Permanent Mission
of the Federal Republic of Germany
to the United Nations
New York

Note No. 91/2015

The Permanent Mission of the Federal Republic of Germany to the United Nations presents its compliments to the Secretary-General of the United Nations and, with reference to Chapter III A (para 26 "Subsequent agreements and subsequent practice in relation to treaty interpretation") of the Report of the International Law Commission on its Sixty-sixth Session (5 May to 6 June and 7 July to 8 August 2014) [United Nations document A/69/10], has the honour to submit the following information requested by the International Law Commission:

(a) Examples where the Practice of an International Organization has Contributed to the Interpretation of a Treaty

The Secretariat of the International Maritime Organization (IMO) issued an interpretative statement on the relationship between the United Nations Convention on the Law of the Sea (UNCLOS) and the several treaties managed by the IMO ("Implications of the United Nations Convention on the Law of the Sea 1982 for the International Maritime Organization (IMO)", doc. LEG/MISC/1 (1986 mimeo.), para. 71-73). In this statement the IMO Secretariat concludes that Art. 237 UNCLOS (Obligations under other conventions on the protection and preservation of the marine environment) and Art. 311 UNCLOS (Relation to other conventions and international agreements) neither restrict the

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normative activity of the IMO nor limit its mandate. According to the IMO, UNCLOS rather seems to rely, in many aspects, on the normative capacity of the IMO to achieve its objectives: "Thus, the Convention on the Law of the Sea does not preclude the existence or adoption of special rules and regulations by IMO, but in fact presupposes the existence of such IMO rules and regulations and depends on them for the effective implementation of its general principles, in many cases." (para. 71)

The interpretative statement clarifies: "… the Convention on the Law of the Sea does not affect the continued viability and applicability of international regulations, rules, standards, procedures, practices and principles which have been developed by IMO for the regulation of activities in the marine environment, except to the extent that any of the IMO regulations may be incompatible with the relevant provisions of the Convention." (para. 72)

This position was confirmed in more recent studies of the IMO Secretariat on the "Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization". Interestingly, the latest document (LEG/MISC.8, 30 January 2014) also notes: "In this regard, States Parties to UNCLOS should ensure that ships flying their flag or foreign ships under their jurisdiction apply generally accepted IMO rules and standards regarding safety and prevention and control of pollution. Non-compliance with these IMO provisions would result in sub-standard ships and violate the basic obligations set forth in UNCLOS concerning safety of navigation and prevention of pollution from ships." (p. 12)

(b) Examples where Pronouncements or Other Action by a Treaty Body Consisting of Independent Experts have been Considered as

Giving Rise to Subsequent Agreements or Subsequent Practice Relevant for the Interpretation of a Treaty

1. **Interpretation of the Provisions of the so-called "Aarhus Convention" by its Compliance Committee**

One example of the pronouncements of an independent expert body giving rise to subsequent practice concerns the interpretation of the provisions of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) by the Compliance Committee of the Aarhus Convention (ACCC).

a. The Committee's findings and recommendations with regard to Communication ACCC/C/2008/31 concerning compliance by Germany were subsequently endorsed by the Meeting of the Parties to the Convention (Decision V/9h). Art. 9 (3) Aarhus Convention stipulates: "In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment." The recommendation of the ACCC endorsed by the Meeting of Parties to the Convention notes with regard to Art. 9 (3) Aarhus Convention: "By not ensuring the standing of environmental NGOs in many of its sectoral laws to challenge acts or omissions of public authorities or private persons which contravene provisions of national law relating to the environment, the Party concerned fails to comply with article 9, paragraph 3, of the Convention." As a result, Germany is currently in the process of changing its domestic law.

b. Another instance of the direct contribution of the ACCC to the interpretation of the Aarhus Convention relates to its interpretation of Art. 6 (10) Aarhus Convention in Communication ACCC/C/2009/41). Art. 6 (10) Aarhus Convention provides: "Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate." The ACCC in this regard states: "...although each Party is given some discretion in these cases to determine where public participation is appropriate, the clause "mutatis mutandis, and where appropriate" does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public

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participation" (para. 55). Moreover, the ACCC interprets the provision as follows: "The Committee considers that the clause "where appropriate" introduces an objective criterion to be seen in the context of the goals of the Convention, recognizing that "access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns" and aiming to "further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment". Thus, the clause does not preclude a review by the Committee on whether the above objective criteria were met and whether the Party concerned should have therefore provided for public participation in the given case." (para. 56)

2. **Pronouncements by the Human Rights Committee concerning Article 2 para. 1 of the International Covenant on Civil and Political Rights**

The scope of application of the International Covenant on Civil and Political Rights (ICCPR) is defined by Article 2, paragraph 1, which provides:

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals ***within its territory and subject to its jurisdiction***[1] *the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

According to the Human Rights Committee's (Committee) constant practice, this means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.[2]

In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice (ICJ) also discussed whether the ICCPR also applies outside a State's national territory. More specifically, the issue before the Court was whether the Covenant is applicable to Israel with regard to individuals residing in the occupied Palestinian territories. Considering the object and purpose of the Covenant, the Court stated that States Parties would appear to be bound to its provisions in

[1] Emphasis added.

[2] Human Rights Committee, General Comment No. 31 of 29 March 2004, para. 10; cf. *inter alia* Case No. 52/79, López Burgos v. Uruguay; Case No. 56/79, Lilian Celiberti de Casariego v. Uruguay; Case No. 106/81, Montero v. Uruguay; Concluding Observation on the 1998 Report of Israel, CCPR/CO/78/ISR, para. 11.

situations when individuals are not present within a State's territory, but subject to that State's jurisdiction.[3]

As corroboration for this ruling, the Court explicitly referred to the Human Rights Committee's constant practice, according to which the Covenant also applies when a State exercises jurisdiction extra-territorially. The ICJ found that the *travaux préparatoires* of the Covenant confirm the Committee's views on Article 2.[4] According to the Court, these show that, in adopting the wording chosen, the drafters of the ICCPR did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.[5]

Concerning the German stance on Art. 2 para. 1 ICCPR, the Federal Government made the following statement before the Commission on 5 January 2005:

"Pursuant to Article 2, paragraph 1, Germany ensures the rights recognized in the Covenant to all individuals within its territory and subject to its jurisdiction.

Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction.

Germany's international duties and obligations, in particular those assumed in fulfilment of obligations stemming from the Charter of the United Nations, remain unaffected.

The training it gives its security forces for international missions includes tailor-made instruction in the provisions of the Covenant."[6]

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[3] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory opinion of 9 July 2004, para. 109.
[4] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory opinion of 9 July 2004, para. 109.
[5] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory opinion of 9 July 2004, para. 109.
[6] UN Doc. CCPR/CO/80/DEU/Add.1, 11 April 2005.

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3. Interpretation of Article 26 of the International Covenant on Civil and Political Rights by the Human Rights Committee

In the 1980s the Committee decided on several individual communications against the Netherlands. In the course of these decisions the Committee established its perception of an independent right to equality contained in Art. 26 ICCPR. The *Broeks* and *Zwaan-de Vries* cases[7] both related to rights guaranteed not by the International Covenant on Civil and Political Rights but rather by the International Covenant on Economic, Social and Cultural Rights. The Government argued that although Article 26 of the Covenant does entail an obligation to avoid discrimination, this article can only be invoked under the Optional Protocol to the Covenant in the sphere of civil and political rights, but not in a complaint concerning the enjoyment of economic, social and cultural rights. The reason for that is that the latter category of rights is the object of a separate international treaty. However, the Committee rejected this argumentation. It claimed that even though States Parties are not required to enact social security legislation by Art. 26 ICCPR, once States Parties enact such laws, they have to comply with the principle of equality and the prohibition of discrimination as established in the aforementioned article. These decisions by the Committee have sparked much controversy.

As a consequence of these decisions, the accession of the Federal Republic of Germany to the Optional Protocol to the International Covenant on Civil and Political Rights on 25 August 1993 was accompanied by the following reservation:

"The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications

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[7] S. W. M. Broeks v. The Netherlands, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 at 196 (1990); F. H. Zwaan-de Vries v. The Netherlands, Communication No. 182/1984, U.N. Doc. CCPR/C/OP/2 at 209 (1990).

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c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

The Permanent Mission of Germany to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

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