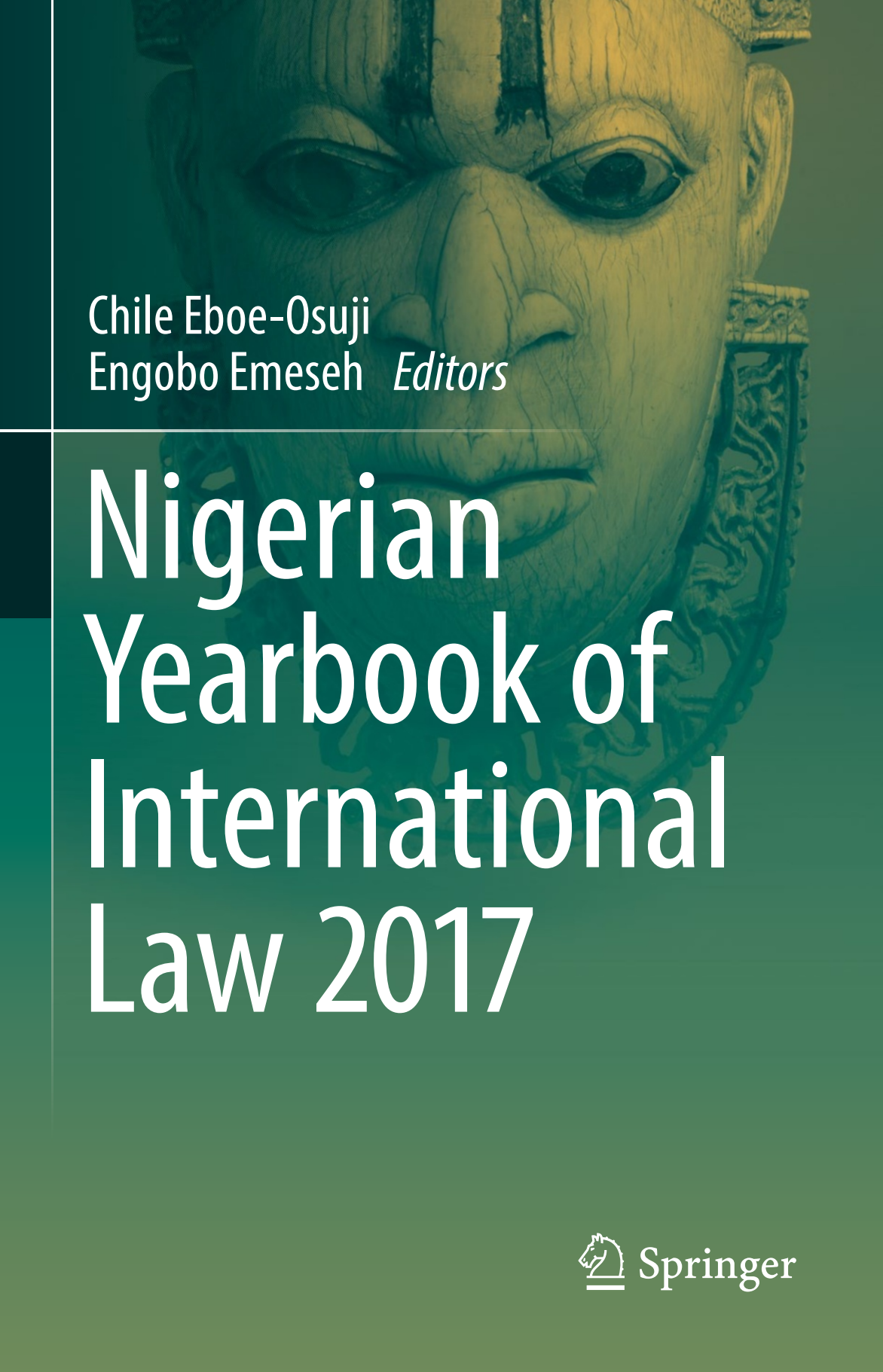

Chile Eboe-Osuji
Engobo Emeseh *Editors*

Nigerian Yearbook of International Law 2017

Springer

Nigerian Yearbook of International Law 2017

The NYBIL has as its main aim analysis of, commentaries on, and reporting of developments in international law that are mostly of relevance within the context of Nigeria in particular, Africa, the black diaspora of the world, and the developing world more generally. But, it is stressed that the publication is not exclusive in that regard: contributions from the perspective of the wider world are also strongly encouraged and welcomed.

Analysis of international law within the context of developing countries in general, the black diaspora, Africa and Nigeria in particular is an area of increasing scholarly and professional interest. This interest will only continue to grow in light of current and emerging global issues such as trade and investment, human rights, armed conflict, humanitarian intervention, transitional justice, international and transnational crimes, transnational migration, environment, international terrorism. The NYBIL provides an authoritative platform for focused analysis of these developments to be readily available to students, academics, practitioners, governments, and international bodies.

More information about this series at http://www.springer.com/series/14355

Chile Eboe-Osuji • Engobo Emeseh
Editors

Nigerian Yearbook of International Law 2017

Springer

Editors
Chile Eboe-Osuji
International Criminal Court
The Hague, The Netherlands

Engobo Emeseh
School of Law
University of Bradford
Bradford, United Kingdom

ISSN 2523-8868 ISSN 2523-8876 (electronic)
Nigerian Yearbook of International Law 2017
ISBN 978-3-319-71475-2 ISBN 978-3-319-71476-9 (eBook)
https://doi.org/10.1007/978-3-319-71476-9

Library of Congress Control Number: 2018935151

Printed on acid-free paper

This Springer imprint is published by the registered company Springer International Publishing AG part of Springer Nature.
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Foreword

I am pleased to write these few prefatory words to the first issue of the *Nigerian Yearbook of International Law*.

The Yearbook is launched against the backdrop of increasing scholarly and professional interest in the analysis of international law within the context of developing countries in general and of Africa and Nigeria in particular. This interest is hardly surprising in the light of current and emerging issues in the areas of human rights, armed conflicts, humanitarian interventions, transitional justice, international crimes, the environment, trade and investment and more, all of which have immediate significance for the African continent and Nigeria. The aim of the Yearbook is to provide an authoritative platform that enlarges the existing forums of critical discourse from varying perspectives—as well as information dissemination about developments in international law in general. All of this is done from perspectives of especial relevance to Africa and its people, including those in the diaspora.

Of note, of course, is the eponymous axiom that the Yearbook has a Nigerian orientation. That is inevitably the case, particularly given the exclusively Nigerian make-up of the Editorial Board—and the very verdure of the book cover itself. Indeed, the sheer size of Nigeria's population and her dynamism, together with the attractions that her economic potentials offer the world, truly combine to command a place for a yearbook devoted exclusively to issues and information about Nigeria, in the context of international law. Nevertheless, a deliberate editorial policy has rightly been taken to expand the scope of the Yearbook, in order to accommodate voices from beyond Nigeria and Africa, while keeping it relevant in the indicated way.

In that connection, it is noted that the roll call of contributors in this inaugural issue includes eminent international law jurists from all corners of the world. They include, from New Zealand, **Judge David Baragwanath** (Judge and former President of the Special Tribunal for Lebanon, former Judge of the Court of Appeal of New Zealand); from Nigeria, **Professor Dakas C. J. Dakas** (Dean of Law, University of Jos; former Ben Nwabueze Distinguished Professor of Law, Nigerian Institute of Advanced Legal Studies (NIALS), Abuja, Nigeria; former Director of Research, NIALS); from Hungary, **Judge Péter Kovács** (Judge of the International Criminal

Court; former Professor and Head of the Department of Public International Law of the Faculty of Law of the Péter Pázmány Catholic University, Budapest, Hungary); from Uganda, **Judge Daniel David Ntanda Nsereko** (Judge of the Special Tribunal for Lebanon, Member of the Advisory Committee on Nomination of Judges of the International Criminal Court, former Judge of the International Criminal Court, former Professor of law and Head of the Department of Law of the University of Botswana); from Ireland, **Ambassador Patricia O'Brien** (Ambassador of Ireland to France, former Permanent Representative of Ireland to the United Nations and other International Organisations at Geneva, former Under-Secretary-General for Legal Affairs and United Nations Legal Counsel); from Nigeria, **Professor Obiora Chinedu Okafor** (Professor and Research Chair in International and Transnational Legal Studies at the Osgoode Hall Law School, York University, Toronto, Canada; former Member and Chairperson of the United Nations Human Rights Council Advisory Committee, Geneva, Switzerland; Gani Fawehinmi Distinguished Chair in Human Rights Law, NIALS); from Australia, **Judge David Re** (Judge of the Special Tribunal for Lebanon; former international Judge in the War Crimes Chamber of the Court of Bosnia and Herzegovina, Sarajevo); from Canada, **Professor William Schabas** (Professor of international law, Middlesex University, London, United Kingdom; Professor of international criminal law and human rights, Leiden University, the Netherlands; *Emeritus* Professor of human rights law, National University of Ireland Galway); and, from Brazil, **Judge Antônio Augusto Cançado Trindade** (Judge of the International Court of Justice; former Judge and President of the Inter-American Court of Human Rights; *Emeritus* Professor of international law of the University of Brasilia, Brazil; former President of the Latin American Society of International Law).

I congratulate the Editorial Board for this effort. I am confident that they will sustain in the coming years the seriousness of the publication to which this eminent participation attests.

Minister of Foreign Affairs, Abuja — Geoffrey Onyeama
Nigeria

Preface

On behalf of the Editorial Board, I welcome you to the *Nigerian Yearbook of International Law [NYbIL]*.

A Nigerian adage likens the world to an awe-inspiring mask, which must be viewed from all angles in order to be seen well. Though the magnificent Idia mask—a leading figure of Nigerian iconography—cannot be viewed from all angles on the book cover, our aim remains that the *NYbIL* represents one more angle from which the world in all its awesomeness (and, regrettably, awfulness, too) is viewed in the round. There have been other national- and regional-themed yearbooks and journals that have provided their own vistas to the world of international law. Those include publications from beyond the African region but also those important efforts that speak from within, such as the *African Yearbook of International Law* and the *South African Yearbook of International Law*. The *Nigerian Yearbook of International Law* now joins them to provide yet another angle to enrich global views of international law.

For my part, the birth of the *NYbIL* is a humbling actualisation of a dream that has endured a professional lifetime: to have a yearbook that affords a forum that is primarily Nigerian in the exchange of scholarly ideas in international law. For this achievement, I thank the jurists and scholars from Nigeria, Africa and around the world, whose erudite contributions are featured in this inaugural volume. But, most importantly, I must personally avow a huge debt of gratitude to my colleagues on the Editorial Board (all of them very busy Nigerian academics around the world) for heeding my call to this labour of love. In that regard, I heartily thank Professor Engobo Emeseh (Head of the School of Law of the University of Bradford, England). Her hard work and dedication as the Managing Editor has made this achievement possible. I similarly thank Ms Odo Ogwuma LLB, LLM, our Editorial Assistant, whose day job is to assist me in my own day job at the International Criminal Court. In addition to her phenomenal hard work, her calmness was legendary in the face of my own anxieties as they waxed and waned concerning multifarious issues along the way. I must also individually thank each member of the Editorial Board, namely, Professor Dapo Akande, Professor Moshood Baderin,

Professor Dakas Clement James Dakas, Professor Uche Ewelukwa Ofodile, Professor Ikechi Mgbeoji, Professor Jide Nzelibe, Professor Ibironke Odumosu-Ayanu, Dr Jumoke Oduwole, Professor Obiora Okafor, Dr Olaoluwa Olusanya and Professor Nsongurua Udombana. On their behalf, I express, in turn, our profound gratitude to Springer Publications Ltd: for undertaking both the actual publication of the series and the work that it entails. In that regard, I particularly thank Dr Brigitte Reschke, Ms Julia Bieler, Ms Abishag Devamani J and Mr Bibhuti Sharma.

Heeding the wisdom of the Nigerian proverb that cautions the farmer against boasting of a good harvest when not yet assured that the stock of yams will last until the following season, we are keenly aware on the Editorial Board that as hard as starting the yearbook may seem, the harder part lies in keeping it going. We are well aware that this first volume is only the first step of a journey intended to endure. I look forward to the continuing interests of all the contributors and to the dedication of team members who have made this volume possible. I am confident that these reflect the shared ambitions and visions of all those who have been a part of this journey thus far.

This first volume was intended to be published as the 2016 edition. But we have been constrained to issue it as the 2017 edition, due to unforeseen delays that occurred in the process of publication. We take full responsibility for the resulting inconvenience, where for that reason any of the articles published appear out of date.

The Hague, The Netherlands Chile Eboe-Osuji
2018

Contents

Part III Criminal Law

Part IV Natural Resources/Environmental Law

Part V Book Review

Part VI Year in Review

Part I
International Law and Regional Systems

Compliance with Judgments and Decisions: The Experience of the Inter-American Court of Human Rights: A Reassessment

Antônio Augusto Cançado Trindade

Contents

1 Preliminary Observations

Although the discussion in this paper derives from an address originally presented to the European Court of Human Rights (ECtHR) in 2014 on the occasion of the opening of its judicial year, it is hoped that its publication in the *Nigerian Yearbook of International Law* might assist in sharing more broadly experiences gained at the

---

Judge at the International Court of Justice The Hague, The Netherlands; former President of the Inter-American Court of Human Rights; Emeritus Professor of International Law of the University of Brasilia, Brazil; Former President of the Latin American Society of International Law. This paper is based on an address delivered by the Author in the Seminar of the opening of the Judicial Year of 2014 of the European Court of Human Rights, held at the Palais des Droits de l'Homme, in Strasbourg, on 31 January 2014; originally published on the website—Implementation of the Judgments of the European Court of Human Rights: A Shared Judicial Responsibility? Dialogue between Judges 2014/La mise en oeuvre des arrêts de la Cour européenne des droits de l'homme: Une responsabilité judiciaire partagée?—Dialogue entre juges 2014, Strasbourg, European Court of Human Rights/Cour européenne des droits de l'homme, 2014, pp 10–17, http://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf, accessed on 20 May 2016.

A. A. Cançado Trindade (✉)
International Court of Justice, The Hague, Netherlands

C. Eboe-Osuji, E. Emeseh (eds.), *Nigerian Yearbook of International Law 2017*,
Nigerian Yearbook of International Law 2017,
https://doi.org/10.1007/978-3-319-71476-9_1

Inter-American Court of Human Rights (IACtHR), in the hope that those experiences might assist sister human rights courts in Africa and elsewhere in tackling possibly common problems.

As a preliminary matter, it may be observed that the IACtHR does not count on a Committee of Ministers for the implementation of its judgments, as compared, notably, to a court like the ECtHR. Given this gap in the mechanism under the American Convention on Human Rights (ACHR), I deemed it fit to insist, during my years of Presidency of the IACtHR (1999–2004), on the need to establish a *permanent* mechanism of supervision of the execution of, or compliance with, the judgments and decisions of the IACtHR. In successive *Reports* that I presented to the main organs of the Organization of American States (OAS), I advanced concrete proposals to that effect. In my *Report* of 17 March 2000, for example, I warned that in case of 'non-compliance with a Judgment of the Court, the State concerned incurred into an additional violation of the Convention'.[1]

Despite the attention with which the delegations of Member States of the OAS listened to me, the gap has persisted as of the date of writing. On one particular occasion, a respondent State (which had denounced the ACHR), availing itself of the gap, felt free not to provide any information at all concerning compliance with judgments in the case of *Hilaire, Benjamin and Constantine v Trinidad and Tobago* (2001–2002). This omission occurred despite the fact that, as President of the IACtHR, I had communicated such non-compliance to the OAS General Assembly (held in Santiago, Chile, in 2003), just as I had done three years earlier, in relation to the *Peruvian cases*, in the OAS General Assembly of 2000 held in Windsor in Canada,[2] in conformity with Article 65 of the ACHR, which provides: 'To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.'

2 Referral of Non-compliance to the Main Organs of the OAS

Within the IACtHR, I constantly insisted on the pressing need of having non-compliance with judgments (partial or total) by the respondent States submitted to the consideration of the *competent organs of the* OAS in order to take due measures to preserve the integrity of the mechanism of protection of the IACtHR.

[1] Report of 5 April 2001 presented to the Commission on Legal and Political Affairs of the Permanent Council of the OAS, reproduced in: A.A. Cançado Trindade, *Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección* (IACtHR, vol II, 2nd edn, San José of Costa Rica 2003) 125.

[2] As documented in the OAS General Assembly's *Annual Reports* of 2000 and 2003.

The supervision of the execution of the judgments of the IACtHR could not keep on taking place only once a year, and in a very rapid way, by the OAS General Assembly itself.

A proposal that I advanced and insisted upon, during my Presidency of the IACtHR, was the creation, within the Commission on Legal and Political Affairs of the OAS Permanent Council (CAJP), of a nuclear commission, composed of representatives of the States Parties to the ACHR, to be in charge of the supervision, on a *permanent* basis, within the OAS, of the execution of the judgments of the IACtHR so as to secure compliance with them and, thereby, the realisation of justice.[3] In successive Reports to the main organs of the OAS, I stressed the pressing need of providing mechanisms—of both domestic and international laws—tending to secure the faithful and full execution of the judgments of the IACtHR at domestic law level.

The ACHR expressly provides that States Parties are bound to comply with decisions of the IACtHR in every case to which they are party.[4] The Convention adds that the part of the judgments of the IACtHR stipulating compensatory damages may be executed in the concerned State by the domestic process in force for the execution of judgments against the State.[5] By the end of the last decade, at *domestic law* level, only two States Parties to the ACHR had in effect adopted *permanent* mechanisms for the execution of international judgments.[6] Throughout the last decade, five other States Parties have adopted norms relating to the execution of the judgments of the IACtHR.[7]

[3]Trindade (n 1) 47-49, 111, 125, 234-235, 664, 793-795 918-921, esp. 793-794.

[4]See Article 68(1) of the ACHR.

[5]See Article 68(2) of the ACHR.

[6]They are, respectively, Peru, which attributes to the highest judicial organ in domestic law (the Supreme Court of Justice) the faculty to determine the execution of, and compliance with, the decisions of organs of international protection to the jurisdiction of which Peru has engaged itself (judicial model); and Colombia, which has opted for the attribution to a Committee of Ministers of the same function (executive model).

[7]Namely, Costa Rica, Guatemala, Brazil, Venezuela and Honduras. Moreover, the duty of compliance with the judgments and decisions of the IACtHR has been expressly acknowledged by the Supreme Courts of a couple of States Parties: it was done so, e.g., in 2007, by the Supreme Court of Justice of Argentina, as well as the Constitutional Tribunal of Peru, among others. Despite these advances, there subsists to date the problem of *undue delays* in the full compliance by respondent States with the IACtHR's judgments and decisions.

3 Supervision of Compliance with IACtHR Judgments and Decisions

In the other States, the judgments of the IACtHR kept on being executed pursuant to empirical—or even casuistic—criteria, in the absence of a permanent mechanism of domestic law to that end. Given the absence of legislative or other measures to that effect, in my *Tratado de Direito Internacional dos Direitos Humanos*, I expressed the hope that States Parties seek to equip themselves to secure the faithful execution of the judgments of the IACtHR in their domestic legal orders.[8] And even if a given State Party to the ACHR has adopted a procedure of domestic law to this effect, it cannot be inferred that the execution of the judgments of the IACtHR is *ipso jure* secured within the ambit of its domestic legal order. The measures of domestic law are to be complemented by those of international law, particularly by the creation of a permanent mechanism of international supervision of the execution of the judgments of the IACtHR—as I maintained throughout the whole period of my Presidency of that Court.

Thus, in my extensive *Report* of 5 April 2001, in which I presented to the CAJP the document I had prepared, as *Rapporteur* of the Court, containing the *Bases for a Draft Protocol to the American Convention on Human Rights, to Strengthen Its Mechanism of Protection*, I proposed the creation of a mechanism of international supervision of the judgments of the IACtHR, within the ambit of the OAS (in the form of a working group of the CAJP). That mechanism was to operate on a *permanent* basis so as to overcome a gap in the inter-American system of human rights protection.[9] Such supervision, I pointed out, is incumbent upon all the States Parties to the ACHR, in the exercise of their *collective guarantee*, so as to give due application to the basic principle *pacta sunt servanda*.[10]

Subsequently, in my *Report* of 19 April 2002, to the CAJP, I insisted on my proposal (which I had taken to the consideration of the Permanent Council itself and of the General Assembly of the OAS in 2001), aiming at filling a gap in the inter-American system of human rights and thus strengthening the mechanism of protection offered by the ACHR.[11] Once again, the matter was taken to the attention of the OAS Permanent Council in 2002 and also in 2003. Faced with the embolism of the OAS in this respect, I took up the subject again—with special emphasis—in my *Report* of 16 October 2002 to the Permanent Council of the OAS, on *The Right of Access to International Justice and the Conditions for Its Realization in the Inter-American System of Protection of Human Rights*. On that occasion, I again pondered

[8] A A Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, (vol II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999) 184.

[9] Trindade (n 1) 369. For a recent reassessment of that and other proposals, See A A CançadoTrindade, *Le Droit international pour la personne humaine* (Paris, Pédone, 2012) 169-214.

[10] ibid 378.

[11] ibid 794-795.

that States Parties are *individually* bound to comply with the judgments and decisions of the IACtHR, 'as established by Article 68 of the ACHR in application of the principle *pacta sunt servanda*, and, moreover, as an obligation of their own domestic law'. They are likewise *jointly* bound to guarantee the integrity of the ACHR; 'the supervision of the faithful execution of the sentences of the Court is a task that falls upon all the States Parties to the Convention'.[12]

I then recalled that the ACHR, in creating obligations for States Parties *vis-à-vis* all human beings under their respective jurisdictions, requires the exercise of the *collective guarantee* for the full realisation of its object and purpose, whereby its mechanism of protection can be enhanced. 'The faithful compliance with, or execution of, their judgments is a legitimate preoccupation of all international tribunals' and is a 'special concern' of the IACtHR.[13] It so happens that, in general, States Parties have been satisfactorily complying with the determinations of reparations in the forms of indemnisations (i.e., compensatory damages), satisfaction to the victims and harmonisation of their domestic laws with the provisions of the ACHR. But the same has not happened in respect of the duty to investigate the facts and to sanction those responsible for grave violations of the protected human rights (as the *cycle of cases of massacres* was to disclose clearly along the last decade).[14] This remains a cause for concern as one cannot prescind from such investigation and sanction in any effort to put an end to impunity (with its negative and corrosive consequences for the social tissue as a whole).

Still in my aforementioned *Report* of 19 April 2002, I observed that, in view of the persisting institutional gap in the inter-American system of protection in this domain, the IACtHR took the initiative of supervising, *motu propio*, the execution of its judgments, in the course of its periods of sessions. Yet this was without prejudice to the *collective guarantee*—by all States Parties to the ACHR—of the faithful execution of judgments and decisions of the Court. My reiterated proposal to the OAS for the creation of a 'nuclear Commission' of the CAJP to undertake the supervision of compliance with the IACtHR's judgments and decisions on a *permanent* basis did not, unfortunately, see the light of day. Such measure was to be complemented by measures to be taken by States Parties at the domestic law level; the principle *pacta sunt servanda* would thus become effective with measures that were to be taken, *pari passu*, at both international and national levels.[15]

The gap persists to date. The OAS took note of my proposal in successive resolutions until early 2007. The only point that materialised was another proposal I had made to create a fund of free legal assistance to petitioners in need of it. The other points have remained presumably 'under study'. And, nowadays, the IACtHR

[12] ibid 919-920.

[13] ibid.

[14] See A.A. Cançado Trindade, *The Access of Individuals to International Justice*, (Oxford University Press, 2011b) 179-191; A.A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, (Universiteit Utrecht, 2011a) 1-71.

[15] ibid 919-921.

continues to take on the additional task of supervising the execution of its judgments at the domestic law level of the respondent States. It has been doing so by means of successive resolutions (on State compliance), at times preceded by post-adjudicative public hearings.

Earlier examples—and remarkable ones—of compliance with the IACtHR's judgments can be found in the cases of *Barrios Altos* (2001), *cas célèbre* on the incompatibility of amnesties with the ACHR, and *Loayza Tamayo* (1997)—both concerning Peru. In the latter, the respondent State promptly complied (on 2 October 1997) with the Court's determination (Judgment of 17 September 1997) to set free a political prisoner. In the case of *Juan Humberto Sánchez v Honduras* (Judgment of 7 June 2003), the IACtHR recalled its own case law to the effect that acts or omissions in breach of the protected rights can be committed by any power of the State (executive, legislative or judicial) or any public authority.

4 Supervision *Motu Propio* by the IACtHR Itself: The Leading Case of *Baena Ricardo and Others* (*270 Workers v Panama*, 2003)

The supervision, assumed *motu propio* by the IACtHR, of the execution of its judgments is what has been occurring in successive cases in recent years. As a pertinent illustration, it may help to recall the leading case of *Baena Ricardo and Others (270 Workers) v Panama*. In its memorable Judgment on competence (delivered on 28 November 2003) to supervise compliance with its previous Judgment on merits and reparations (delivered on 2 February 2001), the IACtHR determined as follows:

> [. . .] Its jurisdiction includes the authority to administer justice; it is not restricted to stating the law, but also encompasses monitoring compliance with what has been decided. It is therefore necessary to establish and implement mechanisms or procedures for monitoring compliance with the judicial decisions, an activity that is inherent in the jurisdictional function. Monitoring compliance with judgments is one of the elements that comprises jurisdiction. [. . .] Compliance with the reparations ordered by the Court in its decisions is the materialization of justice for the specific case and, ultimately, of jurisdiction.[16]
>
> [. . .] [. . .].
>
> Compliance with judgment is strongly related to the right to access to justice, which is embodied in Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention.[17]

[16] *Baena Ricardo and Others (270 Workers) v Panama*, Inter-American Court of Human Rights Series C No 104 (28 November 2003), para 72 (footnote omitted).

[17] ibid para 74.

And the IACtHR lucidly added, in the same line of thinking, that to guarantee the right of access to justice, it was not sufficient to have only the final decision, declaring rights and obligations and extending protection to the persons concerned. It was, moreover, necessary to count on the existence of

> [. . .] effective mechanisms to execute the decisions or judgments, so that the declared rights are protected effectively. The execution of such decisions and judgments should be considered an integral part of the right to access to justice, understood in its broadest sense, as also encompassing full compliance with the respective decision. The contrary would imply the denial of this right.[18]

> [. . .] If the responsible State does not execute the measures of reparations ordered by the Court at the domestic level, it is denying the right to access to international justice.[19]

In the same Judgment, the IACtHR, to my particular satisfaction, endorsed the understanding that I had expressed in my Concurring Opinion in its Advisory Opinion No 18 (delivered on 17 September 2003), on the *Juridical Condition and Rights of Undocumented Migrants*—even expressly citing my Individual Opinion (No 70)[20]—in the sense that the faculty of the IACtHR of supervision of execution of its judgments was grounded on its 'constant and uniform practice' (keeping in mind Articles 33, 62(1) and (3) and 65 of the ACHR and 30 of the Statute) and the 'resulting *opinio juris communis* of the States Parties to the Convention' (reflected in its several resolutions on State compliance with the IACtHR's judgments). And the IACtHR added, retaking my own doctrine on the *universal juridical conscience* as the ultimate *material* source of international law and of all law[21]:

> The *opinio juris communis* means the expression of the universal juridical conscience[22] through the observance, by most of the members of the international community, of a determined practice because it is obligatory. . . This *opinio juris communis* has been revealed because these States have shown a general and repeated attitude of accepting the monitoring function of the Court, which has been clearly and amply demonstrated by their presentation

[18] ibid para 82.

[19] ibid para 83.

[20] For the complete text of my aforementioned Opinion, see A. A. Cançado. Trindade, *Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006)* (Mexico, Edit. Porrúa/Univ. Iberoamericana, 2007) 52-87.

[21] See on this issue: A.A. Cançado Trindade, 'International Law for Humankind: Towards a New *Jus Gentium*—General Course on Public International Law, Part I' (2005), *Collected Courses of the Hague Academy of International Law*, Brill 316, 177-202; A.A. Cançado Trindade, *A Humanização do Direito Internacional*, (Belo Horizonte/Brazil, Edit. Del Rey, 2006) 3-106 and 394-409.

[22] See *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion, Inter-American Court of Human Rights Series A No. 18 (17 September 2003), Concurring Opinion of Judge A.A. Cançado Trindade, para 81.

> of the reports that the Court has asked for, and also their compliance with the decisions of the Court when giving them instructions or clarifying aspects on which there is a dispute between the parties regarding compliance with reparations.[23]

In effect, the Court proceeded that the sanction foreseen in Article 65 of the ACHR assumes the free exercise by the IACtHR of its inherent faculty of supervision of the execution of its judgments within the ambit of the domestic law of the respondent States.[24] Such exercise corresponds to its constant practice, from 1989 until the end of 2003.[25] In the merits and reparations Judgment, the IACtHR recalled that the respondent State had not questioned its competence of supervision earlier on; hence, the Court indicated that it would supervise compliance with the Judgment.[26]

And the Court concluded, in this respect, that the conduct of the State itself showed 'beyond doubt' that the State had recognised the competence of the IACtHR to supervise 'the compliance with its decisions' along 'the whole process of supervision'.[27] After summarising its conclusions on the question at issue,[28] the IACtHR firmly reasserted that it was endowed with competence to 'keep on supervising' 'full compliance' with the merits and reparations Judgment in the *cas d'espèce*.[29] It thereby thus discharged, categorically, the challenge of the State concerned, which was never again formulated before the IACtHR. And the respondent State then proceeded to give compliance with the respective Judgment.

5 A Setback in the Practice of the IACtHR: 'Partial Compliances'

Despite the earlier application (in 2000 and 2003) of Article 65 of the ACHR in cases of manifest non-compliance with judgments of the IACtHR, from 2004 up to now, the IACtHR has no longer applied Article 65 of the ACHR (as it should), thus rendering impossible in the last decade the exercise of the *collective guarantee* (underlying the ACHR). This, in my perception, is ultimately affecting the inter-American system of protection as a whole. It reveals that there is no linear progress

[23] The IACtHR added that its function of supervision has been accepted by the States and the Inter-American Commission of Human Rights, as well as by the victims or the legal representatives; the IACtHR has thus been able to exercise regularly and consistently its function of supervision of compliance with its own judgments (para 103).

[24] *Baena* (n 16) paras 90, 113 and 115.

[25] ibid paras 103-104 and 107.

[26] ibid para 121.

[27] ibid para 127.

[28] ibid paras 128-137.

[29] ibid para 138-139.

in the operation of an international tribunal (or of any other institution of domestic public law or of international law).

If the non-compliance (total or partial) by States with the judgments of the IACtHR is not discussed and considered within the ambit of the competent organs of the OAS—as now happens to be the case—this generates a mistaken impression or assumption that there is a satisfactory degree of compliance with judgments of the IACtHR on the part of respondent States. Regrettably, that is currently not the case—much to the detriment of the victims. I thus very much hope that the IACtHR will return to its earlier practice and principle of applying Article 65 of the ACHR in cases of manifest non-compliance with its judgments.

The new majority viewpoint prevailing in the IACtHR in recent years (since the end of 2004), avoiding the application of the sanction foreseen in Article 65, has been a 'pragmatic' one, in the sense of avoiding 'undesirable' clashes with the respondent States and of 'stimulating' them to keep on complying, gradually, with the judgments of the IACtHR. Hence the current practice of adoption, on the part of the IACtHR, of successive resolutions of supervision of compliance with judgments of the IACtHR, taking note of one or other measures taken by the States concerned and 'closing' the respective cases partially in respect of such measure(s) taken and in this way avoiding discussions on the matter within the OAS.

In effect, this gives the wrong impression of efficacy of the 'system' of protection as the cases cannot be definitively 'closed' because the degree of partial compliance is very high, just as is also the degree of partial non-compliance. And all this is taking place to the detriment of the victims. The cases already decided by the IACtHR are thus kept in the Court's list, for an indeterminate period of time, waiting for definitive 'closing', when full compliance is met—pursuant to a 'pragmatic' approach, seeking to foster 'good relations' with the States concerned and thus eluding the problem. The IACtHR is an international tribunal, not an organ of conciliation, which tries to 'persuade' or 'stimulate' States to comply fully with its judgments.

6 Final Observations

If there is a point in relation to which there persists in the inter-American protection system a very high degree of non-compliance with judgments, it lies precisely—as already indicated—on the investigation of the facts and the imposition of sanctions of those responsible for grave violations of human rights. In my time in the Presidency of the IACtHR, I gave due application to Article 65 of the ACHR (in the OAS General Assemblies of Windsor, Canada, in 2000 and of Santiago de Chile in 2003)—the last time the Court applied that provision until today, having held a position of principle and not a 'pragmatic' one in this respect. The system of protection exists for the safeguard of the victims, and this consideration ought to have primacy over any other.

On the last two occasions (in 2000 and 2003), under my Presidency of the IACtHR, in which the sanction of Article 65 of the ACHR was applied, the concrete results on behalf of the effective protection of human rights under the ACHR were immediate.[30] In sum, on this jurisdictional point of major importance, the norms of the ACHR exist to be complied with, even if this generates problems with one or another State Party. In ratifying the ACHR, States Parties assumed obligations to be complied with (*pacta sunt servanda*), which are obligations of international *ordre public*. The ACHR calls for a position of principle in this matter; after all, for the safeguard of the protected rights, it sets forth prohibitions that belong to the domain of imperative law, of international *jus cogens*.

A remarkable illustration of full compliance with conventional obligations is provided by the case of the *Last Temptation of Christ*,[31] wherein the IACtHR ordered the end of movie censorship—a measure that required the reform of a constitutional provision.[32] On 7 April 2003, the respondent State reported to the Court its full compliance with the Court's Judgment and added that the movie at issue was already being exhibited (since 11 March 2003) in the *Cine Arte Alameda* in Santiago. In its resolution of 28 November 2003, the IACtHR declared that the case was thereby terminated as Chile had fully complied with its Judgment of 5 February 2001.

This Judgment, delivered under my Presidency of the IACtHR, was not only the first pronouncement of the Court in a contentious case on the right to freedom of opinion and of expression, but likewise of full compliance with the Judgment that required the modification of a provision of the national Constitution itself. This was not an isolated episode. Another one, of similar historical significance—having also occurred under my Presidency—was that of the case of the *Constitutional Tribunal v Peru*, culminating likewise in full compliance, by the respondent State, with the Court's Judgment (merits and reparations, of 31 January 2001), with deep implications for the consideration of the relations between international and domestic laws in the present domain of compliance with judgments concerning the safeguard of the rights of the human person.

In that particular Judgment, the IACtHR had condemned the destitution of the three magistrates of the Peruvian Constitutional Tribunal as a breach of the ACHR and determined that such violation of the right to an effective remedy and to the judicial guarantees and the due process of law under the ACHR required the *restitutio in integrum* of the three magistrates (their effective reinstallment into their posts), given the nature of their function and the need to safeguard them from any 'external pressures'.[33] The resolution of destitution of the three magistrates was

[30]For an account, see A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, (3rd edn, Belo Horizonte/Brazil, Edit. Del Rey, 2013) 29-45.

[31]*Olmedo Bustos and Others v Chile* Inter-American Court of Human Rights Series C No 73 (5 February 2001).

[32]Namely, Article 19(12) of the Chilean Constitution of 1980.

[33]See *Constitutional Tribunal v Peru*, Inter-American Court of Human Rights Series C No 71 (31 January 2001), para 75.

annulled by the Peruvian Congress even before the indicated Judgment, which the IACtHR delivered on 31 January 2001. In effect, the National Congress did so on 17 September 2000, before the holding of the public hearing before the Court on 22 November 2000 in the case of the *Constitutional Tribunal*. The three magistrates were reinstalled in their posts in the Peruvian Constitutional Tribunal, which came to be presided over by one of them. On the two subsequent occasions—after the reinstallment of the three magistrates—when I visited the plenary of the Constitutional Tribunal in Lima (on 12 September 2001 and on 18 November 2003), its magistrates expressed to me their gratitude to the IACtHR. The episode reveals the relevance of the international jurisdiction. In a subsequent letter (of 4 December 2003), which, as President of the IACtHR, I sent to the Constitutional Tribunal, I observed, *inter alia*, that the IACtHR's unprecedented Judgment had repercussions 'not only in our region but also in other continents' and marked 'a starting-point of a remarkable and reassuring approximation between the Judiciary at national and international levels, which nowadays serves as example to other countries'.[34]

This precedent is furthermore reflected in the convergence that has followed between their respective jurisprudences (of the IACtHR and of the Constitutional Tribunal). In the same line of thinking, throughout my long period as a judge of the IACtHR, I sustained the view that the *corpus juris* of protection of the ACHR is directly applicable, and States Parties ought to give full execution to the judgments of the IACtHR. This is not to be confused with 'homologation' of sentences as the IACtHR is an international, and not a 'foreign', tribunal; States Parties are bound to comply directly with the IACtHR's judgments, without the need of 'homologation'.

Contrary to what is still largely assumed in several countries, international and national jurisdictions are not conflictual, but rather complementary, in constant *interaction* in the protection of the rights of the human person.[35] In the case of the *Constitutional Tribunal*, international jurisdiction effectively intervened in defence of the national one, contributing decisively to the restoration of the rule of law (*état de Droit*, *Estado de Derecho*), besides safeguarding the rights of the victimised.

In the history of the relations between national and international jurisdictions, this is a remarkable precedent, which will keep on being studied for years to come. The two historical episodes that I herein recall, of the closing of the cases of the *Last Temptation of Christ* and of the *Constitutional Tribunal*, pertaining to Chile and to Peru, respectively, after due compliance by them with the IACtHR's judgments, reveal that, in the present domain of protection, the interaction between international and domestic laws takes place to safeguard the rights inherent to the human person.

In conclusion, the IACtHR, which does not count on an organ such as a Committee of Ministers (in Europe) to assist it in the supervision of the execution

[34]Text of the letter reproduced *in*: OAS, *Informe Anual de la Corte Interamericana de Derechos Humanos - 2003*, IACtHR, San José of Costa Rica, 2004, Annex LVII, 1459-1460, and 1457-1458.

[35]See A. A. Cançado Trindade, *Reflexiones sobre la Interacción entre el Derecho Internacional y el Derecho Interno en la Protección de los Derechos Humanos*, (Ed. del Procurador de los Derechos Humanos de Guatemala, 1995) 3-41; Trindade (n14) ch. V, 76-112 (on the interaction between international law and domestic law in human rights protection).

of its judgments and decisions, has taken upon itself that task. It has done so in the exercise of its *inherent faculty* of that supervision. Much has been achieved, but it has also experienced a setback (of 'partial compliances'), as we have seen. Its homologue ECtHR counts on the Committee of Ministers and has reckoned the *complementarity* of its own functions and those of the Committee in this particular domain. I hope the present reassessment of the accumulated experience of the IACtHR to date may prove useful to the colleagues and friends of international human rights courts in their own experiences. After all, compliance with the judgments and decisions of contemporary international human rights tribunals is directly related not only to the *rule of law* but also, and ultimately, to the *realization of justice* at national and international levels.

References

Cançado Trindade AA (1995) Reflexiones sobre la Interacción entre el Derecho Internacional y el Derecho Interno en la Protección de los Derechos Humanos. Ed del Procurador de los Derechos Humanos de Guatemala

Cançado Trindade AA (1999) Tratado de Direito Internacional dos Direitos Humanos, vol II. Porto Alegre/Brazil, SA Fabris Edn

Cançado Trindade AA (2005) International Law for Humankind: Towards a New Jus Gentium—General Course on Public International Law, Part I. Collected Courses of the Hague Academy of International Law, Brill

Cançado Trindade AA (2006) A Humanização do Direito Internacional. Belo Horizonte/Brazil, Edit. Del Rey

Cançado Trindade AA (2011a) State Responsibility in Cases of Massacres: Contemporary Advances in International Justice. Universiteit Utrecht

Cançado Trindade AA (2011b) The access of individuals to international justice. Oxford University Press

Cançado Trindade AA (2012) Le Droit international pour la personne humaine. Pédone, Paris

Cançado Trindade AA (2013) El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos, 3rd edn. Edn Del Rey, Belo Horizonte/Brazil

Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, (1991–2006) (2007) Mexico, Edit. Porrúa/Univ. Iberoamericana

OAS (2004) Informe Anual de la Corte Interamericana de Derechos Humanos – 2003. IACtHR, San José of Costa Rica, Annex LVII

Report of 5 April 2001 presented to the Commission on Legal and Political Affairs of the Permanent Council of the OAS, reproduced *in*: A A Cançado Trindade, *Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección* (IACtHR, vol II, 2nd edn, San José of Costa Rica 2003)

Part II
Contemporary Challenges/Emerging Issues

Responding to Terrorism: Definition and Other Actions

David Baragwanath

Contents

KNZM, QC, Appellate Judge and former President of the Special Tribunal for Lebanon, Leidschendam, Netherlands. This paper draws on previous extrajudicial visits to this topic: David Baragwanath, 'Liberty and Justice in the Face of Terrorist Threats to Society (2011) 19 Waikato Law Review 61; 'Work in Progress at the First Tribunal Charged with Terrorist Jurisdiction' (2014c) 22 Waikato Law Review 41; 'Terrorism as a Legal Concept' (Second Annual Ashgate Lecture on Criminal Law), Centre for Evidence and Criminal Studies, Northumbria Law School, Newcastle 27 November 2014b; 'The Security Council's Jurisdiction Under Chapter VII of the Charter of the United Nations and Its Relationship with the Judiciary' School of Political Science and International Relations, Tongji University, Shanghai 3 April 2015a; 'Defining Terrorism Under International and Domestic Law' Lecture T.M.V. Asser Centre, The Hague 24 August 2015b and that cited in n 3.

D. Baragwanath (✉)
Special Tribunal for Lebanon, Leidschendam, The Netherlands
e-mail: baragwanath@un.org

C. Eboe-Osuji, E. Emeseh (eds.), *Nigerian Yearbook of International Law 2017*,
Nigerian Yearbook of International Law 2017,
https://doi.org/10.1007/978-3-319-71476-9_2

1 Overview

Terrorism, which has created agony for the people of Nigeria, is a global affliction. To date, there has been a general failure to recognise it as a crime at international law. But that needs to change urgently. As has been recognised by the Court of Appeal of England and Wales, in a decision declining strikeout of a claim against the British government for alleged implication in extraordinary rendition, detention and torture, from which an appeal was dismissed:

> . . . a fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place.[1]

In the case of terrorism, there is required not only national but also concerted global response in which international law, including criminal law, can and should play a full part. On different occasions, I have proposed four contributions an international approach may make. One is a concerted response that includes but reaches beyond officialdom—to demystify 'terrorism', identify and deal with those responsible for the terrorist acts and enhance their respect for the rule of law. A second is to assist international institutions, not least the Security Council, in discharging their vital tasks. The third is creation of an international tribunal charged with assisting States to give effect to domestic criminal laws dealing with terrorism. The fourth is to provide an internationally agreed definition of a crime at international law that, as in the case of piracy off the East African coast, would allow all members of the international community to combine their energies and resources in response.

[1] *Belhaj v Straw* [2014] EWCA Civ 1394, 115, [2015] 2 WLR 1105; on appeal [2017] UKSC 3, [2017] 2 WLR 456.

The first proposal is the subject of a published essay[2]; the second, touched on at the end of this paper, is to be published[3]; the third, currently the subject of a similar suggestion by Romania and Spain, was contained in the 2014 Annual Report[4] of the Special Tribunal for Lebanon (hereafter STL). This paper's focus is the fourth: the definition of terrorism as a crime at international law. The special problem of State terrorism falls outside its scope.

2 Introduction

The STL is the first international criminal tribunal with terrorism jurisdiction, albeit in domestic law. The judges of the Appeals Chamber were asked by the Pre-trial Judge (under a rule permitting such course) to answer his request for a definition to the crime of terrorism in the Lebanese Criminal Code. Our *Interlocutory Decision on the Applicable Law: Terrorism et al* of 16 February 2011 ('Interlocutory Decision') sought to offer two definitions:

- of that crime under the domestic law of Lebanon;
- en route to that, of terrorism under customary international law.[5]

The topic of defining terrorism must be approached with caution: first by me—as a member of the Appeals Chamber, convention prevents me from commenting upon the merits of our decision. Second, the topic can be read as suggesting that if one tries hard enough, there can be discovered some single concept that embraces all formulations of what may be described as terrorism. Such notion may lie behind the inability of the international community for the past 80 years[6] to agree on a common definition for adoption in international criminal law. Such exercise is doomed to failure.

[2]David Baragwanath, 'Liberty and Justice in the Face of Terrorist Threats to Society (2011) 19 *Waikato Law Review* 61.

[3]David Baragwanath, 'The Role of the Hague Institutions in Promoting International Justice' University of Waikato, New Zealand 23 September 2015 in a forthcoming edition of the *Waikato Law Review*.

[4]Fifth Annual Report of Special Tribunal for Lebanon (2013-2014) p 44 adopting an idea of Antonio Cassese.

[5]STL AC *The Prosecutor v. Ayyash and others, Interlocutory Decision on the Applicable Law: Terrorism et al,* 16 February 2011, STL Casebook 2011, 27.

[6]The 1937 *International Convention for the Prevention and Punishment of Terrorism* was adopted under the auspices of the League of Nations, but never implemented: Ben Saul, *Defining Terrorism in International Law* (Oxford 2006) xxiii.

The reality is that, unless quite a narrow definition is adopted, 'terrorism' is a word with a multitude of inconsistent senses: *The Routledge Handbook of Terrorism Research*[7] identifies some 250 different definitions of 'terrorism'.[8]

The term has been used for a wide variety of purposes, including rhetoric and insult. Its use as a concept of criminal law has been tainted by its use by tyrants (such as the Nazis) to describe those who resisted their oppression. Undefined, it is simply too vague to be used to denote a criminal offence. The rule of law and its sub-rule, the principle of legality, require specificity in the definition of any crime. For 'terrorism' to constitute a crime at international law, there must be such certainty as to its existence and content that a person accused cannot have a charge dismissed as infringing the principle of legality. It is therefore unsurprising that leading scholars and the Supreme Court of the United Kingdom have rejected the undefined term as a concept of criminal law. So it is necessary either to abandon its use as a concept of criminal law or to find and have adopted a definition with a higher level of specificity than simple use of that term.

3 Abandoning the Term?

The former Australian Federal Independent National Security Legislation Monitor, Bret Walker SC,[9] said of this logical option:

> One of the best arguments against the counter-terrorist laws is that we didn't need any of them, because we've long criminalised murder, conspiracy to murder, and incitement to murder.[10,11]

Informed opinion, however, suggests that there is rather more to terrorism. But what is it? For the purposes of international criminal law, can it be defined?

Fred Vargas contends:

> We lack the word, the word to define a man who reduces the body of another to shreds. The term killer is inadequate and derisory.[12]

[7] Alex P Schmid (ed) (Routledge 2013).

[8] Anthony Richards, 'Conceptualising Terrorism' (2014) 37 *Studies In Conflict and Terrorism* 213, 226.

[9] Appointed under the *Independent National Security Legislation Monitor Act* 2010.

[10] <https://www.youtube.com/watch?v=5flzfOabMNw&feature=youtu.be&t=7h31m05s> accessed 16 May 2016.

[11] Such 'give it up' approach could be supported by adopting the idea, noted by Franciso Bethencourt, of pluralizing the term: *Racisms from the crusades to the twentieth century* (Princeton 2014).

[12] « Le mot manquait, le mot pour définir un homme qui réduisait le corps d'un autre en charpie. Le terme tueur était insuffisant et dérisoire » *Un Lieu incertain* (Viviane Hamy 2008) 49, cited in Gilles Ferragu, *Histoire du Terrorisme* (Perrin 2014).

Professor Neil Boister asks:

> What is terrorism?

And he answers:

> It appears to consist of actions of a different quality from 'ordinary' murders, assaults, or damage to property. In order to avoid the offence being politicized, it can be conceptualized as a range of distinctive but 'political motive free' acts of violence – hostage-taking, bombing, hijacking and so forth – undertaken by non-state actors against civilian targets.[13]

Constant use of the term in Security Council resolutions suggests that terrorist conduct, at least of certain classes, needs a stronger word even than murder (which can shade from outrageous brutality into assisting a loved one's desire for rest from pain).[14] The fact of 250 different definitions of 'terrorism' has been run as an argument that no single definition is possible. Historian Gilles Ferragu considers that

> . . . despite the depth of their analyses, jurists, political commentators and journalists encounter an incontestable conclusion: the difficulty, indeed the impossibility of giving to a protean phenomenon a solid agreed definition. . . . the contours of the term are vague . . . concurrently semantic, juridical and strategic . . .[15]

But such argument can be turned on its head. That so many attempts have been made to find a definition may rather suggest that—whatever the difficulties in achieving uniformity—some notion of terrorism is needed. Even if within the juridical zone *domestic* definitions differ, does it really follow that no commonly accepted narrower definition of a crime at *international* law is attainable?

4 Does 'Terrorism' Meet the Criteria for an International Customary Crime?

Various writers share the opinion of the distinguished former President of the International Court of Justice, Dame Roslyn Higgins:

[13]Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford 2012) 62.

[14]A topic which English law has found difficult: compare *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] 1 AC 657 (the Supreme Court's tentative view that in narrowly defined circumstances the law might permit assisted suicide) and the later rejection by the House of Commons 330 to 118 of a bill to introduce a right to die; Gallagher J and Roxby P, 'Assisted Dying Bill: MPs reject ""right to die" law' (BBC News, 11 September 2015) <http://www.bbc.com/news/health-34208624> accessed 16 May 2016.

[15]Ferragu (n 12) 8 . . . malgré la profondeur de leurs analyses, juristes, politologues et journalistes aboutissent à un constat sans appel : la difficulté, voire l'impossibilité de donner au phénomène structurante et consensuelle. [les contours du] terme demeurent flous, . . . à la fois sémantiques, juridiques et stratégiques . . .