SHORTER ARTICLES, COMMENTS AND NOTES

THE NOTION OF "REASONABLE" IN INTERNATIONAL LAW: LEGAL DISCOURSE, REASON AND CONTRADICTIONS

FAR from being confined to its most obvious manifestations, such as in the right to be tried within a "reasonable time" guaranteed by Articles 5 and 6 of the European Convention on Human Rights, references to the notion of "reasonable" are found in a large variety of primary rules pronounced in both legal instruments and the case law.[1]

The notion of "reasonable" is also used at every stage of judicial reasoning:[2] the determination of facts, qualification and interpretation of applicable rules, the use of various rhetorical and logical formulas. This frequent use of the notion of "reasonable" is reminiscent of the use of similar notions such as equity or good faith which characterise, according to some authors, an evolution towards "post-modern" law, in which the judge is called upon to play a significant role.[3]

From a methodological point of view, it appears that an analysis of the notion of "reasonable" cannot be achieved through a mere technical or dogmatic approach. Rather, this analysis requires that the notion be examined from a variety of critical angles. The primary material of the present analysis consists in several hundred decisions and opinions rendered by various international courts: essentially the Permanent International Court of Justice, the International Court of Justice, and the European Court of Human Rights.[4] The analysis itself draws from the fields of legal theory, as well as philosophy and sociology of law.

Any attempt to understand the use of the notion of "reasonable" in international legal discourse starts with recognition of a profound ambiguity, which is reflected in this quotation from a decision of the International Court of Justice: "what is reasonable and equitable in any given case must depend on its circumstances".[5] Hence, on the one hand, the Court seems to reject the possibility of ascertaining the meaning of "reasonable", since the content of the notion depends on the circumstances. Yet, on the other hand, it appears possible to draw a general formula according to which what is reasonable will always depend on the circumstances of a particular case.

This ambiguity is also reflected in the works of authors who have examined the notion. On the one hand, some writers have attempted to define and understand the notion of reasonable as a positive public international law concept. This is

1. Corten, *L'utilisation du "raisonnable" par le juge international. Discours juridique, raison et contradictions* (1997), Bruylant (ed.), chap.II.

2. The term "reasonable"—as opposed to reasonableness, for instance—is used to reflect the terms actually used by international courts.

3. Lenoble, *Droit et communication. La transformation du droit contemporain* (1994), pp.72 *et seq.*; Ost, "Quelle jurisprudence pour quelle société?" (1985) XXX Archives de philosophie du droit 26.

4. A significant number of decisions by international arbitration tribunals have also been considered. However, the decisions of the ECJ have not been examined.

5. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* I.C.J. Rep. 1982, 18, para.60.

particularly true, for instance, of the analysis of Articles 5 and 6 of the European Convention on Human Rights, which protect the right to be tried within a "reasonable time".[6] On the other, most authors emphasise the notion's essentially subjective character, which renders, if not impossible, at least extremely difficult any attempt to provide a definition.[7] In the words of Jean Salmon: "what characterises notions such as reasonable is that they cannot be defined objectively".[8] Consequently, what is reasonable "requires an assessment which goes beyond law".[9] Similarly, for Perelman, the notion of reasonable rests on criteria which are more sociological than legal in nature.[10]

It appears, then, that the notion of "reasonable" is both definable and undefinable, both within law and outside law. The ambiguity seems to lead to a paradox, if not a contradiction.

In an attempt to explain or even transcend this ambiguity, the present analysis starts from the following hypothesis: *even considering the essentially subjective character of the notion, it should be possible to identify a coherent method for defining what is reasonable*, at least in the particular legal discourse of international courts.

From a methodological point of view, this hypothesis will be tested, first, by rejecting a static conception of legal discourse and, secondly, by placing this discourse in its social context, in order to understand its meaning.[11] Hence, the present article is divided into two main sections. First, it attempts to explain why the notion of "reasonable" was introduced in judicial discourse, in order to identify its functions. Second, it seeks to derive from the international judicial discourse methods of determining the content of the notion of "reasonable".

A. The Functions Fulfilled by the Notion of "Reasonable"

The functions played by the notion of reasonable can be divided into two categories. The first covers "technical" functions, which enable the legal system to work.[12] The second category covers "ideological" functions, which means that the notion of "reasonable" is used to the benefit of one particular actor in the legal system.

6. See Trechsel, "La durée raisonnable de la détention préventive (Article 5 paragraphe 3 de la Convention européenne des droits de l'homme)" (1971) Revue des droits de l'homme 119–152; Ergec and Velu, "La notion de délai raisonnable dans les articles 5 et 6 de la convention européenne des droits de l'homme" (1991) Revue trimestrielle des droits de l'homme 137–160.

7. Perelman, "Les notions à contenu variable. Essai de synthèse", in Perelman and vander Elst (Eds), *Les notions à contenu variable en droit* (1984), p.365; Jovanovic, *La Restriction des compétences discrétionnaires en droit international* (1988), p.147.

8. Our translation: Salmon, "Les notions à contenu variable en droit international public", in Perelman and vander Elst, *idem*, p.265.

9. Salmon, "Le fait dans l'application du droit international" (1982) 175 Collected Courses of the Hague Academy of International Law 306: what is reasonable "implique une évaluation qui échappe à vrai dire au droit".

10. Perelman, "La motivation des décisions de justice. Essai de synthèse", in Perelman and Foriers (Eds), *La motivation des décisions de justice* (1978), p.421.

11. Cf. Ost and van de Kerchove, *Jalons pour une théorie critique du droit* (1987).

12. See Arnaud (Ed.), *Dictionnaire encyclopédique de théorie et de sociologie du droit* (1988), p.412.

It will appear hereinafter that the functions that the notion of reasonable is called upon to play underline the present contradictions between the legal discourse and the reality that this discourse is meant to govern.

1. The technical functions fulfilled by the notion of "reasonable"

A first example of the technical functions played by the notion of "reasonable" is that of adaptability. Given its inherent flexibility, the notion of reasonable permits the application of a rule to very different situations. This function reflects a contradiction between the essentially static character of legal texts and the dynamic character of the reality to which they apply.

In many cases, States include the term "reasonable" in legal instruments in order to introduce a degree of flexibility. For instance, Article 3 of the First Protocol to the European Convention on Human Rights stipulates that parties to the Convention must organise elections at "reasonable intervals". This expression was obviously chosen in order to cover a variety of evolving national electoral practices.[13]

This "adaptability function" is even more remarkable when judges reformulate a rule by introducing the notion of "reasonable" despite its absence in the original text. For example, according to Article 14 of the European Convention on Human Rights, rights protected by the Convention must be recognised "without discrimination on any ground" or, in the French version, "sans distinction aucune".[14] Faced with this text in particular cases, the European Court of Human Rights held:[15]

> In spite of the very general wording of the French version ("sans distinction aucune"), Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised. This version must be read in the light of the more restrictive text of the English version ("without discrimination"). In addition, and in particular, one would reach absurd results were one to give Article 14 an interpretation as wide as that which the French version seems to imply ... It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question, the Court following the principles which may be extracted from the legal practice of a large number of democratic States, holds that *the principle of equality of treatment is violated if the distinction has no objective and reasonable justification* [emphasis added].

The notion of "reasonable" thus enabled the Court to adapt the text so as to recognise as legitimate a number of differences in treatment.

Authors have also addressed the problem of the rigidity of legal texts. Hence, for Henry Lévy-Bruhl: "A legal text is rigid, or at least, has only a reduced elasticity. By definition, then, it is incapable of satisfying new needs in a society in constant movement."[16] In other words, there is "a fatal contradiction between

13. See the analysis and the references in the present author's book, *op. cit. supra* n.1, at p.142, No.133 and p.308, No.273.

14. Art.14 reads: "The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour ..."

15. *Certain aspects of the laws on the use of languages in education in Belgium*, Ser.A, No.6, 23 July 1968, p.34, para.10.

16. Our translation: Levy-Bruhl, *Sociologie du droit* (1990), p.69; Similar observations are found in Aristotle, *Nicomachean Ethics* (English trans. by Rackman, 1962), V, 14 at para.1137b.

texts, which are by definition rigid, and the fluidity of social life".[17] It is in this context that Perelman insisted on the flexibility of the notion of "reasonable": "Recognising that rigid rules are difficult to apply to evolving situations, law-makers can deliberately introduce into legal texts notions with a variable, indeterminate, vague content, such as 'reasonable'."[18] Hence, the notion of reasonable enables judges to present their decisions and motivation, often of their own creation, as perfectly in line with the intention of States.

The term "reasonable" thus plays an essential function in the very foundation of judicial activity. In some situations the notion of reasonable enables the judge to provide a reasoning in the absence of more precise criteria. In fact, the notion is used at every step of a judge's justificatory discourse.

Unable to determine facts with absolute certainty, judges must content themselves with assertions based on various degrees of probability. For instance, in the *Corfu Channel* case, the International Court of Justice held that Albania's knowledge of the presence of the mines left "no room for reasonable doubt".[19]

In the process of interpreting the applicable law, judges, unable to establish the common will of the parties—which in any event is often illusory—and faced with the tension between the subjectivist and objectivist theories of interpretation,[20] will use expressions such as "the reasonable meaning".[21] Or, more generally, they will insist on a "reasonable interpretation",[22] or will set aside a particular interpretation on the grounds that it yields "absurd and unreasonable" results,[23] terms found in Article 32(2) of the 1969 Vienna Convention on the Law of Treaties.

17. Our translation; Levy-Bruhl, *idem*, pp.76–77.

18. Our translation: Perelman, *Le raisonnable et le déraisonnable en droit* (1984), p.134. See Salmon, "Le concept de raisonnable en droit international public", in *Mélanges Reuter* (1982), pp.449–450 and Hart, *The Concept of Law* (1961), p.128.

19. *Corfu Channel* I.C.J. Rep. 1949, 18 and Eur.Ct.H.R, *Ireland* v. *The United Kingdom*, Ser.A, No.25 (18 Jan. 1978) para.161; see *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* I.C.J. Rep. 1992, 351, para.228.

20. Subjectivist approaches seek to ascertain the will of the parties, and thus insist particularly on preparatory documents. Objectivist approaches aim at ascertaining meaning by interpreting the text itself and its relationship with the legal system as a whole. See Corten, *op. cit. supra* n.1, at p.268, nn.16 and 17.

21. *Claims arising out of decisions of the mixed Greek-German Tribunal set up under Article 304 in Part X of the Treaty of Versailles (between Greece and Germany)* (6 Jan. 1972), Part II, XIX R.I.A.A. 27, 61, para.71; see the *Societa Mineria et Metallurgica di Pertulosa* decision No.95 (8 Mar. 1951) XII R.I.A.A. 174, 186; diss. op. of Judge Hackworth in the *Anglo-Iranian Oil Co.* case, I.C.J. Rep. 1952, 93, 140; sep. op. of Judge Armand-Ugon in the case concerning the *Aerial Incident of July 27th 1955* I.C.J. Rep. 1959, 127, 154; see also *Polish Postal Service in Dantzig*, P.C.I.J. Rep. Ser.B, No.11 (16 May 1925), p.39 and *Peter Pazmany University* v. *The State of Czechoslovakia*, Ser.AB, No. 61 (15 Dec. 1933), p.248.

22. *Naomi Russel* case, 24 Apr. 1931, IV R.I.A.A. 805, 820.

23. See notion in *Polish Postal Service in Dantzig, loc. cit. supra* n.21; *Exchange of Greek and Turkish populations* case, P.C.I.J. Rep. Ser.B, No.10 (30 Jan. 1925), p.24; *Admission to the United Nations*, I.C.J. Rep. 1950, 4, 8; *Temple of Preah Vihéar* (*Cambodia* v. *Thailand*), preliminary objections, I.C.J. Rep. 1961, 17, 32; *Arbitration Award of 1 July 1989* (*Guinea-Bissau* v. *Senegal*) I.C.J. Rep. 1991, 5, para.48; see also the decision in the *Fubini* case, No.201 (12 Dec. 1959) XIV R.I.A.A. 420, 423; *Delimitation of the Maritime boundary between Guinea and Guinea-Bissau* (14 Feb. 1985), XIV R.I.A.A. 149, 176, para.68.

Finally, in reaching conclusions through a series of logical operations, judges, unable to ground their inferences on mere formal logic, will adorn their reasoning with expressions such as "one can reasonably deduct, conclude, consider, . . ."[24]

In all these hypotheses, the notion of "reasonable" enables judges to transcend, in their legal discourse, the apories[25] to which positivist law can lead when confronted by social reality. Indeed, positivist thinking suggests that one, and only one, legal solution applies to any particular case. When faced with the absence of criteria to permit such a solution, be it at the stage of establishing facts, interpreting the applicable law, or reaching the conclusions of a "judicial syllogism", judges will draw upon the notion of "reasonable" in order to avoid declaring a *non liquet*.

At a more global level, the notion of "reasonable" allows judges to present international law as a complete, coherent and closed legal order. In other words, as a "system" as generally understood by legal writers.[26] This function partakes of the process of "systematisation", to borrow from Max Weber.[27]

The notion of "reasonable" is thus used to fill legal lacunae, whether of an interpretative (in the sense that a rule exists, but for which many equally acceptable interpretations are possible) or fundamental (in situations where no rule seems applicable to a particular set of facts) character. One can think of the "reasonable degree of proportionality" criterion, which provides a legal standard in the absence of existing criteria, in matters as different as the setting of maritime boundaries[28] or human rights.[29] In such a case the notion of reasonable demonstrates the contradiction between, on the one hand, the static, and in theory closed, nature of a legal system, and, on the other, the need to integrate facts, and sometimes values, within that system.[30]

In the end, it appears that invoking the notion of "reasonable" fulfils technical functions within legal discourse, without resolving the inconsistencies and

24. See the jurisprudence cited in Corten, *op. cit. supra* n.1, at chap.I, sect.4.

25. Apory: "Cognitive perplexity posed by a group of individually plausible but collectively inconsistent propositions": Honderich (Ed.), *The Oxford Companion to Philosophy* (1995).

26. See Combacau, "Le droit international, bric-à-brac ou système?"; (1986) XXXI Archives de philosophie du droit 86; van de Kerchove and Ost, *Le système juridique entre ordre et désordre* (1988), pp.24–25 and 67 *et seq.*; Braillard, *Théorie des systèmes et relations internationales* (1977), pp.51 *et seq.*

27. *Sociologie du droit* (1986), p.41.

28. *North Sea Continental Shelf* I.C.J. Rep. 1969, 3, para.98, and D(3) of the conclusions, p.54; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* I.C.J. Rep. 1982, 18, 93, para.133; diss. op. Oda, *idem* p.273, para.188; in *Continental Shelf (Libyan Arab Jamahiriya/Malta)* I.C.J. Rep. 1985, 13, see paras.55, 66 and 74; see also the separate opinion of Judge Sette-Camara at pp.72–73, the joint separate opinion at paras.28, 31 and 32, the separate opinion of Judge Valticos at para.18 and the dissenting opinion of Judge Schwebel at p.184; see also *Delimitation of the Maritime Boundary in the Gulf of Maine* I.C.J. Rep. 1984, 246, para.185.

29. Eur.Ct.H.R., *Hadjianastassiou* v. *Greece*, Ser.A, No.252 (16 Dec. 1992), para.47; Eur.Ct.H.R., *Chorherr* v. *Austria*, Ser.A, No.266–B (25 Aug. 1993), para.33.

30. See Perelman, *Justice et raison* (1963), p.432.

antinomies which characterise the international legal order.[31] This conclusion leads to the next section, which addresses the ideological character of the notion.

2. The ideological functions fulfilled by the notion of "reasonable"

Examples of the use made of the notion of "reasonable" can, and should, be analysed by reference to ideology, and more particularly to the phenomenon of legitimisation.

In fact, the notion of "reasonable" is used in order to legitimise an assertion which is, by definition, subject to challenge. The "discovery" of facts, of the will of the parties or of some legal principle which is meant to transcend the literal meaning of a text, to fill a lacuna or to resolve a textual contradiction, is always the result of choices.[32] These choices do not impose themselves through the application of simple legal technique: they also, and perhaps mostly, find their justification in the sphere of ethics or politics. The notion of "reasonable" aims at masking this axiological dimension, by elaborating a solution apparently based solely on reason.[33]

Over and above particular cases, the use of the notion of "reasonable" provides legitimacy to the international legal order as a whole, by presenting an image of a closed, coherent and complete legal system. From that perspective, references to reason suggest an ideal of unity and community of values that is particularly remarkable in an international society which is very loosely integrated, and which is characterised by decentralised centres of power and acute cultural and political differences.[34] In fact, the very presence in international legal discourse of references to the notion of "reasonable" is indicative of the persistent problem of legitimacy of a legal order which is neither based on a common ideology nor controlled by a centralised enforcing body.

It thus appears that the introduction of the notion of "reasonable" in judicial discourse leads to a true occultation: it masks persistent contradictions regarding the meaning of a rule, behind a formula which leaves open the possibility of divergent interpretations.

This role played by the notion is particularly apparent when the term is used to modulate the discretionary powers of States.[35] For instance, the 1958 Geneva Convention on the High Seas recognises the principle of freedom of the high seas.[36] Article 2 of the Convention, however, posits that this freedom should be exercised "with reasonable regard to the interests of other States". The

31. Cf. Salmon, "L'autorité des prononcés de la Cour internationale de Justice de La Haye", in Haarscher, Ingber and vander Elst (Eds), *Arguments d'autorité et arguments de raison en droit* (1988), p.47.

32. Salmon, *op. cit. supra* n.8, at p.303.

33. Cf. Wroblewski, "Motivation de la décision Judiciaire", in Perelman and Foriers (eds), *op. cit. supra* n.10, at p.119.

34. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

35. *Filleting within the Gulf of St Laurence between Canada and France* (17 July 1986), Part VI, XIX R.I.A.A. 225, 259 *et seq.*, *Barcelona Traction* I.C.J. Rep. 1970, 2, 48, para.92.

36. Convention on the High Seas, Geneva (29 Apr. 1958) 450 U.N.T.S. 1963, No. 6465, Art. 2: "Freedom of the high seas is exercised under the conditions laid down by these Articles ... These freedoms ... shall be exercised by all States with reasonable regard to the interests of other States in the exercise of the freedom of the high seas."

expression reflects the persistent contradictions which result from the exercise of the guaranteed freedoms on the High Seas, particularly the exercise of the freedom to fish, by States with widely disproportionate degrees of power.

In fact, if the use of "reasonable" suggests any form of agreement, it is an agreement on the lack of agreement.[37] Each State maintains its own conception of what is reasonable, and will exercise its powers according to that conception. For instance, more powerful States will be able to carry on intensive fishing on the high seas, while maintaining that they are acting according to law. Certain coastal States, victims of intensive fisheries, will, on the contrary, maintain that these fishing methods are unreasonable. In other words, the clash of viewpoints that existed before the rule was actually agreed upon will persist after its coming into force. This phenomenon is even more remarkable given that, in contemporary public international law, neutral third parties are rarely called upon to arbitrate between different States' unilateral positions.

Authors have abundantly addressed the contradictions that underlie not only elements of legal discourse such as the notion of "reasonable", but also law as a normative mode of social ordering.[38] Charles Chaumont and the whole School of Reims, consider that the existence of a contradiction constitutes a *sine qua non* condition of the existence of a rule.[39] The creation of a legal norm finds its meaning in the attempt to resolve a contradiction. This is what is referred to as a "primitive" contradiction. Occasionally, the rule will actually resolve the contradiction; other times it will simply by-pass it. Another contradiction can also appear when judges attempt to apply the rule. This is referred to as a "consecutive contradiction".[40] In this Marxist conception law conveys a balance of power. Law consolidates power relations: it is incapable of resolving them definitively.[41]

While this analysis does not apply to all situations, especially in the context of increased co-operation, it applies particularly well to aspects of legal discourse such as the notion of "reasonable".[42] To take an example already discussed, Article 3 of the First Protocol to the European Convention on Human Rights, which enjoins member States to hold elections at "reasonable intervals", reflects the existence of contradictory positions regarding the organisation of democratic elections. This primitive contradiction is, to a certain extent, hidden by the

37. See Salmon, *op. cit. supra* n.9, at p.351.

38. This conception is not recent: it is found, for instance, in the works of authors such as Jhering, *La lutte pour le droit* (1890), pp.1 *et seq.* and Gumplowicz, *Outlines of Sociology* (1980), pp.308 *et seq.*

39. Chaumont, "Rapport sur l'institution fondamentale de l'accord entre Etats" (1974) Annales de la faculté de droit et des sciences économiques de Reims 249–250.

40. Chaumont, "Cours général de droit international public" (1970) 249 Collected Courses of the Hague Academy of International Law 366; Chemillier-Gendreau, "Quelles méthode pour l'analyse des développements récents du droit international?", in Ben Achour and Laghmani (Eds), *Les nouveaux aspects du droit international* (1994), p.17.

41. Chaumont, "A la recherche du fondement du caractère obligatoire du droit international" (1978) Réalités du droit international contemporain 4–5; Salmon, "Accords internationaux et contradictions interétatiques", in Haarscher and Ingber (Eds), *Justice et argumentation* (1986), pp.67–77; Chemillier-Gendreau, "Rapport sur la fonction idéologique du droit international" (1974) Annales de la faculté de droit et des sciences économiques de Reims 225–226; Chemillier-Gendreau, *Humanité et souverainetés. Essai sur la fonction du droit international* (1995), pp.197–198.

42. Salmon, *op. cit. supra* n.18.

discourse which suggests a common understanding. The contradiction has not, however, disappeared. It can even be coupled with a consecutive contradiction, when States unilaterally proceed to interpret the adopted text in a contradictory fashion.

In the end, both technical and ideological functions of the notion of reasonable are indicative of persistent contradictions between legal discourse and the reality to which it allegedly applies. Moreover, both these technical and ideological roles can operate to mask these contradictions.

The fundamental lesson of this first section is thus as follows: the use of "reasonable" rests on the possibility of maintaining divergent interpretations. It excludes fixed, static and definitive interpretations. One may thus wonder whether the notion can receive a general definition, as is the case with all legal notions, at least in the positivist conception of law. This question is addressed in the second section, which deals with methods of interpreting the notion of "reasonable".

B. Methods of Defining the Notion of "Reasonable"

The second section considers various interpretations given to the notion of "reasonable" by international courts. The issue is no longer the functions played by the notion but, rather, the meaning actually attributed to it.

Despite the diversity of cases, two interpretative models are identified, one based on the *form* taken by the discourse surrounding the "reasonable", the other by its actual *content*. In order adequately to reflect the international case law analysed, both models must be combined. While a judge or a jurisdiction will sometimes emphasise one model, or more specifically an element of one of the models, the process is generally as follows: first, judges will use formal elements of definition, then they will address substantive aspects of the definition.

1. Formal elements of definition

The first model inferred from the case law is concerned with formal elements: it deals with the manner in which a judge or a State will justify an interpretation, independently from the actual content given to the notion of "reasonable" in a particular case.

First, one notes that the method used to provide a content to the notion of reasonable follows the traditional principles of legal interpretation: reference to the applicable instrument, to its object or to criteria identified in similar case law.[43] For instance, in dealing with Article 6 of the European Convention on Human Rights, the European Court of Human Rights systematically refers to the Convention, as well as to criteria identified in precedents, such as the complexity of the case or the respective behaviour of the applicant and the State's public authorities.[44] This is far from an interpretation founded on morality or equity on pretence of the notion's imprecise meaning. In fact, some judges have expressly

43. See e.g. the abundant case law from the European Court of Human Rights in Corten, *op. cit. supra* n.1, at chap.V, section 1. See also Corten, "L'interprétation du raisonnable par les juridictions internationales: au-delà du positivisme juridique?" (1998–1) 103 R.G.D.I.P. 5.

44. Art.6 reads: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time ..."

considered that "reasonable" constitutes a "legal standard".[45] From that perspective, the consequences of interpreting the notion are similar as for other legal notions: for instance, violation by a State of a rule enjoining the adoption of "reasonable measures" will lead to the secondary obligation to repair damage.[46] Similarly, exceeding a "reasonable time" will give rise to a declaration of violation of the European Convention on Human Rights, and to the appropriate measures which such a violation entails. In other words, the notion of "reasonable" is considered as a regular positive law notion, not as a notion rawing from half-way categories between law and not-law, such as "soft-law", so heavily discussed by authors.[47]

However, the formal method of defining the notion is not limited to classical legal approaches. It actually incorporates a "discussion game" that systematically takes place between judges and the parties before them, regardless of the particular circumstances of the case and of the actual meaning that will finally be ascribed to the notion of "reasonable" in that particular case.

To illustrate this point, reference may again be made to the example of the obligation for a State to ensure that trials take place within a "reasonable time". Judges called upon to decide whether the rule was actually complied with in a particular case will not set a precise "reasonable" time frame before deciding whether or not the State acted within that time. Rather, they will let the State submit a justification for the delay. Only then will they proceed to a marginal review of this justification. This is sometimes referred to as the theory of the "margin of appreciation".[48]

In this context, the formal model that is actually followed is founded on five cumulative elements.

First, judges will verify whether the State has provided an explanation regarding the whole contested delay.[49] If the State does not manage to give an explanation with regard to each element of the delay, it will be considered to be unreasonable.[50]

45. Separate opinion of Judge Terje Wold in the *Wemhoff* judgment, Eur.Ct.H.R., Ser.A No.7 (27 June 1968) III; see the separate opinion of Judge Bustamante in North Sea Continental Shelf *supra* n.28, at para.6, p.63.

46. See Corten, *op. cit. supra* n.1, at paras.321–322.

47. Uda, 'Formation des normes internationales dans un monde en mutation. Critique de la notion de *soft law*", in *Mélanges Virally* (1991), pp.335 *et seq.*

48. See Mcdonald, "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights", in *International Law at the Time of its Codification. Essays in Honour of Roberto Ago* (1987), pp.187–190.

49. See the jurisprudence of the European Court of Human Rights: *Letellier* v. *France*, Ser.A, No.207 (26 June 1991), para.35 and the opinion of the Commission, para.38; see also the *Neumeister* case, Ser.A, No.8 (27 June 1968), paras.4 *et seq.*; *cases of Yagci and Sargin/Mansur* v. *Turkey*, Ser.A, No.319–A and B (8 June 1995) resp. at para.50 and para.52; *Van der Tag* v. *Spain*, Ser.A, No.321 (13 July 1995), para.55; *Eckle* case, Ser.A, No.51 (15 July 1982), para.80; see also *mutatis mutandis* the opinion of the Commission in the following cases of the European Court of Human Rights: *Brigandi*, Ser.A, No.194–B (19 Feb. 1991), para.47; *Angelucci* v. *Italy*, Ser.A, No.196–C (19 Feb. 1991), para.33; *Maj* v. *Italy*, Ser.A, No.196–D (1 Feb. 1991), para.26; *Pugliese (II)* v. *Italy*, Ser.A, No.206–A (24 May 1991), para.27; *Vocaturoa* v. *Italy*, Ser.A, No.206–C (24 May 1991), para.28.

50. Eur.Ct.H.R., *Lechner and Hess*, Ser.A, No.118 (23 Apr. 1987), paras.54 and 59; see also Eur.Ct.H.R., *Moreira de Azevedo*, Ser.A, No.189 (23 Oct. 1990), para.74; Eur.Ct.H.R., *Beaumartin* v. *France*, Ser.A, No.296–B (24 Nov. 1994), para.33.

Second, assuming that an explanation is provided, this explanation must appear in the form of a reasoning. In this context, a reasoning can be defined as a series of propositions aimed at explaining the delay.[51] This may seem obvious, which simply goes to show how powerful this aspect of the model is: it is so integrated that it is no longer questioned or, *a fortiori*, challenged.[52] No one would seek a return to ancient rhetorical, literary or poetic approaches, not based on modern reasoning techniques.

Third, the explanation provided must be capable of intersubjective understanding.[53] It must be understandable for the judge called upon to render a decision. Often, the European Court of Human Rights considers a delay to be unreasonable because it "cannot understand why" there were delays between different stages of a proceeding.[54]

On a similar line, the fourth element requires that the justificatory discourse be exempt from contradictions, or at least, to use Chaim Perelman's and Lucie Olbrechts-Tyteca's words, of incompatibilities between different aspects of the explanation.[55] There are numerous examples of this requirement: the opposition between "reasonable" and "contradictory" can be traced to significant case law.[56]

Finally, the fifth element of this model requires that the explanation given be supported by relevant legal authorities. This criterion will not be satisfied according to international law standards if only internal law is invoked, as would be the case if a State attempted to justify a delay by signalling that the delay complied with its national legislation.[57]

As we see, an essentially formal model limits to a certain extent the subjectivity of the notion. Regardless of the content that will be attributed to the notion in a particular case, someone seeking to provide meaning to the notion of "reasonable" will arrange his or her argument according to some commonly accepted rules. If this is not done—which is not exceptional in the existing case law—the justificatory discourse will fail to convince, and may be rejected by the judge. While this model describes particularly well the decisions rendered by the European Court of Human Rights concerning the right to be tried within a reasonable time, it can also be transposed to any interpretation of the notion of "reasonable", whether it be aimed at a judge, a State or even public opinion.

This is what certain philosophers such as Habermas call procedural reason.[58] Nothing is reasonable in the absolute.[59] "Reasonable" is what is considered as

51. Lalande, *Vocabulaire technique et critique de la philosophie* (1993), p.887.

52. See Heidegger, *Le principe de raison* (1962).

53. Haba, "Rationalité et méthode dans le droit" (1978) XXIII A.P.D. 273.

54. See Eur.Ct.H.R., *H.* v. *United Kingdom*, Ser.A, No.120 (8 July 1987), para.80; see also another expression in *Scopelliti* v. *Italy*, Ser.A, No.278 (23 Nov. 1993), para.23, *Schouten and Meldrum* v. *The Netherlands*, Ser.A, No.304 (9 Dec. 1994), para.66.

55. Perelman and Olbrechts-Tyteca, *Traité de l'argumentation. La Nouvelle Rhétorique* (1992), pp.262 *et seq.*

56. See *Temple of Preah Vihear*, *loc. cit. supra* n.23; see also the sep. op. of Judge Bustamante in the *South West Africa* cases (*Ethiopia* v. *South Africa*, *Liberia* v. *South Africa*) I.C.J. Rep. 1962, 319, 365–366; *Free zones of Upper Savoy and the District of Gex*, P.C.I.J. Rep. Ser.AB, No.46, p.138.

57. *Wiesinger* v. *Austria*, Ser.A, No.213 (30 Oct. 1991), para.60.

58. See e.g. Habermas, *Between Facts and Norms* (1996).

59. Cf. J. M. Ferry, *Philosophie de la communication*, Vol.II (1994), p.39.

such following a discussion in which each interested party has had an occasion to present arguments. The "reasonable" is thus both relative, since it holds for a specific community only, and temporary, to the extent that its meaning can be modified as a result of new discussion.[60] Yet, it remains "rational", i.e. coherent or logical, to the extent that one accepts a contemporary conception of rationality, sometimes referred to as "post-modern" or "post-metaphysical", that is, rationality deprived of an ontological foundation.[61]

2. Substantive elements of definition

The interpretation of the notion of reasonable by international jurisdictions does not only follow the formal model examined above. To understand fully this interpretation, we must also consider a second—substantive—model. In other words, a model that integrates content into the justificatory discourse. This model assumes a sufficient causal link between the legitimate objective sought and the behaviour that one seeks to establish as reasonable.

For instance, public international law prohibits arbitrary requisitioning, that is, according to the International Court of Justice, unreasonable requisitioning.[62] The verification that a particular requisition is reasonable proceeds in three stages.

(a) The legitimate purpose or objective. In principle, States have a discretionary power to proceed with a requisition. Within the exercise of their sovereignty, they can unilaterally designate the requisition's purpose. In the absence of an express prohibition, this purpose is presumed to be legitimate.[63] Hence, a State can justify the requisition of a car by invoking the need to transport military troops in times of war.[64]

(b) The causal link. That State must then demonstrate that the alleged legitimate purpose is the actual basis of the requisition. Consequently, a measure which is totally ineffective in realising the alleged purpose will be deemed unreasonable.[65] Such would be the case, for instance, if the requisition took place after the troops had already been transported.

(c) The proportionality criterion: sufficiency of the causal link. Assuming that the measure is effective, judges will then assess the proportionality between that measure and the purpose sought. This implies a comparison of the behaviour in question with the standard of what is generally done, or what should legally be done, in similar situations.[66] Hence, the requisition of an ambulance already in service would be considered unreasonable, at least to the extent that the act is

60. See Chemillier-Gendreau (1995), *op. cit. supra* n.41, at pp.343–346.
61. See Ferry, *op. cit. supra* n.59, Vol.I (1994), at pp.65 *et seq.*
62. *Elettronica Sicula* I.C.J. Rep. 1989, 76.
63. See e.g. Eur.Ct.H.R., *Abdulaziz, Cabales and Balkandali*, Ser.A, No.4 (28 May 1985), para.72.
64. This hypothetical example is used here only for didactic purposes.
65. Eur.Ct.H.R., *Raimondo* v. *Italy*, Ser.A, No.281–A (22 Feb. 1994), para.30.
66. See Corten, *op. cit. supra* n.1, at chap.VI, section 1.

found to be incompatible with the way States normally act in similar circumstances.

Hence, a State whose actions are being challenged will need to justify its behaviour by presenting an understandable and logical reasoning (formal model), and also by invoking substantive criteria which consist of an articulation between the legitimate purpose and the sufficient causal link between the objective and the measures undertaken (substantive model). Subjectivity persists: the State maintains a large margin of appreciation with regard to its conception of what is "reasonable" in specific circumstances. In the foregoing example, the sovereign power of requisition is not in itself called into question. The exercise of this power, however, must be accompanied by a justificatory discourse that complies with the particular aspects pertaining to the notion of reasonable. Moreover, this discourse will have to adapt to the particular audience, as well as to the social and political context in which it takes place.

The requisition example is of course overly simplified. What is essential to understand, however, is that rationality is omnipresent in the application of these two models. Judges will avoid condemning a State on the basis of moral, ethical or political arguments which have not first been formalised and translated into legal arguments. Rather, they will develop a discourse framed in syllogistic terms, invoking elements which appeal to reason, such as reliance on scientific authorities.[67] In any event, values are theoretically absent from this discourse. What we observe is a formal evacuation of the axiological dimension of the notion of "reasonable". This is the most fundamental lesson drawn from the second section.

C. Concluding Remarks

In the first section, we noted that the notion of "reasonable" was introduced in legal discourse in order to permit the co-existence of divergent, even contradictory, subjective interpretations. This is done under the cover of a formally legal notion, which, as with all legal concepts, is supposed to be neutral. In the second section, we examined the essential influence of rational models which characterise the interpretation of the notion of reasonable, models which nevertheless ensure a large margin of appreciation for the various protagonists.

We are thus once more faced with the ambiguity invoked at the beginning of this article. We can now, however, reconcile the two terms which originally appeared to be contradictory. To do so, we must not lose track of the distinction between legal discourse and the social reality it is meant to govern. Reason still permeates the discourse, while the confrontation between subjective understandings continues to regulate the divergent realities addressed by this discourse. Everyone can have their own conception of what is reasonable, to the extent that they are able to justify this choice through a discourse which respects the requirements of the legal system.

One last example is given to illustrate this conclusion.

67. *Abdulaziz*, *supra* n.63, at paras.77 *et seq.*

When, in a dissenting opinion, Judge Jessup deemed the apartheid policies to be discriminatory, he was careful to avoid invoking values in support of his affirmation. In his words, the point was not to "impugn South Africa's motives"; the judge's role was not "to decide subjectively whether he believes the mandatory has chosen wisely or correctly". The unlawfulness of South Africa's behaviour could be determined only after that behaviour had been confronted with an "objective standard", that of the "reasonable man".[68] Yet it is undeniable that the "reasonable man" standard invoked by Judge Jessup reflects a particular ethical and political position, a liberal one, which is incompatible with the racist and reactionary ideology which characterised the apartheid regime.

As this example suggests, the notion of "reasonable" does not exclude value judgments. Rather, it formalises them in legal terms, so as to present them as simple statements of fact. The notion legitimises the judge's own position by calling upon the perfectly universal concept of reason, common to all humankind. This process masks the ideological dimension of the judgment.

In conclusion, the final thesis of this study is as follows: not only is it possible to draw a rational method of defining the notion of "reasonable" from the international judicial discourse, but only a rational definition will fulfil the functions played by the notion. Introducing the notion of "reasonable" in a particular discourse both preserves the margin of appreciation of those called upon to interpret law and serves to hide divergent interpretations behind a discourse which—formally—appears to be value-neutral.

The most common meaning of "reasonable" is "governed by reason".[69] Many interpretations have been, and still are, given to this concept, so central to social and exact sciences. The present author's research in the field of legal theory shows that an appeal to reason in legal discourse plays the essential role of hiding contradictions which this very discourse is incapable of resolving.

OLIVIER CORTEN*

MASS PROPERTY CLAIM RESOLUTION IN A POST-WAR SOCIETY: THE COMMISSION FOR REAL PROPERTY CLAIMS IN BOSNIA AND HERZEGOVINA

A. Introduction

The restoration of the pre-war property fights of displaced persons and refugees is critical to restore the peace.

This is particularly true for Bosnia and Herzegovina. The devastating impact of the war which ravaged Bosnia from 1992 until 1995 has left a third of the housing stock destroyed or otherwise uninhabitable. The systematic practice of ethnic cleansing forced Bosniacs, Croats and Serbs to seek shelter in areas of Bosnia and

68. Dissenting opinion of Judge Jessup in *South West Africa* cases (*Ethiopia* v. *South Africa*, *Liberia* v. *South Africa*) second phase, I.C.J. Rep. 1966, 4, 434–436.

69. Garner, *A Dictionary of Modern Legal Usage* (1987).

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