THE CALAMIRA TRAIAL

Protekistan v. Calamira

A Public Trial on Legal Problems
Concerning the Sale of Nuclear Weapons

Before the International Tribunal
Sitting at the Ninth Internationl
Congress of Jewish Layers and Jurists

Jerusalem December 29, 1992

Legal Problems Concerning the Sale of Nuclear Weapons

How can the international community cope with the threat of the uncontrolled use of nuclear weapons? Over the past few years, this question has become increasingly pressing as it has become clear that many states possess such an arsenal. The fear is that states may themselves misuse nuclear weapons or may sell them to the highest bidder. Nuclear weapons could find their way into irresponsible hands who would consider employing them in the service of their cause and who could thus visit destruction upon humanity.

Does international law provide tools to combat this danger? This was the question considered by a Jerusalem tribunal in a public moot court held in the framework of the Ninth International Congress of the Association in December 1992. The court sat as an international tribunal and was constituted by judges who came to Jerusalem from around the world.

The tribunal was called upon to contend with the following legal issues:

A. Does international law prohibit the sale of nuclear weapons by a state to a terrorist organization that threatens the welfare of another state? Does such a sale of arms amount to giving aid to the terrorist acts of the organization and endangering the security and territorial integrity of the state against which the terrorist organization acts? Can it not be argued that the sale of nuclear arms is a matter that is at the discretion of the state, and that any attempt to prevent or limit such sales should be deemed interference in the internal affairs of the seller?

B. May a state take preventative measures when faced with a nuclear threat? Is it at liberty, for example, to seize a vessel transporting nuclear arms and to confiscate such arms as it fears may be used against it? Can such acts of seizure and confiscation be carried out when the ship is still in the port of the selling state or only after the ship has set out for sea?

C. Can a state that fears that nuclear arms are to be used against it bring a suspect to trial in its domestic courts upon a charge of purchasing atomic weapons or of attempting to make wrongful use of such arms against its citizens? Is jurisdiction contingent upon the suspect being a national of the threatened state, or are the domestic courts competent to try any person who purchases nuclear arms with intent to employ them against the state, regardless of his nationality?

D. What is the status of persons suspected of purchasing nuclear arms and attempting to use them, who have been brought to the threatened state against their will? Will jurisdiction be tainted by the suspects having been forcibly brought to the state?

In the International Tribunal Sitting in Jerusalem

Panel of Judges:

Justice Moshe Landau
formerly President of the Supreme Court of Israel (presiding)

The Hon. Judge Mme. Myriam Ezratty-Bader
Prèmiére Presidente de la Cour d'Appel de Paris

Justice Gabriel Bach
Supreme Court of Israel

The Rt, Hon. Sir John Balcombe
Lord Justice of Appeal, England

The Hon. Justice Richard J. Goldstone
Appeal Court, Republic of South Africa

The Hon. Justice William Kaye, Q.C.
formerly of the Supreme Court of Victoria, Australia

The Hon. Judge Alex Kozinski
U.S. Court of Appeals, Ninth Circuit.

The Pleaders

For the Plaintiff, The State of Protekistan:

Professor Amos Shapiro
Tel-Aviv University, Faculty of Law

Mr. Jonathan Goldberg Q.C.,
London

For the Defendant, the State of Calamira:

Mr. Nathan Lewin
Attorney-at-law, of Washington, D.C.

Me. Joseph Roubache
Paris Bar

Script:

Adv. Yair Ben David
Director General of the Israel Bar

Academic Adviser for the preparation of the case:

Dr. Yaffa Zilbershats
Bar-Ilan University, Faculty of Law

JUDGEMENT

Judge Landau: The case stated for decision by this Tribunal at a Public Moot Trial held in Jerusalem on 29.12.1992, reads as follows:

"Protekistan is a country in Asia, which until recently belonged to the Union of Asian Republics (UAR). Following the dissolution of the Union, Protekistan declared its independence, was admitted as a member of the United Nations, and acceded to many international treaties including: the 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land: the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; the Four Geneva Conventions of 1949 and their two additional Protocols of 1977; and the. 1979 Vienna Convention on the Physical Protection of Nuclear Materials.

Calamira is a country located in south-west Asia. It is a member of the U.N. and is a party to the abovementioned International treaties.

A vast arsenal of weapons was left within the territory of Protekistan, including a stockpile of missiles armed with atomic warheads of the PS 2 type. Protekistan announced that as a sovereign state it reserved the right to preserve the stockpile of missiles located in its territory and that it will do everything to maintain international peace and security. But Calamira's security services became aware that as part of its efforts to fill its empty treasury, Protekistan had begun secretly to sell its vast secret arsenal. Among those interested in this "free-forall" sale were representatives of the "Front for Liberation of Calamira" - a fanatical terrorist organization whose objective is the overthrow of the existing regime in Calamira and its replacement by a government under the control of the Front.

Relying on intelligence information, on August 1, 1992, a commando unit which emerged from a submarine overpowered a small cargo vessel flying a Protekistanian flag, which was still in the harbour but had started to head towards the open sea. The cargo vessel was fired on by the submarine and was forced to sail towards the military port of Calamira.

Upon her arrival at the port, the vessel and her cargo were thoroughly searched. During the course of the search twenty model PS 2 atomic missiles were seized together with their launch systems. The persons that were found on board the vessel were Protekistanian crew members and Protekistanian military experts who were due to supply the know-how and training needed to operate the missile system. Also on board the vessel were members of the "Front for the Liberation of Calamira" who were either Calamira's citizens or citizens of Calamira's neighbouring countries that supported the ideology of the Front.

In the course of the investigation of the persons found on the vessel, it became apparent that the Front had purchased the missiles from Protekistan for enormous sums of money, with the intention of using these missiles in the struggle for the replacement of the government of Calamira. Calamira confiscated the vessel and the atomic missiles. All the persons found on board the vessel were put into custody to await criminal proceedings on charges of:

1) buying or assisting to buy atomic weapons without authorization from the Calamirian government;
2) an attempt to use nuclear weapons against the inhabitants of Calamira.

Protekistan filed a suit against Calamira at the International Tribunal sitting in Jerusalem. This Tribunal exercises jurisdiction over the parties to the dispute, applying the rules of international law.

Protekistan argued that:

I. a) Being a sovereign state, it is not prohibited under international law from selling any kind of arms to anyone who wishes to buy them. Any act by a foreign state trying to limit Protekistan's ability to sell arms, including nuclear weapons, is considered to be interference with Protekistan's internal domestic affairs and contrary to international law.

b) The penetration of the Calamirian submarine into Protekistan's port and the firing on a Protekistanian vessel forcing it to sail to Calamira is a breach of Protekistan's sovereignty and is a breach of Article 2(4) of the U.N. Charter.

II. a) According to international law principles, Calamira has no criminal jurisdiction over any of the persons found on board the vessel.

b) Even if Calamira has criminal jurisdiction under international law against the persons on board the vessel or any of them, such jurisdiction is negated by the fact that the persons got into Calamirian territory as a consequence of the forcible abduction of their vessel by Calamira's armed forces.

Protekistan is claiming from Calamira:

a) A public apology to the Secretary General of the U.N. for breaching its sovereignty and interfering with its domestic affairs.

b) Damages for breaching its sovereignty and harming its property and citizens.

c) An immediate release of the vessel and all the weapons found on board.

d) An immediate release from custody of the people found on board the vessel and a commitment not to start any criminal proceedings against them in Calamira.

Calamira argued in its Statement of Defence that:

I. a) "The Front for the Liberation of Calamira" is a terrorist organization which has been threatening the peace of Calamira for many years. Buying the atomic missiles with the intention of using them against Calamira is an of act terrorism committed by the Front's members and their supporters. The sale of these missiles by Protekistan and the provision of military instructors on the use of the missiles are acts of assisting terrorism. Acts of terrorism and acts of assisting terrorism contravene international law and threaten international peace and security.

b) Being in a situation where its peace and security is being threatened, Calamira has the fight to self-defence according to customary international law and Article 51 of the U N. Charter. According to this right, Calamira was entitled to overpower the vessel carrying the atomic missiles, force her to sail to Calamira, and confiscate the vessel and the missiles and put under arrest the terrorists, their supporters and assistants, found on board.

II. a) According to international law, Calamira has criminal jurisdiction over all the persons found on board the vessel: the Protekistanian citizens, the Calimirian citizens members of the "Front" and their supporters, including citizens of other countries.

b) The fact that these persons were brought into Calamira against their will after their vessel was forcibly abducted, does not affect the criminal jurisdiction of the Calamirian courts in any way.

Calamira states that no apology has to be made by it to the U.N. Secretary General and that it is not obliged to pay any damages to Protekistan.

Calamira plans to keep the seized vessel and missiles, and insists upon not releasing any of the persons found on board the vessel, so that they may stand trial in Calamira.

After the termination of the pleadings at the Trial, the Tribunal announced its conclusions on the same day, 29.12.1992. The following are the reasons for those conclusions:

1. This case is in some aspects a novel one, raising as it does in an acute form questions in international law regarding the possible use of atomic weapons, the danger of which hangs over mankind like a dark cloud. These questions have been dealt with in international treaties and declarations and in academic writings, but to our knowledge they have not as yet been the subject of judicial decision. The cataclysmic dangers inherent in the use of atomic weapons - including atomic fall-out, reaching beyond the population which is to be the direct victim of an atomic attack, and the genetic damage by atomic radiation to future generations - need no elaboration. International law must grapple with these dangers by dynamic development, since they are different not only In magnitude, but also in kind from those involved in the use of even the most powerful of conventional weapons. As the Nuremberg Military Tribunal stated, referring to the law of war: "The law is not static, but by continual adaptation follows the needs of a changing world".

2. At present there is no general prohibition in international law outlawing the use of atomic weapons. For a full account of the opinions of scholars on the legal status of nuclear weapons we refer to an article by *Elliott C. Meyrowitz*.[1] The conclusion at which another learned author, *William R. Hearn*, arrives in an exhaustive essay is:

"It would appear that no binding rule or principle of international law directly or by analogy outlaws nuclear weapons as such; rather the legality of any particular nuclear weapon depends on the circumstances of its threatened or actual use".[2]

The Treaty on the Non-Proliferation of Nuclear Weapons which came into force on 5.3.1970, prohibits by Article 1 the transfer of nuclear weapons by a "nuclear weapon State Party" to any recipient whatsoever. But according to the facts of the case before us, Protekistan is not a party to that Treaty. We should also mention the Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons which was agreed on by the Gener-

[1] E L. Meyrowitz 'The Opinions of Legal Scholars, on the Legal Status of Nuclear Weapons 24 Stanford J. of Int'l L. (1987) 111.

[21 W.R. Hearn "The International Legal Regime Regulating Nuclear Deterrence and Warfare" 61 British Yearbook of Int'l L. (1991) 199.

al Assembly of the United Nations in 1961 (No. 1653 (XVI)). However, by Article 10 of the U.N. Charter the resolutions of the General Assembly bear by themselves the character of recommendations only. Paragraph 2 of the Declaration in question reflects this character by requesting the Secretary General to consult the governments of Member States to ascertain their views on the possibility of convening a special conference for signing a convention on the prohibition of the use of nuclear and thermonuclear weapons for war purposes. As far as we know, such a conference has not yet been convened. Another instrument referred to in argument before us is the Geneva Protocol of 1925 for the Prohibition of the Use of Asphyxiating, Poisonous and Other Gases, and Bacteriological Methods of Warfare. But it is doubtful whether the reference to 11 other gases and ... all analogous liquids materials and devices" in that Protocol can include atomic weapons with their deadly effects of beat, blast and radiation which were not known at the time. Then there is the Convention on the Physical Protection of Nuclear Material, of 1980. But that Convention applies, by Article 2, only to nuclear material used for peaceful purposes and not to nuclear weapons.

3. Counsel for the Plaintiff argued before us that there was nothing in International law to prevent their client, the State of Protekistan from selling the atomic missiles which it had "inherited" from the defunct Union of Asian Republics, to whomsoever it chose to do so. Having regard to what was set out in the preceding paragraph of this Judgment, this argument could not have been lightly dismissed, if the sale had been effected to a sovereign state recognized as such by the international community. But in the present case, the missiles were sold to the Front for the Liberation of Calamira which is described as a "fanatical terrorist organization" whose object is the overthrow of the existing regime in Calamira and its replacement by a government under the control of the Front. Thus, the Front is a group of individuals which aims at breaking the will of resistance of the established government of Calamira by the use or the threat of indiscriminate violence against the civil population of Calamira and through it against the government itself. The use or the threat of atomic weapons to that end is, of course, an extreme manifestation of that violent purpose. This puts an entirely different complexion on the case, Such a group of individuals having a common political aim which it pursues by violent means has no recognized status under international law. It is a law unto itself which, on its part, does not recognize any external prohibition under municipal or international law.

4. The Front is not, and cannot be, a party to these proceedings. We are dealing here with the actions of Protekistan in providing the Front with atomic missiles. As to that, it is a rule of international law that coercive intervention by a state in the internal and external affairs of another state is forbidden. Interference which is sufficiently coercive to constitute intervention may take the form of giving support to terrorist armed activities in another state.[3] As a modem authority for this statement the editors of Openheim refer to the judgment of the International Court of Justice in the *Nicaragua case*[4] on military and paramilitary activities, which concerned a complaint by Nicaragua against military intervention by the United States, in consequence of the military support which Nicaragua gave to rebels in El Salvador and in other Central American countries. The Court there (at p.108) stated it to be a rule of international law that every state is free to choose its political system and that intervention is wrongful when it uses coercion in regard to such choices which must remain free ones. The Court goes on to say (para 205):

"The element of coercion which defines, and indeed forms the very essence of prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action or in the indirect form of support for subversive or terrorist armed activities within another state. As stated above (paragraph 191) General Assembly Resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting state when the acts committed in another state involve a threat or use of force. These forms of action are therefore wrongful in the light of both the principle of non-use of force and that of non -Intervention."

At p. 101 (paragraph 190) of its judgment the Court refers to the principle prohibiting the use of force embodied in Article 2 (4) of the U.N. Charter by which:

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political integrity of any state, or in any other manner inconsistent with the purposes of the United Nations."

The terms of Resolution 2625 (XXV) referred to above, which contains the Declaration on Principles of International Law con-

---

[3] Oppenheirn, International Law. 9th ed. by Jennings and Watts. vol. 1 (1992) at p. 434.

[41 Nicaragua v. U.S.A. (Merits) I.C.J. Reports 14 (1986).

cerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970, are then set out in paragraph 191 of the judgment, with the Court observing that "the adoption by states of this text affords an indication of their *opinio juris* as to customary international law on the question." The following passage in this Declaration is relevant to the case before us:

"Every state has the duty to refrain from organizing, instigating, **assisting** or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force." (emphasis supplied - M.L.)

In 1985, the General Assembly reiterated this duty by Resolution 40/61 which was adopted without vote. Paragraph 6 of that Resolution again "calls upon all states to refrain from organizing, instigating, assisting or participating in terrorist acts in other states..."

5. The sale of atomic missiles by Protekistan to the Front constituted a flagrant act of assistance to the Front, in furthering the criminal design of the Front to use these weapons against Calamira. It flouted Protekistan's own declaration that "it will do everything to maintain international peace and security." When selling the missiles, Protekistan no doubt well realized that the Front was purchasing them with the intent of terrorizing the civil population and the government of Calamira. Protekistan's motive for doing so, to fill the empty coffers of its treasury, does not detract from the illegality of the sale which was obviously concluded with full knowledge of the purpose for which the Front acquired these vehicles of mass death and destruction. Moreover, Protekistan made itself an even more active accomplice in the Front's criminal design, by putting at its disposal Protekistanian experts who were to supply the know-how and the training needed to operate the missile system.

6. Counsel for Protekistan also argued that it does not stand to reason that the Front would have actually set off the missiles against Calamira's territory, since by doing so it would also have harmed its own supporters within Calamira. But that is nothing but speculation unsupported by the facts as stated. We do not know the size of Calamira's territory, whether there were any supporters of the Front within Calamira and if so, whether they were concentrated in a particular part of Calamira. In any case, a fanatical organization like the Front can be expected to go to any length, in order to achieve its aim. It should also be remembered that the mere threat to use the missiles would have been sufficient to sow panic amongst the population of Calamira. The Front would not have expended the enormous sums of money needed for acquiring the missiles, in order to abstain from using them in some form.

7. Our conclusion on this part of the case is that Protekistan committed an act of international delinquency by selling the missiles to the Front, contrary to customary international law and to the prohibition contained in Article 2(4) of the U.N. Charter.

8. We will now consider the action taken by Calamira's armed forces In order to foil the criminal design of the Front. The onus of proving the legality of this action by way of plea of self-defence in law lies on Calamira. In dealing with this defence we have to address ourselves to two conflicting considerations: on the one hand, the enormity of the danger which it was the right and the duty of the government of Calamira to meet, in order to protect itself and even more so, to protect the elementary human right of its citizens to life and soundness of limb; and on the other hand, the duty which lay upon it to use force for its self-defence only in a manner which was required in order to meet the necessities of the case, since any illegitimate use of force undermines the peaceful relations between states on which the international order must rest. The use of force will often breed counter-force in reprisal and may thus lead to anarchy.

9. Self-defence is the subject of Article 51 of the U.N. Charter which states that:

"Nothing in the present Charter shall impair the inherent right of individual and collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security..."

If Article 51 was exhaustive on the subject of self-defence and if the expression "armed attack" was to be taken literally, Calamira would have had to suffer an actual atomic attack on its territory and its population, before being allowed to act in self-defence. Needless to say, that would be an intolerable situation. But the correct legal position under international law does not lead to such an absurd result.

True it is that in the *Nicaragua case* (referred to above) the International Court of Justice decided by a majority that the provision of arms to insurgents did not by itself constitute an 11 armed attack" against the state threatened, so as to activate the fight of collective self-defence claimed by the United States. It may be doubted whether the decision would have been similar, if the arms provided by Nicaragua in that case would have been atomic missiles. Be that as it may, in the same case the Court pointed out:

"that the United Nations Charter... by no means covers the whole area of the regulation of the use of force in international re-

lations... reference to customary law is contained in the actual text of Article 51 which mentions the inherent right (in the French text the 'drolt naturel') of individual or collective self-defence which 'nothing in the present Charter shall impair' and which applies in the event of an armed attack... Moreover, a definition of the 'armed attack' which, if found to exist, authorizes the exercise of the 'inherent right' of self-defence, is not found in the Charter, and it is not part of treaty law..." (p. 94, para 176).

Directly germane to our case is the following passage from the judgment (at p. 126/7, para 247):

"So far as regards the allegations of supply of arms by Nicaragua to the armed opposition in EI Salvador, the Court has indicated that while the concept of an armed attack includes the dispatch by one state of armed bands into the territory of another state, the supply of arms and other support to such bands cannot be equated with armed attack. Nevertheless, such activities may well constitute a breach of the principle of non-use of force and an intervention in the internal affairs of a state, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack."

And further on (para 249 at p. 246):

"The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that state, could only have justified proportionate counter-measures on the part of the state which had been the victim of these acts, namely EI Salvador, Honduras or Costa Rica" [i.e., not by the United States which purported to act on the strength of collective self-defence].

10. Applying this statement to our case, the supply of arms by Protekistan to the Front could justify "proportionate counter-measures" on the part of Calamira against which this activity was directed. The International Court of Justice did not spell out the nature of such permissible counter-measures. In that regard reference has to be made to the classical statement by Mr. Daniel Webster, the U.S. Secretary of State, in connection with the Caroline incident in 1837, that there has to be a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation."

11. In our case, the capture of the Protekistanian vessel, with the missiles, the members of the Front and the Protekistanian instructors on board, was an act of anticipatory or pre-emptive self-defence, because the damage feared had not yet actually occurred. On this subject we will again quote from Oppenheim's International Law:[5]

"There are divided views whether it is permissible for a state to use force in self-defence against an armed attack which has not yet actually begun, but is reasonably believed to be imminent. The better view is probably that while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation, including **the seriousness of the threat** and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; necessity and proportionality are probably even more pressing in relation to anticipatory self-defence than they are in other circumstances. In conditions of modem hostilities it is unreasonable for a state always to have to wait before taking defensive actions." (emphasis supplied - M.L.)

We shall adopt "the better view" put forward in these terms by Oppenheirn's editors.[6]

12. Applying this view, the members of this Tribunal have decided this part of the case on the narrow ground that whatever might have been the legal result if Calamira had intercepted the vessel and abducted the persons on board on the high seas (this question being left open by the Tribunal), in any case Calamira has not discharged the burden of proof which lay on it of showing that in the circumstances there was a pressing necessity for its submarine to enter the Protekistanian harbour and to effect the capture and the abduction then and there. In acting as it did, Calamira purported to exercise its right of self-defence, but in doing so it committed a breach of international law by violating Protekistan's territorial sovereignty and integrity. Although the prohibition of the use of force against territorial integrity which appears in Article 2(4) of the U.N. Charter applies only to offensive action. whereas here Calamira confined its action to a temporary invasion of Protekistanian waters which it believed to be necessary for its self-defence, still the principle of territorial sovereignty is basic in international law. As the International Court of Justice observed in the *Cotfu Channel case*: "Between independent states, respect for territorial sovereignty is an essential foundation of international relations".[7]

13. Regarding the sanction to be imposed on Calamira for this breach of Protekistan's sovereignty, the Tribunal finds extenu-

---

[5] ibid note 3, at pp. 421-422.

[6] See also, D.W. Greig International Law (2d ed. London, Butterworths) 1976 at p. 892.

[7] The Corfu Channel Case (U.K. v. Albania) I.C.J. Reports 4 (1949).

ating circumstances in the act of grave international delinquency which Protekistan committed in selling the missiles to the Front, an act which necessitated effective action by Calamira in order to protect its country against untold damage. Therefore, Protekistan is not entitled to any of the reliefs claimed by it. The Tribunal has decided to follow the *Corfu Channel case* by declaring hereby that Calamira has violated Protekistan's sovereignty, this declaration to constitute in itself appropriate satisfaction.

14. The last issue before this Tribunal concerns the jurisdiction under international law of the Criminal Court of Calamira over the persons who were found on board the captured vessel and were abducted to Calamira.

On this issue the decision of the Tribunal is unanimous only as regards those members of the Front who are citizens of Calamira. Over them the courts of Calamira can exercise jurisdiction under Calamira's municipal law, although the offences with which they will be charged refer to acts which they committed outside Calamira, i.e. the purchase of the missiles with the intention of using them or threatening to use them against the safety and the security of the state and its inhabitants. Under the municipal law of many countries (including, as we may assume, Calamira) it is a criminal offence for citizens of the state, and also for foreigners to commit such acts. By way of example we may refer to Art. 694 of the French Criminal Procedure Code and to Art. 113-10, Book 1, of the New French Criminal Code of 1991 (see the separate opinion of Ezratty P.), and to Section 5 of the Israeli Criminal Code of 1977. Under international law as well it is a recognized principle that a state may exercise jurisdiction over its own nationals for offences committed by them abroad.

15. As regards the other persons found on board the vessel (citizens of countries neighbouring Calamira and the military instructors detailed by Protekistan) there is a difference of opinion between the members of the Tribunal: in the opinion of the minority (Balcombe L.J., Goldstone and Kaye JJ.) the Calamirian Court does not possess Jurisdiction over them and they should therefore be released. In the opinion of the majority (Ezratty, Bach, Kozinski JJ. and myself) the Calamirian Court can exercise jurisdiction over them as well, under the protective principle which is also well recognized in international law.[8]

The restrictions on territorial jurisdiction do not apply to serious crimes against the state's safety, such as the crimes committed in this case by all those persons who were accomplices to the provision of atomic weapons to a group like the Front and to the attempt to transport those weapons by sea for use against Calamira. If the members of the crew should allege that they were not aware of the criminality of the mission on which their government had sent them, they may raise that plea in the court of Calamira. A defence of act of state would not avail them in order to absolve them from their personal liability under international law. As the Military Tribunal at Nuremberg stated in its judgment against the Main War Criminals:[9]

"It was submitted that international law is concerned with the actions of sovereign states and provides no punishment of individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the Tribunal both these contentions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized."

16. Does the fact that the persons on board the vessel were abducted and brought to Calamira against their will affect the jurisdiction of the Calamirian Court to try them? In the view of the majority of this Tribunal it does not. The municipal law of various states differs on this subject. E.g., In the United States the rule in *Ker v. Illinois*[10] and in *Frisbie v. Collins*[11] which was also applied by the Israeli court in the Eichmann case, that the forcible abduction of the accused does not negate the power of the court to try him, is still dominant.[12] Thus, according to Oppenheim,[13] national courts have generally not declined to exercise jurisdiction over an accused who has been brought within their power by means of seizure in violation of international law. As for the international law aspect, which governs the case stated before us, there have been cases where a person abducted was returned to the country from which he was abducted, such as the

---

[8] Openheirn, ibid note 3, at p. 470 and the Eichmann case: District Court: Attorney General of The Government of Israel v. Adolf Eichmann 36 I.L.R. (Butterworths) 5, 50 (1961) Supreme Court: Adolf Eichmann v. Attorney General of the Government of Israel 36 I.L.R.(Butterworihs) 277, 304 (1962).

[9] The Green Series. vol. 22. at p. 446.

[10] Ker v. People of the State of Illinois 119 U.S. 436 (1886): 7 S.Ct. 225 (1886).

[11] Frisbie v. Collins 342 U.S. 519 (1952); 72 S.Ct. 509 (1952).

[121 U.S. v. Alvarez-Machain 112 S.Ct. 2188 (1992).

[13] Ibid note 3, at p. 389.

case of *Jacob Solomon* on which Counsel for Protekistan relied[14] But we have not found any general principle in international law under which a court of a state is deprived of jurisdiction which it possesses by virtue of the protective principle referred to above, when the accused was abducted and brought before the court against his will. The circumstances of each specific case have to be considered. It may be just and equitable to return such a person to the state from which he has been abducted when that state was not at fault. But that is not the case before us. Justice requires that those who have committed. or are suspected of having committed, a serious breach of international law, or of complicity in it, like all the persons on board the Protekistanian vessel, should not go scott-free, but should be put on trial before a competent court. The court of Calamira has jurisdiction to try them under its municipical law, as has been explained above. There being as yet no International Criminal Court, should they he extradited to Protekistan, in order to stand trial there? The State of Protekistan being itself the principal delinquent, it would amount to a perversion of Justice for them to be tried in the courts of Protekistan, Protekistan thus becoming Judge in its own cause. The majority opinion therefore is that all the persons on board the vessel must stand trial before the court of Calamira.

17. The Tribunal has further decided that the vessel itself, without its cargo, should be returned to Protekistan. As for the missiles themselves, which were the instruments of crime, the court of Calamira will be seized with power to decide on the manner of their disposal.

18. On reading the opinion of my esteemed colleague Kozinski J., 1 find it necessary to add a few words by way of clarification. 1 refer to the following passage of his opinion:

"Had the Front been a sovereign state recognized as such by the international community, the majority says, Protekistan's actions would likely have been lawful **and, I take it, Calamira's would have been Unlawful**". (my emphasis, M.L.).

With due respect, the two issues (a) whether the sale of the weapons by Protekistan was lawful, and (b) whether Calamira was entitled to exercise the night of self-defence, were correctly kept apart in the case stated before us and, 1 believe, also in my written opinion. Although Protekistan may not have been in breach of international law, if it had sold the weaponry to a sovereign state, it does not follow that then Calamira would not have been entitled to act in self-defence against a threat by the purchasing state to use it against Calamira. This momentous issue does not arise in our case and there is nothing in my opinion which would justify an assumption that 1 dealt with it, either expressly or by implication.

19. I now wish to add some observations of my own on the question left open by the Tribunal, *viz*. whether the capture of the vessel and the abduction of the persons on board would have been lawful, if it had been effected on the high seas, outside the territorial waters of Protekistan. Speaking for myself, I would have answered that question in the affirmative. I am fully aware of the primary need to solve international disputes by peaceful means, as envisaged by the U.N. Charter. Yet, in my opinion, this was an exceptional case which justified the exercise of the recognized right of self-defence. The requirements of necessity and proportionality were fully met in this case. As for proportionality, the mortal danger inherent in the atomic threat has to be measured against the means employed by Calamira, *i.e*., the use of force against the vessel, its passengers and its crew, without causing them any physical harm. As for necessity, 1 quote again from Oppenheim:[15]

"That a vessel sailing under another state's flag can... be seized on the high seas in case she is sailing to a port of the capturing state for the purpose of an invasion or bringing material help to insurgents there is no doubt. No better case of necessity of self-preservation could be given since the danger is imminent and can be frustrated only by the capture of the vessel."

On behalf of Protekistan it was argued that Calamira, on receiving information from its security services that Protekistan had secretly sold, or was about to sell, the missiles to the Front, should have protested to Protekistan. 1 find this suggestion to be unreasonable: Calamira had good reason not to take the risk involved in such a protest that Protekistan would have denied the facts and would have proceeded to transfer the missiles to the Front under the veil of secrecy. Then it was said that Calamira should have sought peaceful means to avert the danger with which it was faced, such as a complaint to the Security Council, and if peaceful means are insufficient, the application of force should, if possible, be under the auspices of the U.N. Indeed, Article 51 of the U.N. Charter allows by its terms resort to self-defence only during the interim period, until an intervention by

---

[14] Openheirn, ibid note 3, at p. 388.
[15] Ibid note 3, at p. 420 note 15.

the Security Council. But again, it has to be asked whether such a complaint, instead of resorting at once to self-defence, was reasonably sufficient in order to discharge the overriding obligation of Calamira's government to protect its citizens against an atomic disaster. Calamira had no tangible proof of the facts until the capture of the vessel with its lethal cargo, and delinquent states have been known to put forward brazen denials before international fora. This was therefore eminently a case where the very delay caused by a complaint would have meant incurring a hazard which Calamira could not be expected to take upon itself. The capture of the vessel had to be effected as soon as it left the territorial waters of Protekistan, since otherwise there was ground to apprehend that Calamira's submarine might lose contact with it. There remains the question whether Calamira should have complained against Protekistan after the capture of the vessel and its cargo. This question was not raised in the alternative by Counsel for Protekistan and 1 shall not advert to it. The case stated before us does not indicate whether Calamira reported its action to the Security Council, under Article 51 of the U.N. Charter.

20. In the final result, the complaint by Protekistan will be dismissed, subject to the declaration on the illegality of the entry of Calamira's submarine into the waters of Protekistan and also subject to the return of the vessel without its cargo to Protekistan.

Judge Balcombe: I agree with paragraphs 2-14 (Inclusive) and paragraph 19 of the opinion of Landau J. On the issue of the jurisdiction of the court of Calamira, 1 concur with the opinion of the Hon. William Kaye.

Judge Goldstone: I agree, on terms set out by Balcombe L.J.

Judge Ezratty: Je suis d'accord pour I'essentiel avec les conclusions du Juge Landau et sa motivation sur les trois points principaux en litige.

1. Concernant l'état de légitime défense invoqué par l'Est de Calamira, il m'apparait démontré que ce pays a apporté des justifications suffisantes quant à la nécessité de sa riposte préventive: complicité de I'Etat de Protékistan par fourniture de moyens et assistance technique à un groupe d'individus ayant pour but de renverser par la force le gouvernement de Calamira; danger exceptionnel constitué par la menace d'utilisation incontrôlée d'armes atomiques dont les effets dépassent manifestement ceux qui s'attachent à la possession d'armes conventionnelles, fussent-elles sophistiqués, puisqu'ils s'étendront irrémédiablement et durablement aux populations et à l'environment.

Pour l'appréciation de la proportionnalité, je suis d'accord pour admettre que 1'arraisonnement et le transfert forcé du navire avec sa cargaison d'armes et ses occupants (marins, techniciens, membres du Front et leurs alliés) n'était pas line riposte excessive eu égard à la gravité de la menace.

Ainsi se trouve caractérisée, à mon avis, la légitime défense.

En revanche, je ne suis toujours pas convaincue par la distinction que le Juge Landau propose à titre personnel dans son jugement, selon laquelle une interception en haute mer aurait mieux répondu aux conditions exigées pour admettre sans réserve la légitime défense.

En I'absence d'éléments de fait plus précis sur la position géographique des deux protagonistes est-il possible d'affirmer qu'une action menée contre le navire, voguant en pleine mer, n'aurait pas entrainé des risques supérieurs? Il n'est pas certain non plus que les chances de succès de l'opération,opé notamment pour la sécurité des passagers du navire attaqué, auraient présenté dans cette hypothèse des garanties équivalentes.

Or, une action préventive n'a de sens que si elle est conçue de manière à écarter le danger en limitant all maximum les effets négatifs.

2. Sur la compétence de la juridiction du Calamira pour j . uger tous les passagers du navire, y compris les personnes n'ayant pas la nationalité de ce pays.

Je maintiens mon accord sur la position adoptée par la majorité du notre "tribunal international" - à savoir le droit pour la juridiction du Calamira de juger toutes les personnes se trouvant sur le navire sans distinction de nationalité. Je confirme que la loi pénale française (article 694 du code de procédure pénale) permet de juger d'après les dispositions de la loi française un étranger qui, "hors du territoire de la République, s'est rendu coupable, soit comme auteur soit comme complice, d'un crime ou d'un Wit attentatoire 5 la sûreté de I'Etat". Toutefois le texte précise que cet étranger dolt avoir été arrêté en France ou avoir fait I'objet d'une extradition, ce qui laisse entière la question de notre espèce où les personnes détenues par le Calamira ont été appréhendées par force et hors de toute procédure régulière.

A compter du ler Mars 1994, les dispositions du nouveau code pénal se substitueront à celles de l'article 694 qui sont en vigueur atuellement. Pour notre cas il s'agit de l'article 113-10 du livre 1 du N.C.P. qui prévoit que la loi française s'applique aux crimes et délits qualifiés d'atteintes aux intérêts fondamentaux de la nation et réprimés par le titre ler du livre IV ainsi qu'à la falsification et contrefaçon du sceau de l'Etat, de pièces de monnaie, billets etc.. et aux crimes et délits commis contre des agents ou locaux diplomatiques ou consulaires français. La question de la régularité

de l'arrestation resterait posée devant le tribunal français saisi de la poursuite, les conditions exigées pour juger un étranger ayant commis l'infraction hors du territoire français (arrestation en France ou extradition) demeurant inchangées.

3. En ce qui concerne les sanctions, je n'ai aucune objection ou observation à formuler.

Judge Ezratty: I agree in principle with the conclusions reached by Landau J., on the grounds set out by him concerning the three principle points at issue.

1. As regards the situation of legitimate self-defence invoked by the State of Calamira, in my view it has been adequately shown that this country has advanced sufficient justifications for its preventive response: the complicity of the State of Protekistan in furnishing the means of technical assistance to a group of individuals for overturning by force the government of Calamira; the exceptional danger constituted by the threat of the uncontrolled use of atomic weapons, the effects of which manifestly surpass those involved in the possession of conventional arms, be they even of a sophisticated nature, since they extend irremediably and permanently to populations and to the environment.

As regards proportionality, the inspection and the forced removal of the vessel with its cargo of arms and its passengers (seamen, technicians and members of the Front and their allies), I agree that the response was not excessive, having regard to the gravity of the menace.

Thus, in my opinion, legitimate self-defence has been established.

On the other hand, I am not entirely convinced by the separate personal opinion of Landau J. that a distinction should be drawn under which an interception on the high seas would have conformed better to the conditions required for admitting legitimate self-defence without reserve.

In the absence of accurate indications as to the geographical position of the two protagonists, can it be stated that an operation conducted against the vessel while sailing on the high seas would not have entailed major dangers? Neither is it certain that the chances of success of the operation, especially for the safety of the passengers of the vessel attacked would, on this assumption, have assured commensurate safeguards.

Now, a preventive action makes sense only if it is planned in a manner limiting negative consequences as far as possible.

2. As regards the jurisdiction of Calamira, to try all the passengers of the vessel, including those that are not nationals of that country: I maintain my agreement with the position adopted by the majority of our "International Tribunal", i.e., that Calamira has the power of jurisdiction to try all the persons on board the ship, without distinguishing between their nationalities. I confirm that the French Criminal Law (Art. 694 of the Code of Criminal Procedure) permits, according to the provision of French law, to put on trial a foreigner who "outside the territory of the Republic has committed as principal offender or as an accomplice a crime or a delict endangering the security of the state." However, the text of the law makes it clear that that foreigner must have been arrested in France or have been extradited, which leaves open the question arising in our case where the persons detained were apprehended by force and outside any regular procedure.

As from the 1st of March 1994, the provisions of the new Criminal Code will replace those of Art. 694 which are at present in force. In our case this means Art. 113-10, Book 1, of the new Penal Code, which provides that French law is to apply to crimes and to delicts described as endangering the fundamental interests of the nation and made punishable by Chapter I of Book IV, and also falsifying and forging the Sea] of State, coins and paper money, etc. and crimes and delicts committed against French diplomatic or consular agents or premises.

The question of the regularity of the arrest remains to be dealt with by the French court seized with the case, the conditions required for judging a foreigner who has committed his offence outside French territory (arrest in France or extradition) remaining unchanged.

3. Regarding the relief to be granted. I have no reservations or observations to offer.

Judge Kaye: I have read the judgment of Landau J., and I agree with the observations and conclusions expressed by him in paragraphs 2 to 14. The situation postulated in paragraph 20 by the Presiding Judge, not being within the facts and issues of the case stated, I withhold my opinion about the conclusions expressed therein by him. This judgment is therefore confined to the issue of the jurisdiction under international law of the Criminal Court of Calamira to try Protekistan, Calamirian and other subjects who were found on board the captured vessel from where they were abducted into the custody of Calamirian authorities.

For the reasons hereinafter appearing, I am of the opinion that under customary international law a state does not have jurisdiction to try a forcibly abducted alien for criminal offences committed within the territory of another state, unless with the consent or acquiescence of the latter state.

There are some preliminary observations concerning the two

charges intended to be preferred against the Protekistan crew members and military experts, which I regard as relevant to, although not determinative of, the issue of the jurisdiction of the Calamirian Criminal Court. The first intended charge would be one of buying or assisting to buy atomic weapons without authorisation of the Calamirian government. In the absence of any facts relating to their activities the conduct so charged is not of the character expected of crew members of a small ship. Their activities, as crew members, would be carrying out orders and directions for manning and maintenance of the vessel. Their only connection with the seized weapons was that the weapons were found on the ship of which they were crew members at the relevant time. Accordingly, without any allegation of involvement in the purchase of the seized atomic weapons, this charge in relation to crew members is so improbable that it could not be sustained in any court of competent jurisdiction.

The second intended charge would be: an attempt to use nuclear weapons against the inhabitants of Calamira. At the time of interception of the ship, the nuclear weapons were in Protekistan territorial waters in transit to Calamira. The observation of the relevance of the first charge to the crew members which I have made apply equally to them in connection with this further charge. Furthermore, there is nothing in the facts of the case stated from which "an attempt to use nuclear weapons" could reasonably be found against the crew members or the military experts. in the case stated, the allegations made against the Protekistan military experts were that they "were due to supply the know-how and training needed to operate the missile system." Those activities were not ones in which they were engaged at the time of the seizure of the ship. The allegations were of intended future conduct of the military experts in Calamira. Thus their conduct, either when abducted or even at some future unknown date, did not constitute "an attempt to use" nuclear weapons. It follows, in my opinion that the proposed charges were not appropriate to the conduct by either the crew members or the military experts.

However, there are stronger reasons for denying to the Calamirian Criminal Court jurisdiction to try the forcibly abducted Protekistan subjects on charges arising of their conduct within the territory or territorial waters of their own country.

The right of a state to prosecute its citizens for conduct committed abroad, which is criminal under its laws, is not contrary to international law. A prerequisite to the exercise of jurisdiction over a citizen for a crime under the law of the court of the forum committed in a foreign land is that the citizen is at the time of trial present within the territory of the state. If the citizen charged is present voluntarily or after due extradition procedures within the territory of the state, no question of international law arises. If he is being brought illegally or by forceful means from abroad before the court of the state of which he is subject, the question whether the court has jurisdiction to try him for a criminal offence committed abroad will depend upon the municipal law of the state. Thus it would be a matter for the Calamarian Court to determine whether, according to Calamirian municipal law, the Calamarian subjects seized on the ship in Protekistan territonal waters could be tried for the offence of buying or assisting to buy atomic weapons in Protekistan without authorisation of the Calamirian government.

In relation to the Protekistan crew members and military experts, however, there are different principles of law and considerations to be taken into account. This Tribunal, purported to be sitting as an International Court of Justice, is constrained to apply principles and rules of international law in relation to the Protekistan subjects, and not those of Calamirian law. I am unaware of any decision of an International Court of Justice concerned with bearing directly upon the question presented by the forceful seizure of persons such as the Protekistan nationals within their state territory and tried for offences allegedly committed abroad by a court of a state to which they did not owe allegiance. There are decisions and judgments of municipal courts, and opinions of learned authors, however, which are relevant to the question of whether the Protekistan crew members and military experts are justiciable before the Calamarian Criminal Court.

Furthermore, it is to be noted that there are reasons flowing from principles of international law for denying to the Calamirian Criminal Court jurisdiction to try the forcefully abducted Protekistan subjects on charges arising out of their conduct within the territory or territorial waters of their own country. First, I refer to the principle of international law applicable to the exercise of jurisdiction by the court of the state against a foreigner for crimes committed abroad. The judgment of the majority of the Permanent Court of International Justice in the *SS Lotus case*,[16] I arose out of a collision on the high seas between the Lotus, a French ship, and the *Bozi-Kourt*, a Turkish ship, as a result of which the *Bozi-Kourt* and eight of its crew and passengers were lost. The

[16] SS Lotus, France v. Turkey (1927) P.C.I.J. Ser. A No. 10 vol. 2, 4, Hudson World Ct. Rep. 20.

Lotus put in to a Turkish port, where criminal proceedings under Turkish law were instituted against the officer of the watch of the *Lotus* at the time of the collision. The Permanent Court of International Justice found that the Turkish court in so acting had not done so in conflict with the principles of international law. The basis of the Court's decision was expressed in the following passage of the judgment of the majority at page 23:

"... It is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another state, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there."

In his dissenting judgement, M. Loder at page 35 stated:

"The criminal law of a state may extend to crimes and offences committed abroad by its nationals, since such nationals are subject to the law of their own country: but it cannot extend to offences committed by a foreigner in foreign territory, without infringing the sovereign fight of the foreign state concerned, since in that state enacting the law has no jurisdiction.

Nor can such a law extend in the territory of the state enacting it to an offence committed by a foreigner abroad should the foreigner happen to he in this territory after the commission of the offence, because the guilty act has not been committed within the area subject to the jurisdiction of that state and the subsequent presence of the guilty person cannot have the effect of extending the jurisdiction of the state."

Lord Finlay at pages 55 to 56 stated that the court of a country is no more entitled to assume jurisdiction over foreigners for offences committed abroad than to annex "a bit of territory which happened to be very convenient for it." He then cited with approval the following passages, referring to acts committed by foreigners abroad and the claim of states to exercise jurisdiction threatening punishment of those acts, which appeared in the then current edition of Oppenheim on International Law, page 239, paragraph 147.

"These states cannot, of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory. But if, after the committal of such act, he enters their territory and comes thereby under their territorial supremacy, they have an opportunity of inflicting punishment. The question is, therefore, whether states have a right to jurisdiction over acts of foreigners committed in foreign countries, and whether the home state of such an alien has a duty to acquiesce in the latter's punishment in case he comes into the power of these states. The question, which is controversial, ought to be answered in the negative. For at the time such criminal acts are committed, the perpetrators are neither under the territorial nor under the personal supremacy of the states concerned. And a state can only require respect for its laws from such aliens as are permanently or transiently within its territory. No right for a state to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the law of nations, and the right of protection over citizens abroad held by every state would justify it in an intervention in case one of its citizens abroad should be required to stand his trial before the courts of another state for criminal acts which he did not commit during the time he was under the territorial supremacy of such state."

M. Nyholm at pages 60-62 and Mr. Moore at pages 92-93, in their respective dissenting judgments, expressed in substance the same principle of international law applicable to the exercise of jurisdiction by a court over a foreigner for a criminal act committed abroad as stated by M. Loder and Lord Finlay. Mr. Moore at page 92 expressly rejected the protective principle of concurrent jurisdiction by which, it is said, a citizen of one country when visiting another country, takes with him for his protection" the law of his country.

Notwithstanding the eminence of the judicial members of the Court, decisions of the Permanent Court of International Justice, while not binding upon other international judicial tribunals. are of the highest persuasive influence, When considering the degree of authority to be attributed the judgment in the *Lotus case*, I take into account that the judgment was of a majority of six judges, with five dissenting and Mr. Moore's dissent being limited to one ground. It would therefore be open to a subsequent Permanent Court of International Justice to depart from the ratio of the majority in the *Lotus case*, and apply principles of international law prohibiting an alien from being tried in a national court for conduct abroad constituting an offence under the law of the forum.

Moreover, the principle applied by the majority in the *Lotus case*, has no application to the alleged conduct of the Protekistan citizens which is the basis of each proposed charge. At the time of the capture of the Protekistan vessel, the effect of buying or assisting to buy atomic weapons was confined to the carriage by sea of the weapons within Protekistan territorial waters. Up till that time, Calamira had not suffered any detrimental or injurious effects from the alleged criminal acts committed by the Protekistan nationals. Similarly, while in the ship there having been no act or acts of attempting to use the weapons, the inhabitants of Calamira have not suffered any injurious effects from the alleged attempt. Thus, at the time of the interception of the ship, no "constituent element(s) of the offences, and more especially its effects (had)

taken place" in the national territory of Calamira.[17]

A further and more compelling reason for denying to the Calamirian Criminal Court jurisdiction to try the Protekistan citizens for conduct committed in the territory or on territorial waters of Protekistan is the fact that the Protekistan citizens were forcefully abducted by the Calamirian submarine.

The learned authors of Oppenheim,[18] discussing the duty of a country not to violate the independence or territorial or personal authority of another state, stated:

"It is also a breach of international law for a state without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime. Where this has happened, the offending state should - and often does - hand over the person in question to the state in whose territory he was apprehended. But states do not always do this, and the fugitive may be brought to trial in the courts of the state whose agents have seized him. The question then arises whether those courts should decline jurisdiction because of the violation of international law involved in his seizure. National courts have generally not declined to exercise jurisdiction over an accused who has been brought within their power by means of a seizure in violation of international law."

The significance of the author's qualification by the addition of the word "generally" to the practice of national courts not declining to exercise jurisdiction over an accused who has been brought within the territory by means of seizure or violation of international law is made clear from an examination of the authorities noted in the footnote numbered 16 at pages 389-390. The authors there comment that decisions of English Courts are not unambiguous. Reports of early English and Scottish cases, including those referred to in the footnote, do not reveal that in those cases an actual violation of customary international law occurred. Thus, the early English cases were decided upon the application of municipal law without reference to international law. The courts declining to enquire into the circumstances under which the accused was brought within the jurisdiction and before them.[19]

In *R. v. Garett*,[20] Viscount Reading CJ indicated that if on the facts in the habeas corpus proceedings then before the court by persons claiming to have been illegally arrested there had been a breach of international law, a question of the breach would have necessitated careful consideration by the court.

Decisions of the Supreme Court of the United States have upheld the power of a court to try a person brought within its i . urisdiction by unlawful means or by forceful abduction, and in breach of customary international law: Ker v. Illinois,[21] and Frisble v. CollinS.[22] Subsequent decisions of Courts of Appeal of the Second and Ninth Circuits follow the Supreme Court, notwithstanding in each case the accused's claim that his presence before the court was in consequence of his forceful abduction in violation of the due process clause; *United States*, *Ex Rel Lujan v. Gengler*,[23] and *United States v. Lomto*.[24] In so holding, the Appeal Courts' decisions may be contrasted with a decision of the Court of Appeal for the Second Circuit, holding that the due process rights of an accused would be violated and the courts' criminal process would be abused where the accused had been brought before the court after being kidnapped and tortured abroad and drugged before being put on an airline bound for the United States in violation of international treaties; *United States v. Toscanino*.[25]

In recent years there have been conflicting decisions of courts within the common law system about the question whether an accused person claiming to have been unlawfully arrested or illegally brought within the jurisdiction of the court may have those circumstances investigated by the court and thereby to have the pending criminal proceedings forever stayed.

The first in the line of such cases is *R.v. Hartley*.[26] It was there held by the New Zealand Court of Criminal Appeal that the New

---

[17] The Lotus case, ibid note 16 at p. 23.

[181 Ibid note 3. at pp. 387-389.

[19] See Ex Parte Susannah Scott [182919 B and C 446; 109 ER 166; Sinclair v. Her Majesty's Advocate 17 R(J) 38 (1890); In re Parisot 5 TLR 344 (1888-89); Ex Parte Elliot [19491] All E.R. 376, and see for further discussion Paul O'Higgins "Unlawful Seizure and Irregular Extradition" British Yearbook of International Law (1960) 279.

[201 R. v. Garrett 86 L.J. [KB] 894 (1917).

[211 Ibid note 10.

[22) lbid note 11.

[23] United States, Ex Rel Lujan v. Gengler 510 F 2d 62 (1975).

[24] United States v. Lovato 520 F 2d 1270 (1975).

[251 United States v. Toscanino 500 F 2d 267 (1974).

[26] R. v. Hartley[197812 NZLR 199.

Zealand Criminal Court had jurisdiction to hear a charge of murder against the accused who at the telephone request of New Zealand police, had been taken into custody in Melbourne and put on an aircraft for New Zealand by Victorian police, in breach of established extradition processes. The Court further held that the trial judge, exercising discretion under statute or under the inherent jurisdiction of the Court, would have been justified to have directed the accused to be discharged.

The Divisional Court in *R. v. Bow Street Magistrates*; *Ex Parte Mackeson*[27] enquired into the circumstances under which an applicant was sent from Zimbabwe-Rhodesia into the United Kingdom. The Court following *R. v. Hartley*[28] held that, although there was jurisdiction to hear criminal charges against the applicant who had been removed from Zimbabwe-Rhodesia by unlawful means and by circumventing extradition procedures, its discretion ought to be exercised and it grantedthe application for prohibition and discharged the applicant.

In *R. v. Guildford Magistrates Court*; *Ex Parte Healy*,[29] the Divisional Court similarly considered the facts of the applicant's deportation from the United States to the United Kingdom and appearance before a single justice in criminal proceedings. In doing so, the Court followed the procedure adopted in *R.v. Bow Street Magistrates*; *Ex Parte Mackeson*.[30] Finding that there was no abuse of process in the extradition proceedings, the application was refused.

However, R. v. Hartley[31] was not followed by the Divisional Court in *R. v. Plymouth Justices*; *Ex Parte Driver*,[32] and the decisions in *R. v. Bow Street Magistrates*; *Ex Parte Mackeson*[33] and *R. v. Guildford Magistrates' Court*; *Ex Parte Healy*[34] were said by the Court to be per incuriam. Stephen Brown LJ, with whom Stuart-Smith and Otton JJ agreed, after viewing the line of authorities commencing with *Ex Parte Susannah Scott*, expressed his conclusion at page 123:

"...that the Court has no power to enquire into the circumstances in which a person is found in the jurisdiction for the purposes of refusing to try him." [35]

The New South Wales Court of Appeal in Levinge v. Director of Custodial Services, Department of Corrective Services,[36] after considering the divergence in the later English decisions and referring to decisions of the United States Supreme Court and Courts of Appeal, declined to follow *R. v. Hartley*[37] and *R.v. Box, Street Magistrates*; *Ex Parte Mackeson*.[38] McHugh JA (as he then was) stated:[39]

"Notwithstanding the decision of the High Court in *R. v. PI Plymouth Justice; Ex Parte Driver*, I think that this Court should give effect to the law as expounded in *R. v. Hartley*. That case and the cases which have followed it decided that, where there is in existence an extradition treaty which is knowingly circumvented by the prosecuting authorities, a court has jurisdiction to stay criminal proceedings on the ground that they are an abuse of process. It seems to me. as it seemed to the New Zealand Court of Appeal, that the courts cannot turn a blind eye to a deliberate disregard of statutory requirements concerning extradition. In many areas of the civil law, the courts refuse to entertain causes of action on the ground that the plaintiff has been guilty of unlawful or illegal conduct or has contravened a rule of public policy. I see no reason why in an appropriate case a court does not also have jurisdiction to prevent the bringing or continuance of a criminal prosecution which offends "those canons of decency and fairness which express the notions of justice of Englishspeaking peoples even towards those charged with the most heinous offences: *Rochin v. California*.[40] It would be a blot on the administration of justice if, on the facts of a case like *United States v. Toscanino*,[41] the Court had no power to stay the prosecution."

---

[27] R. v. Bow Street Magistrates; Ex Parte Mackeson (1981) 75 Cr. App. R. 24.
[281 lbid note 26
[29] R. v. Guildford Magistrates Court; Ex Parte Healy (1983) 1 WLR 108.
[30] Ibid note 27.
[31] lbid note 26.
[32] R. v. Plymouth Justices; Ex Parte Driver [1986] 1 Q. B. 95.
[33] lbid note 27.
[341 lbid note 29.
[35] Ibid note 32, at p. 123.
[36] Levinge v. Director of Custodial Services 9 NSWLR 546 (1987).
[37] lbid note 26.
[38] lbid note 27.
[39] lbid note 36, at p. 564.
[40] Rochin v. People of California 342 U.S. 165 (1952); 72 S.Ct. 205.
[41] Ibid note 25

It is significant that in the recent cases, apart from references to breach of extradition procedures, no violation of customary international law was considered in the various judgments. Nevertheless there are two cases where municipal courts of appeal and a court of first instance, considered principles of customary international law in relation to an accused person's claim that he had been forcibly abducted from the territory of a foreign state to which he had fled.

I refer first to *Attorney-General of Israel v. Eichmann*.[42] The circumstances of his abduction by Israeli agents from Argentina were relied upon by Eichmann as a violation of customary international law. Events following his abduction were pertinent to his challenge to the District Court's jurisdiction to try him. Soon after his abduction, Argentina presented a complaint to the United Nations protesting that Israel had violated its sovereignty by the unlawful exercise of foreign authority within its territory. The Argentina complaint was subsequently resolved by an expression of regret by the government of Israel which was accepted by Argentina in a joint communique by both governments. This expression of regret was acknowledged as appropriate reparation of the breach of Argentina's sovereignty. Thereafter, the government of Argentina declared the incident closed, refusing thereby to grant any protection to Eichmann. In particular it made no demand for his return. The District Court rejected Eichmann's objection to its jurisdiction, relying on the United States, Israel and older English authorities, including *Ex Parte Susan Brown, R. v. Nelson and Ex Parte Elliott*. The Court stated in substance that the accused could not oppose his trial by reason of the illegality of his arrest or the means by which he was brought within the jurisdiction, whether the illegality was under municipal or international law. The judgment continued that a violation of sovereignty constituted an international tort, giving rise to a duty to make reparations which the injured (complaining) state might waive and that the accused could not claim rights which the injured state had waived, as had been done by Argentina. For those reasons, the District Court did not enquire into the circumstances of Eichmann's abduction.

On appeal, the Supreme Court of Israel at page 306 agreed with the entire reasoning of the District Court in relation to Eichmann's challenge to the Court's jurisdiction to try him. It described Eichmann as "a fugitive from justice from the point of view of the law of nations." It is clear from the judgment of the Supreme Court that the question of violation of customary international law had been resolved because the breach by the Israeli agents of international law invested legal rights upon Argentina only and not upon Eichmann. The Supreme Court stated at page 307:

"...the moment it is conceded that the State of Israel possesses criminal jurisdiction both according to local law and according to the law of nations, the court is not bound to investigate the manner and the legality of the appellant's detention."

I turn now to the second of the two cases where consideration was given to the fact of breach of international law in bringing an accused person for trial before a criminal court. In *S. v. Ebrahim*[43] the Appellate Division of the Supreme Court of South Africa held that it is within the jurisdiction of a state court to investigate the claim of an accused that he was abducted from a foreign state by agents of the former state and that the court, accepting the accused's claim of abduction or unlawful seizure, has jurisdiction to discharge him. I have not had access to a translation from Afrikaans into English of the judgement of the court. However, the report of the case available to me contains an English translation of the headnote and the submissions made in English to the court by counsel for the appellant. It is there reported that the appellant while under a restriction order had fled from South Africa. Agents of the South African government abducted him from his home in Swaziland and returned him to South Africa. There he was charged with treason before a court of a circuit local division. Before pleading to the charge, he made application for an order that he was not amenable to the jurisdiction because his abduction was in breach of international law and therefore unlawful. His application was refused and upon his trial he was convicted and sentenced to twenty years' imprisonment. In the headnote it is stated, *inter alia* "... the issue as to the effect of the abduction on the jurisdiction of the trial court was still governed by the Roman and Roman-Dutch common law which regarded the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area as tantamount to abduction and this constituted a serious injustice. A court before which such a person was brought also lacked jurisdiction to try him, even where such a person had been abducted by agents of the authority governing the area of jurisdiction of the said court. The Court further held that the above rules embodied several fundamental legal prin-

[42] Ibid note 8.
[43] S. v. Ebrahim [1991] 2 S.A. 553.

ciples, viz. those that maintained and promoted human rights, good relations between states and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of states had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The state was bound by these rules and had to come to court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the state was involved in the abduction of persons across the country's border." The Court held that the appellant should never have been tried by the court of first instance and that the consequences of the trial had to be undone. Both the conviction and the sentence were set aside.

The course approved and the law applied by the South African Supreme Court, as recorded in the headnote, are consistent with *R. v. Hartley*,[44] *R. v. Bow Street Magistrates*; *Ex Parte Mackeson*[45] and *Levinge v. Director of Custodial Services*[46] and the dictum of *Viscount Reading CJ in R. v. Garreff*.[47] Again, in the summary of their submissions it is recorded that the authorities relied upon by counsel for the appellant included *R. v. Hartley* and *R. v. Garrett*.

From the foregoing review of authofities, I conclude that it is now recognised by Appellate Courts of New Zealand, South Africa and New South Wales that there is power to investigate the circumstances of the forceful abduction or unlawful means by which an accused person has been brought before a foreign state to be tried on a criminal charge. A breach of customary international law caused by abduction or the unlawful means of bringing the accused from abroad within the court's jurisdiction is a relevant consideration in the interests of justice for the exercise of judicial discretion to discharge him or or her.

In the present matter, there were violations of international law by the Calamirian submarine entering Protekistan's territorial waters, there capturing a vessel flying Protekistan's flag, and forcefully abducting its subjects into Calamira. Protekistan, in proceedings before this Tribunal, which is exercising international law, claimed inter alia immediate release of its subjects so abducted by Calamira. In my opinion, applying principles of customary international law, this Tribunal should give judgments directing the return of the Protekistan crew members and military experts. To do otherwise would be contrary to the rule of law as recognised by the community of nations.

There remains the question of the release of citizens of Calamira's neighbouring countries who supported the ideology of the Front. The governments of those countries did not seek to intervene in the course of proceedings to secure the release of their subjects. It is arguable that the situation in international law of those persons may be equated to that of Eichmann as a fugitive from international justice. Be that as it may, I would reserve any questions concerning their release from Calamirian custody.

Judge Kozinski: As dusk settled on Baghdad on June 7, 198 1, six Israeli bombers swept from the skies above the Osirak nuclear reactor and reduced it to rubble. Had the reactor become operational, Prime Minister Menachern Begin later explained, it would have enabled Saddam Hussein to deploy nuclear weapons within striking distance of Israel.[48]

Two decades earlier, another nation took bold action to keep nuclear missiles from being stationed near its shore. In announcing the 1962 Cuban quarantine, President John F. Kennedy explained:

"We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace."[49]

America's action was greeted with widespread approval;[50] Is-

---

[44] Ibid note 26.
[45] Ibid note 27.
[46] Ibid note 36.
[47] Ibid note 20, at p. 898,
[48] Angus Denning, Two Minutes Over Baghdad, Newsweek, June 22. 198 1. at p. 22.
[491 47 Dep't of State Bull. 715, 716 (Nov. 12, 1962).
[50] See, e.g., Carl Q. Christol, Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba. 1962, 57 Am. J. Int'l L. 525 (1963); Andrew J. Valentine, U.S. Naval Quarantine of Cuba: A New Wine in a New Bottle, 23 Fed. B.J. 244 (1963); WT. Malhson, Jr., Limited Naval Blockade or Quarantine-Interdiction, 3 1 Geo, Wash. L. Rev. 335 (1962).

rael's was generally deplored and eventually censured by the U.N. Security Council.[51] With the benefit of hindsight, however, it is clear that both actions were not merely justified but necessary. What would the world look like today if Castro had planted nuclear warheads less than 400 kilometers from Miami, or if President Bush had faced off against a Saddam Hussein brandishing nuclear Scud missiles?[52]

These two incidents teach us a great deal: That nations must and will act decisively when threatened with the deadliest weapons known to man; that the danger from such weapons extends far beyond the country immediately threatened; that there are no zero-fisk solutions where nuclear weapons are involved; that the cause of peace is generally ill-served by timidity and hesitation.

We ignore these lessons at our peril.

1. There is much in Justice Landau's erudite (and eloquent) opinion with which I agree. His discussion of the dangers of nuclear proliferation is hard to improve on: his conclusion that Protekistan committed international piracy by selling nuclear arms to terrorists is entirely fight; his analysis as to the i . urisdiction of the Calamiran courts is flawless; his dictum explaining that Calamira would have been entitled to seize the cargo vessel on the open sea is unanswerable.

When all is said and done, though, my colleagues focus on the wrong issues. At the heart of the majority's analysis is the conclusion that Protekistan violated international law by selling weapons to the Front for the Liberation of Calamira. Because the Front "has no recognized status under international law",[53] Protekistan's actions were unlawful, and Calamira's were therefore (mostly) lawful. Had the Front been "a sovereign state recognized as such by the international community," the majority says, Protekistan's actions would likely have been lawful and, I take it, Calamira's would have been unlawful.

But all this is largely beside the point. A nation has a fundamental right to fend off a credible nuclear menace which threatens to kill millions of its citizens, to destroy its very existence as a civilized society. This right does not depend on whether the menace happens to come from an internationally recognized entity. International recognition is no guarantee of decency or even rationality: Saddam Hussein, Muammar Qadaffi, Idi Amin, Fidel Castro, the Ayatollah Khomeini, Nicolae Ceaucescu, Joseph Stalin, Adolf Hitler and Pol Pot are proof enough of that. Likewise, the Palestine Liberation Organization, viewed as a terrorist group by many civilized nations, is nonetheless recognized as a government by some and has been granted observer status by the U.N.[54] A nation i's entitled to protect itself against nuclear aggression, whether it comes from unrecognized terrorists, partly recognized terrorists, or terrorists who are so successful they run a fully recognized government of their own.[55]

Nor does it matter whether the defensive action comes in response to a violation of international law. I agree Protekistan committed an appalling violation of international law - to say

---

[51] See, e.g., Michael J. Berlin, U.N. Council Condemns Israeli Raid, Washington Post, June 20, 1981, et al; see also Security Council Resolution 487, 2288th mtg., June 19, 1981.

[52] Shamefully, none of those who ultimately benefitted from the Osirak raid have recanted their censure or given Israel credit for its foresight. Not the United States, which led Operation Desert Storm. nor its President, who mobilized the world community in support of the Gulf War. See Bush Sought Aid Cutoff to Punish Israel, Washington Times, Mar. 18, 1993, at A2 (recounting former Secretary of State Haig s congressional testimony that then-Vice President Bush sought termination of all American aid to Israel in response to the Osirak strike). Not Italy or France, which delivered the Osirak reactor, the 93 percent enriched uranium fuel and the "hot cell" that would have made production of atomic bombs possible, see Beth M. Polebaum, National Self-Defense in International Law: An Emerging Standard for a Nuclear Age, 59 N.Y.U.L. Rev. 187, 219-20 (1984); not Iran, Syria, Jordan, Russia or any of the other countries that would lie within the Iraqi nuclear footprint: certainly not Kuwait or Saudi Arabia, which might well be Iraqi provinces today if Saddam Hussein had managed to amass even a small nuclear arsenal.

[53] Majority opinion para. 4.

[54] The U.N. has come close to giving the P.L.O. the same status it gives nonmember states like Switzerland or the Vatican. See U.S. Threat Halts Vote on PLO. Facts on File World News Digest, Dec. 22, 1989, at 943 D3.

[55] The civilized world may soon have to confront this issue as some recognized governments not known for their sense of responsibility try to join the nuclear club. See, e.g. Peter D. Zimmerman, Nuclear Clock Again Ticks Near Midnight, L.A. Times, Apr. 5, 1993 at B7 ("Three nations — North Korea, South Africa and Iraq - have reached or crossed the nuclear threshold. . ."); Malcolm S. Forbes, Jr., fact and Comment, Forbes, Apr. 12, 1993, at 27; Caspar W. Weinberger, North Korea and Nuclear Arms, Forbes, Apr. 12, 1993, at 37; see also Kenneth r. Timmerman, Time to Stop the Iranian Nuke, Wall St. J., Apr. 21, 1993, at A 14. The newcomers may share their weapons — for ideological or pecuniary reasons — with others. See Rupert Cornwell, Iran Seeks Missile Deal with N. Korea, The Independent, Apr. 9, 1993 at 13 (discussing swap of oil for weapons, perhaps even nuclear ones). that all of these are recognized governments, rather than private groups, should not inhibit civilized nations from taking appropriate countermeasures, Indeed, given the track records of some of the countries allegedly involved, the case for intervention may be more, not less, compelling.

nothing of prudence and decency - by selling nuclear arms to terrorists.[56] I doubt, however, the United States could have shown a violation of international law in Khrushchev's plan to send nuclear missiles to Castro. Similarly, it is hard to say Iraq had violated international law in building the Osirak reactor.[57] But the United States and Israel were not policing violations of international law. They were doing something much more important; defending the lives of their citizens.

"When [a] threat ... involv[es] the possible use of modem nuclear-armed missiles, the test of an action taken in defense against that threat is ... that most comprehensive and fundamental test of all law, reasonableness in [the] particular context".[58] If Calamira's actions were a reasonable response to the threat it faced - as I believe they were - we need inquire no further.

2. A. I turn then to the basic issue: Were Calamira's actions justified by the nuclear threat from a "fanatical terrorist group" that intended to "use [or threaten to use] indiscriminate violence against the civil population of Calamira,"?[59]

In making this determination, I would ask and answer the following five questions, suggested by an exceptionally fine piece of scholarship in the N. Y. University Law Review:[60]

1. Was there a clear threat to Calamira, of which its decision makers were aware, prior to the decision to take preemptive action?
2. Was the threat technologically credible?
3. Did Calamira act at the last available moment for effective action?
4. Did Calamira comply with the traditional requirement that a nation seek alternative means of resolution?
5. Was Calamira's response strictly limited to the force necessary to remove the nuclear threat?

The first two inquiries must be resolved decisively in Calamira's favor. I can imagine no threat graver than terrorists on the loose with nuclear bombs. Nor was there a doubt the threat was credible: any uncertainty about the Front's ability to use the weapons was eliminated by Protekistan's ready willingness to provide on-site technical support. Service like this is hard to find nowadays.

The third inquiry is a bit closer, but only a bit. The last moment for effective action is not always easy to figure out; it depends on the type of action involved and the seriousness of the threat. It may well be, as my colleagues conjecture that Calamira could have waited until the vessel had entered international waters, but not without extra risk. Here Calamira chose to stop the vessel in the confined waters of the harbour, where it could easily be located. Once it left the mouth of the harbour, the ship could go in many directions and take all sorts of evasive actions. Waiting for the ship outside the three-mile limit and then trying to catch up to it on the open sea would have been a much more complex operation. In all likelihood, it would have required a larger task force, which would have increased the risk of detection by Protekistanian armed forces and an all-out firefight.

Perhaps the chances of success would have been reduced only slightly. But even a small Increase in the probability of nuclear disaster is a very heavy price to pay. When the danger I is as serious as it was here, action means seizing the best - not the second-best - opportunity for successfully completing the mission.

The closest question is whether Calamira should have resorted to diplomacy before taking military action. It is not clear from the record that Calamira had time to do this; but even if it did, I conclude Calamira did not fail in its duty to exhaust alternative means of resolution. To begin with, it is hard to be sanguine about a diplomatic solution with a country that treats the sale of nuclear arms to terrorists as just another business deal. Enforcing international norms against countries unwilling to abide by them is notoriously difficult: Consider Iraq, which refused to leave Kuwait

---

[56] Protekistan's violation is not entirely irrevolent. My willingness to tolerate Calamira's minor encroachment of Protekistanian waters is based in part on the fact that Protekistan "as wrong. I would have placed a heavier burden on Calamira to explain its invasion of an innocent third country through whose waters the cargo vessel happened to be passing. But I would not suggest, as the majority may be understood as suggesting, that Calamira was lawless in protecting its vital interests unless it could first prove Protekistan itself had violated international law.

[571 To be sure, there were many suspicious circumstances: Iraq, awash in a sea of Mideast oil. wasn't exactly in dire need of nuclear energy: it had insisted on using 93% enriched uranium (which can be used to make bombs), rejecting France's offer of low-grade fuel; Iraq had also made plans to purchase from Italy a so-called "hot cell." a laboratory capable of handling and separating weapons-grade plutonium. See Polebaum. 59 N.Y.U. L. Rev. at 219-20. Still and all, it is unlikely Israel could have haled Iraq before an international tribunal and gotten the reactor shut down.

[581 Joseph B. McDevitt "The U.N. Charter and the Cuban Quarantine" 17 JAG J. (1963) 80.

[59] Majority opinion para. 4.

[60] B.M. Polebaurn "National Self Defense in International Law: An Emerging Standard for a Nuclear Age" 59 N.Y.U. L. Rev. (1984) 187.

peacefully despite enormous international pressure, and which still refuses to dismantle its major weapons programs (including nuclear ones) two years after suffering ignominious military defeat.[61]

And trying diplomacy first would have been far from cost-free. Calamira managed to seize the ship with little risk and no bloodshed only because Protekistan thought its nefarious little deal was a secret. Had Calamira confronted Protekistan with the facts, it would have lost the element of surprise. Protekistan could then have given the ship a heavy military escort; or, as Justice Landau notes,[62] denied the facts and rearranged the transfer in a way Calamira did not know about.

Having to make out a case in a diplomatic forum also would have required Calamira to disclose how it obtained the information, jeopardizing the channels through which the evidence was gathered, perhaps even the lives of agents in the field:

"The public revelation of sensitive information should not be considered a routine procedure to which... states are expected to adhere... We will often be unable ... to litigate such issues because of limits on our willingness to reveal the sources and nature of evidence we obtain. We cannot, however, treat our national security interests in such cases as though they are solely legal claims to be abandoned unless they can be proved in a real court or in the court of public opinion. Our inability to justify actions in self defense with public proof will inevitably and quite properly affect our willingness to resort to the most serious remedial options. But no formal requirement of public proof should govern our actions in such cases."[63]

Given all this, I have much difficulty concluding Calamira should have done more than it did. With a nuclear Sword of Damocles hanging overhead, few countries would have the *sang froid* to give up a covert military operation with a substantial probability of success in exchange for an uncertain diplomatic solution that would alert the enemy and sacrifice intelligence resources.

The answer to the fifth inquiry - whether the force used was no more than necessary to eliminate the threat also falls heavily on Calamira's side. It is hard to see what less Calamira might have done. It sent a single craft to intercept the Protekistanian ship; it fired one warning shot, harming no one and causing no property damage; it avoided confrontation with Protekistanian armed forces. Calamira did nothing that was not necessary to incapacitate the threat to its very existence. Few countries in Calamira's position would have acted as responsibly, or with as much restraint.

B. Because I do not believe Calamira acted illegally, I cannot agree with even the small sanction the majority imposes on it for trespassing on Protekistanian territory. Territorial integrity is an important principle, but it "is not entitled to absolute deference in international law. National defense requires that [nations] claim the right to act within the territory of other states in appropriate circumstances, however infrequently [they] may choose for prudential reasons to exercise it".[64]

I understand the majority's position that Calamira had the burden of showing its incursion into Protekistanian waters was necessary, and that the stipulated facts do not contain an explicit justification for Calamira's encroachment.[65] I too was of this view and so cast my vote at the close of the trial.

On further reflection, I can no longer agree. The circumstances of this case offer more than adequate justification for Calamira's actions. Protekistan was sending nuclear weapons to "a fanatical terrorist organization" which planned to use them "in the struggle for the replacement of the government of Calamira".[66] The danger was clear, immediate and vast. Calamira really had no choice but to take its best opportunity for capturing the vessel and its deadly cargo. That it managed to do so without bloodshed, with no confrontation between the armed forces of the two nations, is proof enough that its intrusion on Protekistanian territory was no greater than necessary; all things considered, Protekistan got far better than it deserved. Instead of seeking in this Tribunal, Protekistan should have sent Calamira a bouquet of yellow roses and a thank you note.

3. National self-defense is a government's most sacred duty to its citizens. Adopting rules that civilized nations must violate in discharging this vital responsibility only undermines the legitimacy of international law, sapping its power to condemn those

---

[611 See e.g., Diana Edensword & Gary Milhollin. Iraq's Bomb - An Update, N.Y. Times. Apr. 26, 1993. at A15; U.N. Tells Iraq to Destroy Chemical Facilities, Reuter Library Report,

Apr. 15, 1993: U.N. Inspection Team Arrives in Iraq. Reuter Library Report. APT. 9, 1993.

[621 Majority opinion para. 20.

[63] Abraham D. Sofaer "Terrorism, the Law and the National Defense", 126 Military L. Rev. (1989) 89.

[64] Ibid note 63, at p. 106.

[651 Majority opinion paras. 9, 13.

[661 Majority opinion para, 1.

things that are truly evil - genocide, armed aggression for purposes of territorial imperialism, the harboring and training of terrorists. In criticizing the judgment of the International Tribunal in the Nicaragua case, Judge Sofaer made this point eloquently:

"We must not allow the corruption of international law, such as the effort... to diminish the inherent right of self defense, to hamper our national security efforts. Rather, we must ensure that the law is, in fact, on our side, and that while its proper restraints are respected and effectively implemented, no artificial barrier is allowed to inhibit the legitimate exercise of power in dealing with the threat of state-sponsored terrorism.[67]

We are not struggling against the rule of law, but for a rule of law that reflects our values and methods: the values of custom, tolerance, fairness, and equality; and the methods of reasoned, consistent, and principled analysis. We must oppose strenuously the adoption of rules of law that we cannot accept, because of the very fact that we take law so seriously."[68]

Now that the crisis is behind us, it is easy to second-guess Calamira's actions, to say it should have waited until the nuclear warheads got three miles closer to its shore. But with the lives of millions of our fellow citizens in the balance, who among us would give the order that might jeopardize the success of the mission? I understand my colleagues misgivings about transgressions against a nation's sovereignty, and the preference of some of them that Calamira have first exhausted diplomatic channels, but I must conclude that what Calamira did here was entirely reasonable - even laudable.

Even a slap on the wrist carries a bitter sting when unjustly imposed. And it certainly sends the wrong message about who is the transgressor here. Calamira reacted responsibly to a crisis not of its making; it is entitled to a fair measure of deference in responding to the grave exigencies it faced. We have no fight to criticize its reasonable choices with the benefit of perfect hindsight. 1, for one, would commend Calamira for saving us all from the catastrophic consequences of Protekistan's folly.[69] If sanctions are to be imposed on a party in this case, I can think of one besides Calamira that is far more deserving.

Conclusion: I join fully in paragraphs 1-3, 5-12 and 15-17 of the majority opinion. I also join Justice Landau's separate statement in paragraph 20, though I would take that rationale to its logical conclusion. I disagree with paragraph 18, insofar as it requires Calamira to return the cargo vessel to Protekistan; because Calamira did nothing illegal, I would let It keep the vessel as partial recompense for the costs of executing its military mission and bringing some of the miscreants to justice. As to paragraph 21, I would unceremoniously give Protekistan's claim the boot.

Judge Bach: 1. I concur with the judgment of Landau J., in all its parts. His judgment admirably expresses the conclusions arrived at by all of us, at the end of the proceedings before the Tribunal concerning the general issue of the legality under international law of Calamira's action, as well as the opinion of the majority on the question of the scope of Calamira's right to prefer criminal charges before a Calamirian court against the people detained on the ship seized by its submarine.

2. After having read the learned opinion of Kozinski J., I feel, however, bound to add the following observations:

I must confess to a large measure of sympathy and agreement with the opinions and sentiments expressed by Kozinski J.

As already intimated by my remarks during the hearings, I also feel that Calamira had made out a strong case and came very close to presenting a complete defence to the charge brought against it. Further to the arguments put forward by Judge Kozinski, I should like to mention in this connection the following points:

In all the circumstances there can, I believe, be no doubt that Calamira acted in self-defence. But in order to evaluate the proportionality of Calamira's action in seizing the vessel inside the Protekistanian harbour, we have to take into consideration the following factors:

A. The reality of the threat that actual harm to Calamira could result from the delivery of the vessel's cargo to its destination.

B. The size and degree of the danger confronting Calamira and its people if the threat had materialised.

C. To what extent, if any, have the actions and behaviour of the

---

[671 Ibid note 63, at p. 123.

[681 Ibid note 63, at p. 122.

[691 Nuclear fallout does not respect national boundaries. See, e.g., Chernobyl's Other Cloud, N.Y. Times, Apr. 30. 1986, at A30 (discussing spread of contaminants into Sweden and Poland). Worse still, once it put nuclear weapons in the hands of the Front, how could Protekistan be sure they would not be resold to other terrorists. like those who hit the World Trade Center in New York? Indeed, is Protekistan itself a terrorist-free zone?

Protekistan authorities affected and dimished their fight to rely on the inviolability of their territorial sovereignty?

D. What were the alternatives open to the Calamirian government?

3. As to the first two factors, there is nothing I can usefully add to what has already been so ably elucidated by Landau J. and Kozinski J. concerning the enormity of the threat confronting Calamira under the given circumstances.

One cannot possibly compare the danger from nuclear weapons to that resulting from ordinary, conventional weapons. Here quantity changes into quality! Actions which would not be permissible to interfere with a shipment of guns or even armoured cars could be justified in order to prevent a shipment of atomic bombs reaching its hostile destination; the more so, when these bombs are sent to members of an organization whose only fight of existence consists in their desire and attempt to annihilate the lawful regime of Calamira by force. I should also like to point out that Judge Kaye's remarks when discussing the criminal liability of the people arrested on the vessel, namely: "Up till that time Calamira had not suffered any detrimental or injurious effects from the alleged criminal acts committed by the Protekistan nationals. Similarly, while in the ship there having been no act or acts of attempting to use the weapons, the inhabitants of Calamira have not suffered any injurious effects from the alleged attempt," do not detract in any way from the gravity of the situation. A state confronted by such a danger does not have to wait until the bombs are installed on the launching pads and attempts are made to light the fuses, before taking preventive action.

4. As regards Protekistan's illegal actions, I do not agree with Judge Kozinski's assumption that, in the view of the majority of the Court, Calamira's actions would necessarily have been unlawful if Protekistan would have sold the atomic bombs to a sovereign state, without contravening rules of international law. As pointed out by Judge Landau, we did not touch the complex question of the right to self-defence in such a situation, but this right can certainly not be ruled out in appropriate circumstances.

But it is my belief that the action of Protekistan, in sending to this hostile organization atomic missiles together with their experts as instructors, constitutes a serious act of aggression against Calamira, and this, in itself, is one of the factors which should be borne in mind in determining whether Calamira's reaction was justified and proportionate. Considering the seriousness and measure of Protekistan's hostile act in jeopardizing the well-being and the very lives of Calamira's citizens, it is rather cynical of their government to demand sanctions against Calamira for trying to obviate the danger which resulted from Protekistan's action.

5. As to the alternative measures that could have been considered by Calamira, two have been mentioned and discussed:

a. An attempt to apply to the United Nations and ask for the intervention, peaceful or otherwise, of the Security Council.

b. To have refrained from intercepting the vessel at least until it had left the territorial waters of Protekistan.

6. I am in complete agreement with the opinions expressed by Landau J. and Kozinski J. in ruling out the prior application to the Security Council as a realistic alternative to immediate action. This could have perhaps been feasible at an earlier stage, when Calamira's intelligence agencies received information about Protekistan's desire and attempts to find prospective buyers for their unconventional weapons. But when the missiles were already on board the ship, and the vessel was already I in the process of leaving the harbour, it would have been futile and indeed suicidal to embark on the cumbersome procedure of the U.N., risk the detection and destruction of Calamira's submarine by Protekistan counter-measures, and enable Protekistan to achieve its objective by delivering the missiles by an alternative route or by means of another vessel.

The following passage from D.W. Greig,[70] supports this view:

"Before taking action in circumstances other than those of an armed attack, the Charter imposes upon states the obligation to settle their disputes by peaceful means, and empowers the Security Council to take the steps necessary to ensure the maintenance of international peace and security. But if there appears no likelihood of the various procedures proving adequate.... states retain a residual power to act in self-defence even in circumstances where no armed attack has occurred."

I should like to add in this connection, that I would not envy the position of the Prime Minister or of the Minister of Defence of Calamira, if after an ineffectual application to the U.N. the atomic missiles would have reached the members of the Front and a nuclear attack were carried out on Calamira with devastating effect, and it would transpire that they could have prevented the

---

[70] Ibid note 6, at p. 893.

missiles from reaching their destination by an action, as in fact undertaken in our case, and had refrained from doing so only in order to satisfy the need to exhaust all other possible steps not entailing the use of force.

International law has to recognize that there are certain situations where self-help cannot be avoided. Not to acknowledge that could be self-defeating, as it would discourage the international community from obeying those legal rules and norms that can and should be complied with.

7. For the above reasons, I am in complete agreement with Judge Landau's personal observations concerning the justification of Calamira's seizure of the vessel, if that had been carried out on the high seas, i.e., outside the territorial waters of Protekistan.

8. This brings me to the last point, namely the legitimacy of Calamira's submarine entering the harbour of Protekistan in order to seize the suspected vessel there by force.

Here, too, I see the strength of Kozinski J's arguments why any delay might have meant the taking of undue risks. But it is on this issue and because of this point that I concurred at the termination of our hearings with our common conclusion and for myself, I still stand by our decision.

In my observations I have stressed the necessity to recognize the need and justification for self-help in certain extreme circumstances. But this does not mean that I belittle the supreme importance of mutual respect between independent states for each other's territorial sovereignty.

Because of this, there can be no doubt that the onus lies on the state that has intentionally violated the sovereignty of another state, to prove that its actions were justified and based on absolute necessity. This burden of proof is a heavy one, especially in times of peace.

Now the representatives of Calamira have indeed put forward some serious arguments why it could not reasonably have been expected from Calamira to wait for the suspect vessel to leave the territorial waters of Protekistan before taking forceful action. But many of these arguments were somewhat speculative in nature. I should have expected Calamira to prove clearly and up to the hilt by objective and convincing evidence, that given the relevant facts, including the distance the vessel had to cover between the harbour of Protekistan and the expected port of unloading the cargo, the various coast lines the vessel would have to pass, the possible hostility towards Calamira of the respective states to whom these coasts belong, it would have been extremely hazardous to delay the seizure of the vessel.

In the absence of such evidence, and with many of the important facts on this issue remaining unclear and obscure, I concur with the conclusion that Calamira had not fully met the onus of proof on this point which rested on it. I therefore join in the finding of the Tribunal that Calamira had technically been responsible for a violation of the territorial sovereignty of Protekistan. But I also agree, without hesitation, that under the circumstances there was no justification for the imposition of any concrete sanction on Calamira.

This Tribunal therefore decides by a majority, Judge Kaye, Judge Balcombe and Judge Goldstone dissenting as regards Calamira's jurisdiction over persons other than its own citizens, that Protekistan's claim is dismissed. The dismissal of the case is subject to a declaration on the illegality of the entry of Calamira's submarine into Protekistanian waters and also to the return of the vessel without its cargo to Protekistan (Judge Kozinski dissenting from these two reservations).

These reasons were published on July 8, 1993.