International Human Rights, Crimes and Punishment

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International Human Rights, Crimes and Punishment, 3 credits;

Required course materials: (a) Louis Henkin, Gerald L. Neuman, et al. (eds.), Human Rights (1999) (HN); and (b) id., Human Rights: Documentary Supplement (latest ed.) (HND); (c) id., Case Supplement (latest ed.)

Suggested Advance Reading (if you have time during the Christmas break): (a) Robert M. Cover, Justice Accused (1975); (b) Albert Camus, The Plague (any version); (c) Jack R. Censer & Lynn Hunt, Liberty, equality, fraternity: exploring the French Revolution (2001).

1. Course description

1a. 40 word description

Surveys international human rights, crime and punishment both in law and in philosophy. Consists of 3 parts: (1) concepts and philosophical foundations of human rights and international crimes; (2) the substantive content and procedural aspects of human rights and international crimes; (3) a comparative study of human rights.

1b. Longer description

This course attempts to survey all the important issues in international human rights law and international crime and punishment. It has three parts. Part one introduces the idea of rights from an historical, philosophical, conceptual and analytical perspective. Part two, the main part, of the course is devoted to a study of the detailed contents (both substantive and procedural) of the international human rights law and international crime and punishment as found in international treaties, customary international law and other sources of law. This part explores the "primary rules of conduct" as well as other aspects of international human rights and international criminal law such as adjudication and remedies. Part three explores issues relating to selected rights from a comparative (international, United States, and other national) perspective. A prior course on Public International Law is recommended but not mandatory.

Those who have not taken Public International Law are asked to read, before classes start, the following:
(1) Brownlie, Principles of International law (5th ed. 1998), pp. 1-30 (sources of law); 435-520 (state responsibility, etc.); (2) Vienna Convention on the Law of Treaties, particularly articles 30-32. (application and interpretation of treaties).

N.B.
(1) The course will meet 28 times, 1.5 credit hours each time.
(2) The course has an emphasis on law and theory and rigorous discussion; class discussions sometimes may appear tough for a person who is partisan towards certain views.
(3) Efforts will be made to involve all students in class discussions.
(4) The final grade will be based on the final open book exam; there will be a writing option for 50% of the grade if you decide to use the option (there will be a word limit and an assigned topic).
2. **Topics to be covered** (subject to modification; detailed reading assignments to follow)

I. **The idea of human rights**
   1. The Western tradition
   2. Alternative Western conceptions
   3. Non-Western conceptions
   4. Human rights and competing ideas
   5. The idea of human flourishing

II. **The international law of human rights**
   6. Sources of international law: framework; interpretation
   7. Sources of international human rights law
   8. The components of a right and an obligation in international human rights law
   9. Civil and political rights vs. economic and cultural rights
   10. The violation of a right and the potential remedies
   11. Selected rights
   12. Institutional implementation of human rights
   13. Group rights and their implementation
   14. Landmarks of international crime and punishment
   15. Basic content of international humanitarian/criminal law
   16. The Rome Statute of the International Criminal Court

IV. **Human rights law in the comparative perspective**
   17. Human rights law in the US: the Constitution
   19. Human rights law in the US: implementation
   20. The European System: The Human Rights Convention and the Human Rights Court
   22. The African Convention
   23. The Asian system

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**Reading Assignments:** The numbers are page numbers; the pages to be skimmed only for general information, but not for detailed discussion are given in parentheses and designated as “skim”; pages not designated as “skim” should be read with sufficient attention, and for class discussion

**TWEN:** the course materials section has a wealth of info about: jobs, research tips, reserved books, free services, example samples. It is a “must read”.

**Class Topic**

Class 1. Introduction, Part I:
   a. You are required to read this page, for an introduction to international law, if you have not read it somehow: [http://www.sienhoyee.org/pil.htm](http://www.sienhoyee.org/pil.htm).
   b. The course: (a) what will be covered: read “topics to be covered” in Syllabus section on TWEN; (b) exam issue; (c) special lectures.
   c. International law; Structure; Nature; stage of development.
   Consider: what is the rule of law.
   d. Sources of international law (a), ICJ Statute, art. 38, HND, 35. (b), custom and treaty: separate life (Nicaragua case); entangled life (North Sea Continental Shelf case): treaty as codification; crystallization; and making of its own impact, of customary international law.
   e. Henkin, HN, pp. 1-14: Consider: what is human rights, as a concept.
Class 2. Introduction, Part II.
   g. Fundamental & analytical concepts in international human right.
      (a) three concepts of liberty;
      (b) moral partiality;
      (c) intrinsic/inherent value v. instrumental value.
      (d) The concept of a liberal society.
   h. Sources of international law, interpretation of treaties, Vienna Convention on the Law of Treaties, art. 31.
   i. Reservations to treaties, read the relevant articles in Vienna Convention of the Law of Treaties and work out the various possibilities.
   j. UN Charter: find all provisions relating to human rights.
   k. Read: Universal Declaration of HR, HD, pp. 41-47.

Class 3. The Idea of Human Rights, Western Tradition, HN, pp. 16-36.
Class 5. HN, pp. 60-70; 73-77.

Class 6. The Idea of Human Rights (continued)
   a. Finish the materials left from Class 6 (primarily Henkin), if any.
   b. Ronald Dworkin, pp. 77-78.
   c. Rawls and Nietzsche, pp. 78-79, etc..
   d. Introduction, pp. 79-86.
   e. Individual & Collectivity, pp. 87-92.

Class 7. The Idea of Human Rights (continued)
   b. Critical studies, Tushnet, pp. 94-100.
   c. Critical studies, Williams, pp. 101-106.
   d. Universalism, pp. 107-111.

(Feminist perspectives will be studied together with the “rights of women” materials in the next section)

Class 8. Introduction to the US system & International System of Human Rights Protection
   f. Introduction by Sienho Yee to the US System (No reading).
   g. Each member of the Class has 6 minutes to present ONE issue relating to human rights from US law. You may select any issue, from what you have learned from constitutional law or otherwise. You need not read anything specifically for this.
   h. Introduction by Sienho Yee to the International System.
      a. Skim: HN, 273-294
   i. Introduction by Sienho Yee to the sources of international law (law-making process).
      a. Read carefully: Article 38 of the ICJ Statute;
         Read: HN, 295-306.
Class 9. Sources of International law: general (this is a review session for those who have studied international law)
   a. revisit Article 38 of the ICJ Statute
   b. treaties: (Vienna Convention on the Law of Treaties (VCLT), read the entire convention once): three big questions:
      (a) Is something binding on a State? (Party Status)
      (b) How much of it is binding? (Scope).
      (c) That much that is binding, what does it mean? (Interpretation).
   We will deal with the last first.
   **Interpretation**: HN, pp. 311-312; VCLT, arts. 31-33. Sienho Yee will introduce latest ICJ case: La Grand, re: Article 41 of the ICJ Statute, whether an order indicating provisional measures is binding.
   **Party status.** VCLT, arts. 6-18.
   **Scope 1.** VCLT, arts. 2(d), 19-22.
   **Scope 2.** VCLT, art. 30.
   **Scope 3.** VCLT, art. 53, jus cogens..
   Special issue 1: Is there a hierarchy among the different types of law in Art. 38 of the ICJ Statute?
   Special issue 2: re: potential conflict between Art. 7 & Art. 46 of VCLT,

Class 10. Sources of International Law: Human Rights
   Interpretation: HN, 312-14.
   Reservations to treaties: HN, 308-310.
   HN, 787-793. HR Committee (HRC) position; US position; Who wins.
   Custom, HN, 349-55.
   Non-binding instruments, 355-358.

Basics of Right and Responsibility

Class 11: “Right”: pp. 320-330
   1. The structure of a right (generally) under the ICCPR.
   2. The idea of limitations.

   1 “State responsibility” (from HN and ILC).
   2 “breach”.
   3 Attribution of conduct to States.
   4 Responsibility for acts of another state.
   5 Defences.
   6 Remedies.

   7 Invocation, art. 42.
   8 Invocation 2 (read also the excerpt on Erga Omnes from Barcelona Traction (p. 15 here), and compare ILC articles and that excerpt).
   9 Counter-measures (consider which States may have the power to do this).
II. Women’s Rights: Read: HN, pp. 359-364
Class 15: Women’s Rights: Read: HN, 384-403

Class 16: Refugees: Read: HN 405-426.

Implementation of human rights

Class 20. Most important as all the day to day issues are dealt with there.
Place of international law in general in US, 770-794.
Please skip the part about the general aspects of the reservation and the role of the HR Committee, but focus on only the implementation of the ICCPR in the USA.

Three important rules:

General rule:
(a) international law is part of the law of the land (Paquete Habana, 175 US 677 (1900)):
“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”

(b) Charming Betsy rule on interpretation: treaties shall be interpreted, where possible, so as to be consistent with international law.

(c) Presumption against extraterritorial application of statutes, the Sale case.

Class 21. International law in the USA.
Sei Fujii case, 794; Rodriguez Fernandez v. Wilkinson, 797; Garcia-Mir, 803; Filartiga, 856; Tel-Oren, 864; Kadic, 872.

Class 22: Political enforcement: UN, etc.
684-88: Skim.
Read: 688-92; 695-706; (Skip notes); 707-714; (Skip notes); 716-736; (Skip notes)
Role of NGOs, introduction by Sienho Yee.

Class 23: Treaty Bodies
Human Rights Committee, pp. 491-515.
Optional Protocol
Skim: 515-523

Class 24: Regional arrangements
Intern-American System, General framework, 523-25 (introduction) only.
525-36; 538-42; 544-48; 551-58, introduction

Class 25: European System: 551-58, Margin of appreciation, pp. 561-72; [Skim: Exhaustion of local remedies, etc., 575, esq.]
International Court of Justice: Read ICJ Statute, arts. 34-38; Read: 665-67; 669-74; 676-78. (on immunity of experts; no reading).
African System (introduction; no assignment)
Asian System (introduction; no assignment).

Class 26: International crime and punishment.
    SKIM notes
    608-609 (introduction): Skim
    Read: 609-610; 612-616; 618-629; 631-642; 644-654; 656-662.

Class 27: International crime and punishment.
    Rome Statute: jurisdiction and general principles of criminal law sections.

Class 28: finishing:
    International crime and punishment;
    Special topic to be decided;
    How to write a paper in international law.

Possible review session: how to write a good paper
STATE RESPONSIBILITY

Titles and texts of the draft articles on Responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I

General principles
Article 1
Responsibility of a State for its internationally wrongful acts
Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2
Elements of an internationally wrongful act of a State
There is an internationally wrongful act of a State when conduct consisting of an action or omission:
(a) Is attributable to the State under international law; and
(b) Constitutes a breach of an international obligation of the State.

Article 3
Characterization of an act of a State as internationally wrongful
The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II
Attribution of conduct to a State

Article 4
Conduct of organs of a State
1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5
Conduct of persons or entities exercising elements of governmental authority
The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6
Conduct of organs placed at the disposal of a State by another State
The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7
Excess of authority or contravention of instructions
The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8
Conduct directed or controlled by a State
The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9
Conduct carried out in the absence or default of the official authorities
The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental
authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III

Breach of an international obligation

Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13

International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV

Responsibility of a State in connection with the act of another State

Article 16

Aid or assistance in the commission of an internationally wrongful act

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

Article 17
Direction and control exercised over the commission of an internationally wrongful act
A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:
(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) The act would be internationally wrongful if committed by that State.

Article 18
Coercion of another State
A State which coerces another State to commit an act is internationally responsible for that act if:
(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
(b) The coercing State does so with knowledge of the circumstances of the act.

Article 19
Effect of this Chapter
This Chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V
Circumstances precluding wrongfulness
Article 20
Consent
Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21
Self-defence
The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22
Countermeasures in respect of an internationally wrongful act
The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part Three.

Article 23
Force majeure
1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if:
   (a) The situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
   (b) The State has assumed the risk of that situation occurring.
Article 24
Distress
1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.
2. Paragraph 1 does not apply if:
   (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
   (b) The act in question is likely to create a comparable or greater peril.

Article 25
Necessity
1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
   (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
   (a) The international obligation in question excludes the possibility of invoking necessity; or
   (b) The State has contributed to the situation of necessity.

Article 26
Compliance with peremptory norms
Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27
Consequences of invoking a circumstance precluding wrongfulness
The invocation of a circumstance precluding wrongfulness in accordance with this Chapter is without prejudice to:
(a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
(b) The question of compensation for any material loss caused by the act in question.

PART TWO
CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE
CHAPTER I

General principles
Article 28
Legal consequences of an internationally wrongful act
The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Article 29
Continued duty of performance
The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.
Article 30
Cessation and non-repetition
The State responsible for the internationally wrongful act is under an obligation:
(a) To cease that act, if it is continuing;
(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31
Reparation
1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32
Irrelevance of internal law
The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Article 33
Scope of international obligations set out in this Part
1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

CHAPTER II
Reparation for injury
Article 34
Forms of reparation
Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.

Article 35
Restitution
A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
(a) Is not materially impossible;
(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36
Compensation
1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37
Satisfaction
1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38
Interest
1. Interest on any principal sum due under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39
Contribution to the injury
In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III
Serious breaches of obligations under peremptory norms of general international law

Article 40
Application of this Chapter
1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41
Particular consequences of a serious breach of an obligation under this Chapter
1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

PART THREE
THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I
Invocation of the responsibility of a State

Article 42
Invocation of responsibility by an injured State
A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:
(a) That State individually; or
(b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
Specially affects that State; or
Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43
Notice of claim by an injured State
1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:
   (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
   (b) What form reparation should take in accordance with the provisions of Part Two.

Article 44
Admissibility of claims
The responsibility of a State may not be invoked if:
(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
(b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45
Loss of the right to invoke responsibility
The responsibility of a State may not be invoked if:
(a) The injured State has validly waived the claim;
(b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46
Plurality of injured States
Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47
Plurality of responsible States
1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
2. Paragraph 1:
   (a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
   (b) Is without prejudice to any right of recourse against the other responsible States.

Article 48
Invocation of responsibility by a State other than an injured State
1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
   (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
   (b) The obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
   (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
   (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II
Countermeasures

Article 49
Object and limits of countermeasures
1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50
Obligations not affected by countermeasures
1. Countermeasures shall not affect:
   (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
   (b) Obligations for the protection of fundamental human rights;
   (c) Obligations of a humanitarian character prohibiting reprisals;
   (d) Other obligations under peremptory norms of general international law.
2. A State taking countermeasures is not relieved from fulfilling its obligations:
   (a) Under any dispute settlement procedure applicable between it and the responsible State;
   (b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51
Proportionality
Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52
Conditions relating to resort to countermeasures
1. Before taking countermeasures, an injured State shall:
   (a) Call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;
   (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1(b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.
3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
   (a) The internationally wrongful act has ceased, and
   (b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53
Termination of countermeasures
Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.
Article 54
Measures taken by States other than an injured State

This Chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

PART FOUR
GENERAL PROVISIONS

Article 55
Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56
Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57
Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58
Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59
Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.
32. In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.

35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:

' The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach.' (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, pp. 181-182.)

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality?
IN THE MATTER OF Section 53 of the Supreme Court Act, R.S.C., 1985, c. S-26;
AND IN THE MATTER OF a Reference by the Governor in Council concerning certain questions
relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated
the 30th day of September, 1996
Present: Lamer C.J. and L’Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache
and Binnie JJ.

THE COURT –
I. Introduction
1 This Reference requires us to consider momentous questions that go to the heart of our
system of constitutional government. The observation we made more than a decade ago in
Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721 (Manitoba Language Rights
Reference), at p. 728, applies with equal force here: as in that case, the present one "combines
legal and constitutional questions of the utmost subtlety and complexity with political
questions of great sensitivity". In our view, it is not possible to answer the questions that have
been put to us without a consideration of a number of underlying principles. An exploration
of the meaning and nature of these underlying principles is not merely of academic interest.
On the contrary, such an exploration is of immense practical utility. Only once those
underlying principles have been examined and delineated may a considered response to the
questions we are required to answer emerge.

2 The questions posed by the Governor in Council by way of Order in Council P.C. 1996-1497, dated
September 30, 1996, read as follows:
1 Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec
effect the secession of Quebec from Canada unilaterally?
2 Does international law give the National Assembly, legislature or government of Quebec the right to
effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-
determination under international law that would give the National Assembly, legislature or
government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3 In the event of a conflict between domestic and international law on the right of the National
Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

*** [The Court disposed of objections to its jurisdiction.]

III. Reference Questions
A. Question 1
Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec
effect the secession of Quebec from Canada unilaterally?

*** [The Court answered NO.]

B. Question 2
Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?  

For reasons already discussed, the Court does not accept the contention that Question 2 raises a question of "pure" international law which this Court has no jurisdiction to address. Question 2 is posed in the context of a Reference to address the existence or non-existence of a right of unilateral secession by a province of Canada. The amicus curiae argues that this question ultimately falls to be determined under international law. In addressing this issue, the Court does not purport to act as an arbiter between sovereign states or more generally within the international community. The Court is engaged in rendering an advisory opinion on certain legal aspects of the continued existence of the Canadian federation. International law has been invoked as a consideration and it must therefore be addressed.

The argument before the Court on Question 2 has focused largely on determining whether, under international law, a positive legal right to unilateral secession exists in the factual circumstances assumed for the purpose of our response to Question 1. Arguments were also advanced to the effect that, regardless of the existence or non-existence of a positive right to unilateral secession, international law will in the end recognize effective political realities -- including the emergence of a new state -- as facts. While our response to Question 2 will address considerations raised by this alternative argument of "effectivity", it should first be noted that the existence of a positive legal entitlement is quite different from a prediction that the law will respond after the fact to a then existing political reality. These two concepts examine different points in time. The questions posed to the Court address legal rights in advance of a unilateral act of purported secession. While we touch below on the practice governing the international recognition of emerging states, the Court is as wary of entertaining speculation about the possible future conduct of sovereign states on the international level as it was under Question 1 to speculate about the possible future course of political negotiations among the participants in the Canadian federation. In both cases, the Reference questions are directed only to the legal framework within which the political actors discharge their various mandates.

(i) Secession at International Law

It is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state. This is acknowledged by the experts who provided their opinions on behalf of both the amicus curiae and the Attorney General of Canada. Given the lack of specific authorization for unilateral secession, proponents of the existence of such a right at international law are therefore left to attempt to found their argument (i) on the proposition that unilateral secession is not specifically prohibited and that what is not specifically prohibited is inferentially permitted; or (ii) on the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of "a people" to self-determination. The amicus curiae addressed the right of self-determination, but submitted that it was not applicable to the circumstances of Quebec within the Canadian federation, irrespective of the existence or non-existence of a referendum result in favour of secession. We agree on this point with the amicus curiae, for reasons that we will briefly develop.

(a) Absence of a Specific Prohibition

International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below. As will be seen, international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part (R. Y. Jennings, The Acquisition of Territory in International Law (1963), at pp. 8-9). Where, as here, unilateral secession would be incompatible with
the domestic Constitution, international law is likely to accept that conclusion subject to the right of peoples to self-determination, a topic to which we now turn.

(b) The Right of a People to Self-determination

While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the "rights" of entities other than nation states -- such as the right of a people to self-determination.

The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law. (A. Cassese, Self-determination of peoples: A legal reappraisal (1995), at pp. 171-72; K. Doehring, "Self-Determination", in B. Simma, ed., The Charter of the United Nations: A Commentary (1994), at p. 70.)

115 Article 1 of the Charter of the United Nations, Can. T.S. 1945 No. 7, states in part that one of the purposes of the United Nations (U.N.) is:

Article 1

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

Article 55 of the U.N. Charter further states that the U.N. shall promote goals such as higher standards of living, full employment and human rights "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

117 This basic principle of self-determination has been carried forward and addressed in so many U.N. conventions and resolutions that, as noted by Doehring, supra, at p. 60:

The sheer number of resolutions concerning the right of self-determination makes their enumeration impossible.

118 For our purposes, reference to the following conventions and resolutions is sufficient. Article 1 of both the U.N.'s International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, and its International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

119 Similarly, the U.N. General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970 (Declaration on Friendly Relations), states:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

120 In 1993, the U.N. World Conference on Human Rights adopted the Vienna Declaration and Programme of Action, A/CONF.157/24, 25 June 1993, that reaffirmed Article 1 of the two above-mentioned covenants. The U.N. General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, GA Res. 50/6, 9 November 1995, also emphasizes the right to self-determination by providing that the U.N.'s member states will:

Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a
By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. [Emphasis added.]

122 As will be seen, international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise.

(i) Defining “Peoples”

123 International law grants the right to self-determination to “peoples”. Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of “peoples”, the result has been that the precise meaning of the term “people” remains somewhat uncertain.

124 It is clear that “a people” may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to “nation” and “state”. The juxtaposition of these terms is indicative that the reference to “people” does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

125 While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a “people”, as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec. As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.

(ii) Scope of the Right to Self-determination

126 The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination – a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. External self-determination can be defined as in the following statement from the Declaration on Friendly Relations as
The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. [Emphasis added.]

127 The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people’s right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state’s territorial integrity or the stability of relations between sovereign states.

128 The Declaration on Friendly Relations, the Vienna Declaration and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations are specific. They state, immediately after affirming a people’s right to determine political, economic, social and cultural issues, that such rights are not to be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction. . . . [Emphasis added.]

129 Similarly, while the concluding document of the Vienna Meeting in 1989 of the Conference on Security and Co-operation in Europe on the follow-up to the Helsinki Final Act again refers to peoples having the right to determine "their internal and external political status" (emphasis added), that statement is immediately followed by express recognition that the participating states will at all times act, as stated in the Helsinki Final Act, "in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States" (emphasis added). Principle 5 of the concluding document states that the participating states (including Canada):

. . . confirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the [Helsinki] Final Act, at violating the territorial integrity, political independence or the unity of a State. No actions or situations in contravention of this principle will be recognized as legal by the participating States. [Emphasis added.]

Accordingly, the reference in the Helsinki Final Act to a people determining its external political status is interpreted to mean the expression of a people’s external political status through the government of the existing state, save in the exceptional circumstances discussed below. As noted by Cassese, supra, at p. 287, given the history and textual structure of this document, its reference to external self-determination simply means that "no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State".

130 While the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.

(iii) Colonial and Oppressed Peoples

131 Accordingly, the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of "parent" states. However, as noted by Cassese, supra, at p. 334, there are certain defined contexts within which
the right to the self-determination of peoples does allow that right to be exercised "externally", which, in the context of this Reference, would potentially mean secession:

. . . the right to external self-determination, which entails the possibility of choosing (or restoring) independence, has only been bestowed upon two classes of peoples (those under colonial rule or foreign occupation), based upon the assumption that both classes make up entities that are inherently distinct from the colonialist Power and the occupant Power and that their 'territorial integrity', all but destroyed by the colonialist or occupying Power, should be fully restored. . . .

132 The right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power is now undisputed, but is irrelevant to this Reference.

133 The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the Declaration on Friendly Relations:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and
(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

134 A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The Vienna Declaration requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

135 Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold. As stated by the amicus curiae,

Addendum to the factum of the amicus curiae, at paras. 15-16:

[TRANSLATION] 15. The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the amicus curiae, an oppressed people.

16 For close to 40 of the last 50 years, the Prime Minister of Canada has been a Quebecker. During this period, Quebeckers have held from time to time all the most important positions in the federal Cabinet. During the 8 years prior to June 1997, the Prime Minister and the Leader of the Official Opposition in the House of Commons were both Quebeckers. At present, the Prime Minister of Canada, the Right Honourable Chief Justice and two other members of the Court, the Chief of Staff of the Canadian Armed Forces and the Canadian ambassador to the United States, not to mention the Deputy Secretary-General of the United Nations, are all Quebeckers. The international achievements of Quebeckers in most fields of human endeavour are too numerous to list. Since the dynamism of the Quebec people has been directed toward the business sector, it has been clearly successful in Quebec, the rest of Canada and abroad.

136 The population of Quebec cannot plausibly be said to be denied access to government. Quebeckers occupy prominent positions within the government of Canada. Residents of the province freely make
political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a "sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction".

137 The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.

138 In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples", nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.

139 We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Quebec to unilateral secession. In light of our finding that there is no such right applicable to the population of Quebec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference.

(2) Recognition of a Factual/Political Reality: the "Effectivity" Principle

140 As stated, an argument advanced by the amicus curiae on this branch of the Reference was that, while international law may not ground a positive right to unilateral secession in the context of Quebec, international law equally does not prohibit secession and, in fact, international recognition would be conferred on such a political reality if it emerged, for example, via effective control of the territory of what is now the province of Quebec.

141 It is true that international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation. However, as mentioned at the outset, effectivity, as such, does not have any real applicability to Question 2, which asks whether a right to unilateral secession exists.

142 No one doubts that legal consequences may flow from political facts, and that "sovereignty is a political fact for which no purely legal authority can be constituted . . .", H. W. R. Wade, "The Basis of Legal Sovereignty", [1955] Camb. L.J. 172, at p. 196. Secession of a province from Canada, if successful in the streets, might well lead to the creation of a new state. Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms. However, international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve
retroactively as a source of a "legal" right to secede in the first place. Recognition occurs only after a
territorial unit has been successful, as a political fact, in achieving secession.

143 As indicated in responding to Question 1, one of the legal norms which may be recognized by
states in granting or withholding recognition of emergent states is the legitimacy of the process by
which the de facto secession is, or was, being pursued. The process of recognition, once considered to
be an exercise of pure sovereign discretion, has come to be associated with legal norms. See, e.g.,
European Community Declaration on the Guidelines on the Recognition of New States in Eastern
Europe and in the Soviet Union, 31 I.L.M. 1486 (1992), at p. 1487. While national interest and
perceived political advantage to the recognizing state obviously play an important role, foreign states
may also take into account their view as to the existence of a right to self-determination on the part of
the population of the putative state, and a counterpart domestic evaluation, namely, an examination of
the legality of the secession according to the law of the state from which the territorial unit purports
to have seceded. As we indicated in our answer to Question 1, an emergent state that has disregarded
legitimate obligations arising out of its previous situation can potentially expect to be hindered by that
disregard in achieving international recognition, at least with respect to the timing of that recognition.
On the other hand, compliance by the seceding province with such legitimate obligations would weigh
in favour of international recognition. The notion that what is not explicitly prohibited is implicitly
permitted has little relevance where (as here) international law refers the legality of secession to the
domestic law of the seceding state and the law of that state holds unilateral secession to be
unconstitutional.

144 As a court of law, we are ultimately concerned only with legal claims. If the principle of
"effectivity" is no more than that "successful revolution begets its own legality" (S. A. de Smith,
"Constitutional Lawyers in Revolutionary Situations" (1968), 7 West. Ont. L. Rev. 93, at p. 96), it
necessarily means that legality follows and does not precede the successful revolution. Ex hypothesi,
the successful revolution took place outside the constitutional framework of the predecessor state,
otherwise it would not be characterized as "a revolution". It may be that a unilateral secession by
Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to
legal consequences; but this does not support the more radical contention that subsequent recognition
of a state of affairs brought about by a unilateral declaration of independence could be taken to mean
that secession was achieved under colour of a legal right.

145 An argument was made to analogize the principle of effectivity with the second aspect of the rule
of law identified by this Court in the Manitoba Language Rights Reference, supra, at p. 753, namely,
avoidance of a legal vacuum. In that Reference, it will be recalled, this Court declined to strike down
all of Manitoba's legislation for its failure to comply with constitutional dictates, out of concern that
this would leave the province in a state of chaos. In so doing, we recognized that the rule of law is a
constitutional principle which permits the courts to address the practical consequences of their actions,
particularly in constitutional cases. The similarity between that principle and the principle of
effectivity, it was argued, is that both attempt to refashion the law to meet social reality. However,
nothing of our concern in the Manitoba Language Rights Reference about the severe practical
consequences of unconstitutionality affected our conclusion that, as a matter of law, all Manitoba
legislation at issue in that case was unconstitutional. The Court's declaration of unconstitutionality
was clear and unambiguous. The Court's concern with maintenance of the rule of law was directed in
its relevant aspect to the appropriate remedy, which in that case was to suspend the declaration of
invalidity to permit appropriate rectification to take place.

146 The principle of effectivity operates very differently. It proclaims that an illegal act may eventually
acquire legal status if, as a matter of empirical fact, it is recognized on the international plane. Our law
has long recognized that through a combination of acquiescence and prescription, an illegal act may at
some later point be accorded some form of legal status. In the law of property, for example, it is well
known that a squatter on land may ultimately become the owner if the true owner sleeps on his or her
right to repossess the land. In this way, a change in the factual circumstances may subsequently be
reflected in a change in legal status. It is, however, quite another matter to suggest that a subsequent
condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. The broader contention is not supported by the international principle of effectivity or otherwise and must be rejected.

C. Question 3
In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

147 In view of our answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

IV. Summary of Conclusions

148 As stated at the outset, this Reference has required us to consider momentous questions that go to the heart of our system of constitutional government. We have emphasized that the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event a clear majority of Quebecers votes on a clear question in favour of secession.

149 The Reference requires us to consider whether Quebec has a right to unilateral secession. Those who support the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically and culturally) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

150 The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

151 Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of
Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations.

152 The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

153 The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution", not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

154 We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question 1, i.e., a clear democratic expression of support on a clear question for Quebec secession. Some of those who supported an affirmative answer to this question did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

155 Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

156 The reference questions are answered accordingly.
Judgment accordingly.