



# The Indian Society of International Law NEWSLETTER

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For members only

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## Editorial



This year marks the 30th Anniversary of the UN Convention on the Law of Sea, 1982 (UNCLOS). The Convention has been variously described as a “Constitution for the Oceans,” a “world order treaty,” and a “primary pillar of international law.” According to Kofi Annan, former UN Secretary General, “.. the Law of the Sea Convention is one of the United Nation's greatest achievements”. Having received 164 ratifications, the Convention is moving steadily closer to achieving the goal of universal acceptance, although some important countries are yet to ratify.

The UNCLOS comprises 320 Articles in 17 Parts and nine annexure. Various Parts of UNCLOS broadly covers 15 subjects viz., territorial

sea and contiguous zone, straits used for international navigation, archipelagic states, exclusive economic zone, continental shelf, high seas, regime of islands, enclosed or semi-enclosed seas, right of access of land-locked states to and from the sea and freedom of transit, the Area, protection and preservation of the marine environment, marine scientific research, development and transfer of marine technology and settlement of disputes. And nine annexures deal with highly migratory species, commission on the limits of the continental shelf, basic conditions of prospecting, exploration and exploitation, statute of the enterprise, conciliation, statute of the international tribunal for the law of the sea, arbitration, special arbitration and participation by international organizations.

The UNCLOS III negotiations, lasting from 1973 to 1982, were especially important for developing countries as this was the first major UN codification conference in which the newly independent countries participated as equal partners. The provisions of the Convention relating to exploitation of seabed mineral resources, especially from the international seabed area, designated as the common heritage of mankind, which entailed the most difficult and protracted negotiations, and from which the developing countries had great expectations, are yet to become operational, especially due to their operations not being cost-effective.

The Convention establishes three important institutions viz., *Commission on the Limits of the Continental Shelf* (CLCS) to facilitate the establishment of the outer limits of the continental shelf beyond 200 nautical miles from the baselines, *International Sea Bed Authority* (ISBA) which is the organization through which States Parties shall, in accordance with the regime for the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (the Area) established in Part XI and the Agreement, organize and control activities in the Area, particularly with a view to administering the resources of the Area, *International Tribunal of the Law of the Sea* (ITLOS), a judicial body to adjudicate disputes arising out of the interpretation and application of the UNCLOS.

However, recent developments, especially the discovery of new resources such as Sulphide crusts which are located at lesser depths have raised expectations that commercial exploitation of such resources would become a reality in the near future. A wide range of issues which were relevant during negotiation of UNCLOS and which still remain acute concern are overfishing, pollution, population rise and pressures on coastal and estuarine habitats, and depleting marine resources both within, and in areas beyond, national jurisdiction. Recently new challenges emerged including sea level rise and plight of small island developing states, and the more general impact of climate changes has been one of the most fiercely contested issues between developed and developing countries.

Recently an aspect deserves greater attention is of the extraordinary growth in piracy off the coast of Somalia which affected the Gulf of Aden region.

Dr. E. M. Sudarsana Natchiappan

# RECENT ACTIVITIES / RECENT DEVELOPMENTS

## RECENT ACTIVITIES

### CONVOCATION AND INAUGURATION OF P. G. DIPLOMA COURSES OF THE INDIAN ACADEMY OF INTERNATIONAL LAW, ISIL, NEW DELHI

ISIL organized the *Convocation for Awarding of Post Graduate Diploma Certificates* on 3 September 2012. The ceremony was also marked to inaugurate Post Graduate Diploma and Certificate Courses 2012 conducted by the Indian Academy of International Law and



Diplomacy, a teaching wing of the Indian Society of International Law. Dr. E. M. S. Natchiappan, President, ISIL welcomed and introduced the chief guest Hon'ble Justice P. V. Reddi, Former Chairperson, Law Commission of India to deliver the inaugural address. On this occasion, Hon'ble Justice Reddi distributed certificates to students of ISIL. *Mr. Nizamuddin Ahmad Siddiqui* received *V. K. Krishna Menon Memorial Prize* for securing the highest marks in the Post Graduate Diploma Course in International Law and Diplomacy; *Mr. Rajendra Lade* received *K. Krishna Rao Memorial Prize* for securing the highest marks in the Post Graduate Diploma Course in International Trade and Business Law; *Ms. Aditi Sharma* received *Judge Nagendra Singh Memorial Prize* for securing the highest marks in the Post Graduate Diploma Course in Human Rights, International Humanitarian and Refugee Law; *Ms. Anushree Bardhan* received *M. K. Nawaz Memorial Prize* in the Post Graduate Diploma Course on

Intellectual Property Rights; and Mr. Rohit Kumar, topped in the P G Diploma Course on International Environmental Law.

### TWELFTH HENRY DUNANT MEMORIAL MOOT COURT COMPETITION (NATIONAL ROUND)

ISIL and the International Committee of the Red Cross (ICRC), New Delhi jointly organized the Twelfth Henry Dunant Memorial Moot Court Competition at its premises from 20<sup>th</sup> to 23<sup>rd</sup> September 2012. Dr. E. M. S. Natchiappan, President, ISIL, gave welcome address. On this occasion Hon'ble Justice Madan Lokur, Judge,



also addressed the gathering and spoke on the importance of the moot court competition and highlighted the contribution of the ICRC in the development of international humanitarian law. Participants from 47 law universities and/ colleges came to participate in the Competition. Narinder Singh, Secretary General, ISIL gave a formal vote of thanks.

The Competition was conducted in four stages, preliminary, quarter-final, semi-final and final rounds. The participants were judged on the basis of written memorials, appreciation of facts and law, advocacy skills, use of authorities and citations, general impression and court manners. Eminent professors, legal officers and international law scholars judged the teams in preliminary, quarter-final and semi-final rounds. Hon'ble Justice Ravindra Bhat, Judge, Delhi High Court, His Excellency, Prof. (Dr.) Gudmundur Eiriksson, Ambassador of Iceland to India and Dr. Nerru Chadha, Joint Secretary, L&T Division, MEA, Government of India were the final round judges. *National Law University, Delhi*, and *National Law University, Jodhpur* were the winner and runner up of the Competition respectively. *Ms. Gitanjali Ghosh*, North Eastern Hill University, Shilong was adjudged the Best Advocate, *Navya*

Supreme Court of India gave inaugural address. He appreciated team members participations and underlined the importance of the event in the present day which equip the students to develop skills and create asset for the bar of the country. Ms. Mary Werntz, Head of the Regional Delegation, ICRC, New Delhi



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*Jannu*, OP Jindal Global Law School, Sonipat, won the Best Researcher award, and *Jamia Millia Islamia, Delhi* won Best Memorial award in this Competition. Hon'ble Justice Bhat gave valedictory address on the occasion.

## VISIT OF STUDENTS

A delegation of 30 LLB students of Burdwan University, Burdwan visited ISIL on 2 August 2012. Shri Narinder Singh, Secretary General, ISIL and Prof. Lakshmi Jambholkar, Executive President, ISIL, addressed the students.

A delegation of 28 LLB students from Bengal Law College, Santiniketan, visited ISIL on 24<sup>th</sup> September 2012. Dr. Anwar Sadat, Assistant Professor, ISIL, spoke to the students and described the activities of ISIL to the visitors and also discussed the importance of international law and career prospect in this area.

## RECENT DEVELOPMENTS

### UN-BACKED MEETING SEEKS TO ESTABLISH GLOBAL TREATY TO REDUCE USE OF MERCURY

On 2 July 2012, over 500 representatives from governments and civil society organizations are taking part in a United Nations-backed meeting in Punta del Este, Uruguay, which seeks to negotiate a global treaty that would reduce the use of mercury. The meeting of the Intergovernmental Negotiating Committee covered a wide range of areas, from products and processes that contain mercury, to the supply, trade, storage and waste of the element. UNEP also launched a practical guide at the meeting on methods and techniques to reduce mercury use and non-mercury alternative practices in Artisanal Small-Scale Gold Mining (ASGM). Developed in collaboration with the Artisanal Gold Council and other partners, the guide informs policymakers, miners and civil society about available techniques for reducing and ultimately eliminating mercury use in ASGM. With the value of gold having soared amid the recent financial turmoil, small-scale, artisanal gold mining is booming throughout the world. The Artisanal Gold Council estimates that between 12 and 15 million people in over 70 countries are employed in the sector, producing up to 20 per cent of the total gold supply. However, the often

informal and sometimes illegal status of the sector in many countries has been one of the biggest challenges in addressing the health and environmental issues of the sector. The UNEP guide seeks to also be a useful tool for governments to explain the technical fundamentals that underpin and encourage the formalization of ASGM. ASGM is an important economic activity, which can contribute directly to poverty alleviation and regional well-being. The global mercury legal instrument under development gives an important opportunity to ensure that a small-scale activity, such as this one, continues in a safe and sustainable way.

### ICTR BRANCH BEGAN ITS FUNCTIONS

Recently, the Security Council (SC) set up the International Residual Mechanism for Criminal Tribunals (IRMCT) in December 2010 and mandated it to take over and finish the remaining tasks of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) when they are closed after their mandates expire. The SC has urged the two tribunals to conclude their work by the end of 2014. The ICTR branch of the Residual Mechanism began its functions on 1 July 2012, while the branch for ICTY will start on 1 July 2013.

### BAN APPOINTS INDIAN GENERAL AS HEAD OF UN FORCE IN GOLAN HEIGHTS

Secretary-General Ban Ki-moon, on 6 July 2012, announced the appointment of Major General Iqbal Singh Singha of India as the head of the United Nations peacekeeping force monitoring the ceasefire in the Golan Heights between Israel and Syria. Major General Singha will assume his new position as Head of Mission and Force Commander of the UN Disengagement Observer Force (UNDOF) in August, and will succeed Major General Natalio C. Ecarma of the Philippines.

Major General Singha has extensive command experience and knowledge of peacekeeping attained through service at national and international levels. Prior to his appointment, Major General Singha was the General Officer of the Commanding Infantry Division, a position he held since 2010. His peacekeeping experience includes serving with the now-closed UN Mission in Eritrea and Ethiopia. UNDOF was first established by the Security Council in 1974 to supervise the

disengagement accord between Syrian and Israeli forces after their 1973 war. The Security Council agreed to extend its mandate until 31 December 2012.

### UN HEALTH EXPERT HAILS EUROPEAN PARLIAMENT'S REJECTION OF TRADE AGREEMENT

The European Parliament's rejection of the Anti-Counterfeiting Trade Agreement (ACTA) is a step in the right direction to ensure access to affordable medications, a United Nations independent expert on health, Mr. Anand Grover, said on 9 July 2012. ACTA's defeat in Europe is a welcome blow to the flawed agreement that has failed to address numerous concerns related to access to medicines, such as unnecessary inclusion of patents and civil trademark infringements and unjustified stricter civil enforcement provisions that could impede access to generic medicines.

Recently, the European Parliament rejected the agreement, which intended to establish international standards to enforce intellectual property rights, as well as an international legal framework to target generic medicines, counterfeit goods, and copyright infringement online, among others. Mr. Grover cautioned against "heightened enforcement standards, envisioned by agreements like ACTA, that would hinder the legitimate trade and transit of medicines and adversely affect the availability of, and access to, affordable generic medicines," and argued that sufficient intellectual property enforcement standards are already in place, such as the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). "Had ACTA come into force, it would have exposed third parties – producers of active pharmaceutical ingredients, distributors, retailers, non-governmental organizations and funders of health programmes to the risk of liabilities for trademark or patent infringements," Mr. Grover said. The Special Rapporteur also highlighted other concerns about ACTA, such as the lack of protection of measures and judicial review, and absent penalties for abusive litigation and baseless allegation. Mr. Grover had previously stressed – in a 2009 report on access to medicines and intellectual property rights – that the agreement failed to consider the public interest and had warned about the lack of transparency and secrecy surrounding its negotiations. "It is

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encouraging that the public scrutiny led to ACTA's setback by the elected democratic body," Mr. Grover said. "I hope that other signatories to ACTA and countries negotiating similar trade agreements would consider implications of such agreements on their people's right to the highest attainable standard of physical and mental health and allow for more public scrutiny of the agreements fundamental to their health." Independent experts, or special rapporteurs, are appointed by the Human Rights Council (HRC) to examine and report back on a country situation or a specific human rights theme. The positions are honorary and the experts are not UN staff, nor are they paid for their work. In 2011, the Council asked Special Rapporteur Grover to study existing challenges with regard to access to medicines, ways to overcome them and good practices. He is scheduled to present his study to the HRC in June 2013.

## **ICJ RULES SENEGAL MUST PROSECUTE EX-CHADIAN LEADER OR EXTRADITE HIM**

The United Nations International Court of Justice (ICJ) ruled, on 20 July 2012, that Senegal must either prosecute former Chadian President Hissène Habré for war crimes or extradite him "without further delay." The decision by the ICJ is in response to a request by Belgium to prosecute Mr. Habré, who has been accused in a Senegalese Court of massive human rights abuses committed by his regime during the 1980s. Belgium had also sought to have him extradited to face charges in Belgium, citing among other things procedural delays in Senegal's handling of the case. Senegal had maintained that its judiciary is competent to carry out the prosecution. In its judgment, the ICJ found, unanimously, "must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him." He was charged in February 2000 by a lower court in Dakar, the Senegalese capital, but an appeals court later ruled that Senegalese courts did not have the legal competence to try such cases if they were perpetrated in another country.

In April 2008, however, Senegal's National Assembly adopted an amendment to the constitution that together with previous changes allowed the country's legal system

to deal with such cases. Mr. Habré ruled Chad from 1982 to 1990, when he was overthrown and went into exile in Senegal. It is alleged that during his rule thousands of Chadians were tortured and unlawful killings and other serious human rights violations took place.

## **SYRIAN GOVERNMENT AND OPPOSITION FORCES RESPONSIBLE FOR WAR CRIMES – UN PANEL**

Syrian Government and opposition forces have perpetrated war crimes and crimes against humanity, according to a new report released on 15 August 2012 by the United Nations independent panel probing abuses committed during the country's ongoing conflict. Issued and produced by the UN Independent International Commission of Inquiry (Col) on Syria under a mandate from UN Human Rights Council, the report states that war crimes, including murder, extrajudicial killings and torture, and gross violations of international human rights, including unlawful killing, attacks against civilians and acts of sexual violence, have been committed in line with State policy, with indications of the involvement at the highest levels of the Government, as well as security and armed forces.

Syria has been wracked by violence, with an estimated 17,000 people, mostly civilians, killed since the uprising against President Bashar al-Assad began some 17 months ago. The report, which presents the Col's findings based on investigations conducted through 20 July 2012, notes that the situation in the Middle Eastern country has deteriorated significantly in the past six months, with armed violence spreading to new areas and active hostilities between anti-Government armed groups and Government forces and members of the Government controlled militia known as the Shabiha. It also noted that more "brutal tactics" and new military capabilities have been employed in recent months by both sides to the conflict. The report updates earlier findings on the events that took place in the town of Houla on 25 May, concluding that Government forces and Shabiha fighters were responsible for the killings there of more than 100 civilians – nearly half of whom were children. In early June 2012, the Human Rights Council had called for a "special inquiry" into the Houla massacre. It also adopted a resolution condemning in the strongest terms the use of force against civilians. While opposition forces also committed war crimes, including murder and

torture, the Col said in its report that their violations and abuses were not of the same gravity, frequency and scale as those committed by Government force and the Shabiha.

It also reiterates the need for international consensus to end the violence and pave the way for a political transition process that reflects the aspirations of all segments of Syrian society. In a news release issued by Office of the UN High Commissioner for Human Rights (OHCHR), the Commission underlined that the lack of access to the country significantly hampered its ability to fulfil its mandate, and for that reason it continued to collect firsthand accounts of the situation on the ground from people who left the country. Established in September last year, the Col has conducted 1,062 interviews since 15 February 2012. Its report is scheduled to be presented at the 21st session of the Human Rights Council on 17 September 2012.

## **ITLOS JUDGMENT IN THE DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN BANGLADESH AND MYANMAR**

ITLOS issued its Judgment on 14 March 2012 in the Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar. The dispute concerned the delimitation of the territorial seas, exclusive economic zones, and continental shelves of the Bangladesh and Myanmar.

In relation to delimitation of the territorial sea, the Tribunal drew an equidistant line from baseline identified by the parties in accordance with the Article 15 of the UNCLOS. It determined that there were no special circumstances which called for moving this equidistance line.

In relation to the exclusive economic zone and continental shelf within 200 nautical miles, the Tribunal had been asked to draw a single maritime boundary by the parties. The Tribunal identified that it was required to draw the maritime boundary in order to achieve an equitable result in accordance with Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea. The Tribunal decided to draw a provisional equidistance line but it then adjusted this line to take into account the concavity of the Bangladeshi coast.

The Tribunal also decided that "the

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delimitation method to be employed in the present case for the continental shelf beyond 200 nautical miles should not differ from that within 200 nautical miles.” (Para. 455 of the Judgment) As the concavity of the coast continued to have an effect beyond 200 nautical miles, the Tribunal held that the adjusted equidistance line should continue in the same direction beyond the 200 nautical mile limit of Bangladesh until it reaches an area where the rights of third States may be affected. (see Para. 462 of the Judgment) Bangladesh had argued that the Tribunal should use the angle-bisector method in drawing the boundary, as the equidistance line would, in its opinion, lead to inequitable result. This argument was rejected by the Tribunal which accepted that the equidistance/relevant circumstances method was appropriate in this case, as had been argued by Myanmar. Yet, the Tribunal did not fully accept all of the arguments of Myanmar put forward by Myanmar on this point. The Tribunal stressed that it was not bound by the base points suggested by Myanmar in its proposed equidistance line and the Tribunal added its own base point to lead to a more equitable provisional equidistance line. Moreover, the Tribunal also rejected the argument of Myanmar that there were no relevant circumstances. Bangladesh had identified several possible relevant circumstances. The Tribunal accepted that it was necessary to adjust the equidistance line to take into account the concavity of the coast. But it did deny the relevance of the other circumstances, put forward by Bangladesh, including the position of St. Martins Island (subject to the sovereignty of Bangladesh) which was given no effect in the delimitation. (Para. 319 of the Judgment) The adjustment of the line is largely done at the discretion of the Tribunal, with the Tribunal itself noting that “there are no magic formulas.” (Para. 327 of the Judgment)

On point of settlement of the boundary beyond 200 nautical miles, Myanmar had argued that the Tribunal should not exercise its jurisdiction, but the Tribunal was clear that it had the right to decide on the delimitation, regardless of whether the extension of the outer continental shelf had been approved by the Commission on the Outer Limits of the Continental Shelf. The tribunal also rejected Myanmar’s argument that Bangladesh has no

continental shelf beyond 200 nautical miles. At the same time, the tribunal rejected the argument of Bangladesh that there was no natural prolongation from the coast of Myanmar because of the geological discontinuity where the Indian tectonic plate meets the Burma tectonic plate about 50 nautical miles from the coast of Myanmar. In an important clarification of the law, the Tribunal held that natural prolongation refers to the extension of the continental margin and there was therefore no need for geological continuity. (See Para. 437 of Judgment; see also Para. 460) Nor did the Tribunal accept that the geographic origin of the sedimentary rocks had any relevance for the delimitation of the outer continental shelf. (Para. 447 of the Judgment) In the end, the Tribunal simply extends the adjusted equidistance line that it had already drawn for the exclusive economic zone and continental shelf within 200 nautical miles.

On point of disproportionality test, (having established the maritime boundary line) the Tribunal checked whether the line had caused any significant disproportion by reference to the ratio of the length of the coastlines of the two states and the ratio of the maritime area allocated to each state. It noted that the length of the relevant coast of Bangladesh was 413 kilometres, while that of Myanmar was 587 kilometres. The ratio of the length of the coasts was 1:1.42 in favour of Myanmar. The adjusted equidistance line allocated approximately 1,11,631 square kilometres of sea area to Bangladesh and approximately 1,71,832 square kilometres to Myanmar. The ratio of the allocated maritime areas was approximately 1:1.54 in favour of Myanmar. The Tribunal concluded that this ratio did not lead to any significant disproportion in the allocation of maritime areas to Bangladesh and Myanmar relative to the respective lengths of their coasts.

## **ASSANGE (APPELLANT) v THE SWEDISH PROSECUTION AUTHORITY (RESPONDENT) [2012] UKSC 22**

On 2 December 2010 the Swedish Prosecution Authority (“the Prosecutor”), who is the respondent to this appeal, issued a European Arrest Warrant (“EAW”) signed by Marianne Ny, a prosecutor, requesting the arrest and surrender of Mr Assange, the appellant. Mr Assange was, at the time, in England, as he still is. The offences of which he is accused and in respect of which his surrender is sought are alleged to have been committed in Stockholm

against two women in August 2010. They include “sexual molestation” and, in one case, rape. At the extradition hearing before the Senior District Judge, and subsequently on appeal to the Divisional Court, he unsuccessfully challenged the validity of the EAW on a number of grounds. This appeal relates to only one of these. Section 2(2) in Part 1 of the Extradition Act 2003 (“the 2003 Act”) requires an EAW to be issued by a “judicial authority”. Mr Assange contends that the Prosecutor does not fall within the meaning of that phrase and that, accordingly, the EAW is invalid.

Part 1 of the 2003 Act was passed to give effect to the Council of the European Union Framework Decision on the European arrest warrant and surrender procedures between Member States of the European Union 2002/584/JHA (“the Framework Decision”). The phrase “judicial authority” is used in a number of places in the Framework Decision. In particular it is used in article 6, which provides: “1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.”

Miss Rose for the Appellants contends that a “judicial authority” must be a person who is competent to exercise judicial authority and that such competence requires impartiality and independence of both the executive and the parties. As, in Sweden, the Prosecutor is and will remain a party in the criminal process against Mr Assange, she cannot qualify as a “judicial authority”. In effect, Miss Rose’s submission is that a “judicial authority” must be some kind of court or judge.

Where, Miss Clare Montgomery QC for the Prosecutor contends that the phrase “judicial authority”, in the context of the Framework Decision, and other European instruments, bears a broad and autonomous meaning. It describes any person or body authorised to play a part in the judicial process. The term embraces a variety of bodies, some of which have the qualities of impartiality and independence on which Miss Rose relies, and some of which do not. In some parts of the Framework Decision the term “judicial authority” describes one type, in other parts another. A prosecutor properly falls within the description “judicial authority” and is capable of being the judicial authority competent to

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issue an EAW under article 6 if the law of the State so provides. Judicial authority must be given the same meaning in the 2003 Act as it bears in the Framework Decision.

Lord Phillips, President, delivered a judgment on 30 May 2012, in which he concluded that, whatever may be the meaning of the Framework Decision as a matter of European law, the intention of Parliament and the effect of the Extradition Act 2003 was to restrict the recognition by British courts of incoming European arrest warrants to those issued by a judicial authority in the strict sense of a court, judge or magistrate. It would follow from my conclusions that the arrest warrant issued by the Swedish Prosecution Authority is incapable of recognition in the United Kingdom under section 2(2) of the 2003 Act. Parliament could change the law in this respect and provide for wider recognition if it wished, but that would of course be for it to debate and decide. I would therefore allow this appeal, and set aside the order for Mr Assange's extradition to Sweden.

## ICRC EXPERT MEETING REPORT ON OCCUPATION AND OTHER FORMS OF TERRITORIAL ADMINISTRATION

On 11 June 2012, the ICRC published its report on 'Occupation and other forms of administration of foreign territory: expert meeting', presenting the findings of the ICRC project and meeting on these issues. The meetings examined contentious questions like the test for the end of occupation, and its relation with the test for its beginning (Determining the beginning and end of occupation); the scope of the occupier's obligations in transformative and prolonged occupations (Delimiting the rights and duties incumbent upon an occupying power); the applicable rules to multinational and UN occupations (The relevance of occupation law for UN administration of territory); and the recent developments on the convergence between occupation law and human rights law, in particular in the applicable standard on the use of force and the shift in paradigms between the 'conduct of hostilities' and the 'law enforcement' models (The legal framework governing the use of force in occupied territory). Following experts took participations in the meeting: Prof. G. Abi-Saab, Graduate Institute of International and Development Studies, Geneva; Prof. P.G. Alston, New York University/Special

Rapporteur of United Nations; Prof. J. Cerone, New England School of Law; Prof. L. Doswald Beck, Graduate Institute of International and Development Studies, Geneva/Geneva Academy of International Humanitarian Law and Human Rights, Geneva; Prof. R. Kolb, University of Geneva; Dr N. Lubell, Irish Centre for Human Rights, National University of Ireland, Galway; Dr B. Oswald, University of Melbourne; Prof. A. Paulus, Georg-August University of Göttingen; Prof. A. Roberts, University of Oxford; Prof. M. Sassoli, University of Geneva; Dr I. Seiderman, Senior Legal and Policy Adviser, International Commission of Jurists, Geneva; Col D. O. Stewart, Director of the Military Department, International Institute of Humanitarian Law, San Remo; Brig. Gen. K. Watkin, Judge Advocate General, Ministry of Defence, Canada; Dr M. Zwanenburg, Senior Legal Adviser, Ministry of Defence, The Netherlands; Prof. Y. Sandoz, Geneva Academy of International Humanitarian Law and Human Rights, Member of the ICRC; Dr P. Spoerri, Director for International Law and Cooperation within the Movement, ICRC; Mr L. Colassis, Deputy Head of the Legal Division, ICRC; Dr J.F. Queguiner, Head of Unit, Legal Division, ICRC; Ms. J. Pejic, Legal Adviser, ICRC; Dr S. Vité, Legal Adviser, ICRC; and Dr T. Ferraro, Legal Adviser, ICRC.

This report, a major outcome of the ICRC project on occupation and other forms of administration of foreign territory, aimed only to document the debates that took place during the three meetings of experts. It should also shed some light on the adequacy of occupation law in its present state. The conclusion that emerged from the ICRC project is that occupation law, because of its inherent flexibility, is sufficiently equipped to provide practical answers to most of the humanitarian challenges arising from contemporary occupations. Accordingly, it is the ICRC's view that occupation law does not require any further development at present; it requires only some clarification, by way of interpretations made in the spirit of the law that ensure that the needs of the occupied population are met and the security interests of the occupying power preserved at the same time.

A brief summary of the report can be underlined. The discussions concerning the ways in which occupation law regulates prolonged occupiers are particularly interesting for their attempt at seeking progressive solutions to the impositions of limits on the

occupier. Many experts were agreed that the occupier is under an obligation to provide more for the occupied population the longer it stays in the foreign territory, primarily in order to ensure the continuation of normal life in the benefit of the local population. The debate concerned the contours of such an obligation and the ways in which it could be ensured that occupiers act in good faith with genuine intention to serve the local population, without maintaining the occupation indefinitely to serve its advantages or undertaking 'transformative' measures that are proscribed by occupation law.

The major issue of the application of the law of occupation to prolonged occupation considered to be central of all current concerns about the role and object of occupation law. Whilst occupiers' practices and policies will continue to develop, the limits set in law are weakened the longer an occupier maintain its presence in the foreign territory.

Recent phenomenon allows the occupier to undertake measures otherwise prohibited in short-term occupations, measures that demand 'development' as opposed to 'maintenance' as per the conservationist principle. In fact, a number of experts are reported as stating that the four assumptions of the conservationist principle are no longer applicable in cases of prolonged occupation. The experts discussion present three possible solutions to this quandary through the test that compares the policies undertaken by the occupier in the occupied territory with those it has taken *vis-a-vis* its own population. A second test requires that the occupier consult and obtain the consent of the local population in devising and implementing certain long-term policies in the occupied territory. Finally, another group suggested that an international supervisory body be established to supervise occupiers (Orna Ben-Naftali).

The Report highlights a general need to reinforce the mechanisms of the law of occupation by gaining a better understanding of their function in newly emerging situations. Whilst many of the experts agreed to the establishment of monitoring and supervisory mechanisms, which would ensure that the occupier is not entrusted with the last call of judgment and given all the benefit of the doubt in acting in the benefit of an enemy population.

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## INDIA A THIRD PARTY IN AUSTRALIA — CERTAIN MEASURES CONCERNING TRADEMARKS AND OTHER PLAIN PACKAGING REQUIREMENTS APPLICABLE TO TOBACCO PRODUCTS AND PACKAGING (DS434),

On 13 March 2012, Ukraine requested consultations with Australia concerning certain Australian laws and regulations that impose trademark restrictions and other plain packaging requirements on tobacco products and packaging. Ukraine challenges two key measures: Australia's Tobacco Plain Packaging Act 2011 and its implementing Tobacco Plain Packaging Regulations 2011; the Trade Marks Amendment (Tobacco Plain Packaging) Act 2011; and all further regulations, related acts, policies or practices that have been adopted by Australia to implement the two key measures.

Ukraine claims that Australia's measures, especially when viewed in the context of Australia's comprehensive tobacco regulatory regime, appear to be inconsistent with: Articles 1, 1.1, 2.1, 3.1, 15, 16, 20 and 27 of the TRIPS Agreement; Article 2.1 and 2.2 of the TBT Agreement; and Article III:4 of the GATT 1994.

On 22 March 2012, Guatemala requested to join the consultations. On 23 March 2012, Norway and Uruguay requested to join the consultations. On 26 March 2012, Brazil, Canada, the European Union, New Zealand and Nicaragua requested to join the consultations. Subsequently, Australia informed the DSB that it had accepted the requests of Brazil, Canada, the European Union, Guatemala, New Zealand, Nicaragua, Norway and Uruguay to join the consultations. On 14 August 2012, Ukraine requested the establishment of a panel. At its meeting on 31 August 2012, the DSB deferred the establishment of a panel. But in its meeting on 28 September 2012, the DSB established a panel. Argentina, Brazil, Canada, the Dominican Republic, Ecuador, the European Union, Guatemala, Honduras, India, Indonesia, Japan, Korea, New Zealand, Nicaragua, Norway, Oman, the Philippines, Singapore, Chinese Taipei, Turkey, the United States, Uruguay, Zambia and Zimbabwe reserved their third party rights. Subsequently, Chile, China, Cuba,

Egypt, Nigeria, Malaysia, Malawi, Mexico, Moldova, Peru, and Thailand reserved their third party rights.

## INDIA A THIRD PARTY IN CHINA — ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN AUTOMOBILES FROM THE UNITED STATES (DS440)

On 5 July 2012, the United States requested consultations with China with regard to imposing anti-dumping and countervailing duties on certain automobiles from the United States, including any and all annexes. The United States alleges that these measures appear to be inconsistent with: Articles 1, 3.1, 3.2, 3.4, 3.5, 4.1, 5.3, 5.4, 6.2, 6.5.1, 6.8 (including Annex II, paragraph 1), 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement; and Articles 10, 11.3, 11.4, 12.4.1, 12.7, 12.8, 15.1, 15.2, 15.4, 15.5, 16.1 22.3, and 22.5 of the SCM Agreement; and Article VI of the GATT 1994.

On 17 September 2012, the United States requested the establishment of a panel. At its meeting on 28 September 2012, the DSB deferred the establishment of a panel. But DSB in its meeting on 23 October 2012, established a panel. Colombia, the European Union, India, Japan, Korea, Oman, Saudi Arabia and Turkey reserved their third party rights.

## BHARAT ALUMINIUM CO v KAISER ALUMINIUM TECHNICAL SERVICE, INC (CIVIL APPEAL NO.7019 OF 2005)

The constitutional bench reference was made in the case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.* A two-judge bench of the Supreme Court had earlier in this case expressed reservation on the correctness of the operating precedent laid down in *Bhatia International v. Bulk Trading S.A.* (*Bhatia International*), and subsequently followed in *Venture Global Engineering v. Satyam Computer Services* (*Venture Global*) and other cases. Thereafter, in accordance with judicial discipline and propriety, the two-judge bench referred the matter to a three-judge bench setting out the reasons why it could not agree with the three-judge bench operating judgment in *Bhatia International*. Later, the three-judge bench, which also included the Chief Justice, also came to the conclusion that the ruling in *Bhatia International* needs to be reconsidered by a five-judge bench. The matter has been placed before the five-judge constitutional

bench on January 10, 2012 (Hon'ble Supreme Court comprising Hon'ble Chief Justice S.H Kapadia, Justice Surinder Singh Nijjar, Justice D.K. Jain, Justice Mrs. Ranjana Desai, Justice Jagdish Singh Khehar).

The facts of the case are: Bharat Aluminium Co., ("BALCO") and Kaiser Aluminium Technical Service, Inc. ("KATSI") entered into an Agreement dated 22 April 1993 ("said Agreement") vide which KATSI was to supply and install a computer based system for shelter modernization for BALCO. The said Agreement contained an arbitration clause for resolution of disputes arising out of the contract. The arbitration clause was contained in Articles 17 and 22 of the said Agreement, which is reproduced for reference purposes (emphasis supplied):

"Article 17.1 - Any dispute or claim arising out of or relating to this Agreement shall be in the first instance, endeavor to be settled amicably by negotiation between the parties hereto and failing which the same will be settled by arbitration pursuant to the English Arbitration Law and subsequent amendments thereto.

Article 17.2 - The arbitration proceedings shall be carried out by two Arbitrators one appointed by BALCO and one KATSI chosen freely and without any bias. The Court of Arbitration shall be held wholly in London, England and shall use English language in the proceeding. The findings and award of the Court of Arbitration shall be final and binding upon the parties.

Article 22 - Governing Law - This agreement will be governed by the prevailing law of India and in case of Arbitration, the English law shall apply."

Disputes arose between BALCO and KATSI with regard to the performance of the said Agreement. The disputes were referred to arbitration held in England. The Arbitral Tribunal passed two Awards dated 10 November 2002 and 12 November 2002 in England. BALCO challenged the above mentioned Awards under Section 34 (Part I) of the said Act in the Court of Learned District Judge, Bilaspur, India. The Learned District Judge, Bilaspur by an Order dated 20 July 2004 held that the applications filed by BALCO under Section 34 of Part I of the said Act for setting aside the aforementioned foreign awards are not tenable and

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accordingly the same were dismissed. BALCO filed an appeal against the Order of the Learned District Judge, Bilaspur before the Hon'ble High Court of Chattisgarh, Bilaspur. By an Order dated 10 August 2005, a Division Bench of the Hon'ble High Court of Chattisgarh dismissed the appeal. An appeal was filed before the Hon'ble Supreme Court against this decision by BALCO. It is pertinent to note that on account of disagreement between the two judges of the Hon'ble Supreme Court, the appeal was placed for hearing before a three Judge Bench, which by its Order dated 1 November 2011 directed the matter to be placed before the Constitutional Bench of the Hon'ble Supreme Court as mentioned above.

In this case, the Constitutional Bench of the Hon'ble Supreme Court analyzed the English law in detail and its applicability to the said Act. Prior to going into the merits of the matter, the history of arbitration in India as well as the scenario pertaining to International Commercial Arbitration was examined at length. The objects of the said Act and the provisions of the UNCITRAL Model Laws, were taken into consideration. Decisions of various Indian courts, as well as courts of different countries on the aspect of enforcement of awards under foreign arbitral laws were considered by the Hon'ble Supreme Court in this case.

After such comprehensive analysis, the Constitutional Bench of the Hon'ble Supreme

Court on 6 September 2012 held that: Part I of the said Act is applicable only to all arbitrations which take place within the territory of India. There is no overlapping between the provisions contained in Part I and Part II of the said Act. Section 2(2) of Part I of the said Act is not in conflict with any provisions of Part I or Part II of the said Act. In an International Commercial Arbitration held outside India, no application for interim relief would be maintainable as applicability of Part I of the said Act is limited to arbitrations which take place in India. No suit for interim injunction simpliciter would be maintainable in India on the basis of International Commercial Arbitration held outside India.

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## FORTHCOMING EVENTS

Discussion on "The Issue of Sustainability with Special Reference to Rio + 20", 5 October 2012

Round Table Discussion on the Recent Supreme Court Judgement in *Bharat Aluminium Co. v. Kaiser Technical Service, Inc.*, 17 October 2012

Celebration of UN Day and Discussion on "An Overview of COP 11 Meeting on the Convention on Biological Diversity", 2 November 2012

A Panel Discussion on "Protection of Indian Children Abroad", 7 November 2012

Celebration of Human Rights Day and the Thirtieth Anniversary of the Law of the Sea Convention 1982 followed by a Discussion on "Piracy and International Legal Response", 7 December 2012

ISIL and University of Washington School of Law Jointly Organising "Intellectual Property Policy Seminar", 14 December 2012

Third Winter Course-Private International Law, 17 – 21 December 2012

ISIL, Japan Patent Office, India Patent Office, Indian IP Alumni Association, Asia Pacific Industrial Property Centre Jointly Organising a Seminar on "Role of IP and Economic Development" on 22 December 2012

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2012 U.S. Model Bilateral Investment Treaty  
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#### BOOK REVIEW

#### SELECT BIBLIOGRAPHY AND NEW ACQUISITIONS

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