IN THE COURT OF APPEAL **C2002/2183**
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

THE EUROPEAN ROMA RIGHTS CENTER
AND OTHERS

Appellants

- and -

(1) THE IMMIGRATION OFFICER AT PRAGUE AIRPORT
(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

- and -

THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

SKELETON ARGUMENT ON BEHALF OF THE INTERVENER (UNHCR)

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1 The Office of the United Nations High Commissioner for Refugees ('UNHCR') has been entrusted by the United Nations General Assembly with the responsibility of providing international protection, under the auspices of the United Nations, to refugees within its mandate and of seeking permanent solutions to the problems of refugees.

2 The Statute of the Office is annexed to General Assembly Resolution 428 (V) of 14 December 1950 **(see volume 1, tab 9, page 48)**. In that same resolution, the General Assembly,

> '2. Calls upon Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his office, especially by:
>
> (a) Becoming parties to international conventions providing for the protection of refugees, and taking the necessary steps of implementation under such conventions;
>
> (b) Entering into special agreements with the High Commissioner for the execution of measures calculated to

> improve the situation of refugees and to reduce the number requiring protection...
>
> (h) Providing the High Commissioner with information concerning the number and condition of refugees, and laws and regulations concerning them...'

3 The Statute of the Office of the High Commissioner specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of the Office by, among others:

> 'Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto...'
>
> Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res. 428(V), 14 December 1950, Annex, paragraph 8.

4 This supervisory responsibility of the UNHCR is recognized in Article 35 of the 1951 Convention relating to the Status of Refugees, to which the United Kingdom became a party on 11 March 1954.

> *'Article 35 – Co-operation of the national authorities with the United Nations*
>
> 1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.'[1]

5 The legal and political context within which the High Commissioner must fulfil his responsibilities has been described as follows:

> '32. The international refugee protection regime is a dynamic body of universal and regional refugee law and standards, founded on the 1951 Convention and the 1967 Protocol, and complemented by international human rights and humanitarian law instruments, as well as national legislation and jurisprudence... UNHCR has sought in recent years to promote a more flexible, yet principled, application of existing instruments, while working closely with States to develop progressively new

[1] See also Article II, 1967 Protocol relating to the Status of Refugees. **(see volume 1, tab 16, page 149)**.

> approaches to refugee protection in the light of existing gaps and changing needs...
>
> '33. The 1951 Convention, complemented by the 1967 Protocol, forms a central part of the international protection regime. The 1951 Convention is a multilateral instrument of general and universal application, creating a special international legal regime for persons in need of international protection...
>
> '34. Promotional activities undertaken by UNHCR have sought both to foster the effective implementation of international legal standards, incorporating these standards into national legislation and administrative procedures, and to gain public support by strengthening knowledge and understanding of refugee protection issues...'
>
> UNHCR, 'Note on International Protection', UN doc. A/AC.96/930, 7 July 2000 **(see volume 1, tab 13, pages 98-99)**.

6 The extensive nature of UNHCR's international protection and solutions mandate is described in detail in the 'Note on International Protection', submitted by the High Commissioner to the 52nd (2001) and 51st (2000) Sessions of the Executive Committee. A copy of each Note (UN doc. A/AC.96/951, 13 September 2001and UN doc. A/AC.96/930, 7 July 2000) is included in the Intervener's Authorities, for the information of the Court **(see volume 1, tabs 13-14)**.

7 The present case raises important questions concerning the implementation of the 1951 Convention relating to the Status of Refugees, and involves the essential interests of refugees within the mandate of the High Commissioner and the international protection function of the Office. The resolution of this case will likely affect the interpretation by the United Kingdom of the 1951 Convention with regard to the protection of refugees and asylum seekers. The decision in this case can also be expected to influence the manner in which the authorities of other countries interpret the scope and extent of their international obligations.

8 Given its supervisory responsibilities, UNHCR considers it appropriate to place its own view before the Court and to provide any additional assistance to the Court for which it may be called upon. UNHCR will limit its submissions to the issues of international law and obligation raised in the judgment of Burton J. at first instance, including the learned judge's comments on UNHCR's position, as set out in its letter to the court of 19 July 2002 **(see volume 1, tab 15)**. In so far as this letter may have given the impression of inconsistency with the UNHCR *Handbook on Criteria and Procedures for the Determination of Refugee Status* **(see volume 1, tab 11)**, UNHCR will clarify its position.

9 The Court will be aware that Counsel for the Intervener was formerly instructed as one of Junior Counsel for the Appellants, that is, during the initial proceedings leading up to the judgment of Burton J. at first instance. Since November 2002, Counsel has been instructed exclusively by Solicitors SJ Berwin acting on behalf of the United Nations High Commissioner for Refugees. The information and advice furnished herein and the views expressed are those of the UNHCR and may or may not be shared by the Appellants in the present case. In presenting its views, UNHCR, and Counsel on its behalf, has been concerned solely to fulfil the statutory responsibilities set out above and to provide such information and advice on the relevant international law as will assist the Court to reach a decision.

10 Following the 'Summary of principal arguments', the present Skeleton Argument is organized as follows:

1. The stated purpose of the pre-entry clearance procedure
2. Summary of international legal issues raised by the pre-entry clearance procedure in regard to the 1951 Convention/1967 Protocol relating to the Status of Refugees
3. UNHCR's response to the learned judge's comments on its earlier position
4. UNHCR's response to the learned judge's reliance on certain authorities
5. The principle of good faith in international law, with particular reference to the implementation of treaties
   - 5.1 The background and authority of the principle of good faith
   - 5.2 The various aspects of good faith distinguished
   - 5.3 The principle of good faith and the objective theory of responsibility
6. Applying the principle of good faith in the present context
   - 6.1 The international protection of refugees and the object and purpose of the 1951 Convention/1967 Protocol and other relevant international obligations
   - 6.2 The requirement of compatibility of State actions with its international obligations at large
   - 6.3 The choice of means and the availability of alternatives
   - 6.4 Summary of factors relevant to determining the good faith implementation of international obligations
7. Conclusions

Summary of principal arguments

11 The UNHCR mandate, endorsed by the UNHCR Executive Committee and the UN General Assembly, includes the supervision and oversight of the international refugee protection regime at large.

12 The introduction by the United Kingdom of a pre-entry clearance procedure in the Czech Republic raises international legal issues relevant to the implementation of the 1951 Convention/1967 Protocol. These issues fall within the scope of the United Kingdom's general obligation to fulfil its international obligations in good faith.

13 The principle of good faith is a fundamental principle of international law, governing the creation and implementation of legal obligations, irrespective of their source.

14 The International Court of Justice has repeatedly confirmed that the 'good faith obligation' is not solely concerned with the implementation of specific convention provisions, but with the broader question of the compatibility of State actions with international law.

15 The responsibility of the State attaches not only to the actions of State officials within State territory, but also to the actions of such officials outside territorial jurisdiction, including within the sovereign territory of other States.

16 In relation to the introduction and implementation of 'pre-entry clearance' in a foreign State, the principle of good faith requires a State, (1) having ratified a treaty in the same or a related field, to apply and perform it in good faith and not to frustrate the achievement of its object and purpose; (2) to interpret any such treaty in good faith, in accordance with its ordinary meaning considered in context and in the light of its object and purpose; (3) to fulfil in good faith obligations arising from other sources of international law; and (4) to exercise its rights in good faith.

17 Specifically, the principle of good faith requires conduct which is *objectively* compatible with the meaning, object, and purpose of international conventions and other rules of international law.

18 A State lacks good faith in the application of a treaty, not only when it openly refuses to implement its undertakings, but when it seeks to avoid or to 'divert' the obligation which it has accepted, or to do indirectly what it is not permitted to do directly.

19 An agreement between two States party to the 1951 Convention which has the intention or effect of influencing the movement of persons in search of refuge is potentially liable to 'affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations', within the meaning of Article 41 of the 1969 Vienna Convention on the Law of Treaties **(see volume 1, tab 30, page 330)**.

20 An agreement between two or more States party to the 1951 Convention which impinges on its 'non-derogable' provisions is potentially 'incompatible with the effective

execution of the object and purpose of the treaty as a whole', within the meaning of Article 41 of the 1969 Vienna Convention on the Law of Treaties.

21 The principle of good faith is concerned with the effects of State actions, rather than with intent or motivation.

22 The principle of good faith controls also the exercise of rights by States. A State's rights must be exercised compatibly with its various obligations; that is, reasonably, proportionately, and with due regard to alternatives.

23 On the evidence available, the extent to which the policy and practice of pre-entry clearance is compatible with the United Kingdom's international obligations does not appear to have been considered, and no measures appear to have been taken to ensure such compatibility.

24 The principle of good faith, considered with the principle of choice of means, requires a State to consider the use of reasonable alternatives proportionate to its policy objectives in international affairs, which are least likely to violate its international obligations.

1. The stated purpose of the pre-entry clearance procedure

25 From the summary of information provided in the judgment of Burton J. at first instance, UNHCR understands that the procedure known as 'pre-entry clearance' was introduced in Prague by reason of what has been called 'asylum overload' (*European Roma Rights Center & Others v. Immigration Officer at Prague Airport and Secretary of State for the Home Department* [2002] EWHC 1989, paragraphs 11, 15) **(see volume 4, tab 52, pages 1153-1154)**.

26 'Asylum overload', in turn, is described as occurring when 'a substantial number of those who seek asylum outside of entry, or of those who seek and obtain leave to enter on a different basis and then subsequently make their application for asylum, is found not to be entitled to asylum'. (Judgment, paragraph 19). The purpose of pre-entry clearance can be understood from the following Home Office statement of 7 August 2001, also quoted in paragraph 19 of the Judgment of Burton J **(see volume 4, tab 52, page 1155)**:

> 'Pre-clearance immigration controls in Prague have succeeded in sending a firm signal that abuse of UK asylum and immigration procedures will not be tolerated. The deterrent effect of pre-clearance has meant the number of people seeking to abuse British immigration control has now significantly reduced. The scheme was implemented from 18 July as a flexible and short term response to the high levels of passengers travelling from

Prague who are subsequently found to be ineligible for entry to the UK...'

27 According to information provided by the Home Office and summarised in paragraphs 19 and 20 of the judgment, the United Kingdom government was concerned by the numbers of refugees and asylum seekers arriving from the Czech Republic, and by the apparently disproportionate gap between the numbers of well-founded and less or not well founded cases from a country in which, it was recognized in the Home Office's summary country assessment, discrimination and harassment and even persecution of Roma citizens does occur (paragraph 21 of the judgment).[2] According to Home Office information (paragraph 20 of the judgment), in 2000, of some 1,800 applications for asylum by Czech Roma, 10 were recognized at first instance as Convention refugees and a further 10 were granted exceptional leave to remain. According to the same source, the success rate on appeal for Czech applicants is around 6%.[3]

2. Summary of international legal issues arising by reason of the pre-entry clearance procedure in regard to the 1951 Convention/1967 Protocol relating to the Status of Refugees

28 The introduction of a pre-entry clearance procedure raises a number of international legal issues relevant to the implementation of the 1951 Convention/1967 Protocol. In view of the United Kingdom's participation in the international regime for the protection of refugees, these may be subsumed under one rubric, namely, the extent to which the practice is compatible overall with the United Kingdom's general obligation to implement its international obligations in good faith.

29 It will be submitted and shown below that the 'good faith obligation' in turn invites consideration of, among others:

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[2] There is also evidence from other sources (paragraph 28 of the Judgment), and a considerable body of material is available to UNHCR on this matter. In accordance with its normal practice when intervening in proceedings, UNHCR does not consider it appropriate to comment on the facts specific to the individual claimants, although it remains at the service of the Court in regard to general background information relating to countries of origin.

[3] UNHCR is aware that authoritative statistical evidence is not available. However, if one assumes a take up on appeal of 80% by rejected applicants, this would entail Convention recognition of a further 84 refugees and a similar number of grants of exceptional leave to remain. This equates to a total of some 188 grants of protection. In the absence of firm statistics, these figures are necessarily speculative, but suggest a not inconsiderable need for international protection. Although not broken down by reference to country of origin, UNHCR has been advised that the success on appeals reported by the Refugee Legal Centre in 2002, for example, is between 27%-30%.

29.1 The extent to which, before the introduction of pre-entry clearance, relevant facts ought to have been taken into account, including the situation in the country in which pre-entry clearance is to be practised.

29.2 The extent to which the practice of pre-entry clearance is compatible with the United Kingdom's other international obligations, including those under the 1966 International Convention for the Elimination of All Forms of Racial Discrimination **(see volume 1, tab 28)** the 1966 International Covenant on Civil and Political Rights **(see volume 1, tab 28)**, the 1951 Convention relating to the Status of Refugees **(see volume 1, tab 26)**, and the 1969 Vienna Convention on the Law of Treaties **(see volume 1, tab 29)**.

29.3 The extent to which the practice of pre-entry clearance involves the United Kingdom in joint responsibility with the Czech Republic in relation to the latter's obligations under, among others, Article 2 of the Fourth Protocol to the 1950 European Convention on Human Rights **(see volume 1, tab 25.1, page 258)**.

30 Before dealing with these substantive issues, however, UNHCR will address two incidental matters, namely, its position as stated by letter to the court at first instance (section 3 below); and its position on certain authorities relied on in the judgment of Burton J. (section 4 below).

3. UNHCR's response to the learned judge's comments on its earlier position

31 At paragraph 42 of his judgment Burton J. includes the following lengthy quotation from a letter sent by the UNHCR Representative in the United Kingdom on 19 July 2001 to Solicitors acting for the Appellants:

> '4. We acknowledge that the primary questions in this legal action do not turn on the text of the Convention. Rather, they turn on understanding the international protection regime as a complex of international practice and precepts drawn from refugee law, human rights law and general principles of international law. The Convention is the cornerstone of this complex. Where, as in the present case, issues arise that strictly do not fall within the Convention's textual scope, its objectives and purposes should act as a reliable guide. UNHCR's reservations to the pre-screening procedures are best understood in this light.
>
> '8. The Convention's objects and purposes are important in ensuring that States' approach to illegal migration is consistent

> with their Convention obligations. UNHCR acknowledges that States have a legitimate interest in controlling illegal migration. Such controls should not, however, be introduced in a manner which makes it difficult or impossible for refugees to access international protection. The pre-clearance procedures at Prague Airport have precisely the effect of preventing persons from boarding a flight to the UK when they express an intent to seek asylum. This means that persons at risk of persecution will be prevented from gaining access to international protection.
>
> '9. The international refugee protection regime would be significantly jeopardised if States which have agreed to provide protection for refugees were free to cut off all reasonable modalities of access to its territory for refugees in the name of migration control.
>
> '13. … Although the decision to grant asylum to a particular refugee remains the prerogative of the State, there is an implicit responsibility on States to refrain from preventing asylum seekers from finding safety or from obtaining access to asylum procedures. Without such an implied responsibility the right to seek asylum might be rendered illusory.
>
> '14. It should be noted that denial of access to asylum procedures carries with it a significant amount of risk to the safety of the individual. Clearly the potential risks are heightened where – as is the case with the procedures at Prague Airport – access to procedures is denied in co-operation with the very country from which international protection is sought.'
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> *European Roma Rights Center & Ors v. Immigration Officer at Prague Airport & SSHD* [2002] EWHC 1989, para. 43 (quotation reproduced without addenda and comments) **(see volume 4, tab 52, pages 1162-1163)**.[4]

32 At paragraph 43, Burton J. considers the ambit of the 1951 Convention, noting first that,

> 'the Convention arose after the second world war, in the context of massive displacement of peoples, and this led to the "*heavy burden on certain countries*" and "*tension between states*" referred to in the fourth and fifth Recitals to the Convention. The purpose in that regard was thus to protect and place those who were *already refugees*.'

[4] Burton J. added at the end of this quotation: 'However UNHCR did not seek to intervene in the proceedings.' The Court is invited to note that UNHCR's 'intervention' in appeal and review proceedings in fact may take several forms, including through submission of a letter to solicitors, a more detailed report for the benefit of the court, becoming party to an appeal under the Immigration Appeals (Procedure) Rules, and on request to or invitation by, the court. Various factors determine the form of intervention, including resources, and no other significance should be attached to UNHCR's initial decision to respond by letter.

> *European Roma Rights Center & Ors v. Immigration Officer at Prague Airport & SSHD* [2002] EWHC 1989, para. 43(i)(a) – emphasis in original.

33 If the learned judge was of the view that the Convention was intended to deal exclusively with an already existing population of refugees, this is incorrect. The learned judge's use of the past tense ('led') is not supported by the terms of the Preamble, while Recommendation D adopted by the Conference of Plenipotentiaries in its Final Act provides:

> 'The Conference,
> 'Considering that *many persons still leave their country of origin* for reasons of persecution and are entitled to special protection on account of their position,
> 'Recommends that Governments *continue to receive refugees* in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement.' (Emphasis supplied).

34 The Convention, in short, was intended to deal with both present and future refugees, as is confirmed by the terms of the 1967 Protocol, removing the temporal limitation on causes.

35 The learned judge next relies on textbook and academic references and paragraph 88 of the UNHCR *Handbook* to support the non-controversial and undisputed assertion that a Convention refugee is defined as a person *outside* his or her country owing to the fear of persecution. (Judgment, para. 43(i)(b), (c), (d)). Paragraph 88 of the UNHCR *Handbook* reads as follows **(see volume 1, tab 11, page 66)**:

> 'It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.'

36 The learned judge thereupon remarks that the UNHCR *Handbook* 'does not support, and rather conflicts with, the broad statements of views set out in the UNHCR Letter'. However, as will be shown more fully below, UNHCR position is precisely not about the personal scope of Convention and refugee definition, but rather about the broader question of implementation and fulfilment of the Convention as a whole, and of other relevant rules of international law. It is also generally accepted that UNHCR's and States' protection responsibilities extend to *asylum seekers*, that is, to persons whose claims have not yet been determined, until such time as they are found not to be in need

of international protection, for example, because they do not satisfy the refugee definition.

37 That Burton J. does not address these broader issues is clear from the terms of his general conclusion at paragraph 49 **(see volume 4, tab 52, page 1168)**:

> '(i) *On the basis of the Convention, as it stands at present*, there is no obligation on a signatory state not to introduce or continue a system of immigration control, whether by way of a requirement for visas or by the operation of a pre-clearance system such as is here being considered, to prevent those who are not yet refugees and are still in their countries of origin from travelling to the territory of the signatory state, or make it more difficult for them to do so...' (Emphasis supplied)

38 That there is some confusion regarding the nature of international obligation and, indeed, the mandate responsibilities of UNHCR, is evident from the learned judge's further conclusion at paragraph 49:

> '(iii) If such an obligation is to be imposed, it must derive from a further Convention, and not implied into the present one. No doubt any discussions in that regard would need to consider the question of how far and how much further there can be intervention within the internal affairs of countries in order to protect those who are, or allege they are, being persecuted (and whether such is to be best done by facilitating their departure from such a country): and how far indeed the UNHCR, as was canvassed in the course of the hearing, is then to be extending its responsibilities from refugees to potential or internal refugees. But whatever may occur in the future, I am satisfied that the ambit of the Convention at present does not so extend.'

39 At paragraph 41, the learned judge also refers to the State 'extending its frontier' to the territory of the country of origin, but does not consider the responsibilities attaching to such extension of frontier control, for example, as a consequence of the principle of non-rejection of refugees at the frontier inherent in the fundamental principle of *non-refoulement*.

40 However, as indicated already, in UNHCR's submission, the essential legal issue raised in the present case concerns the general obligation to implement and fulfil treaty obligations in good faith. So far as UNHCR's international protection and supervisory responsibilities are engaged, no question arises of an extension of its mandate.

4. UNHCR's response to the learned judge's reliance on certain authorities

41 It follows from the above that the academic commentary relied on by Burton J. at paragraph 44(i) is likewise irrelevant to the central legal question, being something of a gloss on the history of the Convention refugee definition.

42 Burton J. also seeks to rely on the decision of the US Supreme Court in *Sale, Acting Commissioner, Immigration and Naturalisation Service v Haitian Centers Council Inc.* 509 US 155 (1993)[5] **(see volume 4, tab 51)** in support of the proposition that if 'returning those already refugees to their country of origins was not in contravention of the Convention', no obligation is owed to those still in their country of origin.

43 In UNHCR's view, this once again misses the central legal question, which is *not* about the application of the Convention to persons still within their country of origin. Although this authority is not relevant, UNHCR considers it useful to place on record its position in relation to this judgment and its value, if any, in regard to the interpretation of Article 33 of the 1951 Convention **(see volume 1, tab 26, page 270)**.

44 In *Sale*, the US Supreme Court was called upon to rule on the territorial scope of United States domestic law (specifically the provisions of the Immigration and Nationality Act on exclusion and deportation). The majority of the Supreme Court also incidentally pronounced on the territorial scope of Article 33 of the 1951 Convention, but the Court had already held that this article was not *self-executing* in US domestic law; its views on the international meaning and scope of the provision were therefore unnecessary.

45 Moreover, in the view of UNHCR and a wide range of commentators, the majority's position on the international law issues is entirely incorrect, and in marked contrast with the serious and accurate dissent of Justice Blackmun. UNHCR's views on the correct interpretation of Article 33 are set out in the *amicus curiae* brief submitted to the US Supreme Court (a copy of which is included in the Intervener's Authorities, for the information of the Court) **(see volume 1, tab 12)**.

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[5] In the judgment the decision has been attributed in error to the United States Court of Appeal for the Second Circuit.

46 Overall, the judgment should be viewed as a domestic decision having no weight or authority in international law; it was immediately objected to by UNHCR, and has not been followed in any other jurisdiction. Moreover, United States practice has not followed this ruling; on the contrary, persons interdicted by US authorities outside US territory are routinely examined to determine whether they have a 'colorable' claim to asylum.

47 The UNHCR Executive Committee has repeatedly confirmed the fundamental character of the principle of *non-refoulement*, linked to access to procedures, and its non-derogable character.

> See 'Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees', adopted at the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol, Geneva, 12-13 December 2001, doc. HCR/MMSP/2001/09, 16 January 2002; UNHCR Executive Committee Conclusion No. 6 (XXVIII), 1977, 'Non-refoulement', *Report* of the 28th Session, UN doc. A/SC.96/549, para. 53.4 **(see volume 1, tab 10)**; also the following UNGA Resolutions on the Office of the United Nations High Commissioner for Refugees: 48/116, 20 December 1993; 49/169, 23 December 1994; 54/146, 17 December 1999 **(see volume 1, tabs 5-7)**.

5. The principle of good faith in international law, with particular reference to the implementation of treaties

5.1 The background and authority of the principle of good faith

48 The principle of good faith, as a legal principle, forms an integral part, not only of the rule *pacta sunt servanda*, but generally and throughout international law. As the International Court of Justice stated in the *Nuclear Tests* Case:

> 'One of the basic principles governing the creation and performance of legal obligations, *whatever their source*, is the principle of good faith...'
>
> *Nuclear Tests (Australia v. France) Case*, ICJ Reports, 1974, 253, 268, para. 46; see also *Case Concerning Border and Transborder Armed Actions*, ICJ Reports, 1988, 105, para. 94 **(see volume 2, tab 37, page 713)**.

49 The extent to which the principle of good faith pervades international relations has also been remarked on by the International Court of Justice.

> 'The Court observes that the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969. It was mentioned as early as the beginning of this century in the Arbitral Award of 7 September 1910 in the *North Atlantic Fisheries case* (United Nations, Reports of International Arbitral Awards, Vol. XI, p. 188). It was moreover upheld in several judgments of the Permanent Court of International Justice (*Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 30; *Free Zones of Upper Savoy and the District of Gex*, Order of 6 December 1930, P.C.I.J., Series A, No. 24, p. 12 and 1932, P.C.I.J., Series A/B, No. 46, p. 167). Finally, it was applied by this Court as early as 1952 in the case concerning *Rights of Nationals of the United States of America in Morocco* (Judgment, I.C.J. Reports 1952, p. 212), then in the case concerning *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)* (Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 18), the *Nuclear Tests* cases (I.C.J. Reports 1974, pp. 268 and 473), and the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)* (Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, p. 105).'
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> *Cameroon v. Nigeria*, Preliminary Objections Judgment, ICJ Reports 1998, para. 38 **(see volume 2, tab 40, page 733)**.

50 The origins of the principle of good faith as a principle of municipal law generally and widely recognized among the proponents of natural law and through the founding commentators on international law (Suarez, Gentili, Grotius, and others) are well known and do not require repeating for the purposes of the present case.[6]

51 Article 2(2) of the United Nations Charter **(see volume 1, tab 1, page 2)** places the principle in the forefront of those which are to govern the conduct of Members:

> 'The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles...
>
> 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the Charter.'

[6] The background is set out in J. F. O'Connor, *Good Faith in International Law*, Aldershot: Dartmouth, 1991. O'Connor notes: 'The elaboration of the concept of *bona fides* in Roman law as involving a *legal* obligation to do what a decent, fair and conscientious man would do in particular circumstances contributed very largely to the association of good faith, in a wider ethical sense, with *pacta sunt servanda.* In relation to keeping promises and agreements, good faith acquired the meaning of not only the obligation to observe literally the undertakings given, but also the advertence to the real intentions of the parties or to the "spirit" of the agreement.' Ibid., 39.

52 It will be recalled that the Preamble of the Charter affirms the intention, 'to establish conditions under which justice and respect for *the obligations arising from treaties and other sources of international law* can be maintained'. (United Nations Charter, Preamble; emphasis supplied)

53 In the words of the US delegate to the San Francisco conference, the principle,

> '... had the meaning that we are all to observe those obligations, not merely the letter of them, but the spirit of them.'
> United Nations Conference on International Organization (UNNCIO), vi, 71. The wording of Article 2(2) was adopted unanimously by Committee I. Cited in Simma, B., *The United Nations Charter: A Commentary*, Oxford: Oxford University Press, 1995, 89-97 **(see volume 4, tab 67)**.

54 Article 2(2) does not apply merely to obligations assumed under the Charter, but to all obligations that are in accordance with the Charter. This has been confirmed in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by consensus in UN General Assembly resolution 2625 (XXV), 24 October 1970 **(see volume 1, tab 3, page 14)**.

> '*The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter*
> 'Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.
> 'Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.
> 'Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.'

55 The principle of good faith is thus among the 'basic principles of international law' (Declaration on Principles..., para. 3). 'It is not a simple ethical principle, when applied to law, event though it is *also* an ethical principle and was borrowed by law from the ethical realm.'

> M. Virally, 'Review Essay: Good Faith in Public International Law', 77 *American Journal of International Law* 130-4, 133 (1983) **(see volume 4, tab 68)**. See also S. Rosenne, *Developments in the Law of Treaties 1945-1986*, Cambridge: Cambridge University Press, 1989, 135-6: 'Its normative content

> is to be distinguished from the role of good faith against the broader background of international relations... Without denying... that good faith, as a concept, is *also* one of public and of private morality, the view that it is *only* a moral or a metaphysical concept is one that cannot be entertained...' **(see volume 4, tab 65, pages 1273-1274)**

56 The essentially *legal* character of good faith in international law has also been recognized by the International Law Commission (on which, see further below paragraphs **-**) and by modern commentators. Hersch Lauterpacht, when dealing with the related issue of 'abuse of rights', noted in 1958:

> '... it is possible to see an indirect approach [by the international court] to the principle prohibiting abuse of rights in the frequent affirmation of the duty of States to act in good faith in the exercise of their rights.'
>
> H. Lauterpacht, *The Development of International Law by the International Court of Justice*, London: Stevens, 1958, 163 **(see volume 4, tab 60, page 1254)**.
>
> See also, Rosenne, *Developments in the Law of Treaties*, 139-40.

57 In the *Norwegian Loans* Case, and then speaking in his judicial capacity, Judge Lauterpacht observed that,

> 'Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law.'
>
> *Certain Norwegian Loans*, ICJ Reports, 1957, 53 **(see volume 2, tab 36, page 650)**.

58 Fitzmaurice, a former Special Rapporteur on the Law of Treaties and Judge of the International Court of Justice, defined the principle as follows:

> 'The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have bona fide reasons for what it does, and not act arbitrarily and capriciously.'
>
> Fitzmaurice, G., 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law', 27 *British Yearbook of International Law* 1, 12-13 (1950) **(see volume 4, tab 57, pages 1230-1231)**.

59 Schwarzenberger included good faith among the 'seven fundamental principles' of international law.

> Schwarzenberger, G. & Brown, E., *A Manual of International Law,* Milton: Professional Books, 6th edn., 1976, 35-6 **(see volume 4, tab 66, pages 1297-1298)** .

60 Commenting on the 'prohibitory or mandatory character' of the rules underlying the principle of good faith, Schwarzenberger observes:

> 'It is possible to hold that, within the limits in which the principle of good faith is incorporated in international law, any deviation from these rules constitutes a breach of rules prohibiting the interpretation of legal duties of abstention as *jus strictum* or in outright bad faith. It is, however, equally permissible to put the emphasis on the positive regulative functions which the rules underlying the principle of good faith fulfil in delimiting the respective spheres of competing rights.'
>
> Schwarzenberger, G. & Brown, E., *A Manual of International Law,* Milton: Professional Books, 6th edn., 1976, 99.

61 In the words of an authoritative commentary on the United Nations Charter, Article 2(2),

> '... is concerned with a particular method of fulfilling obligations. This constitutes an abandonment of a formalistic understanding of law, in which too much attention is paid to the letter of the law. Instead the object and purpose of legal rules is emphasized in determining the conduct demanded in a concrete case.'
>
> Simma, B., et al., *The United Nations Charter: A Commentary,* Oxford: Oxford University Press, 1995, 91 **(see volume 4, tab 67, page 1301)**.

5.2 The various aspects of good faith distinguished

62 On the question of treaty interpretation, and specifically in regard to the application of Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, Burton J. found that, while this provision requires an obligation to be interpreted in good faith in the light of the object and purpose of a treaty and in accordance with its ordinary meaning, there was no obligation,

> '... actually expressed within the Convention which could be read in accordance with its ordinary meaning but purposively, so as to create a wider obligation in the light of the Convention's object and purpose which had then to be performed in good faith by reference to Article 26 of the Vienna Convention.'
>
> *European Roma Rights Center & Others v. Immigration Officer at Prague Airport and Secretary of State for the Home Department* [2002] EWHC 1989, paragraph 43(ii).

63 In UNHCR's submission, this approach is incomplete. For the avoidance of confusion, it is necessary to distinguish the various aspects of what is in fact a *general* principle of international law. So far as State responsibility is a matter of *objective* conditions (on which, see further below, paragraphs **-**), good faith is also to be distinguished from bad faith ('dolus'). 'Good faith' operates as a legal principle in different contexts, including the obligations of States,

(1) to settle disputes in good faith;[7]

(2) to negotiate in good faith;[8]

(3) having signed a treaty, not to frustrate the achievement of its object and purpose prior to ratification (Article 18 VCLT69);

(4) having ratified a treaty, to apply and perform it in good faith and not to frustrate the achievement of its object and purpose (Article 26 VCLT69);

(5) to interpret treaties in good faith, in accordance with their ordinary meaning considered in context and in the light of their object and purpose (Article 31 VCLT69);

(6) to fulfil in good faith obligations arising from other sources of international law (Article 2(2), UN Charter);

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[7] Manila Declaration on the Peaceful Settlement of International Disputes, UNGA Res. 37/10, 15 November 1982, Annex; *Aerial Incident Case* (Pakistan v. India), Jurisdiction of the Court, ICJ Reports 2000, para. 53 **(see volume 2, tab 41)**.

[8] See, for example, International Court of Justice, *Gabcíkovo-Nagymaros Case* (Hungary/Slovakia), ICJ Reports, 1997, paras. 141-2 **(see volume 2, tab 39)**.

(7) to exercise rights in good faith.[9]

64 In UNHCR's submission, the present case raises issues under the last four headings. These go beyond the interpretation and application of the terms of a particular treaty, but nevertheless require consideration of the law of treaties.

5.2.1 Good faith and the 1969 Vienna Convention on the Law of Treaties (VCLT69)

65 Three articles of the 1969 Vienna Convention on the Law of Treaties are relevant to the good faith implementation of treaty obligations:

> *'Article 18 – Obligation not to defeat the object and purpose of a treaty prior to its entry into force*
>
> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
>
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.
>
> *'Article 26 – Pacta sunt servanda*
>
> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
>
> *'Article 31 – General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith 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.

[9] This is a non-exhaustive list. In addition, VCLT69 provisions on fraud, corruption and coercion (Articles, 49, 50, 51) and on fundamental change of circumstances (*rebus sic stantibus* – Article 62) derive from the principle of good faith in operation.

> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by all the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context,
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.'
>
> 1969 Vienna Convention on the Law of Treaties: 1155 *UNTS* 331; *UKTS* 58 (1980), Cmnd. 7964 **(see volume 1, tab 29, pages 326-327)**.

5.2.2 The obligation not to defeat the object and purpose of a treaty

66 Writing in 1989, the Soviet scholar, Lukashuk noted as follows:

> 'The principle of good faith fulfilment of obligations requires not only that states implement what has been provided for by a rule imposing an obligation, but also that they refrain from acts that could defeat the object and purpose of such a rule. This interpretation was confirmed by the Vienna Convention on the Law of Treaties of 1969, which obliges states to refrain from acts that would defeat the object and purpose of a treaty prior to its entry into force (Article 18). The prescription takes on even greater significance with respect to treaties that have already entered into force. It cannot but apply also to customary norms having equal status with treaty norms.
>
> 'Thus, states are under an obligation to refrain both from acts defeating the object and purpose of a rule and from any other acts preventing its implementation.'

> I. I. Lukashuk, 'The principle *pacta sunt servanda* and the nature of obligation under international law', 83 *American Journal of International Law* 513-18, 515 (1989) **(see volume 4, tab 63, page 1260)**.

67 Although written at a time of major change in Soviet/Russian institutions (the article was published in a section of the *American Journal of International Law* entitled 'Agora: New Thinking by Soviet Scholars'), it is submitted that this is an accurate description of the principle of good faith particularly relevant to the issues now before the Court.

68 Moreover, the writer's propositions can be supported inductively, drawing on other authoritative sources.

69 During the course of drafting the Vienna Convention on the Law of Treaties, the International Law Commission located the obligation of a State to refrain from acts which would defeat the object and purpose of a treaty in two contexts. First, in what became Article 18,[10] as the obligation of a *signatory* State to refrain from such acts before the treaty entered into force. As the Special Rapporteur, Sir Humphrey Waldock noted, in this context, 'good faith was the foundation of an obligation which did not, strictly speaking, arise out of the treaty itself.'

> *Yearbook* of the International Law Commission, 1964, vol. I (Summary records of the 16th Session) 727th Meeting, 20 May 1964, 70**(see volume 1, tab 17)**,. See also *Yearbook* of the International Law Commission, 1965, vol. II (Documents of the first part of the 17th Session), 43, 44 **(see volume 1, tab 20)**; *Yearbook* of the International Law Commission, 1965, vol. I (Summary records of the first part of the 17th Session) 788th Meeting, 21 May 1965, 87, 88**(see volume 1, tab 19)**.

70 The ILC eventually decided to drop the specific reference to 'good faith'. In the view of Mr. Ago,

> '...admittedly the rule stated was an application of the principle of good faith, but there was no need to mention good faith expressly. The essential point was that the State was bound to refrain from acts calculated to frustrate the object of a treaty...'
> *Yearbook* of the International Law Commission, 1965, vol. I (Summary records of the first part of the 17th Session), 813th Meeting, 29 June 1965, para. 102 **(see volume 1, tab 19, page**

[10] As initially drafted, the then text (article 17, paragraph 2) provided that even before a treaty comes into force a State which has established its consent to be bound by the treaty is under an obligation of good faith to 'refrain from acts calculated to frustrate the objects of the treaty, if and when it comes into force'.

> **172)**; other members agreed (see paras. 104, 106, 109, 111, 113). In the words of a recent commentator, 'The legal basis of pre-treaty obligations is to be found in the principle of good faith.' 'Le fondement juridique des obligations préconventionnelles réside dans le principe de bonne foi': Robert Kolb, *La bonne foi en droit international public*, Presses Universitaire de France, 2000, 206 **(see volume 4, tab 61)**.

71 The second instance in which the ILC identified the obligation not to frustrate the object and purpose of a treaty lay in its formulation of the fundamental principle, *pacta sunt servanda*. In the 1964 draft, the then Article 55 provided:

> Article 55 – *Pacta sunt servanda*
>
> 1. A treaty in force is binding upon the parties and must be applied by them in good faith in accordance with its terms and in the light of the general rules of international law governing the interpretation of treaties.
>
> 2. Good faith, *inter alia*, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects...
>
> *Yearbook* of the International Law Commission, 1964, vol. II (Documents of the 16th Session), 7.

72 Referring to the ILC's recognition of 'pre-conventional' obligations, the Special Rapporteur commented,

> '*A fortiori*, when the treaty is in force the parties are under an obligation of good faith to refrain from such acts. Indeed, when the treaty is in force such acts are not only contrary to good faith but also to the undertaking to perform the treaty according to its terms which is implied in the treaty itself...'
>
> *Yearbook* of the International Law Commission, 1964, vol. II (Documents of the 16th Session), 8 **(see volume 1, tab 18, page 170)**.
>
> '... the intended meaning was that a treaty must be applied and observed not merely according to its letter, but in good faith. It was the duty of the parties to the treaty not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty.'
>
> *Yearbook* of the International Law Commission, 1964, vol. I (Summary records of the 16th Session), 727th Meeting, 20 May 1964, 70 **(see volume 1, tab 17, page 163)**.

73 The ILC redrafted the principle as follows: ‘A treaty in force is binding upon the parties to it and must be performed by them in good faith. [Every party shall abstain from any act incompatible with the object and purpose of the treaty.]’

74 It had unanimously agreed on the first sentence, while opinion was divided as to whether the sentence in brackets should be retained. Some members considered that the principle was implicit in the first sentence, whereas others regarded the two sentences as complementary, believing it advisable to stipulate that States must refrain from acts not expressly prohibited by the terms of the treaty, but incompatible with its object and purpose.

> *Yearbook* of the International Law Commission, 1964, vol. I (Summary records of the 16th Session), 748th Meeting, 18 June 1964, Articles submitted by the drafting committee, 52 and following.

75 Replying to a question from Mr. Lachs, the Polish representative, the Special Rapporteur said that the phrase ‘the object and purpose of the treaty’,

> ‘... was used with the same meaning as in paragraph 1(d) of article 18, on reservations. It had been taken from the advisory opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.* The purpose of the second sentence was to deal with the problem of certain acts which, although not prohibited by the letter of the treaty, would, if accomplished, render its performance much more difficult. It was meant to strengthen the first sentence by going beyond its literal provisions.’
>
> *Yearbook* of the International Law Commission, 1964, vol. I (Summary records of the 16th Session), 748th Meeting, 18 June 1964, 55 **(see volume 1, tab 17, page 164)**.

76 It was finally agreed to drop the explicit reference to the obligation of the State to refrain from acts incompatible with the object and purpose of the treaty, because the obligation was implicit in the statement of the principle, and it would be inadvisable to stress one of the applications of the principle to the exclusion of the others.

> *Yearbook* of the International Law Commission, 1964, vol. I (Summary records of the 16th Session), 748th Meeting, 18 June 1964, 55. See, for example, the views of Messrs. Rosenne at 63, de Luna at 71, Yasseen at 75; also *Yearbook* of the International Law Commission, 1966, vol. I (Summary records of the 18th Session), Messrs. Castrén at para. 24, and Ago at para. 32.

77 With regard to Article 26 (then Article 23 in the draft), the ILC's 1966 Commentary thus states:

> '(1) *Pacta sunt servanda* – the rule that treaties are binding on the parties and must be performed in good faith – is a fundamental principle of the law of treaties...
>
> '(2) There is much authority in the jurisprudence of international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*....
>
> '(3) Some members felt that there would be advantage in also stating that a party must abstain from acts calculated to frustrate the object and purpose of the treaty. The Commission, however, considered that this was clearly implicit in the obligation to perform the treaty in good faith and preferred to state the *pacta sunt servanda* rule in as simple a form as possible.'
>
> ILC Commentaries on Draft Articles, paras. 1, 2 and 5 on (then) draft Article 23, *Report* of the ILC on its 18th Session, 1966, 42-3 **(see volume 1, tab 22, pages 214-215)**.

78 Moreover, the link in Article 31 VCLT69 between good faith and the need to respect the meaning and purpose of a treaty emphasises the *objective* function of the principle. As Mr. Reuter observed with regard to then Article 17, the Commission had a choice between adopting an objective criterion or a subjective criterion; in conformity with the Commission's wishes, the Special Rapporteur had adopted an objective criterion by referring to the treaty – a solution which linked the obligation created to the treaty itself.

> *Yearbook* of the International Law Commission, 1965, vol. I (Summary records of the first part of the 17th Session), 788th Meeting, 21 May 1965, 88, paras. 38, 39. See also Aust, A., *Modern Treaty Law and Practice*, Cambridge: Cambridge University Press, 2000, 94 **(see volume 4, tab 53)**: the test is objective, and it is not necessary to prove bad faith.

79 Thus, good faith requires conduct which is objectively compatible with meaning, object and purpose. International jurisprudence has always based itself on objective considerations in determining whether a State has deprived a treaty of its object and purpose before its entry into force. Judgments on good faith or otherwise have thus looked at the conduct of the State and its consequences in fact, rather than at its intentions.

80 In the *Conditions of Admission to the United Nations Case*, Judge Azevodo considered abuse of rights as being related to good faith. In his separate opinion, he remarked:

> '[It] has now been freed from the classical notions of *dolus* and *culpa;* in the last stage of the problem an inquiry into intention may be discarded, and attention may be given solely to the objective aspect; i.e. it may be presumed that the right in question must be exercised in accordance with standards of what is normal, having in view the social purpose of the law.'
>
> *Conditions of Admission to the United Nations,* Advisory Opinion, ICJ Reports, 1947-8, 80 **(see volume 4, tab 33, page 471)**. Commenting on this decision, Rosenne concludes that, '...the court rightly turned itself away from any attempt to explore the depths of the "mind" of a collectivity such as a State and shifted the focus of its attention from such an elusive object to actual conduct.' *Developments in the Law of Treaties,* 171 **(volume 4, tab 65, page 1291)**.

81 Lack of good faith in the implementation of a treaty must be distinguished from a violation of the treaty itself. A State lacks good faith in the application of a treaty, not only when it openly refuses to implement its undertakings, but more precisely, when it seeks to avoid or to 'divert' the obligation which it has accepted, or to do indirectly what it is not permitted to do directly.

82 As Lord McNair has observed, 'A State may take certain action or be responsible for certain inaction, which, though not in form a breach of a treaty, is such that its effect will be equivalent to a breach of treaty; in such cases, a tribunal demands good faith and seeks for the reality rather than the appearance.'

> Lord McNair, *The Law of Treaties,* Oxford: Clarendon Press, 1961, 540 **(see volume 4, tab 64, page 1263)**.

83 Among various examples, he suggests that, 'the making of regulations by one party which in substance destroyed or frustrated the right of the other party would be a breach of good faith and of the treaty.'

> Lord McNair, *The Law of Treaties,* Oxford: Clarendon Press, 1961, 550.

84 In the *Free Zones Case,* France was under treaty obligations to maintain certain frontier zones with Switzerland free from customs barriers. The Permanent Court of International Justice, while recognizing that France had the sovereign and undoubted right to establish a police cordon at the political frontier for the control of traffic and even for the imposition of fiscal taxes other than customs duties, held that:

> 'A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation

> to maintain the zones by erecting a customs barrier under the guise of a control cordon.'
>
> *Free Zones Case*, (Merits), P.C.I.J., Ser. A/B, 46, 167 **(see volume 2, tab 32, page 371)**

85 The *North Atlantic Coast Fisheries Case* (Great Britain–United States of America) recognized the right and duty of Great Britain as the local sovereign to legislate in regulation of fisheries. However,

> '... treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate *at will* concerning the subject-matter of the treaty, and limiting the exercise of sovereignty of the State bound by a treaty with respect to that subject-matter to such acts as are consistent with the treaty.'
>
> UNRIAA, vol. XI, 167, 188 (1910), emphasis in original **(see volume 2, tab 31, page 358)**.

86 In the *Rights of US Nationals in Morocco Case*, the International Court of Justice considered that while the power of making the valuation of import goods for customs purposes vested with the customs authorities,

> '... it is a power which must be exercised reasonably and in good faith.'
>
> *Rights of US Nationals in Morocco*, ICJ Reports, 1952, 212 **(see volume 2, tab 35, page 584)**.

5.2.3 Good faith and the analogy of reservations

87 The role of good faith in the implementation of treaties can be further understood through the analogy of reservations. According to general international law, now set out in Article 19 VCLT69, reservations, if allowed at all, can only be made when signing, ratifying, accepting, approving or acceding to a treaty.

> *'Article 19 – Formulation of reservations*
>
> A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> (a) the reservation is prohibited by the treaty;
>
> (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
>
> (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.'

1969 Vienna Convention on the Law of Treaties: 1155 *UNTS* 331; *UKTS* 58 (1980), Cmnd. 7964.

88 No reservations may be made following the definitive expression of consent to be bound. A State party may not get round the prohibition or limitation of reservations by means which have the same purpose as reservations, but do not meet the definition of reservations; neither may a new reservation be formulated in the guise of interpretation of an existing reservation

> International Law Commission, Alain Pellet, Special Rapporteur, 'Seventh Report on Reservations to Treaties', UN doc. A/CN.4/526/Add.1, 16 May 2002, 'Consolidated text of all draft guidelines adopted by the Commission or proposed by the Special Rapporteur'; *Report* of the 54th Session, ILC *Yearbook*, 2002, ii, 495-99 (Guideline 2.3.4 – Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations) **(see volume 1, tab 23)**.

89 The general principles of law applicable to the making of reservations to treaties were considered by the International Court of Justice in its Advisory Opinion on *Reservations to the Genocide Convention* in 1951.

> 'It is... a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention.'
>
> *Reservations to the Genocide Convention*, Advisory Opinion, ICJ Reports, 1951, 15, at 21 **(see volume 2, tab 34, page 513)**

90 In considering competing arguments for unanimity or compatibility, the Court further remarked:

> '... even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. *The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them.* It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.'

> *Reservations to the Genocide Convention*, Advisory Opinion, ICJ Reports, 1951, 15, at 24 (emphasis supplied) **(see volume 2, tab 34, page 515)**.

91 Under the 1951 Convention, no reservations are permitted to, among others, Article 1 (refugee definition), Article 3 (non-discrimination), Article 4 (religious freedom), Article 16(1) (access to courts of law), and Article 33 (*non-refoulement*): see Article 42 CSR51. The question of reservations to the 1951 Convention does not arise as such in the present case. The point of the analogy is to invite examination of the policy and practice of pre-entry clearance in the light of (a) the permitted range of reservations; and (b) the compatibility with the object and purpose of the Convention of a reservation framed in terms of that policy and practice.

92 If the policy and practice are outside the permitted range of reservations (for example, they act as a geographical limitation on the refugee definition, discriminate in effect by reference to country of origin, deny access to courts of law, or result in *refoulement*), then a violation of the good faith obligation may result.

93 Similarly, if the policy and practice are incompatible with the object and purpose of the Convention then, notwithstanding that they are adopted in exercise of sovereign powers, a good faith violation also results. The object and purpose of the 1951 Convention are considered more fully below (paragraphs **-**).

5.2.4 Good faith and the revision or modification of multilateral treaties

94 The issue of 'revision' of treaties appears to be raised by the agreement between the United Kingdom and the Czech Republic, so far as its *effects* may indeed modify or restrict the application of the 1951 Convention.

95 The revision of multilateral treaties is governed by established rules of general international law, and the revision of the 1951 Convention is also expressly provided for by that instrument.

> See Article 45 CSR52; Article 40 VCLT69.

96 The Vienna Convention on the Law of Treaties also sets out the rules governing the modification of multilateral treaties between certain of the parties only.

> *Article 41 – Agreements to modify multilateral treaties between certain of the parties thereto*
>
> 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

> (a) the possibility of such a modification is provided for by the treaty; or
>
> (b) the modification in question is not prohibited by the treaty and:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
>
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
>
> 2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

97 As the International Law Commission pointed out in its commentary to Article 40 (then draft article 35),

> 'The Commission... considers that the very nature of the legal relation established by a treaty requires that every party should be consulted in regard to any amendment or revision of the treaty. The fact that this has not always happened in the past is not a sufficient reason for setting aside a principle which seems to flow directly from the obligation assumed by the parties to perform the treaty in good faith...'
>
> *Report* of the International Law Commission on its 18th Session, 4 May–19 July 1966, 63, para. (9) **(see volume 2, tab 21, page 202)**.

98 Specifically, with regard to Article 41 (then draft article 37 in a form substantially no different from that adopted in 1969), the ILC remarked:

> '(1) This article... deals not with "amendment" of a treaty but with an "*inter se* agreement" for its "modification"; that is, with an agreement entered into by some only of the parties to a multilateral treaty and intended to modify it between themselves alone. Clearly, a transaction in which two or a small group of parties set out to modify the treaty between themselves alone without giving the other parties the option of participating in it is on a different footing from an amending agreement drawn up between the parties generally, even if ultimately they do not all ratify it. For an *inter se* agreement is more likely to have an aim incompatible with the object and purpose of the treaty. History furnishes a number of instances of *inter se* agreements which substantially changed the régime of the treaty and which overrode the objections of interested States. Nor can there be any doubt that the application, and even the conclusion, of an *inter se* agreement

> incompatible with the object and purpose of the treaty may raise a question of State responsibility. Under the present article, therefore, the main issue is the conditions under which *inter se* agreements may be regarded as permissible.
>
> '(2) *Paragraph 1(a)* necessarily recognizes that an *inter se* agreement is permissible if the possibility of such an agreement was provided for in the treaty: in other words, if "contracting out" was contemplated in the treaty. *Paragraph 1(b)* states that *inter se* agreements are to be permissible in other cases only if three conditions are fulfilled. First, the modification must not affect the enjoyment of the rights or the performance of the obligations of other parties; that is, it must not prejudice their rights or add to their burdens. Secondly, it must not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty... Thirdly, the modification must not be one prohibited by the treaty... These conditions are not alternative, but cumulative. The second and third conditions, it is true, overlap to some extent since an *inter se* agreement incompatible with the object and purpose of the treaty may be said to be impliedly prohibited by the treaty. Nevertheless, the Commission thought it desirable for the principle contained in the second condition to be stated separately...
>
> '(3) *Paragraph 2* seeks to add a further protection to the parties against illegitimate modifications of the treaty by some of the parties through an *inter se* agreement by requiring them to notify the other parties in advance of their intention to conclude the agreement and of the modifications for which it provides...'
>
> *Report* of the International Law Commission on its 18th Session, 4 May–19 July 1966, 65, paras. (1)-(3).
>
> See also Article 60(5) VCLT69 (limiting the termination or suspension of the operation of treaties as a consequence of breach, in respect of 'provisions relating to the protection of the human person contained in treaties of a humanitarian character').

99 As the Commentary shows, Article 41(1)(b) is especially relevant, and invites attention to the impact and effects of any such *inter se* agreement, and to its compatibility with the object and purpose of the treaty, including such provisions as are not subject to derogation.

100 With regard to *reservations*, Article 42 of the 1951 Convention provides:

> '1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to Articles 1, 3, 4, 16(1), 33, 36-46 inclusive.'

101 Thus, no State party to the 1951 Convention may make any reservation in respect to the refugee definition (Article 1), including by way of geographic limitation; to the principle of non-discrimination (Article 3), including in the application of the Convention by reference to race, religion or country of origin; to the freedom of refugees to practice their religion (Article 4); to the principle of access to courts of law (Article 16(1)); or to the principle of *non-refoulement* (Article 33).

102 It is submitted, that an agreement between two States party to the 1951 Convention which has the intention or effect of influencing the movement of persons in search of refuge is potentially liable to 'affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations'. In particular, such an agreement would create disparities between different parts of the world with regard to respect for international obligations and matters for which a common and coherent international practice is required. Such disparities have the effect of distorting the burden-sharing rationale underlying the 1951 Convention, by shifting the responsibility for examining certain types of asylum claims to other countries. The 1951 Convention, together with the 1967 Protocol, is framed to apply without geographic restrictions or discrimination. Its efficacy depends on it being global in scope and adherence, and if *inter se* agreements were permitted, the treaty regime as a whole would be rendered meaningless.

103 It is further submitted that any agreement between two or more States party to the 1951 Convention which impinges on these 'non-derogable' provisions is potentially 'incompatible with the effective execution of the object and purpose of the treaty as a whole'.

104 In the circumstances, UNHCR is not aware that any consideration has hitherto been given to the applicable provisions of general international law here set out. In the absence of such consideration, it would appear that the principle of good faith implementation of international obligations has been infringed.

5.2.5 The duty to exercise rights in good faith

105 Writing in 1953 on the general principles of international law, Bin Cheng concluded:

> 'The principle of good faith which governs international relations controls also the exercise of rights by States. The theory of abuse of rights (*abus de droit*), recognized in principle both by the Permanent Court of International Justice and the International Court of Justice, is merely an application of this principle to the exercise of rights...
>
> 'Good faith in the exercise of rights... means that a State's rights must be exercised in a manner compatible with its various

> obligations arising either from treaties or from the general law. It follows from this interdependence of rights and obligations that rights must be reasonably exercised...'
>
> Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, London: Stevens & Son, 1953, 121, 131 **(see volume 4, tab 55, page 1202)**. See also above, paragraphs **-**.

106 Modern jurisprudence, particularly in the field of human rights, applies corresponding notions of reasonableness and proportionality.

> Cf. Article 300, 1982 United Nations Convention on the Law of the Sea (Good faith and abuse of rights): 'States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.' **(see volume 1, tab 30, page 346)**

5.3 The principle of good faith and the objective theory of responsibility

107 As already indicated above, the principle of good faith is essentially *objective* in application. Consistently with the general principles of international law on the responsibility of States for internationally wrongful acts, good faith looks to the *effects* of State action, rather than to the (subjective) intent or motivation, if any, of the State itself.

> See I. Brownlie, *Principles of Public International Law*, Oxford: Clarendon Press, 5th edn., 1998, 440, 444 remarking that, 'provided that agency and causal connection are established, there is breach of duty by result alone' **(volume 4, tab 54, page 1187)**; and noting the irrelevance of intention to harm, or of *dolus* as a condition of liability.
>
> See also J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge: Cambridge University Press, 2002, 84 (commenting on attribution in particular as an element of responsibility): 'In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of the State that matters, independently of any intention.' **(see volume 4, tab 56, page 1225)**

108 Fitzmaurice, reviewing the law and procedure of the International Court Justice, considered whether the subjective element was essential; he noted:

> 'There is always a natural reluctance to ascribe bad faith to States, in the sense of a deliberate intention knowingly to circumvent an international obligation. Is this subjective element an essential ingredient of the concept of bad faith? Possibly, in the case of bad faith considered purely in and of itself, it is such an ingredient. But this would not seem necessarily to apply to an abuse of rights – and it is largely through abuses of rights that actions that may give the impression of being in (deliberate) bad faith are carried out... A State which, though not with the actual object of breaking an international obligation as such, uses its right to apply certain laws, or to apply them in a certain way, in such a manner that the obligation is not in fact carried out, may be said to have committed an abuse of rights.'
>
> Fitzmaurice, G., 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of International Law', 35 *British Yearbook of International Law* 183, 209 (1959) **(see volume 4, tab 59, page 1242)**.

6. Applying the principle of good faith in the present context

6.1 The international protection of refugees and the object and purpose of the 1951 Convention/1967 Protocol and other relevant international obligations

109 The International Court of Justice approached the 'object and purpose' aspect of certain types of standard-setting agreements, such as in the area of human rights and refugee matters, in the context of its Advisory Opinion on *Reservations to the Genocide Convention.* Its remarks in that instance are particularly significant, in view of claims that the 1951 Convention appear to impose more extensive obligations on some States, than on others.

> 'The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison*

> *d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.'
>
> *Reservations to the Genocide Convention,* Advisory Opinion, ICJ Reports, 1951, 15, at 23 **(see volume 2, tab 34, page 516)**.

110 The object and purpose of the Refugee Convention is to extend the protection of the international community to refugees, and to assure to refugees 'the widest possible exercise of... fundamental rights and freedoms'; the minimum content of protection is illustrated by the category of impermissible reservations.

> 1951 Convention, Preamble; on reservations, see above paragraphs **-**.

111 The jurisprudence of the European Court of Human Rights illustrates the importance of 'object and purpose' to an assessment of validity of State policy and practice.

> See, for example, *Anguelova v. Bulgaria,* 13 June 2002, para. 109 **(see volume 3, tab 50, page 1107)**; *Prinz Hans-Adam II of Liechtenstein v. Germany,* 12 July 2001, para. 48 **(see volume 3, tab 47, page 1002)**; *Z v. United Kingdom,* 10 May 2001, para. 103 **(see volume 3, tab 46, page 958)**; *Chassagnou v. France,* 29 April 1999, para. 100 **(see volume 3, tab 42, page 798)**.

6.2 The requirement of consistency or compatibility of State actions with its international obligations at large

112 The requirement of 'consistency' is a well established principle, applicable in times of emergency as much as in normal times. Article 15 of the European Convention on Human Rights, for example, provides that,

> 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, *provided that such measures are not inconsistent with its other obligations under international law*.' (Emphasis supplied) **(see volume 1, tab 25, page 249)**.

113 Similar provision is made in the Article 4 of the 1966 International Covenant on Civil and Political Rights, which adds the further qualification that such measures should not 'involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'**(see volume 1, tab 28, page 292-293)** .

114 Besides the 1951 Convention/1967 Protocol relating to the Status of Refugees, the United Kingdom has accepted other obligations relevant to the introduction of pre-entry clearance under the 1950 European Convention on Human Rights, the 1966 International Convention for the Elimination of All Forms of Racial Discrimination, and the 1966 International Covenant on Civil and Political Rights.

6.2.1 The 1950 European Convention on Human Rights (ECHR50) and its Protocols

115 Both the United Kingdom and the Czech Republic are party to the European Convention on Human Rights. The Czech Republic is also a party to the Fourth Protocol to the Convention, which the United Kingdom has signed but not yet ratified.

116 The object and purpose of the European Convention is for rights and freedoms to be secured by Contracting States within their jurisdiction (*Z v. United Kingdom,* 10 May 2001, para. 103); and to protect rights 'that are not theoretical or illusory but practical and effective' (*Chassagnou v. France,* 29 April 1999, para. 100).

117 The Czech Republic ratified the Fourth Protocol to the European Convention without reservation or declaration on 18 March 1992 and it entered into force for that country (then Czechoslovakia) on 1 January 1993. The United Kingdom has signed but not ratified the Fourth Protocol.

118 The Czech Republic consequently has accepted the following obligations, pursuant to Article 2 of the Fourth Protocol **(see volume 1, tab 25.1, page 258)**:

> '2. Everyone shall be free to leave any country, including his own.
>
> '3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

119 Article 6 of the Fourth Protocol (Relationship to the Convention) provides:

> 'As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional

> articles to the Convention, and all the provisions of the Convention shall apply accordingly.'

120 The Czech Republic is thus obliged under the Convention to recognize the freedom of its citizens to leave the country and may only restrict that freedom consistently with the exceptions mentioned in Article 2(3) of the Fourth Protocol, and subject to the overriding requirements of non-discrimination set out in Article 14 of the Convention.

121 Moreover, as a signatory to the Fourth Protocol, the United Kingdom is, in the words of Article 18 VCLT69, 'obliged to refrain from acts which would defeat the object and purpose' of the treaty.

6.2.2 The 1966 International Convention for the Elimination of All Forms of Racial Discrimination (ICERD66)

122 The Czech Republic ratified ICERD66 on 22 February 1993, following on the earlier ratification by Czechoslovakia on 29 December 1966 with reservations (subsequently withdrawn in 1991).

> 660 *UNTS* 276; 1350 *UNTS* 386.

123 The United Kingdom ratified ICERD66 on 7 March 1969; on ratification, it made the following interpretative statement:

> '... the United Kingdom does not regard the Commonwealth Immigrants Acts, 1962 and 1968, or their application, as involving any racial discrimination within the meaning of paragraph 1 of article 1, or any other provision of the Convention, and fully reserves its right to continue to apply those Acts.'

124 The Commonwealth Immigrants Acts are no longer in force. An 'interpretative statement' is not equivalent to a reservation to a treaty and does not affect the international meaning of the terms of a treaty. Moreover, as indicated above, it is not open to the United Kingdom, following the expression of its consent to be bound, to 'revise' its position on the compatibility of UK law and practice with the provisions of the Convention.

125 Article 1 ICERD66 provides **(see volume 1, tab 27, page 280)**:

> '1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental

> freedoms in the political, economic, social, cultural or any other field of public life.'

126 The Convention does not apply to 'distinctions, exclusions, restrictions or preferences made by a State Party... between citizens and non-citizens': Article 1(2). However, the Convention does *not* permit distinctions among non-citizens on racial grounds, as defined.

127 Article 5 ICERD66 provides **(see volume 1, tab 27, page 282)**:

> 'In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> ...
>
> (d) Other civil rights, in particular:
>
> ...
>
> (ii) The right to leave any country, including one's own, and to return to one's country...'

128 The initiation and operation of pre-entry clearance, or indeed of any form of immigration control, must therefore also be assessed against the obligations accepted by the United Kingdom in regard to the prohibition of racial discrimination.

6.2.3 The 1966 International Covenant on Civil and Political Rights (ICCPR66)

129 Czechoslovakia ratified ICCPR66 on 23 December 1975; the Czech Republic became a party by succession on 22 February 1993, and earlier reservations have been revoked.

130 The United Kingdom ratified ICCPR66 without reservations on 16 September 1968 and it entered into force for the UK on 20 May 1976.

131 The object and purpose of the International Covenant on Civil and Political Rights, according to the Human Rights Committee,

> '... is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.'
>
> Human Rights Committee, General Comment 24, 4 September 1994, para. 7 **(see volume 1, tab 28.1, page 311)**.

132 Article 12 ICCPR66 provides **(see volume 1, tab 28, page 296)**:

> '2. Everyone shall be free to leave any country, including his own.
>
> '3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.'

133 Article 26 ICCPR66 provides **(see volume 1, tab 28, pages 300-301)**:

> 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

134 As with the International Convention on the Elimination of All Forms of Racial Discrimination, pre-entry clearance and other forms of immigration control must also be assessed against the obligations accepted by the United Kingdom in regard to the movement of persons and discrimination generally.

6.2.4 The 1951 Convention/1967 Protocol relating to the Status of Refugees

135 Both the United Kingdom and the Czech Republic are party to the 1951 Convention and the 1967 Protocol, and no reservations are permitted to Articles 1 (refugee definition), 3 (non-discrimination), 4 (freedom of religion), 16(1) (access to courts of law), or 33 (*non-refoulement*) of the 1951 Convention: Article 42 CSR51.

136 As indicated above, the international refugee protection regime is premised on, among others, international solidarity and cooperation, especially through the Office of the United Nations High Commissioner for Refugees, as well as on the expectation that each participant will play its part, including through the good faith implementation of its treaty and other international obligations.

137 The International Court of Justice pointed out in its Advisory Opinion on *Reservations to the Genocide Convention* (above, paragraphs **-**), that in a convention regime of this character, involving the protection of human rights, 'a perfect contractual balance

between rights and duties' among the parties does not necessarily follow. In the nature of things, some States may face greater and/or different demands as a result of movements in search of refugee and solutions, by reason of geographical proximity, historical and cultural connections, language, family links, and so forth.

138 Nevertheless, the steps taken by one or more States with regard to the movements of refugees and asylum seekers will often increase the burden on other States party to the convention regime. Where those measures effectively alter the scope of the treaty relationship, then a revision or modification may be said to result.

139 In both instances, the principle of good faith applies and may be shown to have been violated.

6.2.5 Consistency/compatibility in practice

140 It may be argued that no State is obliged to facilitate the travel to its territory of those who wish to seek asylum. However, even as they were not prepared to recognize a right on the part of the refugee to be *granted* asylum, yet in 1948 States, including the United Kingdom, did acknowledge in principle 'the right of everyone *to seek*... in other countries asylum from persecution'.

> Article 14(1), 1948 Universal Declaration of Human Rights.

141 Moreover, the options available to a State wishing to frustrate the movement of those who seek asylum are limited by specific rules of international law and by the State's obligation to fulfil its international commitments in good faith. These commitments, illustrated above, include obligations towards refugees and asylum seekers, obligations in relation to racial discrimination and freedom of movement, and obligations generally with regard to treaties. The 'legitimate purpose' of immigration control may only be pursued within the law.

142 The United Kingdom and the Czech Republic are both party to ICERD66 and have both accepted, without reservation, the obligations described above, and have undertaken 'to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms': Article 2(1) ICERD66.

143 The United Kingdom and the Czech Republic have undertaken not to limit the freedom of movement of persons under Article 12 ICCPR66, otherwise than in the circumstances and in accordance with the conditions set out in that provision.

144 As a matter of international law, a State may be jointly responsible with another for an internationally wrongful act.

> UNGA Resolution 56/83, 'Responsibility of States for internationally wrongful acts', 12 December 2001, Annex, Article 47 – Plurality of responsible States: '1. Where several States are responsible for the same internationally wrongful act..' **(see volume 1, tab 8, page 45)** See also Articles 16, 19.

145 The European Court of Human Rights has recognized that the implementation of Convention obligations may involve the responsibility of more that one State, and that,

> 'Where States establish international organizations, 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...' *T.I. v. the United Kingdom,* Application No. 43844/98, 7 March 2000, emphasis supplied **(see volume 1, tab 43)**.
>
> See also *Prince Hans-Adam II of Liechtenstein v. Germany,* 12 July 2001, para. 48 **(see volume 1, tab 45, page 1002)**.

146 In *Bankovic v. Belgium and 16 Other Contracting States,* the European Court of Human Rights accepted that jurisdiction (and hence responsibility under the Convention) was primarily, though not exclusively, territorial. It recalled, however, that it had also recognized extra-territorial jurisdiction, for example,

> 'when the respondent State... *through the consent, invitation or acquiescence of the Government of [the relevant] territory, exercises some or all of the public powers normally to be exercised by that Government.'*
>
> *Bankovic v. Belgium and 16 Other Contracting States*, (Application no. 52207/99), 12 December 2001, paragraph 71 **(see volume 3, tab 48, page 1039)**.

147 The Court mentioned other recognized instances of the extra-territorial exercise of jurisdiction by a State, 'include cases involving the activities of its diplomatic or consular agents abroad...' Ibid., paragraph 73.

148 The decision in *Bankovic,* clearly distinguishable as to the facts, is nevertheless authoritative as to the principles of responsibility. That case involved acts of war against a State non-party to the Convention. The present case involves a co-operative engagement by two parties to the European Convention to take or to tolerate action in the common legal space (*espace juridique*: *Bankovic,* paragraph 80) which affects the international obligations of one at least of those parties.

> Cf. *K.-H. W. v. Germany* (Application no. 37201/97), Grand Chamber, 22 March 2001, a claim arising out of the prosecution and conviction of the applicant for intentional homicide in the death of a person trying to escape from the German Democratic Republic (East Germany). The European Court of Human Rights included as 'relevant international law' the 1966 International Covenant on Civil and Political Rights, including Article 12(2), (3) on freedom of movement, and found that GDR State practice was in breach of its international obligations. (Paragraphs 62-7, 92-101).

149 Under the pre-entry clearance procedure as described to the Court, the United Kingdom exercises immigration authority (a sovereign function) on the sovereign territory of another State, with the agreement of the Government of the Czech Republic. The question for consideration is the extent to which the exercise of this power may tend to frustrate the object and purpose of the 1951 Convention/1967 Protocol; deny freedom to leave their country to citizens of the Czech Republic on the basis of their race or ethnic origin, contrary to the 1966 International Convention on the Elimination of All Forms of Racial Discrimination and Article 14 of the European Convention, and deny freedom of movement generally in circumstances other than those permitted under Article 12 ICCPR66 and Article 2(3) of the ECHR50 Fourth Protocol; and the extent to which it also denies to such individuals an effective remedy for such violation, contrary to Article 13 of the European Convention.

150 These questions require appreciation, among others, of the exercise of discretionary powers, good faith, and the abuse of rights; they are of a nature appropriate for evaluation by a court of tribunal.

> Fitzmaurice, G., 'Hersch Lauterpacht – The Scholar as Judge, Part I', 37 *British Yearbook of International Law* 1, 36 (1962) **(see volume 4, tab 60)**.

6.3 The choice of means and the availability of alternatives

151 Wherever the actions of a State, taken in pursuit of a lawful aim, such as migration management, run the risk of undermining the object and purpose of a particular treaty of infringing the internationally protected rights of those affected, including other States party to multilateral treaties, the principle of good faith requires the State to consider, among others, the availability of reasonable alternatives which are proportionate to the

purported objective (such as alleged abuse of the asylum process) and which are least likely to violate the United Kingdom's international obligations.

152 According to the general principles of State responsibility, a plea of necessity,

> '... may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.'
>
> UNGA Resolution 56/83, 'Responsibility of States for internationally wrongful acts', 12 December 2001, Annex, Article 25 **(see volume 1, tab 8, page 41)**. See also Article 26 – Compliance with peremptory norms: 'Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.'

153 As a matter of general principle, and in view of the applicability of international obligations deriving from a variety of sources to the exercise of the powers in question, it is incumbent on the State to provide objective justification for the course of conduct chosen and to show its consistency with international law.

> Cf. *Former King of Greece v. Greece,* 23 November 2000, para. 98 **(see volume 3, tab 44, pages 871-872)**.

154 It may be argued that there is no substantial difference between the implementation of a policy of pre-entry clearance and the administration of a visa system, under which prospective travellers are required to seek authorisation to enter from the diplomatic or consular authorities of the prospective receiving country; and that as the visa system is generally accepted in the practice of States, even with regard to those who may be seeking to leave their country of origin by reason of a well-founded fear of persecution, so the same acceptance should be accorded to a system of pre-entry clearance requiring the submission of prospective passengers to immigration control immediately before boarding an aircraft in their country of origin.

155 The fact that visas have long figured in the administration of international travel movements is not conclusive of their lawfulness in all instances, however. Thus, a visa regime can be unlawful, both in domestic and in international terms, for example, where visas are introduced or required for the purpose of maintaining a policy of racial

discrimination; or where they are in fact used for the purpose of assisting the government of another State to commit an internationally wrongful act.

> Cf. Article 16, Articles on the Responsibility of States for Internationally Wrongful Acts (responsibility of a State in connection with the act of another State; aid or assistance in the commission of an internationally wrongful act).

156 In each case, the purpose is relevant. It may be difficult to draw the line between clear instances of unlawful purposes, and instances where the harm to individuals is incidental to the practice; but the line is there.

157 The expulsion or deportation of non-citizens is similarly a matter falling within the discretion of States, but the power must be exercised in good faith and not for an ulterior motive. In certain circumstances, expulsion may also constitute an internationally wrongful act, for example, when it infringes the principle of non-discrimination, which is part of customary international law.

> I. Brownlie, *Principles of Public International Law*, Oxford: Clarendon Press, 5th edn., 1999, 523 **(see volume 4, tab 54)**.

158 Passive regimes, such as visas and carrier sanctions, should therefore be distinguished in the first instance from the active interdiction or interception of persons seeking refuge from persecution or protection of their human rights. Depending on the circumstances, including the knowledge of the acting State, the scope and extent of that State's international obligations, the availability of reasonable alternatives (including screening and referral), such practices may violate international law.

159 Both the UNHCR Executive Committee and the United Nations General Assembly have stressed the importance, both for States and asylum seekers, of access to 'fair, expeditious and effective procedures' for the determination of claims to refugee status (see above, paragraphs **-**).

160 A fair, efficient and expeditious procedure for the determination of claims to refugee status, combined if necessary with bilateral or regional arrangements for the return to their countries of origin of those found not to be in need of protection, is the best deterrent to 'abuse'. In contrast, a system in which decisions are delayed or so flawed as to require regular correction on appeal or review, is most likely to attract numbers of applications from persons not in need of protection.

> See *Conka v. Belgium* (Application no. 51564/99), 5 February 2002 **(see volume 3, tab 49)**, in which the European Court of Human Rights recalled the principle of effectiveness of remedies (paragraph 75) and stated: 'As to the overloading of the *Conseil d'Etat*'s lists and the risks of abuse of process, the Court

considers that, as with Article 6 of the Convention, Article 13 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet its requirements.' (Paragraph 84).[11]

6.4 Summary of factors relevant to determining the good faith implementation of international obligations

161 The principle of good faith requires that a State contemplating action within the area of its sovereign authority, for example, in controlling the movement of persons, must ensure that its actions are compatible with its international obligations.

162 Good faith regulates the area between the permissible and the clearly impermissible. Thus, while certain things may not be done in pursuit of the 'legitimate aim' of migration management (such as shooting people or sinking boats suspected of carrying illegal migrants), the principle of good faith requires that the actions of the State are consistent with its other obligations under international law.

163 The principle of good faith requires the State:–

[11] The case arose out of a Belgian Government proposal for the 'collective repatriation' of asylum seekers from Slovakia, following a sharp increase in numbers (paragraphs 30, 31). The Court cited reports on the situation of Roma in Slovakia which indicated that they were disadvantaged, often the victims of skinhead violence and regularly subjected to ill-treatment and discrimination by the authorities (paragraphs 32, 33). The Government claimed that its measures were justified, *inter alia*, by the numbers and 'major abuses of process which undermined [the] effectiveness' of the *Conseil d'Etat* (paragraph 74). The Court found that the Applicants did not have a remedy available that satisfied the requirements of Article 13 to air their complaint under Article 4 of Protocol No. 4 (paragraph 85).

- to identify in good faith the actual circumstances and interests affected by its proposed action;
- to select the course of action to be adopted in good faith;
- to ensure that policies and practices are implemented compatibly with the letter and spirit of international obligations binding the State;
- to define in good faith the scope of its policies and practices so as not to apply them in such a way as to cause damage to the rights and lawful interests of other subjects of international law, including protected persons;
- to prevent abuse of rights.

7. Conclusions

164 A State proposing, in respect of another State known to be the origin of people in search of refugee or protection of their human rights, to introduce pre-entry clearance or similar methods of extra-territorial interception of persons, is legally obliged as a matter of good faith,

(1) to take into account the facts relating to conditions in the country of origin, including evidence relating to the protection of human rights, discrimination, and persecution;

(2) to take into account the impact of its proposed measures on:

(a) the rights and obligations of other States, in particular, where the area of action is the subject of a convention-based regime;

(b) the rights and interests of individuals, in particular, where these are protected by treaty or by general international law;

(3) to ensure that its actions are compatible with its international obligations, including

(a) obligations expressly accepted by treaty;

(b) the object and purpose of treaties to which it is party; and

(c) obligations deriving from general international law.

(4) to act in accordance with the rules of general international law, especially with regard to methods and mechanisms of revision and modification of treaties, and the requirements for consultation and co-operation;

(5) to exercise its rights reasonably, that is, proportionately to a lawful purpose, and with due regard to alternatives.

165 On the basis of the evidence available, it would appear that no steps have been taken to ensure that the above matters have been taken into account and that the implementation of pre-entry clearance procedures conforms with the United Kingdom's obligations in international law.

166 In UNHCR's submission, the determination of compliance with the principle of good faith in international law is appropriate for determination by the Court, which is respectfully requested to apply the relevant standards, as set out above.

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