same focus of attention, than the MDGs; nor have they led to similar degrees of resource mobilization. Attempts have been made to build human rights into the MDG process:

The Millennium Development Goals and economic, social and cultural rights. A Joint Statement by the UN Committee on Economic, Social and Cultural Rights and the UN Commission on Human Rights' Special Rapporteurs on Economic, Social and Cultural Rights (29 November 2002), paras. 3–4:

We believe that chances for attaining Millennium Development Goals will improve if all UN agencies and governments adopt a comprehensive human rights approach to realizing the MDGs, including in the formulation of the corresponding indicators.

The Committee on Economic, Social and Cultural Rights (CESCR) and Commission on Human Rights' Special Rapporteurs on Economic, Social and Cultural Rights believe that human rights, including economic, social and cultural rights help to realize any strategy to meet the MDGs for example by:

(i) providing a compelling normative framework, underpinned by universally recognized human values and reinforced by legal obligations, for the formulation of national and international development policies towards achieving the MDGs;
(ii) raising the level of empowerment and participation of individuals;
(iii) Affirming the accountability of various stakeholders, including international organisations and NGOs, donors and transnational corporations, *vis-à-vis* people affected by problems related to poverty, hunger, education, gender inequality, health, housing and safe drinking water; and
(iv) reinforcing the twin principles of global equity and shared responsibility which are the very foundation for the Millennium Declaration.

Philip Alston, 'Ships Passing in the Night: the Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', *Human Rights Quarterly*, 27 (2005), 755 at 813 and 826–7:

Institutionalized arrangements for monitoring processes and outcomes and for establishing some form of accountability are indispensable in any human rights context and they are equally relevant and necessary in relation to MDGs. Such a dimension is necessary to ensure that the MDG initiative is more than just another bureaucratic scheme that will come and go just as its predecessors have. In the MDG context this would require the setting of explicit targets or benchmarks and then detailed annual or biannual reporting on the progress achieved in relation to those targets. Where the benchmark has not been met, a re-examination of the relevant policies would be triggered. The reporting would also need to be disaggregated to the extent possible, to take account of elements such as gender, regional disparities, and the situation of the most disadvantaged groups in the society in question (who should be identified in the benchmarking process). There is … an important role for international human rights mechanisms in this regard, but the first line of support should be at the national level. Thus, in every state in which a national human rights institution exists, the institution should be given an explicit mandate to review and report on the realization of MDG targets at regular intervals …

[Actors of the human rights community share a responsibility for the lack of integration of the MDG and human rights agendas.] In the future, human rights proponents need to prioritize, stop expecting a paradigm shift, and tailor their prescriptions more carefully to address particular situations. The key elements in a new approach to ensuring effective complementarity between human rights and the MDGs should be: (i) overt recognition of the relevance of human rights obligations; (ii) ensuring an appropriate legal framework; (iii) encouraging community participation but doing so in a realistic and targeted way; and (iv) promoting MDG accountability mechanisms. All of these elements should, however, avoid being too prescriptive. Instead, what is needed is faith in the dynamism and self-starting nature of the rights framework once it is brought inside the gates of the development enterprise.

United Nations Development Program (UNDP), The Application of a Human Rights-Based Approach to Development Programming – What is the Added Value? (1998) (excerpt):

A human rights-based approach not only defines and identifies the subjects of development but it also translates people's needs into rights, and recognises the human person as the active subject and claim-holder. It further identifies the duties and obligations of those, against whom a claim can be brought, to ensure that needs are met. Thus, the concept of claim-holders and duty-bearers introduces another important element of the rights approach namely, accountability, which in current development strategies is not adequately addressed. Increased focus on promoting accountability, using the human rights obligations as the vehicle, holds the key to improved effectiveness and transparency of action and as such offers the potential 'added-value' flowing from the application of a rights-based approach. Accountability derives from the duties and obligations of States that are required to take steps, for example, through legislation, policies and programmes, that aim to respect, protect, promote and fulfil the human rights of all people within their jurisdiction. It should be underscored that this does not imply conditionalities but rather encourages action through co-operation and constructive dialogue in the development process.

Consider also the following proposal for strengthening the human rights dimension of development co-operation, both in clarifying the nature of the obligations donor States owe to developing States, and in defining how development co-operation should be made more accountable towards the ultimate beneficiaries, who should also become active participants in the process of development, as stated in the Declaration on the right to development:

***The Role of development Co-operation and Food Aid in Realizing the Right to Adequate Food: Moving from Charity to Obligation*, Report of the Special Rapporteur on the right to food, Mr Olivier De Schutter (A/HRC/10/005, 6 February 2009):**

2. Development co-operation is one aspect of a broader obligation of international assistance and co-operation which may include, but is not limited to, the transfer of resources. In recent

years, development co-operation has been criticized from a number of different angles. Some have dismissed it as excessively donor-driven and top-down, and therefore as insufficiently informed by the views of the ultimate beneficiaries. The tendency of donors – whether Governments, intergovernmental agencies or private non-governmental organisations – to impose various demands on recipients without co-ordination has also been seen as imposing a heavy burden on the partner Government's administrative capacities, leading to suboptimal results. Others have denounced the mismanagement of aid by recipient Governments, noting that poor governance often resulted in aid not being used effectively. On 2 March 2005, the Paris Declaration on Aid Effectiveness was adopted as an attempt to improve the quality of aid. It has been endorsed by 122 Governments and the European Commission, 27 international organisations including six regional development banks, the World Bank and the Organisation for Economic Co-operation and Development (OECD), and a number of non-governmental organisations. The commitments contained in the Paris Declaration focus on the five principles of ownership, alignment, harmonization, managing for results and mutual accountability. These principles mark a shift from donor-driven to needs-driven aid strategies, and emphasize the need for evaluating the performance of both donors, particularly as regards harmonization and predictability of aid, and their partners ... [The] Paris Declaration could be further concretized if placed under a human rights framework, and particularly by taking into account the human right to adequate food ...

5. ... By co-operating internationally, ... donor States are not only meeting basic human needs. They are also contributing to realize the human right to adequate food. This has potentially three implications. First, there is the question of whether States are under an obligation to provide international assistance, including food aid, in certain circumstances, or at certain levels. Second, the way international assistance is delivered must take into account that it should contribute to implement the right to food: the principles of participation, transparency, accountability and non-discrimination, as well as access to remedies, must therefore be taken into account in the implementation of development co-operation policies and in the delivery of food aid. Third, the effectiveness of the aid provided should be regularly evaluated by measuring the contribution of the existing policies to the realization of the right to adequate food.

6. Whether in the field of development co-operation or in the field of food aid, their contributions are argued by donor countries to be made on a purely voluntary basis. However, donors cannot ignore their obligations under human rights law in the implementation of their policies in these fields. There are also situations where they may be under a duty to help, particularly when they have made commitments to this effect, and where reneging on those commitments would violate the principle of predictability for the recipient State.

[Defining obligations to provide aid]

7. Millennium Development Goal 8 is to develop a global partnership for development, a goal to which increased levels of donor country commitments to official development assistance can contribute ... Despite repeated commitments, again reaffirmed in the Millennium Declaration, in the Monterrey Consensus [Final Outcome of the International Conference on Financing for Development, adopted on 22 March 2002 in Monterrey, Mexico, A/CONF/198/3], in the Food and Agriculture Organisation of the United Nations (FAO) Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security ('FAO Guidelines') [see below, chapter 5], and in the 2008 Doha Declaration on Financing for Development, developed countries have mostly failed to meet the targets for ODA of

0.7 per cent of GDP to developing countries and 0.15 per cent to 0.2 per cent of GDP to least developed countries.

8. The Charter of the United Nations imposes in general terms an obligation on all its Members to 'take joint and separate action in cooperation with the Organisation', *inter alia*, for the achievement of human rights (see Arts. 55 and 56). Neither the International Covenant on Economic, Social and Cultural Rights, nor other human rights instruments, define precise levels at which States should provide aid. That, however, is not equivalent to saying that there is no such obligation; it is to say, rather, that this obligation is still 'imperfect', in need of being further clarified [A. Sen, 'Human Rights and Development' in B. Andreassen and St. Marks, *Development as a Human Right* (Cambridge, Mass.: Harvard University Press, 2006), chapter 2]. According to the Committee on Economic, Social and Cultural Rights, 'States parties [to the Covenant] should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food *and to provide the necessary aid when required*.' In the General Comment it devoted in 2000 to the right to the highest attainable standard of health, the Committee similarly noted that 'Depending on the availability of resources, States [in particular States in a position to assist developing countries in fulfilling their core and other obligations under the Covenant] should facilitate access to essential health facilities, goods and services in other countries, wherever possible *and provide the necessary aid when required*.' A consensus seems to emerge, at a minimum, on three requirements.

9. First, the Covenant imposes an obligation on all States parties to 'move as expeditiously and effectively as possible' towards the full realization of all human rights, including the right to adequate food. Moreover, 'any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources' [E/1991/23, para. 9]. Therefore, at a minimum, developed countries should make measurable progress towards contributing to the full realization of human rights by supporting the efforts of governments in developing countries, and they should not diminish pre-existing levels of aid calculated as ODA in percentage of the GDP. Any regression in the level of aid provided that is not fully justified should be treated, presumptively, as a violation of States' obligations under international law.

10. Second, the assistance provided should be non-discriminatory. Even if it remains based on the voluntary decisions of each donor Government, the aid provided should not be determined by the political, strategic, commercial or historically rooted interests of the donors, but by an objective assessment of the identified needs in developing countries. This is required if aid is to be effective ... It also follows from the recognition of the fact that development co-operation is a means of fulfilling human rights, particularly the right to food. The implication is that aid should be informed by an adequate mapping of needs – including, in particular, the existence in certain countries of food insecurity and vulnerability ...

11. Third, the amount of aid provided to recipient countries remains volatile and unpredictable, changing from one year to the next and from one country to another. This does not allow recipient countries to plan their development over a number of years and creates the risk of aid being suspended or interrupted for politically motivated reasons, without such measures being based on objective and transparently applied considerations. Where such decisions result in negative impacts on the enjoyment of human rights, particularly on the right to food, they require careful consideration of the donor State's obligations. Donor States must therefore follow

up on the commitments they make to provide certain levels of aid at a specific time and in a given year. Such commitments give rise to legitimate expectations for the recipient State, which cannot be disappointed without an adequate justification being provided by the donor State.

[Implementing development co-operation in a human rights framework]

26. Until a few years ago, international aid was seen as a unilateral undertaking, by a donor country, to provide assistance to a recipient country, whether through bilateral or through multilateral channels. Now, strategies which were donor-driven are increasingly needs-driven, and expected to be aligned with strategies developed at the level of the partner country. A human rights framework requires that we deepen the principles of ownership, alignment and mutual accountability, by shifting our attention to the role of national parliaments, civil society organisations, and the ultimate beneficiaries of aid – the rights-holders – in the implementation and evaluation of foreign aid. It is this triangulation, away from a purely bilateral relationship between Governments, which the adoption of a human rights framework requires.

27. The current reform process of international aid is based on the principles of ownership, alignment, harmonization, managing for results, and mutual evaluation, which are made explicit in the Paris Declaration on Aid Effectiveness. An explicit endorsement of a human rights framework for the implementation of these principles could make them more concrete and operational. At a general level, human rights-based approaches to development co-operation recognize people 'as key actors in their own development, rather than passive recipients of commodities and services': they emphasize participation as both a means and a goal; they seek to empower, and thus should combine top-down and bottom-up approaches; both outcomes and processes should be monitored and evaluated, following the adoption of measurable goals and targets in programming; all stakeholders should be involved in analysis; and the programmes should focus on marginalized, disadvantaged, and excluded groups, and aim at reducing disparity [United Nations Development Group, The Human Rights Based Approach to Development Co-operation – Towards a Common Understanding among UN Agencies (2003)]. The human right to adequate food in particular should be guiding countries' choices of development strategies, and provide an objective benchmark to evaluate the effectiveness of development efforts, thus improving the accountability of both donors and partners.

28. Specifically, the implementation of the principles of national ownership and alignment would be greatly facilitated if the recipient State were to define its national priorities according to a national strategy for the realization of the right to food, whether it is formally integrated into broader poverty-reduction strategy documents or not. The Committee on Economic, Social and Cultural Rights has insisted on the need for States to work towards the adoption of a national strategy to ensure food and nutrition security for all, based on human rights principles that define the objectives, and the formulation of policies and corresponding benchmarks (E/C.12/1999/5, para. 21). Guideline 3 of the FAO Guidelines provides useful indications about how States could adopt a national human rights-based strategy for the realization of the right to adequate food, emphasizing in particular the need to allow for monitoring of progress and accountability, and to develop such strategies through participatory processes.

29. One of the commitments of the States adhering to the Paris Declaration on Aid Effectiveness is to enhance partner countries' accountability to their citizens and parliaments for their development policies, strategies and performance (paras. 3 (iii), and 14). This objective has been further reaffirmed by the Accra Summit on Aid Effectiveness of 2–4 September 2008 and in the 2008 Doha Declaration on Financing for Development. The elaboration, through participatory

processes, of a national strategy for the realization of the right to food provides a concrete means to improve the accountability of national governments and their responsiveness to the needs of their populations. The Accra Agenda for Action provides that developing countries and donors will 'ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability' (para. 13(d)). Grounding development assistance on the human right to food would contribute to this agenda. Since development co-operation programmes would fit into a national strategy for the realization of the right to food defined at national level, the recipient Government would improve its bargaining position in aid negotiations. Since this national strategy would involve national parliaments and civil society organisations, development policies would be democratized. And since it would set benchmarks and allocate responsibilities, it would increase accountability in their implementation.

The principles of progressive realization, non-discrimination (or needs-based development co-operation), and predictability, are put forward in the Report above as a means to overcome the dichotomy between an understanding of development co-operation as 'charity' (i.e. as purely voluntary), and one which sees development co-operation as an 'obligation' (i.e. to transfer resources at certain defined levels). An interesting proposal made by Arjun Sengupta, the former independent expert on the right to development, also in order to overcome this dichotomy, is that of 'development compacts': developing countries would commit to fulfil and protect human rights, in particular by the adoption and implementation of a rights-based development programme and by setting up appropriate institutions, against the promise of the international community – including the United Nations system, the international financial institutions, and developed States – to support that process. Specifically, Sengupta proposed that the Development Assistance Committee of the Organization for Economic Co-operation and Development (OECD) could organize a 'support group' to scrutinize, review and approve the national development policies of the developing country; identify financial burden sharing and specific responsibilities and duties of the parties to the compact; and monitor the implementation of the compact. A new financing facility could also be established in order to ensure that resources are made available to finance the programmes which have been approved. Thus conceived, development compacts are 'a mechanism for ensuring that all stakeholders recognize the mutuality of obligations, so that the obligations of developing countries to carry out rights-based programmes are matched by reciprocal obligations of the international community to co-operate to enable the implementation of the programmes. The purpose of development compacts is to assure the developing countries that if they fulfil their obligations, the programme for realizing the right to development will not be disrupted owing to lack of financing' (*Fifth Report of the Independent Expert on the Right to Development*, E/CN.4/2002/WG.18/6, para. 14). Such development compacts thus clarify, by mutual agreement, the content of the obligations that correspond to the right to development, both for developing countries and for developed countries that are in a position to assist (see also A. Sengupta, 'On the

Theory and Practice of the Right to Development', *Human Rights Quarterly*, 24, No. 4 (2002), 837–89; and A. Sengupta, A. Negi and M. Basu (eds.), *Reflections on the Right to Development* (London: Sage Publications, 2005)).

Finally, it is vital to emphasize that neither the right to development, nor the obligation of international assistance and co-operation, are exclusively or even primarily about the transfer of resources from wealthy States to poorer States. This is first because the right to development can be given concrete meaning, and be considered justiciable, when considered in its 'do no harm' component: even if the obligation to assist is considered, at yet, to constitute an 'imperfect' obligation insofar as resource transfers are considered, at a minimum, it does require that States abstain from taking measures that could create obstacles to the realization of the right to development, for example by plundering the natural resources of another State or by allowing the revenues from the exploitation of natural resources to be diverted from the development needs of the population (indeed, these are the consequences derived by the African Commission on Human and Peoples' Rights from Article 22 of the African Charter, that recognizes the right to development: see Communication 227/1999, *Democratic Republic of Congo* v. *Burundi, Rwanda and Uganda* (2004) A.H.R.L.R. 19 (ACHPR 2004) (20th Activity Report); and Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria* (2001) A.H.R.L.R. 60 (ACHPR 2001) (15th Annual Activity Report), presented in chapter 3, section 1).

But a second reason to be distrustful about assimilating the right to development to the transfer of resources from rich countries to poor countries is because such a view exemplifies a typically 'humanitarian' approach to the question of development – one that insists on alleviating poverty, rather than on combating the structural causes of poverty. It is for taking such an approach that the Millennium Development Goals have been heavily criticized, both by certain economists and by certain jurists. Erik Reinert, a Norwegian economist, thus notes that '[t]he pursuit of the MDGs seems to indicate that the United Nations institutions, following several failed development decades, have abandoned the effort to treat the causes of poverty, and have instead concentrated on attacking the symptoms of poverty ... Instead of attacking the sources of poverty from the inside of the production system ... the symptoms are addressed by throwing money at them from the outside' (E. S. Reinert, *How Rich Countries Got Rich ... and Why Poor Countries Stay Poor* (London: Constable, 2007), p. 240). This echoes the critique by Margot Salomon:

Margot E. Salomon, 'Poverty, Privilege and International Law: the Millennium Development Goals and the Guise of Humanitarianism', *German Yearbook of International Law*, 51 (2009), 39–73 at 72:

International law's sting, that which is said to distinguish it from other social scientific approaches to addressing poverty, is the principle of accountability. Yet there has been little accountability to the poor and impoverished, to the hungry, and to those without access to the basic necessities of life struggling on the other side of this small planet. Accountability remains

all but absent in the wake of the financial crisis as poor people in poor countries pay the heaviest price for a disaster they had no hand in creating, and we can anticipate that climate change will apportion its retribution similarly. The MDGs are not being achieved because they exist as a discrete humanitarian project rooted in the idea of collective good and shared responsibility, appended to the far grander economic project resting on a belief in individualized gain and minimal regulation. As a result, the MDGs were not set up to challenge structural inequality, nor to present economic alternatives, nor were they given any teeth with which to confront the demands of poverty reduction.

It is thus important to anchor the right to development, as does the Declaration on the Right to Development, into Article 28 of the Universal Declaration of Human Rights, which states that everyone is entitled to 'a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized'. The implication is that all international agreements – including in particular in areas such as trade and investment – should be evaluated, in order to ensure that they will contribute to the full realization of human rights and to development as defined by the Declaration on the Right to Development. It is also this more ambitious view of the right to development that was approved at the Vienna World Conference on Human Rights:

Vienna Declaration and Programme of Action (World Conference on Human Rights, 14–25 June 1993), paras. 10–12:

10. As stated in the Declaration on the Right to Development, the human person is the central subject of development.

While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.

States should co-operate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international co-operation for the realization of the right to development and the elimination of obstacles to development.

Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.

11. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations ...

12. The World Conference on Human Rights calls upon the international community to make all efforts to help alleviate the external debt burden of developing countries, in order to supplement the efforts of the Governments of such countries to attain the full realization of the economic, social and cultural rights of their people.

2.5. Questions for discussion: international co-operation and the right to development

1. What are the commonalities and differences between Sen's concept of 'development as freedom' and the human rights-based approaches to development, as put forward, for instance, in the context of the discussion on the Millennium Development Goals? Are these views identical, albeit expressed in different terminologies? Are they compatible and complementary? Or are they incompatible?
2. One of the main critics of the 'big push' idea underlying the Millennium Development Goals is the economist William Easterly. Easterly argues against the idea that lack of development essentially is attributable to a 'poverty trap', itself the result of insufficient savings and thus insufficient ability to invest in the future: 'Rather than worrying about how much investment is "needed" to sustain a given growth rate, we should concentrate on strengthening incentives to invest in the future and let the various forms of investment play out how they may ... Giving aid on the basis of the financing gap creates perverse incentives for the recipient ... The financing gap is larger, and aid larger, the lower the saving of the recipient. This creates incentives against the recipient's marshaling its own resources for development' (W. Easterly, *The Elusive Quest for Growth* (Cambridge, Mass.: MIT Press, 2001), p. 44). He also contrasts the role of 'planners' with that of 'searchers', the former imposing solutions top-down on the basis of their understanding of the needs of developing countries, and the latter identifyfing bottom-up projects that work best in specific local contexts (W. Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest have done so much Ill and so Little Good* (Oxford University Press, 2006)). Are Sen's ideas about the instrumental role of freedoms in achieving development, and the human rights-based approaches to development (that put forward the principles of accountability, non-discrimination, participation and empowerment), appropriate answers to the concerns expressed by Easterly?
3. There are three obstacles, it could be argued, to making the right to development operational. One is the problem of causality: lack of development in any particular region or country cannot be attributed solely to policies or measures adopted by one actor or set of actors, but are instead the result of a combination of causes, making assertions of responsibility problematic. Another is what some have referred to as the 'paradox of the many hands': since the international community as a whole is responsible for the lack of development, no State in particular bears responsibility. A third is the apparently limitless character of the obligation of assistance and co-operation: it appears difficult to define the precise levels at which resources should be transferred from rich States to developing States, in order to fulfil the right to development. Are the 'development compacts' proposed by Sengupta an adequate answer to these obstacles? Should the obligations corresponding to the right to development be defined through a new international agreement? Should other solutions be explored?

3 THE RESPONSIBILITY OF STATES IN INTER-STATE CO-OPERATION

Specific problems of imputability arise in circumstances where a State has acted in collaboration with other States, either in their bilateral relations, or in the establishment of an international organization to which certain powers are delegated. This section reviews situations where States co-operate with one another, and where their collaborative action results in a violation of an international obligation of at least one of the States concerned. Section 4 examines the specific case of international organizations. This latter situation is both more complex, since a distinct subject of the international legal order has been created with its own rights and obligations under international law; and in certain ways more simple, since, if none of the States participating in the establishment of the organization or in its decision-making may be held responsible under international law, there remains the possibility that the responsibility of the organization itself will be engaged.

3.1 Deportation cases

A first typical case where human rights violations may result from the collaborative conduct by States, is where an individual is removed by one State to another, where he or she faces the risk of violations in the receiving State. Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates:

1. No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The prohibition against *refoulement* was then developed in the case law at both the regional and universal levels. While this prohibition is explored further in greater detail as an illustration of the nature of the protection benefiting rights of an 'absolute' character (see chapter 3, section 2.2.), the examples set out in this section aim to introduce the specific difficulties encountered where the measure which is alleged to constitute a violation is part of a larger operation involving more than one State.

European Court of Human Rights (plen.), *Soering* v. *United Kingdom*, judgment of 7 July 1989, Series A, No. 161:

[At the time of the application, the applicant, Mr Jens Soering, a German national, was detained in prison in England pending extradition to the United States to face charges of murder in the

Commonwealth of Virginia. Indeed, on 11 August 1986 the Government of the United States had requested the applicant's and Miss Haysom's extradition under the terms of the Extradition Treaty of 1972 between the United States and the United Kingdom. Both Jens Soering and his girlfriend had been indicted on charges of murdering the parents of the latter, and they had fled the United States when they were arrested in England in connection with a cheque fraud. Later – in March 1987 – Germany too requested the extradition of Jens Soering, since the German courts had jurisdiction to try the applicant. Mr Soering lodged an application (No. 14038/88) with the European Commission of Human Rights on 8 July 1988. In his application Mr Soering stated his belief that there was a serious likelihood that he would be sentenced to death if extradited to the United States. He maintained that in the circumstances and, in particular, having regard to the 'death row phenomenon', he would thereby be subjected to inhuman and degrading treatment and punishment contrary to Article 3 of the Convention. In his further submission his extradition to the United States would constitute a violation of Article 6(3)(c) of the Convention because of the absence of legal aid in the State of Virginia to pursue various appeals. Finally, he claimed that, in breach of Article 13, he had no effective remedy under UK law in respect of his complaint under Article 3. Interim measures were granted by the President of the Commission, which were subsequently prolonged by the Commission on several occasions until the reference of the case to the Court.]

80. The applicant alleged that the decision by the Secretary of State for the Home Department to surrender him to the authorities of the United States of America would, if implemented, give rise to a breach by the United Kingdom of Article 3 of the Convention, which provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

A. Applicability of Article 3 in cases of extradition

81. The alleged breach derives from the applicant's exposure to the so-called 'death row phenomenon'. This phenomenon may be described as consisting in a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death.

82. In its report ... the Commission reaffirmed 'its case law that a person's deportation or extradition may give rise to an issue under Article 3 of the Convention where there are serious reasons to believe that the individual will be subjected, in the receiving State, to treatment contrary to that Article' ... The applicant likewise submitted that Article 3 not only prohibits the Contracting States from causing inhuman or degrading treatment or punishment to occur within their jurisdiction but also embodies an associated obligation not to put a person in a position where he will or may suffer such treatment or punishment at the hands of other States. For the applicant, at least as far as Article 3 is concerned, an individual may not be surrendered out of the protective zone of the Convention without the certainty that the safeguards which he would enjoy are as effective as the Convention standard.

83. The United Kingdom Government, on the other hand, contended that Article 3 should not be interpreted so as to impose responsibility on a Contracting State for acts which occur outside its jurisdiction. In particular, in their submission, extradition does not involve the responsibility of the extraditing State for inhuman or degrading treatment or punishment which the extradited person may suffer outside the State's jurisdiction. To begin with, they maintained, it would be straining the language of Article 3 intolerably to hold that by surrendering a fugitive criminal the extraditing State has 'subjected' him to any treatment or punishment that he will receive following conviction and sentence in the receiving State. Further arguments advanced against

the approach of the Commission were that it interferes with international treaty rights; it leads to a conflict with the norms of international judicial process, in that it in effect involves adjudication on the internal affairs of foreign States not Parties to the Convention or to the proceedings before the Convention institutions; it entails grave difficulties of evaluation and proof in requiring the examination of alien systems of law and of conditions in foreign States; the practice of national courts and the international community cannot reasonably be invoked to support it; it causes a serious risk of harm in the Contracting State which is obliged to harbour the protected person, and leaves criminals untried, at large and unpunished.

In the alternative, the United Kingdom Government submitted that the application of Article 3 in extradition cases should be limited to those occasions in which the treatment or punishment abroad is certain, imminent and serious. In their view, the fact that by definition the matters complained of are only anticipated, together with the common and legitimate interest of all States in bringing fugitive criminals to justice, requires a very high degree of risk, proved beyond reasonable doubt, that ill-treatment will actually occur.

84. The Court will approach the matter on the basis of the following considerations.

85. As results from Article 5 §1(f), which permits 'the lawful ... detention of a person against whom action is being taken with a view to ... extradition', no right not to be extradited is as such protected by the Convention. Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee (see, *mutatis mutandis*, the *Abdulaziz, Cabales and Balkandali* judgment of 25 May 1985, Series A No. 94, pp. 31–32, §§59–60 – in relation to rights in the field of immigration). What is at issue in the present case is whether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State.

86. Article 1 of the Convention, which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I', sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 in particular.

In the instant case it is common ground that the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant's complaints. It is also true that in other international instruments cited by the United Kingdom Government – for example the 1951 United Nations Convention relating to the Status of Refugees (Article 33), the 1957 European Convention on Extradition (Article 11) and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment

or Punishment (Article 3) – the problems of removing a person to another jurisdiction where unwanted consequences may follow are addressed expressly and specifically.

These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction.

87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see the *Ireland* v. *United Kingdom* judgment of 18 January 1978, Series A No. 25, p. 90, §239). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, the *Artico* judgment of 13 May 1980, Series A No. 37, p. 16, §33). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' (see the *Kjeldsen, Busk Madsen and Pedersen* judgment of 7 December 1976, Series A No. 23, p. 27, §53).

88. Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.

The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that 'no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture'. The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.

89. What amounts to 'inhuman or degrading treatment or punishment' depends on all the circumstances of the case ... Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the

requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

90. It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article ...

91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.

B. Application of Article 3 in the particular circumstances of the present case

92. The extradition procedure against the applicant in the United Kingdom has been completed, the Secretary of State having signed a warrant ordering his surrender to the United States authorities ...; this decision, albeit as yet not implemented, directly affects him. It therefore has to be determined on the above principles whether the foreseeable consequences of Mr Soering's return to the United States are such as to attract the application of Article 3. This inquiry must concentrate firstly on whether Mr Soering runs a real risk of being sentenced to death in Virginia, since the source of the alleged inhuman and degrading treatment or punishment, namely the 'death row phenomenon', lies in the imposition of the death penalty. Only in the event of an affirmative answer to this question need the Court examine whether exposure to the 'death row phenomenon' in the circumstances of the applicant's case would involve treatment or punishment incompatible with Article 3.

Whether the applicant runs a real risk of a death sentence and hence of exposure to the 'death row phenomenon'

93. The United Kingdom Government ... did not accept that the risk of a death sentence attains a sufficient level of likelihood to bring Article 3 into play. Their reasons were fourfold.

Firstly, as illustrated by his interview with the German prosecutor where he appeared to deny any intention to kill ..., the applicant has not acknowledged his guilt of capital murder as such.

Secondly, only a prima facie case has so far been made out against him. In particular, in the United Kingdom Government's view the psychiatric evidence ... is equivocal as to whether Mr Soering was suffering from a disease of the mind sufficient to amount to a defence of insanity under Virginia law ...

Thirdly, even if Mr Soering is convicted of capital murder, it cannot be assumed that in the general exercise of their discretion the jury will recommend, the judge will confirm and the Supreme Court of Virginia will uphold the imposition of the death penalty ... The United Kingdom Government referred to the presence of important mitigating factors, such as the applicant's age and mental condition at the time of commission of the offence and his lack of previous criminal activity, which would have to be taken into account by the jury and then by the judge in the separate sentencing proceedings ...

Fourthly, the assurance received from the United States must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out ...

At the public hearing the Attorney General nevertheless made clear his Government's understanding that if Mr Soering were extradited to the United States there was 'some risk', which was 'more than merely negligible', that the death penalty would be imposed ...

96. [The] various elements arguing for or against the imposition of a death sentence [in the State of Virginia] have to be viewed in the light of the attitude of the prosecuting authorities.

97. The Commonwealth's Attorney for Bedford County, Mr Updike, who is responsible for conducting the prosecution against the applicant, has certified that 'should Jens Soering be convicted of the offence of capital murder as charged ... a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out' ... The Court notes ... that this undertaking is far from reflecting the wording of Article IV of the 1972 Extradition Treaty between the United Kingdom and the United States, which speaks of 'assurances satisfactory to the requested Party that the death penalty will not be carried out' ... However, the offence charged, being a State and not a Federal offence, comes within the jurisdiction of the Commonwealth of Virginia; it appears as a consequence that no direction could or can be given to the Commonwealth's Attorney by any State or Federal authority to promise more; the Virginia courts as judicial bodies cannot bind themselves in advance as to what decisions they may arrive at on the evidence; and the Governor of Virginia does not, as a matter of policy, promise that he will later exercise his executive power to commute a death penalty ...

This being so, Mr Updike's undertaking may well have been the best 'assurance' that the United Kingdom could have obtained from the United States Federal Government in the particular circumstances. According to the statement made to Parliament in 1987 by a Home Office Minister, acceptance of undertakings in such terms 'means that the United Kingdom authorities render up a fugitive or are prepared to send a citizen to face an American court on the clear understanding that the death penalty will not be carried out ... It would be a fundamental blow to the extradition arrangements between our two countries if the death penalty were carried out on an individual who had been returned under those circumstances' ... Nonetheless, the effectiveness of such an undertaking has not yet been put to the test.

98. The applicant contended that representations concerning the wishes of a foreign government would not be admissible as a matter of law under the Virginia Code or, if admissible, of any influence on the sentencing judge.

Whatever the position under Virginia law and practice ..., and notwithstanding the diplomatic context of the extradition relations between the United Kingdom and the United States, objectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed. In the independent exercise of his discretion the Commonwealth's Attorney has himself decided to seek and to persist in seeking the death penalty because the evidence, in his determination, supports such action ... If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the 'death row phenomenon'.

99. The Court's conclusion is therefore that the likelihood of the feared exposure of the applicant to the 'death row phenomenon' has been shown to be such as to bring Article 3 into play ...

111. ... in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.

Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.

Interestingly, the European Court of Human Rights has refused to consider that the fact that a receiving State was bound by the European Convention on Human Rights necessarily excluded a responsibility of the sending State, where there are circumstances which may give rise to fear that there exists a substantial risk of torture or ill-treatment in a third State, to which the individual could be removed by the receiving State.

European Court of Human Rights (3d sect.), *T.I.* v. *United Kingdom* (Appl. No. 43844/98), decision (inadmissibility) of 7 March 2000:

[After having fled Sri Lanka, where he feared persecution in the hands of pro-governmental groups as well as by the the Tamil Tigers (LTTE, a Tamil terrorist organization), T.I. arrived in Germany, where he claimed asylum on 13 February 1996. The claim failed, since the local courts considered that the actions of the LTTE could not be attributed to the State and that the applicant would be sufficiently safe from political persecution if he returned to the south of Sri Lanka. Without exhausting the appeals in Germany, T.I. then left for the United Kingdom, where he filed another asylum claim in September 1997. On 15 January 1998, the UK Government requested that Germany accept responsibility for the applicant's asylum request pursuant to the Dublin Convention. The Dublin Convention (the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European

Communities, 15 June 1990) provides for measures to ensure that applicants for asylum have their applications examined by one of the EU Member States and that applicants for asylum are not referred successively from one Member State to another. Articles 4–8 set out the criteria for determining the single Member State responsible for examining an application for asylum. Pursuant to Article 7, the responsibility for examining an application for asylum is incumbent upon the Member State responsible for controlling the entry of the alien into the territory of the Member States. The United Kingdom and Germany are both signatory States. In accordance with its obligations under the Dublin Convention, on 26 January 1998, Germany agreed to take T.I. back. On 28 January 1998, the Secretary of State issued a certificate under section 2 of the Asylum and Immigration Act 1996 and directed the applicant's removal to Germany. He refused to examine the substance of the applicant's asylum claim. After his appeals before the UK courts failed, T.I. filed an application with the European Court of Human Rights. He complained that the United Kingdom's conduct in ordering his removal to Germany, from where he will be summarily removed to Sri Lanka, violated Articles 2, 3, 8 and 13 of the Convention. He submitted in particular that there are substantial grounds for believing that, if returned to Sri Lanka, there was a real risk of facing treatment contrary to Article 3 of the Convention at the hands of the security forces, the LTTE and the pro-Government Tamil militant organizations. He noted that the German authorities only treated as relevant the acts of the State and that they did not consider excesses by individual State officials as State acts. The Court's answer follows:]

The Court reiterates in the first place that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. It also notes that the right to political asylum is not contained in either the Convention or its protocols (see the *Vilvarajah and others* v. *United Kingdom* judgment of 30 October 1991, Series A No. 215, p. 34, §102). It is however well-established in its case law that the fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3, read in conjunction with Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3 (see, amongst other authorities, the *Ahmed* v. *Austria* judgment of 17 December 1996, *Reports* 1996–VI, p. 2206, §§39–40).

The Court's case law further indicates that the existence of this obligation is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Having regard to the absolute character of the right guaranteed, Article 3 may extend to situations where the danger emanates from persons or groups of persons who are not public officials, or from the consequences to health from the effects of serious illness (see *H.L.R.* v. *France* judgment of 29 April 1997, *Reports* 1997–III, §40, *D* v. *United Kingdom* judgment of 2 May 1997, *Reports* 1997–III, §49). In any such contexts, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny.

In the present case, the applicant is threatened with removal to Germany, where a deportation order was previously issued to remove him to Sri Lanka. It is accepted by all parties that the applicant is not, as such, threatened with any treatment contrary to Article 3 in Germany. His removal to Germany is however one link in a possible chain of events which might result in his return to Sri Lanka where it is alleged that he would face the real risk of such treatment.

The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (see e.g. *Waite and Kennedy* v. *Germany* judgment of 18 February 1999, *Reports* 1999, §67). The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered.

On the facts however, the Court arrived at the conclusion that the fears expressed by Mr T.I. were not substantiated. It was not established in its view that there was a real risk that Germany would expel the applicant to Sri Lanka in breach of Article 3 of the Convention. Consequently, the United Kingdom had not failed in their obligations under this provision by taking the decision to remove the applicant to Germany.

A similar approach was adopted by the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR). But the methodology followed by the Committee did undergo a certain evolution. In 1993, in *Kindler* v. *Canada*, the Human Rights Committee had taken the view that, although Canada had abolished the death penalty on its territory, it was not in violation with Article 6 ICCPR when extraditing Mr Kindler to the United States, where he faced the imposition of the death penalty. Canada would be in violation of Article 6 of the Covenant if it decided to reintroduce the death penalty under its jurisdiction. However, the Committee reasoned that the question whether Mr Kindler's rights under Article 6 of the Covenant would be violated by extraditing him to the United States should be answered taking into account the situation of the death penalty in the United States, where it was not abolished and where, therefore, the imposition of the death penalty remains acceptable under the Covenant. The Committee thus considered that '[w]hile States must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr Kindler would have violated Canada's obligations under article 6 of the Covenant, if the decision to extradite without assurances would have been taken arbitrarily or summarily. The evidence before the Committee reveals, however, that the Minister of Justice reached a decision after hearing argument in favour of seeking assurances. The Committee further takes note of the reasons given by Canada not to seek assurances in Mr Kindler's case, in

particular, the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder' (Communication No. 470/1990, final views adopted on 30 July 1993, para. 14.6.). This approach was abandoned ten years later, in the case of *Judge* v. *Canada*:

Human Rights Committee, *Judge* v. *Canada*, Communication No. 829/1998, final views of 20 October 2003 (CCPR/C/78/D/829/1998 (2003)).

[The author of the communication is Mr Roger Judge, a citizen of the United States. At the time of the submission, he was detained in Québec, Canada. Mr Judge had been convicted on 15 April 1987 in Philadelphia, Pennsylvania, on two counts of first-degree murder and possession of an instrument of crime, and had subsequently been sentenced to death by electric chair. He escaped from prison on 14 June 1987 and fled to Canada. He was deported to the United States on 7 August 1998, on the day the communication was submitted on his behalf to the Human Rights Committee.]

Question 1. As Canada has abolished the death penalty, did it violate the author's right to life under article 6, his right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment under article 7, or his right to an effective remedy under article 2, paragraph 3, of the Covenant by deporting him to a State in which he was under sentence of death without ensuring that that sentence would not be carried out?

10.2 In considering Canada's obligations, as a State party which has abolished the death penalty, in removing persons to another country where they are under sentence of death, the Committee recalls its previous jurisprudence in *Kindler* v. *Canada*, that it does not consider that the deportation of a person from a country which has abolished the death penalty to a country where he/she is under sentence of death amounts *per se* to a violation of article 6 of the Covenant. The Committee's rationale in this decision was based on an interpretation of the Covenant which read article 6, paragraph 1, together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. It considered that as Canada itself had not imposed the death penalty but had extradited the author to the United States to face capital punishment, a State which had not abolished the death penalty, the extradition itself would not amount to a violation by Canada unless there was a real risk that the author's rights under the Covenant would be violated in the United States. On the issue of assurances, the Committee found that the terms of article 6 did not necessarily require Canada to refuse to extradite or to seek assurances but that such a request should at least be considered by the removing State.

10.3 While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights – the right to life – and in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the abovementioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out. Significantly, the Committee notes that since *Kindler* the State party itself has recognized the need to amend

its own domestic law to secure the protection of those extradited from Canada under sentence of death in the receiving State, in the case of *United States* v. *Burns* [[2001] 1 S.C.R. 283: see also on this case the references in *Suresh* v. *Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3, discussed in chapter 3, section 2.2.]. There, the Supreme Court of Canada held that the government must seek assurances, in all but exceptional cases, that the death penalty will not be applied prior to extraditing an individual to a State where he/she faces capital punishment. It is pertinent to note that under the terms of this judgment, 'Other abolitionist countries do not, in general, extradite without assurances.' The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.

10.4 In reviewing its application of article 6, the Committee notes that, as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Paragraph 1 of article 6, which states that 'Every human being has the inherent right to life …', is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances. Paragraphs 2 to 6 of article 6 are evidently included to avoid a reading of the first paragraph of article 6, according to which that paragraph could be understood as abolishing the death penalty as such. This construction of the article is reinforced by the opening words of paragraph 2 ('In countries which have not abolished the death penalty …') and by paragraph 6 ('Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.'). In effect, paragraphs 2 to 6 have the dual function of creating an exception to the right to life in respect of the death penalty and laying down limits on the scope of that exception. Only the death penalty pronounced when certain elements are present can benefit from the exception. Among these limitations are that found in the opening words of paragraph 2, namely, that only States parties that 'have not abolished the death penalty' can avail themselves of the exceptions created in paragraphs 2 to 6. For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.

10.5 The Committee acknowledges that by interpreting paragraphs 1 and 2 of article 6 in this way, abolitionist and retentionist States parties are treated differently. But it considers that this is an inevitable consequence of the wording of the provision itself, which, as becomes clear from the *Travaux Préparatoires*, sought to appease very divergent views on the issue of the death penalty, in an effort at compromise among the drafters of the provision. The Committee notes that it was expressed in the *Travaux* that, on the one hand, one of the main principles of the Covenant should be abolition, but on the other, it was pointed out that capital punishment existed in certain countries and that abolition would create difficulties for such countries. The death penalty was seen by many delegates and bodies participating in the drafting process as an 'anomaly' or a 'necessary evil'. It would appear logical, therefore, to interpret the rule in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly.

10.6 For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional

Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author.

10.7 As to the State party's claim that its conduct must be assessed in the light of the law applicable at the time when the alleged treaty violation took place, the Committee considers that the protection of human rights evolves and that the meaning of Covenant rights should in principle be interpreted by reference to the time of examination and not, as the State party has submitted, by reference to the time the alleged violation took place. The Committee also notes that prior to the author's deportation to the United States the Committee's position was evolving in respect of a State party that had abolished capital punishment (and was a State party to the Second Optional Protocol to the International Covenant on Human Rights, aiming at the abolition of the death penalty), from whether capital punishment would subsequent to removal to another State be applied in violation of the Covenant to whether there was a real risk of capital punishment as such (Communication No. 692/1996, *A.R.J.* v. *Australia*, Views adopted on 28 July 1997 and Communication No. 706/1996, *G.T.* v. *Australia*, Views adopted on 4 November 1997). Furthermore, the State party's concern regarding possible retroactivity involved in the present approach has no bearing on the separate issues to be addressed under question 2 below.

Question 2. The State party had conceded that the author was deported to the United States before he could exercise his right to appeal the rejection of his application for a stay of his deportation before the Quebec Court of Appeal. As a consequence the author was not able to pursue any further remedies that might be available. By deporting the author to a State in which he was under sentence of death before he could exercise all his rights to challenge that deportation, did the State party violate his rights under articles 6, 7 and 2, paragraph 3 of the Covenant?

10.8 As to whether the State party violated the author's rights under articles 6, and 2, paragraph 3, by deporting him to the United States where he is under sentence of death, before he could exercise his right to appeal the rejection of his application for a stay of deportation before the Quebec Court of Appeal and, accordingly, could not pursue further available remedies, the Committee notes that the State party removed the author from its jurisdiction within hours after the decision of the Superior Court of Quebec, in what appears to have been an attempt to prevent him from exercising his right of appeal to the Court of Appeal. It is unclear from the submissions before the Committee to what extent the Court of Appeal could have examined the author's case, but the State party itself concedes that as the author's petition was dismissed by the Superior Court for procedural and substantive reasons ..., the Court of Appeal could have reviewed the judgment on the merits.

10.9 The Committee recalls its decision in *A.R.J.* v. *Australia*, a deportation case where it did not find a violation of article 6 by the returning state as it was not foreseeable that he would be sentenced to death and 'because the judicial and immigration instances seized of the case heard extensive arguments' as to a possible violation of article 6. In the instant case, the Committee finds that, by preventing the author from exercising an appeal available to him under domestic law, the State party failed to demonstrate that the author's contention that his deportation to a country where he faces execution would violate his right to life, was sufficiently considered. The

State party makes available an appellate system designed to safeguard any petitioner's, including the author's, rights and in particular the most fundamental of rights – the right to life. Bearing in mind that the State party has abolished capital punishment, the decision to deport the author to a state where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of article 6, together with article 2, paragraph 3, of the Covenant.

10.10. Having found a violation of article 6, paragraph 1 alone and, read together with article 2, paragraph 3 of the Covenant, the Committee does not consider it necessary to address whether the same facts amount to a violation of article 7 of the Covenant.

The Human Rights Committee returned to this case law in its most recent General Comment on Article 7 ICCPR. It will be noted, however, that certain controversies continue to exist concerning the degree of certainty which must exist about the risks incurred by the individual upon being returned to a country where he/she fears for his/her life or security (see *Cox* v. *Canada*, Communication No. 539/1993 (final views of 31 October 1994) (CCPR/C/52/D/539/1993 (1994)), discussed in chapter 9):

Human Rights Committee, General Comment No. 20, *Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (1992), para. 9:

In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.

The vast majority of cases presented to the Committee against Torture (CAT) in individual communications concern deportation cases, where an individual expelled, extradited, or denied entry (*refouled*) fears that he/she will be subject to torture in the country of destination. The CAT summarized the factors to be taken into account in the assessment of such claims:

Committee against Torture, General Comment No. 1, *Implementation of Article 3 of the Convention in the Context of Article 22* (Refoulement *and Communications)* (1996):

In view of the requirements of article 22, paragraph 4, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that the Committee against Torture 'shall consider communications received under article 22 in the light of all information made available to it by or on behalf of the individual and by the State party concerned',

In view of the need arising as a consequence of the application of rule 111, paragraph 3, of the rules of procedure of the Committee (CAT/C/3/Rev.2), and,

In view of the need for guidelines for the implementation of article 3 under the procedure foreseen in article 22 of the Convention

The Committee against Torture, at its nineteenth session, 317th meeting, held on 21 November 1997, adopted the following general comment for the guidance of States parties and authors of communications:

1. Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention.
2. The Committee is of the view that the phrase 'another State' in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited.
3. Pursuant to article 1, the criterion, mentioned in article 3, paragraph 2, of 'a consistent pattern or gross, flagrant or mass violations of human rights' refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Admissibility

4. The Committee is of the opinion that it is the responsibility of the author to establish a prima facie case for the purpose of admissibility of his or her communication under article 22 of the Convention by fulfilling each of the requirements of rule 107 of the rules of procedure of the Committee.

Merits

5. With respect to the application of article 3 of the Convention to the merits of a case, the burden is upon the author to present an arguable case. This means that there must be a factual basis for the author's position sufficient to require a response from the State party.
6. Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.
7. The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present. All pertinent information may be introduced by either party to bear on this matter.
8. The following information, while not exhaustive, would be pertinent:
   (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see article 3, paragraph 2)?
   (b) Has the author been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
   (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
   (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
   (e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?

(f) Is there any evidence as to the credibility of the author?
(g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?

9. Bearing in mind that the Committee against Torture is not an appellate, a quasi-judicial or an administrative body, but rather a monitoring body created by the States parties themselves with declaratory powers only, it follows that: (a) Considerable weight will be given, in exercising the Committee's jurisdiction pursuant to article 3 of the Convention, to findings of fact that are made by organs of the State party concerned; but (b) The Committee is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

2.6. Questions for discussion: the nature of State responsibility in deportation cases and beyond

1. Is the shift in the position of the Human Rights Committee, from Kindler v. Canada in 1993 to Judge v. Canada in 2003, justified? Consider Article 16 of the International Law Commission's 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (entitled 'Aid or Assistance in the Commission of an Internationally Wrongful Act'), which reads: 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.' Is the question raised by the deportation cases reviewed in this section one of complicity, as understood in this provision of the ILC's Draft Articles?
2. The case law inaugurated by the European Court of Human Rights in *T. I.* v. *United Kingdom* may be evolving. In the case of *K. R. S.* v. *United Kingdom*, the European Court of Human Rights had initially requested the United Kingdom, under rule 39 of its Rules of Procedure, not to return the applicant, an Iranian national, to Greece. The Court made this request after the United Nations High Commissioner for Refugees (UNHCR) had recommended that parties to the Dublin Regulation – implementing into EU law the Dublin Convention (Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L50) – refrain from returning asylum seekers to Greece, as it believed that the prevailing situation in Greece called into question whether 'Dublin returnees' would have access to an effective remedy as foreseen by Article 13 of the Convention. Following further exchanges with the UK authorities, the Court nevertheless concluded later that the application of *K. R. S.* should be held inadmissible. While recognizing the weight which was to be given to this evaluation by the UNHCR, the European Court of Human Rights noted that the applicant in the case before it was an Iranian national, and that 'Greece does not currently remove people to Iran ... so it cannot be said that there is a risk that the applicant would be removed there upon arrival in Greece'. The Court also noted

that 'the Dublin Regulation, under which such a removal would be effected, is one of a number of measures agreed in the field of asylum policy at the European level and must be considered alongside Member States' additional obligations under Council Directive 2005/85/EC and Council Directive 2003/9/EC to adhere to minimum standards in asylum procedures and to provide minimum standards for the reception of asylum seekers. The presumption must be that Greece will abide by its obligations under those Directives.' The Court finally concluded that 'in the absence of any proof to the contrary, it must be presumed that Greece will comply with [its obligations under the ECHR and in particular with interim measures ordered under rule 39 of the Rules of Court] in respect of returnees including the applicant' (Eur. Ct. H.R. (4th sect.), *K. R. S.* v. *United Kingdom* (Appl. No. 32733/08), decision of 2 December 2008). Do you agree? How strong should the presumption be that a State will in fact comply with its obligations under existing instruments that are binding upon that State?

3. In *Judge* v. *Canada*, the Human Rights Committee concluded that Canada had violated its obligations under the Covenant because it 'established the crucial link in the causal chain that would make possible the execution of the author'. What are the limits of this reasoning? How relevant is it that the violation alleged in that case concerned 'the most fundamental of rights – the right to life', as noted by the Committee? Would a State be in violation of the Covenant by returning a person under its jurisdiction to a country where his rights to defence would not be fully complied with in a criminal trial? Or by sending back a LGBT person to a country where she would be facing harassment for her sexual orientation? Consider in this respect the inadmissibility decision of the European Court of Human Rights in *Fashkami* v. *United Kingdom* (Appl. No. 17341/03, decision of 22 June 2004), where – in a case in which a gay person of Iranian nationality alleged that he could not be returned to Iran, since 'the existence of a criminal law criminalising adult consensual homosexual acts violated Article 8' – the Court observes 'that its case law has found responsibility attaching to Contracting States in respect of expelling persons who are at risk of treatment contrary to Articles 2 and 3 of the Convention. This is based on the fundamental importance of these provisions, whose guarantees it is imperative to render effective in practice … Such compelling considerations do not automatically apply under the other provisions of the Convention. On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention.'
4. The probability of the rights of the individual being violated in the country of return may be difficult to assess. For instance, does the notoriety of the individual concerned protect him from serious violations of his rights by the authorities, or do they put him at a special risk? Is the existence of a 'consistent pattern of gross, flagrant or mass violations of human rights', as referred to in Article 3, para. 2, of the Convention against Torture, sufficient evidence of the risk to the individual, or should circumstances specific to the individual be adduced, in addition, before he/she can assert protection from expulsion, extradition or refoulement under the relevant human rights instruments?

5. Could reasonings held in *Soering* and *Judge* be transposed to cases other than deportation cases? For instance, would a State be in violation of its human rights obligations if it provided evidence allowing a foreign court to convict a defendant in violation of due process rights? Would it be in violation of its obligations if it transferred personal data without ensuring that such data will be processed in accordance with the rules pertaining to the processing of personal data? If so, does this amount for States bound by such obligations to imposing human rights norms they have chosen to comply with on other States, not committed to upholding the same standards? Is this an excessive restriction on the possibilities of inter-State co-operation, precisely at a moment when such co-operation is particularly important given the transnational dimension of a number of issues, including crime and migrations?

3.2 The execution of foreign judgments

Deportation cases are not the only ones where the collaborative conduct by States may result in human rights violations. Another typical instance where this may happen is in the context of international judicial co-operation, where the courts in one State are requested to recognize and executed a judgment delivered by foreign courts, which – either because of procedural deficiencies or because of the outcome – may have been adopted in violation of human rights binding on the State of execution. Consider the following examples:

European Court of Human Rights (2nd sect.), *Pellegrini* v. *Italy* (Appl. No. 30882/96), judgment of 20 July 2001:

[In 1962 the applicant, Ms Pellegrini, married Mr A. Gigliozzi in a religious ceremony which was also valid in the eyes of the law (*matrimonio concordatario*). On 23 February 1987 Ms Pellegrini petitioned the Rome District Court for judicial separation. In a judgment dated 2 October 1990 the District Court granted her petition and also ordered Mr Gigliozzi to pay the applicant maintenance (*mantenimento*) of 300,000 Italian lira per month. In the meantime, on 20 November 1987, Ms Pellegrini was summoned to appear before the Lazio Regional Ecclesiastical Court of the Rome Vicariate on 1 December 1987, since on 6 November 1987 her husband had sought to have the marriage annulled on the ground of consanguinity (the applicant's mother and Mr Gigliozzi's father being cousins). In a judgment delivered on 10 December 1987 and deposited with the registry on the same day, the Ecclesiastical Court annulled the marriage on the ground of consanguinity. The court had followed a summary procedure (*praetermissis solemnitatibus processus ordinarii*) under Article 1688 of the Code of Canon Law. That procedure is followed where, once the parties have been summoned to appear and the *defensor vinculis* (defender of the institution of marriage) has intervened, it is clear from an agreed document that there is a ground for annulling the marriage. Ms Pellegrini appealed against the judgment of the Ecclesiastical Court, complaining of a number of procedural defects. However, in a judgment of 13 April 1988, the Roman Rota upheld the decision annulling the marriage on the ground of consanguinity.

On 23 November 1988 the Rota informed the applicant and her ex-husband that its judgment, which had become enforceable by a decision of the superior ecclesiastical review body, had been

referred to the Florence Court of Appeal for a declaration that it could be enforced under Italian law (*delibazione*). This is in accordance with Article 8 §2 of the Concordat between Italy and the Vatican, according to which a judgment of the ecclesiastical courts annulling a marriage, which has become enforceable by a decision of the superior ecclesiastical review body, may be made enforceable in Italy at the request of one of the parties by a judgment of the relevant court of appeal. This provision also states that the Court of Appeal should verify that 'in the nullity proceedings the defence rights of the parties have been recognised in a manner compatible with the fundamental principles of Italian law'. In a judgment of 8 November 1991, the Florence Court of Appeal declared the judgment of 13 April 1988 enforceable. The Court found that the opportunity given to the applicant on 1 December 1987 to answer questions had been sufficient to ensure that the adversarial principle had been complied with and that, moreover, she had freely chosen to bring the proceedings before the Rota and had been able to exercise her defence rights in those proceedings 'irrespective of the special features of proceedings under canon law'. Ms Pellegrini appealed the judgment. However, the Italian Court of Cassation dismissed the appeal in a judgment of 10 March 1995. It held, first of all, that the adversarial principle had been complied with in the proceedings before the ecclesiastical courts; moreover, there was case law authority to support the view that while the assistance of a lawyer was not a requirement under canon law, it was not forbidden: the applicant could therefore have taken advantage of that possibility. The court also held that the fact that the applicant had had a very short time in which to prepare her defence in November 1987 did not amount to an infringement of her defence rights because she had not indicated why she had needed more time.

Ms Pellegrini complained before the European Court of Human Rights of a violation of Article 6 of the Convention on the ground that the Italian courts declared the decision of the ecclesiastical courts annulling her marriage enforceable following proceedings in which her defence rights had been breached.]

40. The Court notes at the outset that the applicant's marriage was annulled by a decision of the Vatican courts which was declared enforceable by the Italian courts. The Vatican has not ratified the Convention and, furthermore, the application was lodged against Italy. The Court's task therefore consists not in examining whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention, but whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6. A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention. Such a review is especially necessary where the implications of a declaration of enforceability are of capital importance for the parties.

41. The Court must examine the reasons given by the Florence Court of Appeal and the Court of Cassation for dismissing the applicant's complaints about the proceedings before the ecclesiastical courts.

42. The applicant had complained of an infringement of the adversarial principle. She had not been informed in detail of her ex-husband's application to have the marriage annulled and had not had access to the case file. She was therefore unaware, in particular, of the contents of the statements made by the three witnesses who had apparently given evidence in favour of her ex-husband and of the observations of the *defensor vinculis*. Furthermore, she was not assisted by a lawyer.

43. The Florence Court of Appeal held that the circumstances in which the applicant had appeared before the Ecclesiastical Court and the fact that she had subsequently lodged an appeal against that court's judgment were sufficient to conclude that she had had the benefit of an adversarial trial. The Court of Cassation held that, in the main, ecclesiastical court proceedings complied with the adversarial principle.

44. The Court is not satisfied by these reasons. The Italian courts do not appear to have attached importance to the fact that the applicant had not had the possibility of examining the evidence produced by her ex-husband and by the 'so-called witnesses'. However, the Court reiterates in that connection that the right to adversarial proceedings, which is one of the elements of a fair hearing within the meaning of Article 6 §1, means that each party to a trial, be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see, *mutatis mutandis*, *Lobo Machado* v. *Portugal*, and *Vermeulen* v. *Belgium*, judgments of 20 February 1996, *Reports of Judgments and Decisions* 1996–I, pp. 206–07, §31, and p. 234, §33, respectively, and *Mantovanelli* v. *France*, judgment of 18 March 1997, p. 436, §33).

45. It is irrelevant that, in the Government's opinion, as the nullity of the marriage derived from an objective and undisputed fact the applicant would not in any event have been able to challenge it. It is for the parties to a dispute alone to decide whether a document produced by the other party or by witnesses calls for their comments. What is particularly at stake here is litigants' confidence in the workings of justice, which is based on, *inter alia,* the knowledge that they have had the opportunity to express their views on every document in the file (see, *mutatis mutandis*, *F.R.* v. *Switzerland*, No. 37292/97, §39, 28 June 2001, unreported).

46. The position is no different with regard to the assistance of a lawyer. Since such assistance was possible, according to the Court of Cassation, even in the context of the summary procedure before the Ecclesiastical Court, the applicant should have been put in a position enabling her to secure the assistance of a lawyer if she wished. The Court is not satisfied by the Court of Cassation's argument that the applicant should have been familiar with the case law on the subject: the ecclesiastical courts could have presumed that the applicant, who was not assisted by a lawyer, was unaware of that case law. In the Court's opinion, given that the applicant had been summoned to appear before the Ecclesiastical Court without knowing what the case was about, that court had a duty to inform her that she could seek the assistance of a lawyer before she attended for questioning.

47. In these circumstances the Court considers that the Italian courts breached their duty of satisfying themselves, before authorising enforcement of the Roman Rota's judgment, that the applicant had had a fair trial in the proceedings under canon law.

48. There has therefore been a violation of Article 6 §1 of the Convention.

European Court of Human Rights (1st sect.), *Lindberg* v. *Sweden* (Appl. No. 48198/99), decision (inadmissibility) of 15 January 2004:

[The applicant, Mr Lindberg, a Norwegian national living in Sweden, had been on board the seal hunting vessel *M/S Harmoni* as a seal hunting inspector for the Norwegian Ministry of Fisheries for the 1988 season. He served on board the *Harmoni* from 12 March to 11 April 1988.

Thereafter, and until 20 July 1988, a Norwegian newspaper, *Bladet Tromsø*, published twenty-six articles on Mr Lindberg's inspection, including his entire inspection report (of 30 June 1988). Following the wide publicity made around the report, the nineteen crew members of *Harmoni* brought, mostly with success, a series of defamation proceedings against the applicant and a number of media corporations and companies, including *Bladet Tromsø* and its former editor. The defamation case against *Bladet Tromsø* and its former editor were the subject-matter of an application (No. 21980/93) lodged under the European Convention on Human Rights. In its *Bladet Tromsø and Stensaas* v. *Norway* judgment of 20 May 1999 ([GC], No. 21980/93, E.C.H.R. 1999–III), the Court, by thirteen votes to four, found that there had been a violation of Article 10 of the Convention with regard to the newspaper and the former editor.

Here, Mr Lindberg complains about the Swedish courts' refusal to prevent the enforcement in Sweden (where he lived) of a judgment of 25 August 1990 (delivered by the Sarpsborg City Court) in defamation proceedings against him on account of similar or comparable allegations. In that judgment, the Sarpsborg City Court declared five statements in the inspection report of Mr Lindberg null and void under Article 253 §1 of the Penal Code (since they were considered defamatory), as well as two other statements made by him in television programmes. It further prohibited the applicant from making accessible to the relevant public film footage, where the plaintiffs could be identified, and ordered him to pay to each of them NOK 10,000 in compensation for non-pecuniary damage, plus NOK 3,000 in respect of profits he had obtained through illegal publication of the film, as well as legal costs. Invoking that the 25 August 1990 judgment violated his right to freedom of expression under Article 10 of the Convention, Mr Lindberg opposed the execution of the judgment by the Swedish courts. The European Court of Human Rights summarizes thus the proceedings before the Swedish courts: '... the Vänersborg City Court (*tingsrätt*), by a decision (*beslut*) of 22 February 1996, rejected the applicant's claim. It noted that the impugned matter predated the entry into force of the 1988 Lugano Convention (on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) for Sweden and Norway (respectively on 2 January and 1 May 1993), so it fell to be considered under Act 1977:595 regarding the Recognition and Enforcement of Nordic Judgments in the area of Private Law, section 8 §1 No. 6 of which provided that a judgment which was obviously incompatible with the Swedish public order should not be recognised or implemented in Sweden. According to the preparatory works this provision should be applied with great caution. In practice it had only been applied in narrowly defined and exceptional circumstances, when there was question of principles fundamental to the Swedish legal system and provisions protecting the interests of a weaker party. In this respect the City Court observed that the principle of exclusive responsibility on the part of the publisher of an allegation in a periodical or a film was a very important part of the Swedish constitutional protection of free speech. That principle did not exist in the Norwegian legal system, under which several persons might incur liability with respect to the contents of a periodical or a television programme. However, this difference between the Swedish and the Norwegian law, albeit decisive in part for the outcome before the Sarpsborg City Court, did not amount to an exceptional circumstance warranting the application of the public order provision in the 1977 Act. Accordingly, there was no obstacle to recognition and enforcement of the Sarpsborg City Court's judgment of 25 August 1990. Nor could that judgment be said to breach the Convention.'

This position was upheld by the Court of Appeal and by the Swedish Supreme Court. The Supreme Court stated that: 'an examination ought to be made of [the applicant's] submission

that the Sarpsborg City Court's judgment must not be executed on the grounds that it violates Article 10 in the Convention. It can, however, not be a question of undertaking a complete review of the City Court's judgment. Such a scheme would cause an excessive burden to the international co-operation aimed at facilitating the execution of judgments in countries other than that where the judgment was delivered. It is also apparent that a court in the State of origin is normally better placed than an authority in the State of enforcement to make certain assessments, for example evidentiary matters and the application of the national law of the State of origin. Normally the proceedings in that State have been complete and afforded the parties an opportunity to adduce evidence and legal arguments in support for their case. This can be presumed to be the case especially with respect to States which have ratified the Convention. In the relations among the Convention States themselves it should normally suffice for the authority in the country of execution to pursue a rather summary assessment in verifying whether the judgment is in conformity with the Convention. However, should there, for example on a claim by a party, emerge circumstances that would make it questionable whether the judgment fulfils the requirements in the Convention, a closer scrutiny must be carried out.'

The position of the European Court of Human Rights is expressed below:]

The applicant complains under Article 13 of the Convention, in conjunction with Article 10, that the Swedish Supreme Court had failed to carry out a proper review of his claim that the Norwegian City Court's judgment of 25 August 1990 violated his rights under Article 10 of the Convention.

The applicant further submitted that the Swedish recognition and enforcement of the Norwegian judgment also entailed a violation of Article 10 of the Convention taken on its own.

... [I]n so far as the applicant claims that the outcome of the main proceedings in Norway was incompatible with Article 10 of the Convention, the proper venue of redress for him would have been to pursue an application to Strasbourg against Norway in accordance with the formal conditions under the Convention. He did in fact seek to bring an application (No. 26604/95) under Article 10 of the Convention, but failed to observe the six months' time limit and so, on 26 February 1997, the former Commission declared the application inadmissible as being out of time. Thus, the Court's assessment of the existence of an arguable claim in the present case may not directly address the main libel case in Norway but is limited to the ensuing enforcement proceedings in Sweden. A contrary approach would give an applicant the undue possibility of having reopened matters already finally settled, at the risk of upsetting the coherence of the division of roles between national review bodies and the European Court, making up the system of collective enforcement under the Convention.

Accordingly, ... the Court does not find that the applicant could pray in aid the *Bladet Tromsø and Stensaas* judgment to underpin his argument that the Swedish authorities recognition and enforcement of the Norwegian judgment in his case violated Article 10 of the Convention. On a whole, the Court finds it questionable whether the applicant could at all be said to have an arguable claim for the purposes of Article 13 with respect to his claim that the Swedish authorities' co-operation was inconsistent with Article 10 of the Convention. However, for the reasons set out below it does not need to decide this question and will proceed on the assumption that Article 13 is applicable.

Turning, then, to the issue whether the applicant was afforded an effective remedy in Sweden against the Swedish authorities' recognition and enforcement of the Norwegian judgment, the Court cannot but note that the Swedish courts, at three levels of jurisdiction, reviewed the

applicant's appeal against enforcement. The only question is whether the scope of review carried out was sufficient to provide the applicant an effective remedy for the purposes of Article 13 of the Convention.

Comparable issues have previously been examined in the context of co-operation between States inside and outside the Convention territory, notably in the plenary *Drozd and Janousek* v. *France and Spain* judgment of 26 June 1992 (Series A No. 240) and the *Iribarne Pérez* v. *France* judgment of 24 October 1995 (Series A No. 325–B). Both cases concerned complaints about the enforcement in a Contracting State of a judgment by a court of a non-Contracting State (in Andorra – before joining the Council of Europe) reached in proceedings claimed to be at variance with due process. The Court attached decisive weight to whether the impugned conviction was the result of a 'flagrant denial of justice' (see *Drozd and Janousek*, §110; and *Iribarne Pérez*, § 31; see also *Pellegrini* v. *Italy*, No. 30882/96, E.C.H.R. 2001–VIII, even though no express mention was made of the said criterion in that judgment).

However, the Court does not deem it necessary for the purposes of its examination of the present case to determine the general issue concerning what standard should apply where the enforcing State as well as the State whose court gave the contested decision is a Contracting Party to the Convention and where the subject-matter is one of substance (i.e. here, the freedom of expression) rather than procedure. In the particular circumstances it suffices to note that the Swedish courts found that the requested enforcement (in respect of the award of compensation and costs made in the Norwegian judgment) was neither prevented by Swedish public order or any other obstacles under Swedish law. The Court, bearing in mind its findings above as to whether the applicant had an arguable claim, does not find that there were any compelling reasons against enforcement. That being so, the Court is clearly satisfied that the Swedish courts reviewed the substance of the applicant's complaint against the requested enforcement of the Norwegian judgment, to a sufficient degree to provide him an effective remedy for the purposes of Article 13 of the Convention.

It follows that this part of the application is manifestly ill-founded ...

The applicant further alleged that the Swedish recognition and enforcement of the Norwegian judgment entailed in addition a violation of Article 10 of the Convention taken on its own.

However, the Court sees no reason to doubt that the interference with the applicant's Article 10 rights by the Swedish authorities' enforcement of the Norwegian judgment was 'prescribed by law' and pursued legitimate aims, namely 'the protection of the reputation or rights of others' and 'maintaining the authority of the judiciary'. Moreover, bearing in mind its reasoning and conclusions above in relation to Article 13, the Court finds that the interference resulting from the decision to enforce the judgment was clearly 'necessary' within the meaning of the second paragraph of Article 10. The application discloses no appearance of violation of Article 10 of the Convention.

2.7. Questions for discussion: human rights requirements and mutual trust in international judicial co-operation

1. Are *Pellegrini* and *Lindberg* in contradiction with one another? What is the difference that may justify a distinction being made between these cases? In particular, is justifiable to require

from the Italian courts that they verify whether the Vatican courts have adopted their decisions in accordance with the requirements of Article 6 of the Convention, and not to impose the same requirements on the Swedish courts enforcing judgments adopted in Norway, despite the fact that these judgments were found, in the *Bladet Tromsø and Stensaas* v. *Norway* judgment adopted on 20 May 1999 by the European Court of Human Rights, to be in violation of freedom of expression? Or were other differences between *Pellegrini* and *Lindberg* more relevant?

2. Should *Lindberg* be taken as authority for the view that, where a State party to the European Convention on Human Rights is requested to execute a foreign judgment delivered by a court of another State party, it may presume the compatibility of that judgment with the requirements of the Convention, and thus exercise only a minimal scrutiny on the content of the judgment as well as on the respect with the procedural requirements of Article 6 ECHR, where this provision is applicable? Is this compatible with the decision in *T.I.* v. *United Kingdom*? Does it imply that States parties to the Convention may agree, among themselves, to enter into forms of judicial co-operation based on mutual trust, on the presumption that they comply with the requirements of the Convention?

4 THE RESPONSIBILITY OF STATES FOR THE ACTS OF THE INTERNATIONAL ORGANIZATIONS

4.1 The general regime

By concluding a treaty establishing an intergovernmental organization, States may transfer to this organization certain powers which the organization may then exercise in violation of human rights its Member States have agreed to uphold. But the organization is recognized as a separate international legal personality, for the purposes of exercising those attributed powers. As a result, its acts are in principle not attributable to its Member States. Although this situation is obviously not satisfactory, human rights bodies have sometimes considered it was the inevitable result of the growth of international co-operation. Consider the following cases:

European Commission of Human Rights, *Ilse Hess* v. *United Kingdom* (Appl. No. 6231/73), 2 DR 73; 18 Yearbook of the European Convention of Human Rights 174 (1975)

[The applicant is the wife of Rudolf Hess, a close collaborator of Hitler, who was condemned to life imprisonment in 1946 by the International Military Tribunal of Nuremberg after being found guilty of conspiracy to wage aggressive war and crimes against peace. He was transferred on 18 July 1947 to the Allied Military Prison in Berlin-Spandau, located in the British sector of Berlin and guarded in monthly turns by the United States, France, the United Kingdom and the Union of Soviet Socialist Republics. Since 1966, when the last other prisoners were released, Rudolf Hess was in solitary confinement in a prison which could hold 600 prisoners. The applicant argues that this situation amounts to a violation of Articles 3 and 8 of the European Convention on Human

Rights. She argues that the Convention on Human Rights also applies to the interpretation of the Agreement of 8 August 1945 concluded in London between the Governments of the United Kingdom, the United States of America, France and the Union of Soviet Socialist Republics. She states that her husband has served long enough and claims that the Commission should press the United Kingdom (at the time of the application, the only one of these four States to be bound by the ECHR) to step up its efforts to secure renegotiation of the Four Power Agreement over Berlin in order to obtain the release of Rudolf Hess; or, alternatively, release him when it is next responsible for his custody.]

For the purposes of determining the obligations of the United Kingdom under Art. 1 of the Convention, the Commission recalls that Spandau Allied Prison was established by the Allied Kommandatura Berlin in compliance with a directive of the Control Council. This followed from the assumption in 1945 of supreme authority by the Four Powers with respect to Germany. The supreme authority over the prison was vested in the Allied Kommandatura. The executive authority consists of four governors acting by unanimous decisions. Each of the governors is the delegate and the representative of one of the Four Powers.

The rights and obligations arising out of the agreements between the Four Powers concerning Spandau Prison continued to be in force after the withdrawal of the Soviet Union from the Kommandatura. This fact is not disputed by any of the parties. In regard to the administration of the prison, the Commission notes that changes therein can only be made by the unanimous decision of the representatives of the Four Powers in Germany or by the unanimous decision of the Four Governors. Administration and supervision is at all times quadripartite, including the day to day 'civil administration' of the prison and the responsibility for providing the military guard ...

The Commission concludes that the responsibility for the prison at Spandau, and for the continued imprisonment of Rudolf Hess, is exercised on a Four Power basis and that the United Kingdom acts only as a partner in the joint responsibility which it shares with the three other Powers.

The Commission is of the opinion that the joint authority cannot be divided into four separate jurisdictions and that therefore the United Kingdom's participation in the exercise of the joint authority and consequently in the administration and supervision of Spandau Prison is not a matter 'within the jurisdiction' of the United Kingdom, within the meaning of Art. 1 of the Convention.

The conclusion by the respondent Government of an agreement concerning Spandau prison of the kind in question in this case could raise an issue under the Convention if it were entered into when the Convention was already in force for the respondent Government. The agreement concerning the prison, however, came into force in 1945. Moreover, a unilateral withdrawal from such an agreement is not valid under international law.

Human Rights Committee, *H. v. d.P.* v. *Netherlands*, Communication No. 217/1986 (CCPR/C/OP/2 at 70) (1990) (final views (inadmissibility) of 8 April 1987):

[The author of the communication is a national of the Netherlands. Previously an industrial engineer in the Netherlands, he was subsequently employed as a substantive patent examiner

at the European Patent Office (EPO) in Munich, Germany. A few months after having accepted a post at the AI, step 2 level in the EPO, he came to the conclusion that he had been appointed at a discriminatorily low level and he felt that the preponderance of citizens of the Federal Republic of Germany in the higher grades was the result of the discriminatory practices of the organization. His internal appeals were rejected, however. He filed an application with the European Commission of Human Rights, which on 15 May 1986 declared his application inadmissible *ratione materiae* on the grounds that litigation concerning the modalities of employment as a civil servant, on either the national or international level, fell outside the scope of the European Convention on Human Rights. The author then turned to the Human Rights Committee, which he considered competent to consider the case, since five States parties (France, Italy, Luxembourg, the Netherlands and Sweden) to the European Patent Convention are also parties to the Optional Protocol to the International Covenant on Civil and Political Rights.]

3.1. Before considering any claims contained in a communication, the Human Rights Committee shall, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

3.2. The Human Rights Committee observes in this connection that it can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant. The author's grievances, however, concern the recruitment policies of an international organisation, which cannot, in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto. Accordingly, the author has no claim under the Optional Protocol.

More recently, the case law has evolved in order to ensure that States parties to human rights treaties would not circumvent their pre-existing obligations by establishing international organizations to which certain powers are attributed. A first step in this direction are the judgments delivered by the European Court of Human Rights in the cases of *Matthews*, *Beer and Regan*, and *Waite and Kennedy*.

European Court of Human Rights (GC), *Matthews* v. *United Kingdom* (Appl. No. 24833/94), judgment of 18 February 1999, paras. 31–3:

[The applicant, Ms Denise Matthews, was denied the right to take part in the June 1994 elections of the European Parliament. Previously an assembly with purely advisory powers, the European Parliament has received significant supplementary powers with the entry into force, on 1 November 1993, of the Treaty on the European Union signed in Maastricht. This makes Article 3 of Protocol No. 1 to the Convention, under which the States parties to the Convention 'undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature', applicable to the elections to the European Parliament – now considered to have become a 'legislature' in the meaning of that provision. However, the elections to the European Parliament are regulated by Council Decision 76/787 (the Council Decision), signed by the President of the Council of the European Communities and the then Member States'

foreign ministers, which was adopted pursuant to a provision of the EEC Treaty (Art. 138(3)) requiring the Council to 'lay down the appropriate provisions, which it [was to] recommend to Member States for adoption in accordance with their respective constitutional requirements'. The specific provisions concerning the modalities of European elections were set out in an Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976 (the 1976 Act), signed by the respective foreign ministers, which was attached to the Council Decision. Annex II to the 1976 Act, which forms an integral part thereof, states that 'The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom.' Residents of Gibraltar are thus excluded from the right to participate in elections to the European Parliament.]

31. The Court must ... consider whether, notwithstanding the nature of the elections to the European Parliament as an organ of the EC, the United Kingdom can be held responsible under Article 1 of the Convention for the absence of elections to the European Parliament in Gibraltar, that is, whether the United Kingdom is required to 'secure' elections to the European Parliament notwithstanding the Community character of those elections.

32. The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer.

33. In the present case, the alleged violation of the Convention flows from an annex to the 1976 Act, entered into by the United Kingdom, together with the extension to the European Parliament's competences brought about by the Maastricht Treaty. The Council Decision and the 1976 Act ..., and the Maastricht Treaty, with its changes to the EEC Treaty, all constituted international instruments which were freely entered into by the United Kingdom. Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a 'normal' act of the Community, but is a treaty within the Community legal order. The Maastricht Treaty, too, is not an act of the Community, but a treaty by which a revision of the EEC Treaty was brought about. The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty.

In their joint dissenting opinion, judges Sir John Freeland and Jungwiert took the view that there is 'a certain incongruity in the branding of the United Kingdom as a violator of obligations under Article 3 of Protocol No. 1 when the exclusion from the franchise effected multilaterally by the 1976 Decision and Act – in particular, Annex II – was at that time wholly consistent with those obligations (because on no view could the Assembly, as it was then known, be regarded as a legislature); when at no subsequent time has it been possible for the United Kingdom unilaterally to secure the modification of the position so as to include Gibraltar within the franchise; and when such a modification would require the agreement of all the member States (including a member State in dispute with the United Kingdom about sovereignty over Gibraltar)' (para. 8).

European Court of Human Rights (GC), *Beer and Regan* v. *Germany* (Appl. No. 28934/95), judgment of 18 February 1999, paras. 49, 53–4, 57–60, 62–3.

[Both applicants were put at the disposal of the European Space Agency (ESA) by private companies who employed them. In October and November 1993, they instituted proceedings before the Darmstadt Labour Court (*Arbeitsgericht*) against the ESA, arguing that, pursuant to the German Provision of Labour (Temporary Staff) Act (*Arbeitnehmerüberlassungsgesetz*), they had acquired the status of employees of ESA. The ESA however relied on its immunity from jurisdiction under Article XV para. 2 and Annex 1 of the Convention for the Establishment of a European Space Agency (ESA Convention) of 30 May 1975 (*United Nations Treaty Series* 1983, vol. 1297, I – No. 21524). The applicants contended that they had not had a fair hearing by a tribunal on the question of whether, pursuant to the German Provision of Labour (Temporary Staff) Act, a contractual relationship existed between them and ESA. They alleged that there had been a violation of Article 6 para. 1 of the Convention, which guarantees the right to access of a court for the determination of claims concerning civil rights and obligations.]

49. The Court recalls that the right of access to the courts secured by Article 6 §1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 §1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved ...

53. ... the Court points out that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments. The immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations. The importance of this practice is enhanced by a trend towards extending and strengthening international cooperation in all domains of modern society.

Against this background, the Court finds that the rule of immunity from jurisdiction, which the German courts applied to ESA in the present case, has a legitimate objective.

54. As to the issue of proportionality, the Court must assess the contested limitation placed on Article 6 in the light of the particular circumstances of the case ...

57. The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their co-operation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to

a fair trial (see, as a recent authority, the *Aït-Mouhoub* v. *France* judgment of 28 October 1998, *Reports* 1998–VIII, p. 3227, §52, referring to the *Airey* v. *Ireland* judgment of 9 October 1979, Series A No. 32, pp. 12–13, §24).

58. For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.

59. The ESA Convention, together with its Annex I, expressly provides for various modes of settlement of private-law disputes, in staff matters as well as in other litigation ... Since the applicants argued an employment relationship with ESA, they could and should have had recourse to the ESA Appeals Board. In accordance with Regulation 33 §1 of the ESA Staff Regulations, the ESA Appeals Board, which is 'independent of the Agency', has jurisdiction 'to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member' ...

60. Moreover, it is in principle open to temporary workers to seek redress from the firms that have employed them and hired them out. Relying on general labour regulations or, more particularly, on the German Provision of Labour (Temporary Staff) Act, temporary workers can file claims in damages against such firms. In such court proceedings, a judicial clarification of the nature of the labour relationship can be obtained. The fact that any such claims under the Provision of Labour (Temporary Staff) Act are subject to a condition of good faith ... does not generally deprive this kind of litigation of reasonable prospects of success ...

62. The Court shares the Commission's conclusion that, bearing in mind the legitimate aim of immunities of international organisations ..., the test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law. To read Article 6 §1 of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in such matters would, in the Court's view, thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international co-operation.

63. In view of all these circumstances, the Court finds that, in giving effect to the immunity from jurisdiction of ESA ..., the German courts did not exceed their margin of appreciation. Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their 'right to a court' or was disproportionate for the purposes of Article 6 §1 of the Convention.

Paragraphs 32 and 33 of the judgment delivered by the European Court of Human Rights in the case of *Matthews* could be read to suggest that the EU Member States could only be held responsible for the consequences of measures originating in the European Union where such measures cannot be reviewed by the European Court of Justice. However, the judgment delivered by the European Court of Human Rights on 30 June 2005 in the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* v. *Ireland* widens the range of situations in which States parties to the European Convention on Human Rights may be found responsible for the adoption or the implementation of measures adopted within the EU.

European Court of Human Rights (GC), *Bosphorus Hava Yolları Turizm* v. *Ticaret Anonim Şirketi v. Ireland* (Appl. No. 45036/98), judgment of 30 June 2005, paras. 150–8:

[In April 1992, the applicant company, an airline company chartered in Turkey, had leased two aircraft from Yugoslav Airlines (JAT), the national airline of the former Yugoslavia. However, from 1991 onwards the United Nations adopted a series of sanctions against the former Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY) designed to address the armed conflict and human rights violations taking place in the former Yugoslavia. On 17 April 1993 the UN Security Council adopted Resolution 820 (1993), which provided that States should impound, *inter alia*, all aircraft in their territories 'in which a majority or controlling interest is held by a person or undertaking' in or operating from the FRY. That Resolution was implemented in the European Community by EC Regulation 990/93 which entered into force on 28 April 1993. After one of the applicant's leased aircraft arrived in Dublin for maintenance on 17 May 1993, it was stopped from departing after the maintenance work had been completed. In the course of the ensuing judicial proceedings before the Irish courts, the European Court of Justice was asked to interpret EC Regulation 990/93. In a judgment of 30 July 1996, it concluded that Article 8 of the said Regulation did apply and that, therefore, the impounding of the aircraft was an obligation imposed under EC law on the Irish authorities. It considered the argument of the applicant company that the impounding was in violation of its right to peaceful enjoyment of his possessions and its freedom to pursue a commercial activity, but it rejected that argument, considering that 'As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the [FRY], cannot be regarded as inappropriate or disproportionate.'

Before the European Court of Human Rights, the applicant company alleges a violation of Article 1 of Protocol No. 1 to the ECHR, which guarantees the right to property. In its submissions to the Court, before which it appeared as *amicus curiae*, the European Commission (Commission of the European Communities) noted that the application concerned in substance a State's responsibility for Community acts. In the view of the European Commission, this question had to be answered by reference to the 1990 decision of the European Commission on Human Rights in the '*M. & Co.*' case (Appl. No. 13258/87, decision of 9 February 1990, *Decisions and Reports* (D.R.) 64, p. 138) and its 1994 decision in the case of *Heinz* v. *Contracting Parties also Parties to the European Patent Convention* (Appl. No. 21090/92, decision of 10 January 1994, D.R. 76–A, p. 125). Those decisions suggested that while a State retained some Convention responsibility after it had ceded powers to an international organization, that responsibility was fulfilled once there was proper provision in that organization's structure for effective protection of fundamental rights at a level at least 'equivalent' to that of the Convention. Thereafter, any Convention responsibility, over and above the need to establish equivalent protection, would only arise when the State exercised a discretion accorded to it by the international organizations. The European Court of Human Rights essentially agreed with that position:]

150. The Court considers ... that the general interest pursued by the impugned action was compliance with legal obligations flowing from the Irish State's membership of the EC. It is, moreover, a legitimate interest of considerable weight. The Convention has to be interpreted in

the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties (Article 31 §3(c) of the Vienna Convention on the Law of Treaties of 23 May 1969 and *Al-Adsani* v. *United Kingdom* [GC], No. 35763/97, §55, E.C.H.R. 2001–XI), which principles include that of *pacta sunt servanda*. The Court has also long recognised the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations (the above-cited cases of *Waite and Kennedy*, at §§63 and 72 and *Al-Adsani*, §54. See also Article 234 (now Article 307) of the EC Treaty). Such considerations are critical for a supranational organisation such as the EC [which produces rules binding on the Member States: *Costa* v. *Ente Nazionale per l'Energia Electtrica* (ENEL), Case 6/64, [1964] E.C.R. 585] ...

151. The question is therefore whether, and if so to what extent, that important general interest of compliance with EC obligations can justify the impugned interference by the State with the applicant's property rights.

152. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue co-operation in certain fields of activity (the *M. & Co.* decision, at p. 144 and *Matthews* at §32, both cited above). Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party (see *CFDT* v. *European Communities*, No. 8030/77, Commission decision of 10 July 1978, D.R. 13, p. 231; *Dufay* v. *European Communities*, No. 13539/88, Commission decision of 19 January 1989; the above-cited *M. & Co.* case, at p. 144 and the above-cited *Matthews* judgment, at §32).

153. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's 'jurisdiction' from scrutiny under the Convention (*United Communist Party of Turkey and others* v. *Turkey* judgment of 30 January 1998, Reports, 1998–I, §29).

154. In reconciling both these positions and thereby establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (*M. & Co.* at p. 145 and *Waite and Kennedy*, at §67). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (*mutatis mutandis*, the above-cited *Matthews* v. *United Kingdom* judgment, at §§29 and 32–34, and *Prince Hans-Adam II of Liechtenstein* v. *Germany* [GC], No. 42527/98, §47, E.C.H.R. 2001–VIII).

155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the

Convention provides (see the above-cited *M. & Co.* decision, at p. 145, an approach with which the parties and the European Commission agreed). By 'equivalent' the Court means 'comparable': any requirement that the organisation's protection be 'identical' could run counter to the interest of international co-operation pursued ... However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights (*Loizidou* v. *Turkey (preliminary objections)*, judgment of 23 March 1995, Series A No. 310, §75).

157. It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations ... The *Matthews* case can ... be distinguished: the acts for which the United Kingdom was found responsible were 'international instruments which were freely entered into' by it (§33 of that judgment) ...

158. Since the impugned act constituted solely compliance by Ireland with its legal obligations flowing from membership of the EC ..., the Court will now examine whether a presumption arises that Ireland complied with its Convention requirements in fulfilling such obligations and whether any such presumption has been rebutted in the circumstances of the present case.

[Taking into account the protection of fundamental rights in the legal order of the European Union, the European Court of Human Rights arrives at the conclusion that 'the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, "equivalent" (within the meaning of para. 155 above) to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC' (para. 165). It moreover considered that 'there was no dysfunction of the mechanisms of control of the observance of Convention rights [and that] therefore, it cannot be said that the protection of the applicant's Convention rights was manifestly deficient with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted' (para. 166). It concluded that the impoundment of the aircraft did not give rise to a violation of Article 1 of Protocol No. 1 to the Convention.]

When, in August 2001, it adopted its Articles on the responsibility of States for internationally wrongful acts, the International Law Commission had deliberately left open the question of the responsibility of States for the acts of international organisations. These Articles were 'without prejudice to any question of the responsibility of ... any State for the conduct of an international organisation' (Art. 57). This question however is under consideration by the International Law Commission in its ongoing work on the responsibility of international organizations. The inclusion of the following provisions is envisaged (see Report of the International Law Commission on the work of its fifty-eighth session, 1 May–9 June and 3 July–11 August 2006, I.L.C. Report, A/61/10 (2006), chapter VI, paras. 77–91):

International Law Commission, Draft Articles on the Responsibility of International Organisations (2006):

Article 25. Aid or assistance by a State in the commission of an internationally wrongful act by an international organisation

A State which aids or assists an international organisation in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) The act would be internationally wrongful if committed by that State.

Article 26. Direction and control exercised by a State over the commission of an internationally wrongful act by an international organisation

A State which directs and controls an international organisation in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:
(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) The act would be internationally wrongful if committed by that State.

Article 27. Coercion of an international organisation by a State

A State which coerces an international organisation to commit an act is internationally responsible for that act if:
(a) The act would, but for the coercion, be an internationally wrongful act of that international organisation; and
(b) That State does so with knowledge of the circumstances of the act.

Article 28. International responsibility in case of provision of competence to an international organisation

1. A State member of an international organisation incurs international responsibility if it circumvents one of its international obligations by providing the organisation with competence in relation to that obligation, and the organisation commits an act that, if committed by that State, would have constituted a breach of that obligation.
2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organisation.

Article 29. Responsibility of a State member of an international organisation for the internationally wrongful act of that organisation

1. Without prejudice to draft articles 25 to 28, a State member of an international organisation is responsible for an internationally wrongful act of that organisation if:
(a) It has accepted responsibility for that act; or
(b) It has led the injured party to rely on its responsibility.
2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary.

Article 30. Effect of this chapter

This chapter is without prejudice to international responsibility, under other provisions of these draft articles, of the international organisation which commits the act in question, or of any other international organisation.

The Commentaries to certain of these provisions deserve to be mentioned here. The Commentary to Article 25 states in part: 'A State aiding or assisting an international organisation in the commission of an internationally wrongful act may or may not be a member of that organisation. Should the State be a member, the influence that may amount to aid or assistance could not simply consist in participation in the decision-making process of the organisation according to the pertinent rules of the organisation. However, it cannot be totally ruled out that aid or assistance could result from conduct taken by the State within the framework of the organisation. This could entail some difficulties in ascertaining whether aid or assistance has taken place in borderline cases. The factual context such as the size of membership and the nature of the involvement will probably be decisive.' Similar comments are made in respect of Articles 26 and 27 of the draft Articles. As to the Commentary to Article 28, it states in part that: 'the existence of a specific intention of circumvention is not required and responsibility cannot be avoided by showing the absence of an intention to circumvent the international obligation. The use of the term "circumvention" is meant to exclude that international responsibility arises when the act of the international organisation, which would constitute a breach of an international obligation if taken by the State, has to be regarded as an unwitting result of providing the international organisation with competence. On the other hand, the term "circumvention" does not refer only to cases in which the member State may be said to be abusing its rights.'

While they seek to codify the existing emerging customary law in the area of the responsibility of international organizations (and of States in relation to wrongful acts adopted by international organizations), these rules are not entirely satisfactory. They leave open an important gap: where States have transferred competences to an international organization without it being reasonably possible to anticipate that those competences will be exercised by the organization in a way which would constitute a breach of their international obligations if they had adopted such acts directly – and, in particular, where such transferral of competences has been accompanied by certain safeguards, intended to ensure that the organization will comply with such international obligations in the exercise of its powers – they will not be held responsible for such acts, even if they took part in the decision-making within the organization. Thus, to the extent that the international organization either is not under the same international obligations as its Member States (in particular, in the event that the Member States have ratified certain international human rights treaties to which the international organization itself is not a party), or cannot be subjected to enforcement mechanisms similar to those which can be invoked against States, situations may arise where the international organization will adopt measures which have an impact similar to that of measures which, if they were adopted by its Member States, would constitute a breach of their international obligations, and for which nevertheless neither the Member States, nor the international organization itself, will be responsible under international law.

It is in order to overcome these difficulties that the following proposal has been made:

Jean d'Aspremont, 'Abuse of the Legal Personality of International Organisations and the Responsibility of Member States', *International Organisations Law Review* (2007), 91–119 at 102 and 109–10:

When member states effectively and overwhelmingly control the decision-making process of an international organisation, ... the legal personality of that organisation can no longer constitute a shield behind which member states can evade a responsibility that they would have incurred if they had themselves committed the contested action ...

The influence over the decision-making process turns abusive when one or a few member states overrule(s) the whole process, thereby stifling any adverse opinion that could be expressed ... [However,] the exercise of overwhelming control requires resort to types of pressure that are not expressly provided for by the constitutive treaty of the organisation concerned. In other words, if a member state overrules the decision-making process of an organisation thanks to the procedural rights that it has been granted under the constitutive treaty of the organisation, this cannot be considered overwhelming control.

The exercise of such 'overwhelming control' would constitute a form of abuse of the separate legal personality of the organization, since the autonomy of the organization, which is at the core of the attribution of a legal personality, would be reduced to a mere fiction. The extension of State responsibility to such situations would go beyond the hypothesis known as coercion of an international organization, since it would not be required that the State have knowledge about the illegal character of the act in question. In addition, the substantive obligations violated would be those of the State exercising overwhelming control, rather than those of the international organization itself, a difference which may prove crucial in the field of human rights where a number of obligations are treaty-based and therefore apply only to States parties to those treaties, rather than to all subjects of international law.

Such an extension of the law of State responsibility is not sufficient, however, to fill in the gap referred to. Indeed, since the hypothesis of 'overwhelming control' would not seem to include situations where a State simply exercises its voting rights as part of the normal decision-making process of the organization, it would still be possible for a State or a group of States to transfer certain powers to an intergovernmental organization, which this organization would have to exercise on the basis of its own, internal decision-making procedures, and for such a transferral to lead to the adoption of acts which, if they had been adopted by the Member States themselves, would have been in violation of their international obligations, without this engaging the responsibility of the Member States concerned. Of course, the provision of competences to the international organization may itself engage the responsibility of the Member States, however this will not be the case where the violation resulting from the exercise by the organization of the powers it has been entrusted is simply 'an unwitting result of providing the international organization with competence', as expressed by the International Law Commission's Rapporteur on this issue. But the reality is that in

many cases, especially where whole areas of competence are being transferred to international organizations, such violations cannot be predicted in advance. This is especially so as regards human rights obligations, which are evolutive by nature, since they are grounded in covenants whose general and vague language is progressively filled in by expert bodies or courts which interpret these obligations in concrete settings.

Another proposal, then, would be to adopt a 'holistic' approach to the question of the responsibility of Member States for the acts of an international organization to which they have transferred certain powers which the organization may then use in violation of their pre-existing human rights obligations. Such an approach would refuse to distinguish between the three modalities of participation of the State in the life of the international organization (the setting up of the organization and the transferral of certain competences; participation in the decision-making within the organization; and the implementation of any decisions of the organization which the Member States are to comply with). The responsibility of States, in this view, would result from the fact that this sequence of events has led to a violation of their human rights obligations, even if this could not have been anticipated in the transferral of powers to the organization, if the State concerned has merely taken part in the decision-making of the organization without abusing its rights by seeking to exercise 'overwhelming control' over the organization, and if it then merely implements the decisions adopted by the organization. This would allow for the possibility that, whereas the State will not be internationally responsible for any of these steps separately, it will nevertheless be responsible for the result of the full sequence.

Box 2.3. Alternatives to Member States' responsibility for human rights violations committed by international organizations

This section explores whether the Member States of an intergovernmental organization (IO) may be held accountable for human rights violations stemming from the acts adopted by the organization. But there are other ways to ensure that any such violations resulting from the transfer of powers to an IO do not remain unpunished (see generally on this issue, A. Reinisch, 'Securing the Accountability of International Organizations', *Global Governance*, 7 (2001), 131; A. Reinisch, 'Governance without Accountability', *German Yearbook of International Law* (2001), 270; H. G. Schermers, 'Liability of International Organizations', *Leiden Journal of International Law*, 1 (1988), 3; W. E. Holder, 'Can International Organizations be Controlled? Accountability and Responsibility', *American Society of International Law Proceedings*, 97 (2003), 231).

1. First, as subjects of international law, international organizations are 'bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties' (International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion (20 December 1980), I.C.J. Reports 1980, 73 at 89–90 (para. 37)). For the moment, most human rights treaties are not open to the participation of international organizations. An evolution may be discerned in this respect, however: the recent Convention on the Rights of Persons

with Disabilities provides for the signature and expression of consent to be bound by regional integration organizations (see Art. 44 of the Convention, and Art. 12 of the Optional Protocol to the Convention), in order to facilitate accession by the European Union which has been attributed legislative powers by the EU Member States in certain of the domains covered by the Convention. In addition, human rights obligations have their source in general international law as well as in human rights treaties (see chapter 1, section 4.1.).

To the extent IOs are imposed human rights obligations under general international law, national courts may in principle provide a forum for the victims of the measures they adopt. The main obstacle this avenue will be facing resides in the immunity of jurisdiction generally recognized to international organizations before domestic courts (see J.-F. Lalive, 'L'immunité de juridiction des Etats et des organizations internationales', *Recueil des cours de l'Académie de droit international*, 84 (1953–III), 205–396; A. S. Muller, *International Organizations and their Host States: Aspects of Their Legal Relationship* (The Hague: Kluwer Law International, Martinus Nijhoff, 1995), esp. chapter 5 on immunity of jurisdiction; M. Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns', *Virginia Journal of International Law*, 36 (1995), 53; E. Gaillard and I. Pingel-Lenuzza, 'International Organizations and Immunity from Jurisdiction: to Restrict or to Bypass', *International and Comparative Law Quarterly*, 51 (2002), 1). August Reinisch confirms the importance of this argument in his empirical study of the practice of national courts when facing suits against international organizations, and he documents other 'avoidance techniques' resorted to by national courts to avoid entertaining claims against IOs, including the lack of recognition of the legal personality of international organizations; the refusal to attribute a particular act to the organization, in particular because it has been adopted *ultra vires*; doctrines of act of state, political questions, or other doctrines of non-justiciability; lack of jurisdiction of the forum court; absence of case or controversy; or abuse of right by the plaintiff (A. Reinisch, *International Organizations before National Courts* (Cambridge University Press, 2000), p. 127 *et seq.*).

The obstacle resulting from immunity of jurisdiction is not necessarily insuperable. Certain international organizations have renounced benefiting from such immunity in their constitutive instruments. This is the case, in particular, for two member organizations of the World Bank Group (the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA)), which provide for the possibility of legal action being brought against the institution 'only in a court of competent jurisdiction in the territories of a member' in which the Bank has offices (Art. VII, section 3 of the Articles of Agreement of the IBRD; and Art. VIII, section 3 of the IDA Agreement). Although the resulting waiver of immunity has sometimes been interpreted very restrictively in order to ensure that it will remain compatible with the fulfilment by the IBRD of its functions, a suit based on alleged violations of human rights universally recognized should not be treated as having a disruptive effect on its activities such as to justify upholding the immunity rule (compare *Mendaro* v. *World Bank*, 717 F.2d 610, 614–15 (D.C. Cir. 1983), where the US Court of Appeal for the District of Columbia Circuit held that the justification for granting immunity to international organizations was to enable them to pursue their functions more effectively, in particular, to operate freely from unilateral control by a Member State over their activities within its territory, leading it to offer a very restrictive

interpretation of the waiver of immunity contained in the Agreement establishing the IBRD in the context of a sexual harassment suit based on Title VII of the 1964 Civil Rights Act against the IBRD by a former employee: see the comment by M. Leigh, *American Journal of International Law*, 78, No. 1 (1984), 221–3). National courts have also considered that immunity of jurisdiction should only be granted when it is expressly invoked by the defendant international organisation – that, in other terms, the waiver could be implicit.

Even beyond the rather exceptional case where, explicitly or tacitly, the international organization concerned waives its right to immunity of jurisdiction, it should be asked whether the blanket invocation of its immunity by the international organization may be reconciled with the requirements of the right of access to a court, as recognized in international human rights law (see M. Singer, 'Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns', *Virginia Journal of International Law*, 36 (1995), 53–165 (arguing, at 91–5, that the international responsibility of a Member State of the international organization could be engaged for granting immunity to the international organization in the absence of an adequate alternative remedy); and K. Wellens, *Remedies against International Organizations* (Cambridge University Press, 2002), at p. 214). As we have seen earlier in this section, while the European Court of Human Rights has adopted the view that the application by national courts of the doctrine on immunity of jurisdiction of an international organization does not necessarily constitute a violation of Article 6 para. 1 of the European Convention on Human Rights, this was based on the consideration that 'the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention' (Eur. Ct. H.R. (GC), *Beer and Regan* v. *Germany* (Appl. No. 28934/95), judgment of 18 February 1999, para. 58; Eur. Ct. H.R. (GC), *Waite and Kennedy* v. *Germany* (Appl. No. 26083/94), judgment of 18 February 1999, para. 73).

2. A second possibility is self-regulation. Initiatives through which international organizations voluntarily choose to develop procedures which aim to ensure that they will comply with human rights (or with certain standards related to human rights but better adapted to their specific areas of activity) have proliferated in recent years. Certain mechanisms omit any reference to external forms of control or pre-existing standards. Thus, the World Bank and the International Monetary Fund have developed a set of operational policies, rather comparable to internal codes of conduct regulating their activities, which integrate human rights considerations. In addition, institutional mechanisms have been set up for monitoring compliance. Both the World Bank and the IMF have set up internal evaluation units to enhance accountability and improve the effectiveness of the strategies of these institutions. These units are 'independent' in the sense that they are not part of the administrative hierarchy of the organizations: they are the Independent Evaluation Group (IEG) for the IBRD/IDA, IFC and MIGA; and the Independent Evaluation Office (IEO) for the Fund (see P. G. Grasso, S. S. Wasty and R. V. Weaving, *World Bank Operations Evaluation Department – the First 30 Years* (Washington, D.C.: The International Bank for Reconstruction and Development/The World Bank, 2003)). In addition, alleged breaches of the aforementioned operational policies may be examined the World Bank's Inspection Panel (for IBRD and IDA operations) or Compliance and Accountability Ombudsman (CAO) (for the IFC and MIGA) (see in particular, L. Boisson de Chazournes, 'The Bretton Woods

Institutions and Human Rights: Converging Tendencies' in W. Benedek, K. De Feyter, and F. Marrella (eds.), *Economic Globalization and Human Rights* (Cambridge University Press, 2007), pp. 210–42; D. Bradlow, 'The World Bank, the IMF and Human Rights', 6 *Transnational Law and Contemporary Problems* 63 (1996); R. Dañino, 'The Legal Aspects of the World Bank's Work on Human Rights' in P. Alston and M. Robinson (eds.), *Human Rights and Development. Towards Mutual Reinforcement* (Oxford University Press, 2005)), p. 509; M. Darrow, *Between Light and Shadow: the World Bank, the International Monetary Fund and International Human Rights Law* (Oxford: Hart Publishing, 2003); S. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish, 2001)). These mechanisms remain internal to the operations of the international financial institutions, however. And human rights considerations, if relevant at all to the evaluation of the operations of the international financial institutions, are so only indirectly – not because of a recognition that they would constitute binding obligations on these institutions, but because they are integrated in their operational policies or in the terms of reference of the evaluation mechanisms which have been set up.

3. In other cases, international agencies have chosen to submit to existing monitoring mechanisms, although they were not originally a party to the intergovernmental agreements establishing these mechanisms. This has been the case in particular in Kosovo, after it was placed under the administration of the United Nations following the 1999 conflict. Section 2 of Regulation 1999/1 adopted by the United Nations Interim Administration Mission in Kosovo (UNMIK) provides that in the discharge of its functions, UNMIK shall comply with international human rights standards. On 23 August 2004, the UNMIK and the Council of Europe concluded an Agreement whereby UNMIK accepted not only to comply with the substantive provisions of the Council of Europe Framework Convention for the Protection of National Minorities, but also to be bound by the provisions on the monitoring of the implementation of the FCNM by UNMIK in Kosovo. A similar agreement was concluded between the UNMIK and the Council of Europe on technical arrangements related to the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, allowing the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), by means of visits, to examine the treatment of persons deprived of their liberty in Kosovo with a view to ensure their protection and to prevent risks of torture or ill treatment. In 2006, an exchange of letters was concluded between the Secretaries-General of the Council of Europe and the North Atlantic Treaty Organisation (NATO), allowing the CPT to exercise its monitoring functions also as regards detention facilities managed by the NATO troops under K-FOR.

2.8. Questions for discussion: ensuring accountability in transfers of powers to intergovernmental organizations

1. Consider the joint dissenting opinion of Judges Sir John Freeland and Jungwiert to the judgment adopted by the European Court of Human Rights in the case of *Matthews* v. *United Kingdom*. As these judges predicted, the implementation of the judgment was particularly difficult, because

the United Kingdom alone could not in principle decide to comply with the judgment of the European Court of Human Rights. While the European Parliament (Representation) Act 2003 (EPRA 2003) finally did provide for the enfranchisement of the Gibraltar electorate for the purposes of European Parliamentary elections as of 2004, this action was taken unilaterally after a failure to secure the unanimous agreement of the Council to an amendment to the EC Act on Direct Elections of 1976 to provide for its application to Gibraltar. Indeed, Spain considered that, by extending the right to vote in European Parliament elections, as provided for by the EPRA 2003, to persons who are not UK nationals for the purposes of Community law, the United Kingdom had violated its obligations under Community law. It decided to file a direct action against the United Kingdom before the European Court of Justice. The Court rejected this claim in a judgment of 12 September 2006 (Case C-145/04, *Kingdom of Spain* v. *United Kingdom of Great Britain and Northern Ireland*). It took the view that the EU Member States are allowed to grant the right to vote and to stand as a candidate for elections to the European Parliament 'to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory'. Although Spain argued that the United Kingdom would be in breach of Annex I to the 1976 Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage and of the Declaration of 18 February 2002, the European Court of Justice considered that, in the light of the judgment of the European Court of Human Rights in *Matthews* v. *United Kingdom*, 'the United Kingdom cannot be criticised for adopting the legislation necessary for the holding of such elections under conditions equivalent, with the necessary changes, to those laid down by the legislation applicable in the United Kingdom' (para. 95). Does this epilogue validate the fears expressed by Judges Sir John Freeland and Jungwiert? These judges consider that 'at no subsequent time [following the adoption of the 1976 Act] has it been possible for the United Kingdom unilaterally to secure the modification of the position so as to include Gibraltar within the franchise'. What could have been expected from the United Kingdom, which they failed to do, in order to secure the right to vote of the residents of Gibraltar?

2. In order to ensure that the conferral of powers to intergovernmental organizations does not lead to accountability gaps and to conflicting obligations being imposed on States – stemming respectively from their pre-existing obligations and from their membership of, and participation in the life of, the IO – Dan Sarooshi proposes that States setting up IOs should 'decide to "delegate" and not "transfer" their powers to an organisation so that they will not be bound to comply with decisions taken by the organization when exercising conferred powers'. This proposal is based on the distinction between *delegations of powers* to international organizations and *transfers of powers*. In the former case, according to this distinction, States retain the right to exercise powers on a unilateral basis; they are not bound to comply with any measure adopted by the organization on the basis of the delegation of powers; and they may put an end, in principle, to the conferral of powers. In the latter case, by contrast, States are bound to comply with obligations flowing from the exercise by the organization of the powers which it has transferred (D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford University Press, 2005), chapter 5, section II (pp. 58–64)). Is this a viable solution? Should States be prohibited from 'transferring' powers to IOs, in order to ensure that no attribution of powers

to IOs will result in States circumventing their international obligations? Sarooshi notes that 'the World Health Organisation, the Universal Postal Union, and the International Civil Aviation Organisation are given powers such that an organ of the organization can adopt binding regulations by majority decision, but in such cases the Member States have an express right to contract out of, or make reservations to, the application of a specific regulation to them, usually before it enters into force' (p. 59). Could these models be generalized?

3. How attractive are the alternatives to asserting a responsibility of its Member States for the acts adopted by an international organization in violation of human rights (see box 2.3.)? Consider the following arguments against seeing the direct responsibility of international organizations as an adequate substitute for the responsibility of its Member States: 'first, the human rights obligations of its member States may not correspond to those of the international organisation itself (in particular insofar as the international organisation will not be subjected to the monitoring mechanisms provided for in human rights treaties), so that the international responsibility resulting from the attribution of an international legal personality to the organisation should not be seen as a substitute for the compliance by its member States with their international obligations; second, the principle of the continuity of States' obligations imposed by human rights treaties is opposed to the idea that such obligations may be lessened, or set aside, by the transferral of powers to an international organisation; and third, since human rights treaties create obligations of an objective character, rather than institute a web of mutual rights and obligations between the States parties, it will generally not be in the interest of any State taking part in the negotiation of multilateral treaties establishing international organisations or in the decision-making procedures within those organisations to raise the issue of the compatibility with the human rights obligations of the acts adopted within that organisation'. Are these arguments convincing? Which counter-arguments could be invoked?
4. If, despite the objections recalled above, the option of a direct responsibility of the international organization appears preferable, what are the obstacles to the development of such a responsibility?

4.2 The specific character of the UN Charter and of UN Security Council Resolutions

Following the end of the conflict in Kosovo (March-June 1999), UN Security Council Resolution 1244 of 10 June 1999 decided on the deployment, under UN auspices, of an interim administration for Kosovo (UNMIK), as well as for the establishment of a security presence (KFOR) by 'Member States and relevant international institutions', 'under UN auspices', with 'substantial NATO participation' but under the 'unified command and control' of COMKFOR from NATO. KFOR contingents, whose troops came from thirty-five NATO and non-NATO countries, were grouped into four multinational brigades, each responsible for one geographic sector. KFOR was mandated to exercise complete military control in Kosovo. UNMIK was to provide an interim international administration and the authority vested in it by the UN Security Council was considered

to comprise all legislative and executive power as well as the authority to administer the judiciary (as confirmed by the First UNMIK Regulation (UNMIK Regulation 1999/1)). Although there was no formal or hierarchical relationship between the two presences, civil through UNMIK and military through KFOR, UNMIK and KFOR were to co-ordinate closely.

This was the background for two cases in which the issue of the responsibility of the States participating in the UNMIK or in the KFOR arose under the European Convention on Human Rights. In the case of *A. and B. Behrami* v. *France*, an application had been filed by the father of two children, one of whom was killed and the other seriously disabled in March 2000 when playing with undetonated cluster bomb units (CBUs) which had been dropped during the bombardment by NATO in 1999 in the municipality of Mitrovica, in an area placed under the authority of a multinational brigade (MNB) led by France. The investigation into the incident by the UNMIK police highlighted that UNMIK could not access the site without KFOR agreement and that, while KFOR had been aware of the unexploded CBUs for months, these had not been considered a high priority, although the detonation site had been marked out by KFOR the day after the incident took place. The complaint filed with the French Troop Contributing Nation Claims Office (TCNCO) was rejected on the ground that the UNSC Resolution 1244 had required KFOR to supervise mine-clearing operations until UNMIK could take over and that such operations had been the responsibility of the UN since 5 July 1999. However, when the UN were requested by the European Court of Human Rights to intervene as a third party in the *Behrami* case, they submitted that, while de-mining fell within the mandate of UNMIK, the absence of the necessary CBU location information from KFOR meant that the impugned inaction could not be attributed to UNMIK. Before the Court, Agim Behami complained under Article 2 ECHR that the incident took place because of the failure of French KFOR troops to mark and/or defuse the un-detonated CBUs which those troops knew to be present on that site.

In the companion case of *R. Saramati* v. *France, Germany and Norway*, Mr Saramati was detained on remand upon decision of KFOR, between 24 April 2001 and the decision to release him adopted by the Supreme Court on 4 June 2001. He was subsequently again arrested on 13 July 2001 by the UNMIK police, in the sector assigned to MNB Southeast, of which the lead nation was Germany. The detention was decided by order of the Commander of KFOR (COMKFOR), who was a Norwegian officer at the material time, after Mr Saramati had reported to the UNMIK police in Prizren, in order to collect belongings confiscated from him upon his previous arrest. At each trial hearing from 17 September 2001 to 23 January 2002, Mr Saramati's representatives requested his release. The Trial Court consistently responded that, although the Supreme Court had ruled against the continuation of the detention of Mr Saramati in June 2001, his detention was entirely the responsibility of KFOR. On 23 January 2002, Mr Saramati was convicted of attempted murder. He was detained until 9 October 2002, when the Supreme Court of Kosovo quashed Mr Saramati's conviction and sent his case for retrial, and ordered his release. In answer to a letter from Mr Saramati's representatives taking issue with the legality of his detention, the KFOR Legal Adviser advised that