Volume 28, nº/No. 1 - Hiver/Winter 2002

Dans ce numéro.... In This Issue

• **EN TITRE / FEATURES** •

Too Close to the USA: Canadian Reluctance to Stand up for Itself *by Michael Byers* 5

Suresh: Some Aspects of Public International Law *by Christina Johnson and Mark C. Power* 11

• **DU CCDI / FROM THE CCIL** •

ICC To Become Reality 1

Message du Président/ President's Message 2

Editor's Notebook 4

En Bref/In Brief 8

ICJ Practice Directions
Member Publication
Indigenous Issues Forum
La peine de mort en Europe
Milosevic at the ICTY
Canada and Terrorism Treaty
ICJ and Belgian Warrant
Viewpoint on Armed Conflict
Benin-Niger Boundary
ILA - Canadian Branch
World Trade Review

Congrès 2002 Conference 9

Russia's Continental Shelf..... 10

Global Governance Issues 15

CBD COP 'Consensus' Decision
OPCW Chairman Ousted

Au Calendrier/ Upcoming Events..... 20

• **COMPLIANCE MATTERS** •

Biological Weapons 17

US Proposals No Substitute for BWC Protocol

Chemical Weapons 18

OPCW Lacks Funding for Inspection

Rome Statute to enter into force in July, 2002

The *Rome Statute of the International Criminal Court (ICC)* will enter into force on July 1, 2002, after ten ratifications deposited on April 11, 2002 brought the total to 66. The Statute needed 60 to enter into force. The Canadian contribution to the Statute's negotiation, and to promotion of its signature and ratification, has been considerable. It is further expected that Canadians will play a significant role in the implementation of the Statute and in the operation of the Court. One Canadian who has been instrumental in bringing the ICC to this stage is Philippe Kirsch. Q.C., currently Canadian Ambassador to Sweden and also Chairman of the Preparatory Commission for the International Criminal Court. Here is some of what Ambassador Kirsch had to say to *Le Monde* about the wide-scale acceptance of the ICC:

"Moi-même je ne m'y attendais pas car la conférence de Rome s'est achevée dans une atmosphère de relative division, malgré l'appui substantiel recueilli par le texte. Progressivement cependant, le processus a été mieux compris. Il y a eu un effort d'explication, qui a porté ses fruits. A mesure que la commission préparatoire avançait ses travaux, des États ont pris conscience que l'objectif des pays qui la prônaient était d'en faire une institution judiciaire, pas un instrument politique. J'ai toujours été soucieux d'aborder le processus de continuation de la conférence de Rome de façon aussi englobante que possible, de viser à une Cour qui soit vraiment un jour une Cour universelle. Je suis satisfait des résultats : on est passé des 120 votes en faveur de l'adoption du statut, à Rome, à 139 signatures à la fin de l'année 2000, ce qui est tout à fait exceptionnel."

Responding to the entry-into-force of the Rome Statute, John R. Bolton, U.S. Undersecretary of State for Arms Control and International Security, sent the following letter to the Secretary-General of the United Nations:

"Dear Mr. Secretary-General: This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty. Sincerely, John R. Bolton"

More information about the ICC is available on the following websites:

Official ICC site at the UN: <http://www.un.org/law/icc>
Canadian Government's ICC site: <http://www.icc.gc.ca>
Site of the NGO *Coalition for the ICC*: <http://www.iccnow.org>.

Message du président

La séance d'ouverture du Congrès annuel du CCDI, en octobre dernier, était consacrée à ce qu'on appelle parfois 'l'exceptionalisme américain', cette tendance maintes fois remarquée du gouvernement des États-Unis à agir seul en matière de questions juridiques et politiques internationales fondamentales. Cette séance ayant lieu peu après les attaques du 11 septembre, la discussion s'est révélée lourde de sens, mais il va sans dire prudente. La sensibilité américaine étant encore à vif, il ne convenait pas que de bons amis critiquent trop sévèrement les politiques du gouvernement américain. Le refus des États-Unis de participer à l'affaire du *Nicaragua* et la réaction hautaine des tribunaux américains aux ordonnances de mesures intérimaires de la Cour internationale de justice dans les affaires du *Paraguay* et de *Lagrande* ont toutefois soulevé d'importantes questions. D'ailleurs, le recours à la force des dirigeants américains successifs en diverses occasions a été remis en question, entre autres, la légalité des actions des États-Unis en Afghanistan. De l'avis d'un invité, les motifs profonds de ce qu'on perçoit comme de l'exceptionalisme américain sont complexes, mais un facteur semble fort important : l'idéologie américaine est plus conservatrice et plus souverainiste que celle des sociétés occidentales analogues. Étant donné le courant intégrationniste de l'Union européenne, la société internationale pourrait s'écarter de la position américaine.

Depuis octobre dernier, le rôle des États-Unis d'Amérique dans la définition de l'ordre mondial a fait l'objet de débat public, bien que rarement en termes purement juridiques. Les divers commentateurs se sont demandé si l'invocation de la légitime défense pour justifier la guerre en Afghanistan n'allait pas modifier le sens de l'usage légitime de la force, en particulier si d'autres mesures étaient prises contre les États qui 'abritent' des terroristes. Le déplacement des prisonniers du Taliban et d'Al-Qaïda vers la baie de Guantanamo a donné lieu à des tollés de protestations dans le monde, surtout quand les dirigeants américains ont annoncé que les Conventions de Genève ne seraient pas appliquées à la catégorie présumée des 'combattants illégaux'. La décision du président Bush de renoncer au *Traité sur les missiles anti-balistiques* a aussi suscité de vives réactions tant de la part des alliés que des ennemis. Lors du remaniement du cabinet fédéral canadien et de la nomination de Bill Graham, membre honorifique

President's Message

The opening plenary of the CCIL's annual conference last October was devoted to what is sometimes called 'American exceptionalism,' that is the oft-observed tendency of the United States government to try to 'go it alone' on fundamental matters of international law and politics. Taking place in the shadow of the attacks of September 11th, the plenary debate was pointed, yet understandably cautious. With American sensibilities raw, good friends were not inclined to criticize US government policies too harshly. Yet, important questions were raised concerning the refusal of the United States to participate in the *Nicaragua case*, and the dismissive reaction of US courts to orders of interim measures by the International Court of Justice in the *Paraguay* and *Lagrande* cases. Moreover, various instances of the use of force by successive American administrations were questioned, with particular attention being focussed on the legality of US actions in Afghanistan. One panelist suggested that the reasons underlying perceived American exceptionalism were complex, but that one key development had strong explanatory power: US ideology has been more conservative and sovereignty-oriented than that of comparable Western societies. Given the integrative tendencies of the European Union, international society might be moving further from the U.S. position.

Since last October, the role of the United States of America in the shaping of international order has emerged as a matter of public debate, even if the debate is rarely cast in explicitly legal terms. Various commentators have questioned whether the invocation of self-defence as a justification for the war in Afghanistan will lead to an altered understanding of the lawful use of force, especially if further actions are taken against states that are said to 'harbour' terrorists. The removal of Taliban and Al-Qaïda prisoners to Guantanamo Bay raised storms of protest internationally, especially when it was announced by the American Administration that the Geneva Conventions would not be applied to a supposed category of 'unlawful combatants.' The decision of President Bush to renounce the *Anti-Ballistic Missile Treaty* likewise prompted harsh reactions from ally and foe alike. When the Canadian federal cabinet was shuffled and CCIL honorary member Bill Graham was appointed as Secretary of State for Foreign

du CCDI, au poste de secrétaire d'État aux Affaires étrangères, les médias ont craint l'attitude du nouveau ministre à l'égard des États-Unis. Les opinions semblaient divisées à savoir si le Canada devait être l'ami des États-Unis ou le terrier mordant aux talons les États-Unis.

Les rapports bilatéraux entre le Canada et les États-Unis sont de loin les plus importants. Ils sont en conséquence les plus difficiles à gérer, comme le démontrent clairement les travaux continus sur les bois mous. Les tensions à cet égard ne sont pas nouvelles. MacKenzie King a lutté pour que le Canada ait sa place entre le Royaume-Uni et les États-Unis. Le gouvernement Diefenbaker a eu bien de la difficulté à équilibrer sa politique de défense Canada-États-Unis. Trudeau et Nixon étaient notoirement en désaccord, tant et si bien que Trudeau a poursuivi sa 'troisième option' quichottesque et a cherché à adapter le Canada au modèle européen, afin de faire contrepoids à l'éléphant sur notre continent.

On répète sans cesse que le 11 septembre a 'tout changé'. C'est faux, bien sûr. Certains modèles politiques sont les mêmes; d'autres ont changé. Déterminer lesquels est l'un des plus grands défis des analystes politiques et juridiques de nos jours. Les membres du CCDI peuvent aider en cela. Les paramètres fondamentaux du droit international restent les mêmes depuis le 11 septembre et peuvent toujours influencer les développements politiques si nous leur réservons la place qui convient dans les débats d'ordre public. S'il nous faut une réassurance quant au pouvoir du droit d'influencer (et non de contrôler) la politique internationale, il suffit de penser au volte-face du gouvernement américain en matière de l'application des règles des Conventions de Genève concernant les prisonniers de guerre aux combattants du Taliban détenus dans la baie de Guantanamo. Après maintes déclarations publiques des hauts dirigeants américains qui refusaient de considérer les prisonniers du Taliban comme des prisonniers de guerre, l'opinion du monde et des gouvernements alliés a fait changer les choses. Cette opinion était fondée sur les normes juridiques internationales.

Les juristes internationaux canadiens ont un devoir particulier de respecter les règles internationales en matière des droits de la personne, les lois humanitaires de la guerre et les normes conventionnelles et coutumières relatives à l'usage de la force, car le Canada est directement engagé dans la lutte contre le

Affairs, the media was preoccupied with the new Minister's attitude towards the United States. Opinion seemed to be deeply divided about whether Canada should cast itself as America's sweetheart or as a terrier biting at US heels.

Canada's bilateral relationship with the USA is by far its most important. For that very reason, it is also its most difficult to manage, as the continuing work over softwood lumber so clearly indicate. Tensions in the bilateral relationship are nothing new. MacKenzie King struggled to position Canada somewhere between the United Kingdom and the United States. The Diefenbaker government had enormous difficulty achieving equilibrium in Canada-US defence policy. Trudeau and Nixon were famously at odds, so much so that Trudeau pursued his Quixotic "third option," attempting to fit Canada within the European framework, so as to counterbalance the elephant in our continental double bed.

Yet we are constantly told that September 11th has "changed everything." Of course, it hasn't. Some political patterns remain and some have been altered. Understanding which is one of the hardest tasks for political and legal analysts today. Here the members of the CCIL can be of some help. The fundamental parameters of international law have not yet been re-shaped since September 11th, and they can continue to influence political developments if we ensure that international law finds its rightful place in public policy deliberations. Lest we need any reassurance concerning the power of law to influence (I do not say control) international politics, we need only consider the about-face of the American Administration on the application of the rules of the Geneva Conventions concerning prisoners of war to the Taliban fighters held in Guantanamo Bay. After a myriad of public statements from high-ranking Administration officials, refusing to consider the Taliban as prisoners of war, world opinion and the opinion of allied governments shifted the terrain. World opinion was constructed around international legal norms.

Canadian international lawyers have a particular responsibility to uphold international human rights, the humanitarian laws of war, and conventional and customary norms on the use of force because Canada is directly implicated in the prosecution of the 'war' on terrorism. The fuss over when the Minister of

terrorisme. L'agitation quant au moment où le ministre de la Défense a appris que des soldats canadiens avaient capturé des soldats ennemis en Afghanistan et les avaient remis aux soldats américains est vraiment un détail. Pour les juristes internationaux, l'important est le traitement de ces prisonniers. De même, l'engagement du Canada en Afghanistan comme combattant ne change en rien sa responsabilité de respecter le droit international relatif à l'usage de la force. À ces deux égards et d'autres encore, il incombe aux juristes canadiens de droit international d'aider le gouvernement canadien à saisir la portée générale de ses rapports bilatéraux avec les États-Unis. Ceux sont bien sûr l'ami et l'allié le plus important du Canada, mais l'honnêteté est de mise entre amis, surtout si l'agir de l'un risque de miner les fondements politiques et juridiques des relations pacifiques.

Defence knew about the capture by Canadian soldiers of 'enemy forces' in Afghanistan, and their surrender to the US military, is really a sideshow. For international lawyers, the central question is how those prisoners are treated. Similarly, Canada's engagement in Afghanistan as a combatant does not affect Canada's responsibility to uphold international law on the use of force. On both these questions, and many others, Canadian international lawyers must help the Canadian government to understand the wider implications of its bilateral relationship with the United States. Yes, the United States of America is Canada's most important friend and ally, but friends must be honest with one another, especially when the actions of one may undermine the political and legal foundations upon which all peaceful relations depend.

Stephen J. Toope
Président / President

Cahier du rédacteur / Editor's Notebook

The Bulletin *To Get New Publisher*

With the greater demands on my time over the last year (accompanying my transition from studies to full-time employment), I have been increasingly unable to give the time required to see to the timely production of the *Bulletin* and the website. Gratefully, both for my sake and for the future timeliness of the *Bulletin*, the Executive Committee has recently approved in principle a request for more funding to contract out the production of the *Bulletin*. Beginning with the next issue, someone else (most certainly someone with better qualifications and equipment than I have for this sort of activity) will be taking care of the mechanics of producing the *Bulletin*. The result, I am sure, will be a better quality and more timely product.

A case in point is the current issue. Since most of the items presented here were solicited and submitted for a January 2002 publication, they sometimes reflect the international legal issues prominent at the time of writing. What one notices from this, however, is that even as our attention shifts to new international events (e.g. from Afghanistan to the Middle East; from Guantanamo Bay to the ICC), the underlying messages about Canada's role in the international legal system remain the same. This a testament to the timeless style and ideals of the contributors, but also to the fact that one of the goals of international law is precisely to discipline and stabilize our actions over time. Nevertheless, since individual events still do matter, I am determined to work with Sonya and others to produce a more timely *Bulletin* in the future. I also extend an invitation to all who wish to join in this effort, whether in a substantive, editorial or administrative capacity, to indicate to us your desire to do so. In particular for students, watch for news about upcoming credited internships for working with the CCIL on material for the *Bulletin* and the website.

Edward G. Lee, Q.C. Made Honorary Life Member

Finally, one important decision recently taken by the CCIL Executive Committee has been the passage of a recommendation to the Board of Directors that Edward G. (Ted) Lee, Q.C. be granted the designation of "Honorary Life Member". This designation is meant to recognize Ted's long and distinguished service to the Council and to the international legal community in Canada. The Executive Committee invites everyone to join with it in thanking Ted for his many years of dedication to the organization, most recently as Chair of the Nominating Committee, and in congratulating him on this unanimous nomination. The recommendation will formally be made to the Board of Directors at the annual meeting in October.

Too Close to the USA: Canadian Reluctance to Stand up for Itself

By Michael Byers[*]

Author's note: The following article was first published on 6 September 2001, and is reprinted here in the hope of stimulating debate among CCIL members. Was the argument justified at the time? What effect, if any, have subsequent events had upon the Canada-US relationship in general, and upon the specific issues examined here? Should Canada stand up for itself more often? Should Canadian international lawyers?

Canadians make much of something Pierre Trudeau said in a speech to the Washington Press Club in 1969: 'Living next to you is in some ways like sleeping with an elephant. No matter how friendly and even-tempered the beast, one is affected by every twitch and grunt.' Canada shares a continental market, the world's longest undefended border, a language and increasingly a culture with the US, and seems, in recent decades, to have lost its ability to adopt a critical - or even guarded - view of its neighbour when developing and implementing its own foreign policy. Successive Canadian Governments, charged with managing an asymmetrical relationship from which there is no exit, have chosen to assume that the relationship is one between equals. But what if the decision makers in Washington see things differently! What if, as far as they're concerned, respect and equality are not part of the arrangement! What if their sole aim is the advancement of the American national interest, whatever the costs to Canada!

Over the next decade, a series of issues will test Canada's assumptions about the benevolence of the United States. They include missile defence, global warming, energy and water exports, and control of the North-West Passage.

In I983, Ronald Reagan launched the Strategic Defense Initiative (SDI), the aim of which was to develop the capacity to shoot down ballistic missiles launched at the US. Work on the project continued through subsequent Administrations, and now it seems that the necessary technology may soon be within reach. George W. Bush wants to push ahead with the scheme, and has committed the US to constructing a National Missile Defense system, at a cost of more than $60 billion. A successful test was carried out in July.

Canada's co-operation is essential if the system is to be built. Any Russian, Chinese, North Korean or Iraqi missiles launched at the US would have to fly through thousands of kilometres of Canadian airspace. Moreover, they would have to be destroyed while still in Canadian airspace, which would in all likelihood mean that radar stations - and probably intercept launchers - would have to be built on Canadian soil. During the Cold War, Canada and the US cooperated closely in defending the continent against Russian bombers. Radar stations were built in northern Canada; American B-52s circled over the Arctic waiting for the signal to fly into the Soviet Union and drop their nuclear payloads. Together, the two countries still operate a string of automated radar stations and co-ordinate the North American Aerospace Defense Command, an organisation central to Bush's missile defence plans.

Air defence co-operation was clearly in Canada's interest; it is less obvious that the same could be said of a missile defence system. A new arms race between the United States, Russia and/or China would see Canada caught literally in the middle: by allowing missile defence installations to be built, it would make itself a target of any large-scale attack, although the 'rogue states' seen as the hypothetical justification for the scheme are unlikely to want to waste their few missiles on Vancouver or Toronto. Canadian taxpayers, meanwhile, would be asked to foot a substantial portion of the bill for missile defence - although the bulk of the jobs and profits would go to the United States.

Yet the Canadian Government appears poised to offer its full co-operation. Although Defence Minister Eggleton, insists that it is still too early to form an opinion, Prime Minister Chrétien, has already said that the decision is for the US alone - despite the fact that Canada would clearly be involved. As things currently stand, however, the defection of the Republican US Senator James Jeffords last year may be enough to put the brakes on the project since it has given the Democrats, who are more skeptical about the whole idea, a majority on the Congressional committees that control military funding.

[*] Professor of Law, Duke Law School, currently Peter North Fellow at Oxford University.

Canadian policy on climate change is similarly becalmed. Canada is the world's second largest per capital emitter of greenhouse gases after the US. The reasons for this include a cold climate and a small population spread over a huge area, as well as a consumerist lifestyle heavily influenced by the States. Canadians appear to be more concerned than Americans about environmental issues, however, in part because of the attention the Canadian press has given to the effects of acid rain on lakes and forests, and is now giving to the consequences of global warming for the Arctic, with its populations of polar bears and seals. There has been some domestic pressure to address the issue, and the Government recently announced that it will seek to reduce energy consumption by its own offices and employees to 30 per cent below 1990 levels within the next nine years.

Yet Canada has stood staunchly beside the US, sharing its preference for less stringent emission targets, greater reliance on market mechanisms and the inclusion of 'carbon sinks' in any multilateral agreement. When Bush pulled out of talks on the Kyoto Protocol, Canada stayed in and secured terms that are far worse for the environment than those offered by the Clinton Administration last autumn. This apparent schizophrenia results from the Government's wish to sell more oil and gas to the US. Although the process of extracting these resources, especially from the tar sands of Alberta, generates large emissions that would count against carbon-production quotas, oil and gas exports inevitably boost the economy: Canada already exports more than $30 billion worth of energy annually to the US.

"Canada has much that the US and other countries want and need and has no need to sell out prematurely and on disadvantageous terms."

The US is far and away Canada's largest export market, thanks to the continuing integration of the North American economy. The first step in this process was the Auto Pact of I965, whereby the two countries established a free trade in cars and trucks, and shared production lines. In I988, the Auto Pact was extended into a comprehensive free trade treaty, which was itself transformed into the North American Free Trade Agreement of 1994. As a result, bilateral trade increased and is now worth more than $1.2 billion a day. More than 75 per cent of Canadian exports go to the US, while Canada buys 23 per cent of American exports in return. It is now easier to export many goods from Canada to the States than it is to trade them internally between provinces. An 'open skies' agreement has also been concluded, eliminating most of the barriers to competition between Canadian and American airlines. Many of the consequences of this increased trade have been beneficial to Canada, helping to generate a standard of living that approaches - and an overall quality of life that may well exceed - that of the US. That said, several elements of NAFTA have aroused considerable concern in Canada.

One is a temporary visa scheme that has encouraged many thousands of Canadian doctors, lawyers, nurses, teachers, computer scientists and other professionals to move to the US. Another is a mechanism which allows American, Mexican or Canadian companies investing in another NAFTA country to obtain a binding dispute settlement if they believe their investments have been harmed by government action in that country. Indeed, the Canadian Government has backed away from several environmental protection initiatives because of their possible effects on US investments. Also worrying are provisions that prevent the Government from trying to reduce energy prices in Canada if the result would be that they would drop below the price of energy exports to the States. It is easy to imagine that sovereign country, especially one that endures bitterly cold winters, might someday wish to cap prices on domestically consumed energy - the current energy crisis in California has convinced even the regulation-phobic Bush to allow the introduction of price controls there.

Yet Canadian Governments accepted all these conditions and now talk enthusiastically of increasing oil and gas exports without any apparent concern for the long-term environmental, economic or social costs. When Bush encountered opposition to his plans for drilling in the Alaska Wildlife Refuge. Chrétien promptly offered alternatives in Canada. Ralph Klein, Alberta Premier recently told Dick Cheney that his province 'had energy to burn'. The short-term benefits of increased energy exports are considerable, especially when world prices are high, and Canadian politicians are all too well aware of this. Swollen government revenue and job creation in the oilfields will, they calculate, make for happy voters in the next round of federal and provincial elections.

The US is also running short of fresh water. Aquifers in the South-west which contain water derived from wetter periods in the geological past, but which now receive little or no recharge from rain, are being exhausted as the population of the region increases dramatically. To have swimming pools, golf courses and irrigated vegetable farms in deserts does nothing for conservation. Today, neither the Colorado River nor the Rio Grande reaches the sea. Several private companies have long had plans to divert rivers from Canada to the United States, regardless of what Canada might have to say. Water has been transferred from Lake Michigan into the Chicago Sanitation Canal and onwards into the Mississippi River system ever since 1900. Some entrepreneurs would now like to extract even more, and to replenish the Great Lakes by building a dyke that would transform James Bay into an enormous freshwater reservoir, with nuclear-powered pumping stations to lift the water over the Canadian Shield. A second plan involves diverting the Mackenzie River - the Amazon of the north - into the Rocky Mountain Trench and so down to California. Although these grandiose plans are currently dormant, as attention focuses on the possible use of supertankers to transport water, they are likely to re-emerge soon. And it is clear that bulk water exports of any kind would have dramatic environmental consequences, as well as raising difficult questions of Canadian sovereignty.

Canadians are in fact extremely nationalistic when it comes to fresh water. Accordingly, it tends to be assumed that the Government would oppose the export of water and that the issue would turn on legal arguments. The worry has been that, since NAFTA does not specifically exclude trade in water, allowing bulk exports would transform water into a 'good' under that agreement. If this happened, additional exports would then have to be permitted on a nondiscriminatory basis.

More important, since NAFTA does not prohibit measures that reduce trade restrictions, the Canadian government would face no legal impediment if it decided to allow water exports either on its own initiative or as the result of economic or political pressure from the US. And pressure from the US is building. One American water company has already invoked NAFTA in a dispute with British Columbia over a permit to export water that was later revoked. Pressure is being exerted at government levels as well: Bush recently indicated a desire to discuss large-scale water diversions with Chrétien. The Canadian Government, while denying that it has any intention of allowing exports, last year called for tenders to study the potential monetary value of the country's fresh water resources. Plans, announced in 1999, to adopt legislation banning exports have not yet been implemented. Whether Canadians like it or not, their water will soon be up for sale. Another imminent concern is control of the North-West Passage. The polar ice-cap is 40 per cent thinner than it was in the 1950s. The melting ice presents the US with a major opportunity. Its lease on the Panama Canal ran out in 1999, and the Canal is in any case too narrow for supertankers and aircraft carriers. An ice-free North-West Passage would provide a shorter and more secure route around North America, as well as giving easy access to the energy and other riches of Alaska and the Canadian north.

Canada's long-standing claim to sovereignty over the Arctic islands and waters presents something of a problem, however, as do Canadian concerns about the environmental impact of oil shipments on the fragile northern ecosystem. The US insists that the North-West Passage is an international straight and therefore open to vessels from any country. This claim has been backed up with action, most recently in the summer of 1985 when a US Coastguard icebreaker made the passage without Canada's permission. Once the ice melts sufficiently to make commercial shipping economically viable, the US will undoubtedly press its claim again. In response, the Canadian government will make a show of objecting, and then very likely concede. In Ottawa and elsewhere, there is already talk of an agreement that would see Canada surrender its claim to sovereignty so as to provide access to the Passage for everyone.

All countries feel the weight of American influence in their decision-making, but none - apart perhaps from Mexico and Cuba - feels it as heavily and as regularly as Canada. Retaining a distinct political and cultural identity in the shadow of their neighbour has both challenged and defined Canadians; and uncertainty as to whether their relationship with the US is really an equal one hasn't helped.

Canada has been enormously successful in promoting changes at the international level, even if it has only sought to do so on issues not impinging on critical interests of the US. Whether the issue has been banning land-mines, or setting up an international criminal court, or outlawing certain organic pollutants, Canada has used its position as a middle power to

advance its own interests and those of other countries. This capacity for leadership provides it with an enormous advantage vis-a-vis its southern neighbour, whose political and economic dominance, and tendency to use coercion rather than persuasion have reduced its ability to inspire trust or exert moral influence.

Canadians are not as far away from the rest of the world as they once were. Advances in transport and communications have dramatically reduced the cost and time involved in engaging with other countries, markets and cultures. One of the greatest ironies of Canada's current relationship with the US is that more and more of its sovereignty is being ceded as an inevitable consequence of geographic proximity just as technology is bringing 190 other countries virtually to Canada's doorstep.

Canada has much that the US and other countries want and need and has no need to sell out prematurely and on disadvantageous terms. What is required are politicians capable of looking beyond the current electoral cycle to take advantage of long term negotiating strengths. And such politicians, although rare, are more likely to be found in a cohesive, social-welfare oriented society such as Canada than in the US. This does not require that Canada become anti-American. Americans are accustomed to and respect power politics. Benevolent beast or swaggering bully, the US would be better behaved if Canada stood up for itself more often.

En Bref — In Brief

ICJ PRACTICE DIRECTIONS

On October 31, 2001, the International Court of Justice adopted with immediate effect Practice Directions for the use by the States appearing before it. Those Practice Directions are an addition, without alteration, to the *Rules of Court* justified by the congested state of the Court's List and budgetary constraints. In the Practice Directions, the Court urges the parties to append to their written pleadings only strictly selected documents. It insists on the succinct character of oral arguments and wishes to discourage the practice of simultaneous filing of pleadings in cases brought by Special Agreement (two States jointly). It finally states that the time limit for the presentation by parties of written observations shall generally not exceed four months.

The Practice Directions can be found on the Court's web-site at: <http://www.icj-cij.org>. (OR)

MEMBER PUBLICATION

Advancing Safe Motherhood through Human Rights
By Rebecca Cook (CCIL member), Bernard Dickens, Andrew Wilson & Susan Scarrow

This report considers how human rights laws can be applied to relieve the estimated 1,400 deaths world-wide that occur every day, an annual mortality rate of 515,000, that women suffer because they are pregnant. Human rights principles have long been established in national constitutional and other laws and in regional and international human rights treaties to which nations voluntarily commit themselves. The intention of the report is to facilitate initiatives by governmental agencies, non-governmental groups and, for instance, international organizations, to foster compliance with human rights in order to protect, respect and fulfil women's rights to safe motherhood.

The report outlines how the dimensions of unsafe motherhood can be measured and comprehended, and how causes can be identified by reference to medical, health system and socio-legal factors. It introduces human rights laws by identifying their sources and governmental obligations to implement them, and explains a range of specific human rights that can be applied to advance safe motherhood.

The setting of performance standards for monitoring compliance with rights relevant to reproductive health, and availability and use of obstetric services is addressed. In conclusion, the report considers several strategies to encourage professional, institutional and governmental implementation of the various human rights in national and international laws relevant to reduction of unsafe motherhood, and to enable women to go through pregnancy and childbirth safely.

Publication Information:
Department of Reproductive Health and Research, World Health Organization, 1211 Geneva 27, Switzerland.
Available in full text on the WHO website at:
<http://www.who.int/reproductive-health/publications>.

(continued on page 10 - suite page 10)

Congrès annuel du CCDI (2002) « La mesure du droit international : Efficacité, Équité et Validité »

La planification du Congrès annuel du CCDI 2002 se déroule sous la direction de John McManus, président cette année du Comité organisateur. Le Congrès aura lieu du 24 au 26 octobre, 2002 dans l'environnement habituel de l'Hôtel Fairmont Château Laurier à Ottawa. Le thème du Congrès cette année est : « La mesure du droit international : Efficacité, Équité et Validité ».

Le droit international façonne les relations entre les états, établit des processus qui aident à identifier et à poursuivre des buts sociaux, contribue à la construction des institutions internationales et est utilisé comme moyen de résolution pacifique des différends. Quoique les buts du droit international soient louables, les méthodes ou les outils disponibles pour les promouvoir reflètent la complexité de notre environnement global et politique. Ces outils sont souvent lourds et fréquemment décrits comme inefficaces. Le 30ième Congrès du Conseil canadien de droit international examinera comment on peut mesurer la valeur du droit international, en se demandant particulièrement si l'efficacité est par elle-même une mesure adéquate. Nous explorerons également comment nous devrions évaluer «l'efficacité», et si cette évaluation doit se coordonner avec d'autres valeurs ou tests, tel que l'équité et la validité.

La soirée du jeudi sera consacrée à une table ronde portant sur un sujet d'actualité, co-parrainée par le « Canadian Centre for Foreign Policy Development ». Une réception parrainée par Ogilvy Renault suivra. Vendredi matin, le conférencier chargé du discours-programme explorera le thème du Congrès. Vendredi et samedi, le thème sera approfondi lors des panels portant sur une variété de sujets incluant le droit commercial, les droits de la personne, la méthodologie de la conformité, le droit international privé, le droit pénal international, le droit de l'environnement et la lutte contre le terroriste à la lumière des Conventions de Genève et de La Haye. Le Congrès se terminera samedi par l'Assemblée générale annuelle. Les formulaires d'inscription seront postés aux membres pendant l'été.

Les détails quant au programme et à l'inscription seront disponibles sur la site Internet du CCDI. ➢

CCIL Annual Conference (2002) "The Measure of International Law: Effectiveness, Fairness and Validity"

The details for the 2002 Annual CCIL Conference are coming together under the direction of John McManus, chair of this year's organizing committee. The conference will take place from October 24 to 26, 2002 in the usual setting of the Fairmont Chateau Laurier Hotel in Ottawa. The theme of this year's conference is: "The Measure of International Law: Effectiveness, Fairness and Validity"

International law shapes inter-state relations, establishes processes that help to identify and pursue social goals, contributes to the construction of international institutions, and is employed as a means of peacefully resolving disputes. While the aims of international law are commendable, the methods or tools available to advance them are reflective of our complex global and political environment. These tools are often cumbersome and are frequently described as ineffective. The 30th conference of the Canadian Council on International Law will examine how we should measure the value of international law, specifically questioning whether or not "effectiveness" is an adequate measure in and of itself. We will also explore how we should assess effectiveness, and whether or not this assessment should coordinate with other values or tests such as fairness and validity.

Thursday evening will be devoted to a roundtable on a matter of pressing concern, co-sponsored by the Canadian Centre for Foreign Policy Development. A reception sponsored by Ogilvy Renault will follow. On Friday morning our keynote speaker will offer an exploration of the conference theme. Over both Friday and Saturday the theme will be examined further in panels on a variety of subjects including trade law, human rights, compliance methodology, private international law, international criminal law, environmental law, and combating terrorism in the light of the Geneva and Hague Conventions. The Conference will close with the Annual General Meeting on Saturday. Registration forms will be mailed out to members in the summer.

Programme and registration details will be posted on the CCIL website as they become available. ➢

En Bref — In Brief

(continued from page 8 - suite de page 8)

PERMANENT FORUM ON INDIGENOUS ISSUES

UN Economic and Social Council (the Council) resolution 2000/22 establishes the Permanent Forum on Indigenous Issues to serve as an advisory body to the Council, with a mandate to discuss indigenous issues relating to economic and social development, culture, the environment, education, health and human rights. The forum will meet for 10 days each year, its first session in New York from May 13 to 24, 2002. The Council has nominated sixteen members to the forum: eight indigenous experts and eight state-nominated experts. Canada is represented by Mr. Willie Littlechild and Mr. Wayne Lord, respectively.

The principle idea behind the establishment of the Permanent Forum is that it would co-ordinate the activities of the various organisations with respect to indigenous issues. The current mandate of the forum, following a series of deliberations and concessions, is relatively limited. The forum would: (a) provide expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations, through the Council; (b) raise awareness and promote the integration and co-ordination relating to indigenous issues within the United Nations system, and; (c) prepare and disseminate information on indigenous issues.

The Permanent Forum may face several potential difficulties. Firstly, the UN Declaration on the Rights of Indigenous Peoples is still in the draft process, and on a number of issues there is no agreement among the parties. Secondly, there is a possibility that the work of the Permanent Forum will overlap with the work of the Working Group on Indigenous Populations and other UN bodies. Thirdly, there is no firm agreement on the location of the Permanent Forum.

The Permanent Forum is nevertheless an important step towards a greater recognition of the rights of indigenous peoples in international law. It is a significant development that adds a new dimension to the international human rights framework. More information on the Forum is available at:
<http://www.unhchr.ch/indigenous/ind_pfii.htm> (OR)

(continued on page 14 - suite page 14)

Russia Presents Submission to Establish the Outer Limits of its Continental Shelf

By David Sproule[*]

On December 20, 2001, the Russian Federation delivered to the United Nations Commission on the Limits of the Continental Shelf its submission to establish the outer limits of its continental shelf in the Arctic and Pacific Oceans. The Commission considered the submission at its session from March 25 to April 12, 2002. A subcommission was established, as provided by the UN Convention on the Law of the Sea (UNCLOS), to address the submission. The subcommission is expected to undertake its work from June 10-14, 2002 and present its recommendations to the newly elected Commission from 24-28 June 2002. As a state with coasts opposite to Russia's, Canada takes particular interest in the Commission's work.

The Russian submission was the first made pursuant to Article 76 of the UNCLOS and will be important in developing the role and procedures of the Commission. While paragraph 8 of Article 76 stipulates that its recommendations are to be "final and binding", paragraph 10 notes that provisions of Article 76 do not prejudice the delimitation of the continental shelf vis a vis States with opposite or adjacent coasts.

Whether the Russian submission will prompt other States with claims to continental shelves beyond the 200-nautical mile limit established under Article 76 to proceed expeditiously with submissions of their own will depend on, among other things, the significance attached to the Commission's recommendations by the international community. This in turn is likely to depend on a number of factors, including the quantity and quality of the data on which recommendations are based, the transparency of the Commission process, the perceived technical expertise of Commission members, and the objectivity of the process by which members of the technical subcommission examining the submission are chosen.

[*] Director, Oceans, Environmental and Economic Law Division, Department of Foreign Affairs and International Trade.

Suresh: Some Aspects of Public International Law

By Christina Johnson and Mark C. Power[1]

For the first time since September 11, 2001, Canada's highest court considered the balance to be struck between, on the one hand, the threat to national security posed by transnational terrorism and, on the other, Canada's human rights obligations rooted in the *Canadian Charter of Rights and Freedoms* and international instruments. The ensuing scrutiny of *Suresh* v. *Canada (Minister of Citizenship and Immigration)*[2] was to be expected and, as Canadian immigration and refugee law practitioners and human rights advocates consider its impact, it seems appropriate to draw attention to three issues deserving of more reflection. These are torture as *jus cogens*, the reception of international law in Canada, and Canada's policy of deporting terrorists.

The *Suresh* Decision

The appellant in *Suresh* was a Sri Lankan citizen of Tamil descent who, one year after entry into Canada, was recognised as a "Convention refugee" by the Immigration and Refugee Board ("IRB"). Mr. Suresh was subsequently detained and faced deportation proceedings on security grounds; he was suspected of being a member and fundraiser of the Liberation Tigers of Tamil Eelam ("LTTE"), an alleged terrorist organization based in Sri Lanka and active throughout the world. Mr. Suresh applied for judicial review on the basis that the Minister's decision to deport him was unreasonable, that the procedures under the *Act* were unfair insofar as they did not require an oral hearing and an independent decision-maker, and that the *Immigration Act* unconstitutionally infringed ss. 2(b), 2(d) and 7 of the *Charter*.

The Court held, in a 9-0 decision, that the appellant was entitled to a new deportation hearing and that the broad discretion conferred by ss. 53(1)(b) of the *Immigration Act* – which permits the Minister to deport a refugee deemed a danger to the security of Canada – leaves open the possibility of deportation to torture. To comport with the principles of fundamental justice, however, the Minister should generally avoid such action where, on the evidence, there is a substantial risk of torture. Though finding the impugned legislation to be constitutional, the Court set out the procedural safeguards to which refugees are entitled having first established a *prima facie* case of risk of torture. Without trivialising the issues related to administrative law raised by the decision, the focus of this comment is on the Court's discussion and treatment of international public law.

a) Torture as jus cogens

The Court turned to international law in the course of its inquiry into the principles of fundamental justice. Specifically, before analysing the international prohibition on deportation to torture, the Court briefly pondered in its reasons whether the prohibition on torture constitutes a peremptory norm, as submitted by intervenor Amnesty International. The status of the prohibition on torture in international law was not at issue in *Suresh*. The Court nevertheless found there to be three "compelling indicia" pointing towards an affirmative response, namely: i) the array of multilateral instruments explicitly prohibiting torture; ii) the fact that no state has ever legalized torture or admitted to its deliberate practice, as well as; iii) the apparent consensus amongst international authorities. The Court surprisingly concluded that the said prohibition "cannot be easily derogated from." We submit that this conclusion is disturbingly ambiguous, and that it is unfortunate that the Court hesitated in coming to a more categorical conclusion. Torture, we submit, is never justified and like-minded human rights advocates should continue to relentlessly challenge any suggestion to the contrary.[3] Given the overwhelming evidence that torture is *jus cogens*, we wonder why our apex court hesitated in declaring it to be so.

b) The Reception of International Law in Canada

More fundamentally, *Suresh* highlights Canada's muddled approach with respect to the reception of

[1] Christina Johnson and Mark C. Power are third year LL.B. students at the University of Ottawa as well as M.A. candidates at the Norman Paterson School of International Affairs, Carleton University.

[2] *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 S.C.C. 1, 11 January 2002 [hereinafter *Suresh*].

[3] See P. Aussaresses, *Services spéciaux, Algérie 1955-57* (Paris: Éditions Perrin, 2001) [in which a former French General justified torture as a legitimate method for extracting information during times of war]; L. Kershnan, "An argument for the use of torture as punishment" (1998) 19 *Hamline J. Pub. L. & Pol'y* 997; M.S. Moore, "Torture and the balance of evils" (1989) 23 *Israel L. Rev.* 280.

international law in Canada. The "transformationist" approach to the reception of international treaties is called into question by the Court's interpretation of the *Convention Relating to the Status of Refugees*, its incorporation of Article 2 of the *International Convention for the Suppression of the Financing of Terrorism* into Canadian law, and its treatment of the relationship between the *Refugee Convention*, the *International Covenant on Civil and Political Rights* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, on the one hand, and the *Charter*, on the other.

As a general rule, treaties must be implemented or transformed into domestic law by statute to be given legal effect in the Canadian legal system.[4] The federal and provincial legislatures usually reproduce treaty terms in the text of the statute or incorporate, by reference, a treaty appended as a schedule. Nonetheless, the boundaries of the transformationist doctrine remain unsettled. The Supreme Court has yet to enunciate a theoretical framework for the reception of treaty law in Canada that accounts for its occasional deviations from the rule. One such deviation is seen in cases of apparent conflict between a treaty and implementing legislation; here, the Court favours reconciliation by way of statutory interpretation, invoking the presumption that Parliament does not intend to legislate in violation of its international obligations.[5] Some more significant deviations are seen, however, in cases of conflict between Canadian law and treaties that have yet to be implemented in Canada.

"*Suresh* exposes not only the extent to which Canadian and international law collide, but also the increasingly internationalised nature of domestic litigation."

In *Suresh* for instance, the Court discussed whether the ability of the Minister to deport individuals to torture pursuant to s. 53 of the *Immigration Act* – which reflects the permissive approach to deportation to torture in Article 33(2) of the *Refugee Convention* – comports with principles of fundamental justice. After a review of Canadian law, the Court found that, generally, deportation to torture would be unconstitutional. It then proceeded to the international aspect of its inquiry into the principles of fundamental justice. In so doing, it drew upon the absolute prohibition against torture found in the *Torture Convention* and read the *ICCPR* to contain a similar prohibition. This highlights what we submit is now an important exception to the doctrine of transformation: fundamental human rights and freedoms guaranteed in Canada must accord with their counterparts in international human rights treaties, notwithstanding the fact that such treaties have not been incorporated by statute into Canadian law. In essence, this is the result of a series of cases in which the Supreme Court has indirectly incorporated international human rights and freedoms into the *Charter*, by way of constitutional interpretation.[6]

In its application of this exception in *Suresh*, however, the Court added a new twist, further implicating the cogency of the transformationist doctrine. In its resort to the international context, the Court confronted a conflict between the terms of the *Torture Convention*, the *ICCPR* and the *Refugee Convention*. In substance, the Court treated the latter as one of many international instruments of value to the Court in constitutional interpretation. In so doing, we question whether the Court adequately addressed the implications of a crucial distinction between the *Refugee Convention* and other international human rights treaties: the *Refugee Convention* has undergone the formal process of transformation into the Canadian legal system, unlike the *Torture Convention* and the *ICCPR*. Nevertheless, the Court found that the absolute prohibition contained in the latter two, from an international perspective, prevails over the permissive approach embodied in the *Refugee Convention*. The outcome is not unlike that which was achieved in the majority judgment in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, and which provoked a strong dissent by Justice Iacobucci on the basis that the

[4] *R.* v. *Francis*, [1988] 1 S.C.R. 1025; *Capital Cities Communications Inc.* v. *Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *References re The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act, and the Limitation of Hours of Work Act*, [1937] A.C. 326.

[5] *National Corn Growers Assn.* v. *Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.

[6] *United States of America* v. *Burns*, [2001] 1 S.C.R. 283; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, per Dickson C.J.C. (dissenting); *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038; *R.* v. *Keegstra*, [1990] 3 S.C.R. 697; *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [hereinafter *Baker*].

majority had thereby dealt a serious blow to the transformationist doctrine.

Finally, faced with a challenge to the vagueness of the term "terrorism" in s. 19 of the *Immigration Act*, the Court noted the absence of an authoritative definition in Canadian law, as well as the lack of an agreed meaning in the international community. The Court ultimately adopted the definition of "terrorism" found in Article 2 of the *Terrorist Financing Convention*. Although it did not treat Article 2 as legally binding upon Canada – indeed, Canada had yet to even ratify this treaty at the time the Court released its reasons – the Court indirectly incorporated it into Canadian law through judicial notice. This marks a significant departure from its own jurisprudence related to the use of international treaties. The term "terrorism" is not a constitutional one, compelling resort to similar rights and freedoms in international human rights treaties; nor is it an impugned term found in legislation implementing the *Terrorist Financing Convention*. Its adoption without hesitation is thus unusual.

In light of the foregoing, the boundaries of the transformationist doctrine seem unclear. Perhaps the fact that Canada has ratified an international treaty should be reflected in Canadian law notwithstanding the fact that it has yet to implement some of its provisions, for the Court observed in *Suresh*, "[i]t is only reasonable that the same executive that bound itself to the *CAT* intends to act in accordance with the *CAT*'s plain meaning." This, however, risks undermining the separation of powers. While the executive should not be allowed to evade obligations to which it has clearly consented, it bears reminding that such consent is normally granted without formal involvement of Parliament or the provincial legislatures. On the other hand, while it is necessary to preserve the constitutional separation of powers, Canadian law generally treats international custom — a source of international law over which Canadian legislators have even less control than treaties — as part of the law of Canada.

c) Canada's Policy of Deporting Terrorists

Suresh should spur Canada's legal community to reconsider how the state ought to deal with terrorists found on its soil. Recall that the Government of Canada wanted to deport Mr. Suresh because he was alleged to be a high-ranking international terrorist who had collected funds and procured materials (some possibly being military) on behalf of the LTTE. While such actions, if proven, are despicable, we view the policy of deportation as untenable where there is a real risk of torture, or of a trial by a tribunal lacking independence or impartiality. Seen in this light, the amendments to the *Criminal Code* seeking to implement Canada's obligations pursuant to the *Terrorist Financing Convention* may be welcome (though perhaps unintended) developments in the Canadian criminal justice system. In similar future situations, we submit that alleged international criminals should be tried in Canada and, if convicted, serve their sentences in Canada. Such a shift in policy would accord with the increasing worldwide recognition and acceptance of universal jurisdiction with respect to certain crimes[7] and is all the more compelling when, as was the case in *Suresh*, the alleged activities are performed in part on Canadian soil.

Conclusion

It is with some regret that we read the Supreme Court's hesitation in finding torture to be *jus cogens* in light an apparent consensus as to its absolute prohibition. We submit that the Court would do well (in its forthcoming reasons in *Gosselin*,[8] for instance) to revisit the transformationist doctrine, to clarify its application and, most importantly, to provide a cogent framework for any exceptions thereto. Further, *Suresh* exposes not only the extent to which Canadian and international law collide, but also the increasingly internationalised nature of domestic litigation. The Court was compelled to address international law in part due to interventions by international human rights organisations, Canadian non-governmental associations and professional and religious bodies alike. *Suresh* exemplifies the dialogue between the Canadian judiciary and civil society, which now occupies a front line position in ensuring Canada's respect of human rights; indeed, as this case demonstrates, the reporting and fact-finding activities of human rights organizations are *sine qua non* in preventing refugees from being deported to torture.

[7] In the Canadian context, see the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 and the *Criminal Code*, R.S.C., c. C-46, s. 7(3.71) 1985).

[8] *Gosselin* v. *Québec (Procureur général)*, [1999] R.J.Q. 1033, [1999] J.Q. no. 1365 (QL) (C.A.), aff'g [1992] J.Q. no. 928 (QL) (S.C.), leave to appeal to S.C.C. granted [2000] S.C.C. Bulletin at 1020.

En Bref

In Brief

(continued from page 10 - suite de page 10)

LE CONSEIL DE L'EUROPE ADOPTE PROTOCOLE N° 13 SUR L'ABOLITION DE LA PEINE DE MORT

Trente-six des quarante-quatre États membres du Conseil de l'Europe ont signé, le 3 mai 2002, le Protocole n° 13 à la *Convention européenne des droits de l'homme*, relatif à l'abolition de la peine de mort en toutes circonstances. Grâce au Protocole n° 6 et à un moratoire dans les pays qui ne l'ont pas encore ratifié, les 44 États membres du Conseil de l'Europe constituent déjà une zone sans peine de mort en temps de paix. Le Protocole n° 13 abolit la peine de mort en toutes circonstances, même pour les actes commis en temps de guerre ou de danger imminent de guerre. De plus, aucune dérogation ni aucune réserve ne seront admises aux dispositions de ce Protocole n° 13 à la *Convention européenne des droits de l'homme*. Le Protocole entrera en vigueur après le dépôt de dix ratifications.

Le texte du Protocole et de plus amples renseignements sont disponibles sur le site :
<http://conventions.coe.int>.

UPDATE ON MILOSEVIC AT THE ICTY

On February 1, 2002, the Appeals Chamber of the International Criminal Tribunal for Yugoslavia ordered that three separate Indictments against Milosovec concerning events in Kosovo, Croatia, and Bosnia and Herzegovina be tried together in one single trial, overturning a decision of the Trial Chamber.

By the decision of December 13, 2001, the Trial Chamber allowed the Motion to the extent that the Croatia and Bosnia Indictments would be joined together, and denied it to the extent that the Kosovo Indictment were to be tried separately.

The main issue considered was "whether the three Indictments form part of a series of acts committed together which formed the same transaction, *i.e.*, part of a common scheme, strategy or plan," required by Rule 49 of the *Rules of Procedure and Evidence*. The Prosecution's case was that they do, since they form part of a plan for a "Greater Serbia." The Trial Chamber rejected this argument for a number of reasons. First, there is a gap of more than three years between the last evens in Bosnia (ended December 1995) and first events in Kosovo (January 1999), which gap does not exist between events in Croatia and Bosnia. Second, the conflicts in Croatia and Bosnia did not take place in the Federal Republic of Yugoslavia (FRY), but in neighbouring States, whereas the conflict in Kosovo took place in FRY. Subsequently, in case of Croatia and Bosnia, the accused is alleged to have acted "indirectly," through individuals in joint criminal enterprise. In Kosovo, on the other hand, the accused is said to have acted "directly" and was in *de jure* and *de facto* control. The Trial Chamber also stated that it would be onerous and prejudicial for the accused to defend himself in the context of all three trials.

Leave to appeal was granted on the basis that the correct interpretation of Rule 49 dealing with the joinder of crimes in one indictment had not been determined and that clarification may be important to the proceedings before the Tribunal. However, emphasis was made that the grant of leave to appeal was not to delay the trial. The Trial Chamber commenced the trial as scheduled on 12 February.

After an oral request for provisional release by the accused during the proceedings on 26 and 27 February 2002, the Trial Chamber denied the request in a written Decision on 6 March 2002.

All documents related to the Milosovec trial at the ICTY can be found at:
<http://www.un.org/icty/milosevic>. (OR)

CANADA RATIFIES *INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS*

On May 1, 2002, Canada announced its ratification of the *International Convention for the Suppression of Terrorist Bombings*. The Convention gives countries jurisdiction over the unlawful and intentional use of explosives and other lethal devices in public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of a public place. The *Convention* was unanimously adopted by the UN General Assembly on December 9, 1999, and has been open for signature since January 10, 2000. With this ratification, Canada becomes one of the few countries to have ratified all 12 existing United Nations' international counterterrorism.

More information on international action to combat terrorism is available at:
<http://www.un.org/terrorism>.

(continued on page 16 - suite page 16)

Global Governance: Decision-Making in International Organizations

Director General of OPCW Ousted*

The Organization for the Prohibition of Chemical Weapons was created in 1997 independently of the United Nations by the parties to the *Chemical Weapons Convention* for the purpose of monitoring compliance with the Convention. In a special meeting of the OPCW's Conference of the States Parties (CSP) on 22 April 2002, José Bustani was dismissed as Director General.

Prior to the meeting, the US distributed a list of some 30 complaints against his behaviour, which it said could be summarized as "mismanagement". Nothing was alleged in the nature of corruption or failure to follow the directives of the Organization's policymaking bodies. The US first tried to persuade the OPCW Executive Council to dismiss Bustani, and having failed, it convened a meeting of the CSP and renewed its attempt. The rule for decisions by the CSP is two-thirds majority of those present and voting.

The voting among the 145 parties to the treaty showed 48 in favour of dismissal, 7 against, 58 abstaining and 32 absent. Canada voted for dismissal along with all the other western bloc except France which abstained. Those voting against dismissal were Belarus, Brazil, China, Cuba, Iran, Mexico and Russia.

Canada's explanation of its vote omitted any reference to the merits of the issue; instead referring only to the danger of the Organization collapsing if the internal conflict over leadership could not be settled. Mexico was reported as disputing the legality of the dismissal on the grounds that the Convention contained no provision for dismissal of a Director General during his term of office.

While one may argue that the vote itself is permitted under Article VIII.19 of the Convention, that vote should be treated as a nullity since it resulted in a decision to do something not otherwise permitted by the Convention. It seems that many in the western bloc assumed that any international organization for monitoring compliance necessarily needs the support of the US in order to operate. One must question the wisdom of such an assumption, since it would mean surrendering a large degree of control over the operations of the organization to the US. ◅

* By Douglas Scott, President of The Markland Group.

CBD COP 'Consensus' Decision Questioned*

Adopted in 1992, the *Convention on Biological Diversity* (CBD) has the objectives of the conservation and sustainable use of biological diversity, and the fair and equitable sharing of the benefits from the use of genetic resources. The 6th Meeting of the Conference of the Parties (COP) met in the Hague from April 7-19, 2002, to take decisions on a range of issues arising from the implementation of the Convention.

The Parties reconvened in Plenary on Friday, April 19 to formally adopt more than 30 compromise texts worked out in two Working Groups over two weeks of often difficult negotiations. The COP President, Geke Faber of the Netherlands, consistently resisted efforts by several countries to re-negotiate consensus texts in Plenary, insisting that the decisions be adopted by consensus and that any outstanding concerns be registered on the record.

When the time came to adopt a decision dealing with guiding principles on invasive alien species, many countries expressed reservations about language considered unclear and possibly in conflict with trade obligations. After several hours of debate and back-room discussion failed to achieve a solution to the impasse, discussions turned to the nature of decision-making by consensus, particularly in view of the fact that the voting procedures in the CBD's rules of procedure were unsettled. While many countries felt that the past practice of CBD COPs allowed consensus to be achieved when a 'substantial number of parties agree', others felt a decision could only be adopted by consensus when there were 'no formal objections'.

In particular, Australia made it clear that it was formally objecting to adoption of the decision. When the President adopted the decision by 'consensus' anyway, Australia then made a formal reservation about the process by which the decision had been adopted, insisting that since it had formally objected to the decision it could not be adopted by consensus. On its procedural reservation, Australia was joined by several countries, including Canada and Spain (on behalf of the EC, the main proponent of the controversial text). The implications of this consensus for CBD decision-making are still being discussed and will be felt for some time to come by CBD Parties. ◅

* By Robert McDougall

En Bref — In Brief

(continued from page 14 - suite de page 14)

ICJ ORDERS CANCELLATION OF BELGIAN WARRANT

On February 14, 2002, the ICJ ruled that Belgium must cancel, "by means of its own choosing," an international arrest warrant that a Belgian investigating judge had issued against the former Congolese Minister for Foreign Affairs on April 11, 2000. The ICJ held that the warrant was in violation of Belgium's obligation to respect the immunity of the Congolese Minister and, "more particularly, infringed the immunity from criminal jurisdiction and the inviolability … enjoyed by him under international law." The warrant was issued pursuant to a 1993 Belgium law that entrusted Belgium courts with jurisdiction over offences such us grave breaches of the 1949 Geneva Conventions and their Additional Protocols, and crimes against humanity, regardless of where the offences were committed. The law in question also provided that immunity stemming from official capacity of potential offenders would not represent an obstacle to its application.

The ICJ first addressed issues of jurisdiction and admissibility. The ICJ rejected Belgium's objection that it lacked jurisdiction in the case due to the fact that the former Minister was relieved of his position in the Congolese government, holding that it had jurisdiction on the date the case was referred to it and that it continued to do so "regardless of subsequent events." Additionally, the ICJ held that, although events subsequent to the filing of an application might render the application without object, the change that had taken place in the case of the former Minister had not "put an end" to the current dispute and had not "deprived the Application of its object." The ICJ also affirmed that the Congo had never sought to invoke the Minister's personal rights and that it continued to have "a direct legal interest in the matter," thus rejecting Belgium's objection that the rule on exhaustion of local remedies barred the Congo's application.

On the merits, the ICJ noted that, in customary international law, the immunities accorded to Foreign Affairs Ministers were "not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States." The ICJ further noted that an incumbent Foreign Affairs Minister, when abroad, enjoyed a "full immunity from criminal jurisdiction and inviolability," even when he or she is suspected of having committed war crimes or crimes against humanity. The ICJ emphasized, however, that the immunity from jurisdiction did not mean that Foreign Affairs Ministers enjoyed "*impunity*" in respect of any crimes they might have committed because this immunity could, *inter alia*, be waived by their states, or cease to exist after they leave the office. The ICJ also pointed out that an "incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."

The full text of the decision is available from the ICJ website at: <http://www.icj-cij.org>.

Also see various ASIL Insights on this topic at: <http://www.asil.org/insights.htm>. (ASIL ILIB)

SELECTED VIEWPOINTS ON ARMED CONFLICT (II)

"From the international lawyer's perspective, 'war', as has often been remarked, is a bit of a misnomer. Of course, international law is haunted by its shadow, and one is always a bit more dependent on one's negative image than one would like to admit. The discipline, after all, once owed its *summa divisio* to the distinction between a law of peace and a law of war, still the distinguishing mark of Oppenheim's classic volumes on many an international lawyer's shelf. But 'war' is supposed to have vanished long ago, with the League of Nations and the outlawing of aggression. In the UN Charter itself, 'war' remains almost unmentioned, except where it is referred to negatively. Even when it comes to the 'laws of war', international lawyers prefer to speak of '*armed conflicts*' of an 'international' or 'non-international' nature – and 'international humanitarian law', with its soothing, almost effete touch, has gone a long way to becoming the favoured expression. And then, a puzzle to lawyers of all persuasions, is the vexing problem that war is supposed to be waged against states, not against social phenomena, so that none of the unfolding events would seem to fit into law's neat categories."

***- Frédéric Mégret**, Université Paris and Institut Universitaire des Hautes Etudes Internationales, excerpt from "'War'? Legal Semantics and the Move to Violence" at <http://www.ejil.org/forum_WTC>*

(continued on page 20 - suite page 20)

COMPLIANCE MATTERS

Recent Developments Relating to Compliance under Multilateral Treaties in the Area of Disarmament and International Security

• *THE MARKLAND GROUP* •

Edited by Douglas Scott[*]

I. EFFORTS TO STRENGTHEN BIOLOGICAL WEAPONS CONVENTION IN LIMBO

By Sean Howard, Ph.D.[*]

Efforts to strengthen the Biological Weapons Convention (BWC) suffered a series of major setbacks in 2001, even as international concern over the proliferation and potential use of biological weapons by states or terrorist groups reached new heights. In July, the new US Administration announced it would no longer participate in the work of the ad hoc group (AHG) in Geneva negotiating a protocol equipping the Convention with real power to verify compliance and investigate alleged transgressions. In November, in the throes of the anthrax mailings in the US and elsewhere, President Bush released proposals aimed at bypassing the protocol and providing the UN Security Council with the power to conduct – and veto – investigations. The year ended with an unprecedented twelve-month suspension of the Convention's Fifth Review Conference. On December 7, the final day of the three-week meeting in Geneva, the US moved that the work of the AHG be officially declared at an end and its mandate withdrawn. The proposal, which shocked even close US allies, dashed hopes of agreement on a Final Declaration establishing a follow-up process to focus discussion between the five-yearly Review Conferences. While the US is not opposed to such a process in principle, it was clearly determined that it should not become a means of reviving the AHG. To avoid the total collapse of the Review Conference, delegates agreed to resume deliberations in November 2002.

The Markland Group
203-150 Wilson Street West
Ancaster (Ontario) L9G 4E7
Tel: (905) 648-3306
Fax: (905) 648-2563
E-mail: marklandgroup@hwcn.org
Internet: www.hwcn.org/link/mkg

Although the United States figures in this thumbnail sketch as the sole villain of the peace, the reality is more complex and less convenient. Without sharing America's sweeping view that any legally binding verification instrument will inevitably be flawed and ineffectual, a large number of states parties harboured serious reservations about elements of the proposed protocol. For example, while some developed countries voiced suspicions of proposals to replace or dilute existing export control regimes, many developing countries identified the discriminatory nature of the current arrangements as a double-standard motivated more by considerations of commercial advantage than genuine proliferation concerns. Conversely, states with advanced biotechnology sectors and biodefence programmes – particularly but not exclusively the United States – worried that a protocol could impinge on legitimate business and military activity, potentially jeopardizing commercial confidentiality and even national security.

The issue of biodefence encapsulates many of these differences in perception and priority. US media reports, surfacing in September and continuing into the new year, suggest that recent research by the US Army may have involved developing a new strain of weapons-grade anthrax. While biodefence programmes are permitted under the BWC, many would argue that the development of new strains of weapons-grade material, for whatever purpose, is prohibited, in part to prevent its diversion for malicious use – as may in fact have occurred with the anthrax mailings – and in part to prevent biodefence being used as a cover for offensive programmes. Whether or not the US stands in actual violation of the treaty, the speculation is bound to fuel suspicion that Washington 'sabotaged' the protocol because it had something to hide in the area of biodefence. For its part, while insisting it remains in full compliance, the US Administration argues that effective biodefence cannot be exposed to the full glare of inspections, or subjected to rigorous transparency requirements, as such openness would be

[*] Douglas Scott is a lawyer in Ancaster, Ontario. He is the President of the Markland Group.

[*] Sean Howard Ph.D. (University of Bradford) is the editor of Disarmament Diplomacy (www.acronym.org.uk) and Adjunct Professor in the Department of Politics, Government and Public Administration at the University College of Cape Breton. He lives in Louisbourg, Nova Scotia.

of significant benefit to state or non-state actors hoping to use biological weapons against the US and its allies.

When the BWC Review Conference resumes, it will have to address in an intensive fashion this key question of the balance between prudent and dangerous research, between a secrecy that may act to undermine confidence in compliance and a level of accountability that may perversely encourage proliferation. For the Conference to rise to this formidable challenge, considerable prior consultation and coordination will be required. It is clear from recent statements that the US is planning to embark on a series of discussions aimed at persuading other states to back its unequivocal rejection of the protocol, and support instead an emphasis on 'self-compliance', broadly defined as rigorous domestic legislation supported by coordinated international law-enforcement and intelligence efforts, overlaid with the strong prospect of punitive action, including military attack, against proven violations.

It is vital for supporters of the protocol to respond with a diplomatic and political offensive of their own, exposing the serious ambiguities and weaknesses in the US stance. States parties can hardly be expected to agree that no multilateral verification mechanism is needed, or that the Security Council can adequately and fairly discharge the critical function of detecting non-compliance. But a willingness to respect and address the legitimate interest in biodefence, particularly on the part of states feeling vulnerable to potentially devastating attack, is a minimal first step toward reviving serious discussions aimed at bolstering the treaty. These discussions need not even include the US, at least initially. If during these discussions supporters of the basic concept of a protocol reached agreement on at least some minimal provisions, they would have the option of adopting a voluntary protocol or side agreement that would be binding on its signatories. The issue, after all, is not pleasing the US, but finding the right mix of incentives and disincentives, pressure and cooperation, to seriously dissuade states from contemplating the development of biological weapons. Even with the BWC in a formal state of suspended animation, the evolution of the international regime against biological weapons need not grind to a halt.

° ° °

II. CHEMICAL WEAPONS: WHY NO CHALLENGE INSPECTIONS?

By Douglas Scott*

Abstract

Several authors have pointed to reports suggesting that there are secret caches of chemical weapons in Iran and possibly Sudan and have wondered why no country has filed a request for a challenge inspection. Among several reasons suggested for this reluctance is the fact that any information offered in support of the request as to the location of the secret cache is likely to have been obtained through intelligence sources, in which case, the country filing the request would likely be unwilling to reveal it.

This paper suggests that the answer to that problem may lie in a seldom-discussed provision in the Convention whereby that type of information could be kept within the Secretariat and not divulged to the States Parties. It is argued that Paragraph 59, Part X of the Verification Annex (which provides that certain information should be placed in an "Appendix" and kept within the Secretariat) could be interpreted as applying to information submitted in support of a request for a challenge inspection.

Jonathan Tucker is one of several experts on chemical weapons who have alluded recently to reports alleging that Iran continues to be involved in chemical weapons notwithstanding its ratification of the Chemical Weapons Convention (CWC). Writing in **Arms Control Today**, he argues that "…the United States, for example, has asserted publicly that Iran continues to produce chemical weapons in violation of its treaty obligations… "and the US should therefore launch a challenge inspection without delay.[9] He goes on to argue that the longer the mechanism of challenge inspection remains unused, the harder it will be to bring it into play. Amy Sands expresses similar opinions in a chapter in *The Chemical Weapons Convention – Implementation, Challenges and Solutions* recently published by the **Monterey Institute**.[10]

Sudan's involvement has been alleged in two recent articles, one by Michael Rubin in the **Wall Street**

* Douglas Scott is a lawyer in Ancaster, Ontario. He is the President of the Markland Group.

[9] Arms Control Today, April 2001, p. 11.

[10] Jonathan Tucker, ed., Monterey Institute of International Studies, April 2001, p. 20.

Journal[11] and the other by Daniel Benjamin and Steven Simon in the **New York Review of Books**.[12] Sudan acceded to the Convention on 25 May 1999.

The question posed by several of these writers is why hasn't the US or some other country requested a challenge inspection? They point to the provisions in the Convention that stipulate that any State Party is entitled to request a challenge inspection[13] upon presentation of sufficient evidence indicating the likelihood of illegal activities.[14] They allude to the provision whereby once the request is submitted to the Director General of the OPCW,[15] he is required to proceed with the inspection unless the OPCW Executive Council votes by three-quarters majority to stop it.[16]

Having asked the question why no challenge inspections, the writers examine some possible answers. One of several answers proffered relates to the evidence that the requesting State would have to submit in order to qualify for a challenge inspection. Such evidence would be required to be fairly detailed in order to demonstrate the likelihood of illegal activity at the target site.[17] Quite likely, the evidence would be based on information from intelligence sources, in which case the requesting State Party would be reluctant to reveal it – out of concern for protecting its sources – and would therefore forego the inspection.

There is, however, a provision in the Convention that could be construed as being intended to deal with that problem by allowing such information to be submitted in confidence to the Director General on the understanding that it will not be passed on to the 41 members of the Executive Council.[18] The provision in question, however, is not clearly worded and it could be given a totally different interpretation. Consider the following wording

Detailed information relating to the concerns regarding possible non-compliance with this Convention cited in the request for the challenge inspection shall be submitted as an Appendix to the final report and retained within the Technical Secretariat under appropriate safeguards to protect sensitive information.

Although not so designated in the Convention, for ease of reference, we will refer to this provision as clause 59.3. (It appears as the third sentence of paragraph 59, Part X of the Verification Annex.)

The alternative interpretation of clause 59.3 would have it that the type of information to be placed in the Appendix was not information supplied by the requesting state in support of its request, but information gathered by the inspectors. Indeed, clause 59.3 appears as part of a provision dealing with the contents of the inspectors' report and not as part of the provisions dealing with the contents of the request which are found elsewhere.[19]

Putting the information submitted in support of the request in the Appendix could be problematical. The Convention requires the request to be transmitted to the Executive Council in order that its members may consider whether the request is "… frivolous, abusive or clearly beyond the scope of this Convention …"[20] in which case they are entitled to vote to stop the inspection. When they receive the request, the members will likely demand to see all the supporting information. On the other hand, if this were to happen, the Director General could argue that he is required by paragraph 14 of Article IX to ascertain whether the inspection request meets the specified requirements, and that clause 59.3 implies that he is required to examine the supporting evidence *in camera*, and that once he has determined that the requirements have been met, Council is not entitled to challenge his findings.

What then is the true meaning of clause 59.3? Is the Appendix intended for information contained in the inspectors' report or information submitted by the requesting state? It seems there are compelling arguments both ways. Certainly, the issue needs more analysis than is possible in this limited space.[21]

[11] *Don't "Engage" Rogue Regimes,* Wall Street Journal, 12 December 2001.
[12] *A Failure of Intelligence,* New York Review of Books, 20 December 2001.
[13] CWC, Article IX.8. The text of the Convention is available at : <http://www.opcw.org/cwcdoc.htm>.
[14] CWC, Verification Annex, Part X, para. 4.
[15] Organization for the Prohibition of Chemical Weapons, which is responsible for administering the Convention.
[16] CWC, Article IX.14 and IX.17.
[17] See footnote 6.
[18] CWC, Verification Annex, Part X, para. 59, third sentence.
[19] CWC, Verification Annex, Part X.4.
[20] CWC, Verification Annex, Part X.17.
[21] An extended version of this paper containing further analysis is available at : <http://www.hwcn.org/link/mkg/issue_17.html>.

En Bref/In Brief

(continued from page 16 - suite de page 16)

BENIN-NIGER BOUNDARY DISPUTE AT ICJ

On May 3, 2002, Benin and Niger jointly submitted a boundary dispute to the International Court of Justice (ICJ) for binding resolution. The two countries agreed, in a Special Agreement signed in Cotonou in June 2001, to request the ICJ to: (a) determine the course of the boundary between the Republic of Benin and the Republic of Niger in the sector of the River Niger; (b) specify which State owns each of the islands in the said river, and in particular Lété Island, and; (c) determine the course of the boundary between the two States in the sector of the River Mekrou. The parties have also undertaken, pending a decision from the ICJ, to "preserve peace, security and quiet among the peoples of the two States."

More information on the resolution of the dispute is available at: <http://www-icj-cij.org>.

CANADIAN BRANCH OF THE ILA

The International Law Association (ILA) is an international non-governmental organization dedicated to the study, clarification and development of public and private international law. The ILA, which has consultative status at several specialized agencies of the United Nations, has over 50 autonomous Branches around the world, including one in Canada since 1967. The ILA pursues its aims through its International Committee structure and by promoting discussions at biennial conferences. The Canadian Branch is hosting the 72nd Biennial World Conference in 2006.

More information about the activities of the Canadian Branch, including information on how to join, is available at: <http://www.ila-canada.ca>.

NEW JOURNAL: *WORLD TRADE REVIEW*

The World Trade Organization (WTO), in close collaboration with Cambridge University Press, has launched a new interdisciplinary peer-review journal, the *World Trade Review*. The journal, to be published three times a year, aims to be a forum for critical analysis and constructive debate on the issues facing the international trading system. The independent editorial board is comprised of professors drawn from universities around the world.

Subscription information is available on the website of the WTO at: <http://www.wto.org>.

Au Calendrier/Upcoming Events

Sustainable Justice – Implementing International Sustainable Development Law

June 13-15, 2002, Montreal: A conference of the Centre for International Sustainable Development Law will address issues of the environment, the economy, social justice, human rights, health and the inter-linkages among them. The conference is aimed at focusing the resources and expertise of the global legal community towards the *World Summit for Sustainable Development* to be held in Johannesburg, South Africa from 26 August through 4 September 2002. For more information, email <conference@cisdl.org> or see: <http://www.cisdl.org>.

From Government to Governance? The Growing Impact of Non-State Actors on the International and European Legal System.

July 4-6, 2002, The Hague, Netherlands: The 2002 Hague Joint Conference on Contemporary Issues of International Law is organized by the American Society of International Law, The Netherlands Society of International Law (NVIR), and the T.M.C. Asser Instituut. More information is available at:

<http://www.asil.org/hjctheme.htm>.

Équipe du Bulletin/Bulletin Team

Rédacteur/Editor: Robert McDougall

Rédacteurs associés/Associate Editors: Sonya Nigam, Olga Rivkin

Translation/Traduction: Hélène Laporte

Site Internet/Web Site: <http://www.ccil-ccdi.ca>

Courriel/E-mail: <bulletin@ccil-ccdi.ca>

ISSN: 0229-7787

Founded in 1972, the CCIL is an independent, non-partisan entity that seeks to promote the study and analysis of international legal issues by university scholars, government lawyers, practitioners and students. The CCIL *Bulletin* is published quarterly to share information about developments and activities in the field of international law in Canada and elsewhere.

Créé en 1972, le CCDI est une association indépendante, sans allégeance politique, qui cherche à promouvoir l'étude et l'analyse de questions de droit international par les spécialistes dans les milieux universitaires et gouvernementaux de même qu'en pratique privée. Publié quatre fois par an, le *Bulletin* contient des renseignements relatifs aux développements du droit international et aux activités se rapportant à ce domaine au Canada et ailleurs.