INTERNATIONAL LAW IN THE AGE OF HUMAN RIGHTS

General Course on Public International Law

by

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BIOGRAPHICAL NOTE

Theodor Meron, born in Poland in 1930; emigrated from Israel to the United States in 1978; became a citizen of the United States in 1984.

Judge, and currently the President, of the International Criminal Tribunal for the former Yugoslavia and the Charles L. Denison Professor of Law at New York University Law School (on leave).

Received his legal education in the Universities of Jerusalem, Harvard, where he received his doctorate, and Cambridge. Since 1978 has been Professor of International Law at New York University School of Law. Between 1991 and 1995 was also Professor of International Law at the Graduate Institute of International Studies in Geneva. Has been a Visiting Professor at the Harvard Law School and at the University of California (Berkeley). In 2000-2001 served as Counselor on International Law in the US Department of State.

Leading scholar of international criminal law, international humanitarian law and human rights. Was a rapporteur of a study group of the Council on Foreign Relations which recommended the establishment of the International Criminal Tribunal for the former Yugoslavia. A Shakespeare enthusiast, has written about the laws of war and chivalry in Shakespeare's historical plays.

Was Co-Editor-in-Chief of the *American Journal of International Law* (1993-1998) and now an honorary editor. Member of the Board of Editors of the *Yearbook of International Humanitarian Law*, the Council on Foreign Relations, the Institute of International Law, the American Society of International Law, the French Society of International Law, the American Branch of the International Law Association, the Bar of the State of New York and the International Institute of Humanitarian Law. Served on the advisory committees or boards of several human rights organizations, including Americas Watch and the International League for Human Rights. In 1990 was a Public Member of the United States Delegation to the CSCE Conference on Human Dimensions in Copenhagen. In 1998 served as a member of the United States Delegation to the Rome Conference on the establishment of an International Criminal Court. As a member of the US Delegation, participated in two sessions of the Preparatory Commission for the establishment of the International Criminal Court. Was a member of several committees of experts of the International Committee of the Red Cross (ICRC): on Internal Strife, on Environment and Armed Conflicts, and on Direct Participation in Hostilities, and was a member of the steering committee of ICRC experts on Customary Rules of International Humanitarian Law. Was a counsel and advocate of the United States before the International Court of Justice. Served as consultant to the World Bank, the Asian Development Bank and the US Department of State.

Was a Humanitarian Trust Scholar at the University of Cambridge, Carnegie Lecturer at the Hague Academy of International Law, Fellow of the Rockefeller Foundation, Max Planck Institute Fellow (Heidelberg), Sir Hersch Lauterpacht Memorial Lecturer at the University of Cambridge, Visiting Fellow at All Souls College, Oxford, and a Special Fellow of UNITAR. Has lectured in many universities and in the International Institute of Human Rights (Strasbourg) and presented papers to many conferences. Leads the annual ICRC seminar for UN diplomats on humanitarian law at New York University, and for many years has led a similar seminar in Geneva. Also led ICRC seminars on international law for university teachers in Geneva.

PRINCIPAL PUBLICATIONS

Investment Insurance in International Law, Oceana-Sijthoff, 1976.
The United Nations Secretariat : The Rules and the Practice, Lexington Books, 1977.
Human Rights in International Law, Oxford University, Clarendon Press, 1984.
Human Rights Law-Making in the United Nations : A Critique of Instruments and Process, Oxford University, Clarendon Press, 1986 (certificate of merit of the American Society of International Law).
Human Rights in Internal Strife : Their International Protection, Sir Hersch Lauterpacht Memorial Lectures, Cambridge University, 1986, Grotius Publications, Cambridge, 1987.
Human Rights and Humanitarian Norms as Customary Law, Oxford University, Clarendon Press, 1989 ; reprinted as paperback, 1991.
Henry's Wars and Shakespeare's Laws, Oxford University Press, 1993.
Bloody Constraint : War and Chivalry in Shakespeare, Oxford University Press, 1998.
War Crimes Law Comes of Age : Essays, Oxford University Press, 1998.
"Status and Independence of the International Civil Servant", 167 *Recueil des cours* 289-384, 1980.

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To Monique

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INTRODUCTION

The success human rights have achieved over the last half century as law, as a living discipline and as a movement, is clear. From rhetorical and moral concepts, human rights have been transformed into legal entitlements protecting human dignity. They comprise not only a comprehensive corpus of rights, but mechanisms and procedures designed to ensure respect for those rights, which are based on treaties and draw on human rights clauses in the United Nations Charter. These changes have been facilitated by broader political changes, including the collapse of totalitarianism and the strengthening of democracy in many countries. Despite claims of exceptionalism, often masked by assertions of cultural relativism, the uniform, universal character of human rights has on the whole been maintained. The principle of international accountability has been broadly accepted. Governments recognize that they must account to the international community and to other Governments for the way they treat their own populations. That basic human rights constitute obligations *erga omnes* has been recognized by most Governments and by international institutions.

What makes human rights today different from the past is that instead of being only a part of natural law and of internal law, human rights have now been accepted as a part of international law. The reserved domain of domestic jurisdiction no longer protects the State from at least some degree of scrutiny, supervision, *droit de regard* or intervention by other States and international organizations. The establishment of the two *ad hoc* international criminal tribunals under Chapter VII of the UN Charter and of the Sierra Leone special court, and the launching of the International Criminal Court, signal the end to impunity for perpetrators of atrocities.

International law and especially human rights scholars have often emphasized the specificity of human rights law, the virtual elimination of reciprocity, the contraction of domestic jurisdiction, and the operation of the law not between theoretically equal sovereign entities, but between Governments subject to duties and individuals benefiting from rights. This emphasis on the specificity of human rights has created some tension with the desire to consider human rights not merely as a system of entitlements, but as a part of general

international law. This problem still persists, though its scope has been attenuated by the large number of ratified human rights treaties, and the growing acceptance of customary law.

My object is not to retrace the fairly familiar terrain of establishing the legal character of human rights, or to argue the proposition, now well accepted, that human rights are part and parcel of the discipline of international law[1], but to consider the influence of human rights on general international law. Although human rights are central to this course, then, this is not a course about human rights. The reader will not find in it a detailed discussion of human rights norms on this or that topic, nor of human rights mechanisms and procedures. Rather, this is a course about the radiation, or the reforming effect, that human rights law has had, and is having, on other fields of public international law. Because of the peculiarities of human rights law, this influence cannot be taken for granted. It is sometimes said that the elaboration of human rights norms and institutions has produced no less than a revolution in the system of international law. Is this true and if so in what parts of international law? By examining most of the general areas of public international law, I attempt to demonstrate that the influence of human rights has not remained confined to one sector of international law, and that its influence has spread to many other parts, though to varying degrees. The humanization of public international law under the impact of human rights has shifted its focus above all from State-centred to individual-centred.

To study the influence of human rights on general international law, we must start from the assumption, which I accept, that there is such a thing as universal human rights, and that the core of human rights is essentially the same all over the world, even though there may be rhetorical, political and sometimes perhaps even legal differences at the margin. A relativist approach is often advanced by States that seek excuses for non-compliance and by liberal scholars anxious not to impose a Western view on non-Western countries[2], but such assertions have not affected the essential similarity of the core of human rights aspirations everywhere.

1. See, e.g., Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989); *Human Rights Law-Making in the United Nations* (1986).
2. See, e.g., discussion in Rosalyn Higgins, *Problems and Process* 96-97 (1994).

A human rights scholar must resist the urge to present a triumphalist view of the impact human rights have had on all the rest of international law. We must not exaggerate their influence where there has been little or none. But we must recognize and assess that influence where it can be found.

CHAPTER I

THE HUMANIZATION OF THE LAW OF WAR

A. Introduction and General Principles

In this chapter, I focus on the humanization of the law of war, a process to a large extent driven by human rights and principles of humanity. The subject is vast. It is inevitable that major issues must be left out of my discussion. I will show how — under the influence of human rights — the law of war has been changing and acquiring a more humane face: the inroads made on the dominant role of reciprocity; the fostering of accountability; the formation, formulation and interpretation of rules. These trends are manifested by both substantive and terminological changes. For example, the phrase "international humanitarian law" has increasingly supplemented terms such as the "law of war" and "the law of the armed conflict", a change influenced by the human rights movement. Although initially, in the 1950s, international humanitarian law or IHL referred only to the Geneva Convention on the protection of war victims, it is now increasingly employed to refer to the entire law of armed conflict.

The law of war has always contained rules based on chivalry, religion, and humanity designed for the protection of non-combatants, and especially women, children and old men, presumed incapable of bearing arms and committing acts of hostility. It also contained rules protecting combatants (in matters such as quarter, perfidy, unnecessary suffering)[3]. For some time now, the law of war has included an increasing number of rules on accountability and protection, such as those on protecting powers, the International Committee of the Red Cross (ICRC), criminal responsibility and international criminal tribunals. Nevertheless, the law of war has inevitably been geared to considerations of military strategy and victory[4]. Historically, reciprocity has been central to its development, serving as a rationale

3. See Meron, *Henry's Wars and Shakespeare's Laws* (1993); *Bloody Constraint: War and Chivalry in Shakespeare* (1998).

4. See generally Meron, *Human Rights in Internal Strife: Their International Protection* (1987).

for the formation of norms and as a major factor for securing respect and discouraging violations. The law of war was paradigmatically inter-State law, and thus, as Georges Abi-Saab put it, driven by "collective responsibility, with the attendant collective sanctions of classical international law : belligerent reprisals *durante bello* and war reparations *post bellum*" [5]. This State-centric character of the traditional law of war was reflected in the definition both of liability and of remedies. When a soldier violated the rules, the State for whom he fought was usually liable for the violation not to the victims but to the victims' State. Individuals seldom benefited from such arrangements.

Chivalry and principles of humanity are a competing inspiration for the law of armed conflict, creating a counterbalance to military necessity. Nevertheless, in recent conflicts where wars are increasingly fought against civilians, chivalry is often ignored. Tension between military necessity and restraint on the conduct of belligerents is the hallmark of the law of armed conflict. However, the weight assigned to these two conflicting factors has been shifting. The principle of humanitarian restraints has been of growing importance, especially in normative developments and in the elaboration of new standards, but, regrettably, less in the actual practice in the field, which remains cruel and bloody, especially in internal conflicts.

Calamitous events and atrocities have always driven the development of international humanitarian law. The more offensive or painful the suffering, the greater the pressure for adjustment of the law. The American Civil War generated the Lieber Code (1863), which ultimately spawned the branch of international humanitarian law commonly known as the Hague Law, which governs the conduct of hostilities. The battle of Solferino, immortalized in Henry Dunant's moving portrayal of the suffering and the bloodshed at the battle, in *A Memory of Solferino* (1862), inspired the Red Cross Movement and the Geneva Law, the other branch of humanitarian law, which, starting with the first Geneva Convention (1864), emphasizes the protection of the victims of war, the sick, the wounded, prisoners and civilians. Nazi atrocities led to Nuremberg, the Geneva Conventions for the Protection of Victims of War and the Genocide

5. Abi-Saab, "International Criminal Tribunals and the Development of International Humanitarian Law", in *Liber Amicorum — Judge Mohammed Bedjaoui* 649, 650 (Emile Yakpo and Tahar Boumedra, eds., 1999).

Convention. Those atrocities also helped shift some State-to-State aspects of international humanitarian law to individual criminal responsibility, thus contributing to a change in its emphasis from State-centric to homocentric. The atrocities in the former Yugoslavia, Rwanda and elsewhere had a pronounced impact not because of their unprecedented nature — there is, unfortunately, nothing new in atrocities — but because of the role of the media, which resulted in rapid sensitization of public opinion, reducing the time between atrocities and responses. One result was the establishment of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, which have had a tremendous impact both on the development of international humanitarian law and on its humanization[6]. The current changing nature of conflicts from international to internal has drawn humanitarian law in the direction of human rights law.

Human rights law has had a major influence on the formation of customary rules of humanitarian law, in terms of scholarship and, more importantly, of the jurisprudence of courts and tribunals and the work of international organizations. This trend started at Nuremberg and has continued through such ICJ cases as the *Nicaragua* case and the *Nuclear Weapons* Advisory Opinion and the jurisprudence of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda. *Opinio juris* has proven influential in the form of verbal statements by governmental representatives to international organizations, the content of resolutions, declarations and other normative instruments adopted by such organizations, and in the consent of States to such instruments[7].

This is not surprising given that robust efforts had to be made to humanize the behaviour of States and fighting groups in armed conflicts. Although humanitarian norms may have a lesser prospect for actual compliance than other norms of public international law, they enjoy a stronger moral support. Judges, scholars, Governments and non-governmental organizations are often ready to accept a rather large gap between practice and norms without questioning their binding character. Gradual and partial compliance with norms has often been accepted as fulfilling the requirements for the formation

6. Meron, "The Normative Impact on International Law of the International Tribunal for former Yugoslavia", [1995] *Israel YB Hum. Rights* 163.

7. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Chap. I (1989); Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law", 90 *AJIL* 238 (1996).

of customary law. Contrary practice has been downplayed. Courts and tribunals have often ignored operational or battlefield practice. Without formally abandoning the traditional dual requirements (practice and *opinio juris*) for the formation of customary international law, the tendency has been to weigh statements by Governments, the ICRC, and intergovernmental organizations both as evidence of practice and as articulation of *opinio juris*. Courts and tribunals have relied on *opinio juris* or general principles of humanitarian law distilled in part from the Geneva, the Hague and other humanitarian conventions. The methodology thus resembles that applied in the human rights field rather than than that used in other areas of international law. In terminology, however, courts and tribunals have followed the law of war tradition of speaking of practice and custom, even when this requires stretching the traditional meaning of customary law. Similar tendencies have also been apparent in the restatement of norms in the Rome Conference for the establishment of an international criminal court (ICC) and in the ICRC project on customary rules of International Humanitarian Law[8]. Public opinion, the media, the NGOs and the ICRC have played a critical role in promoting such tendencies.

Human rights enrich humanitarian law, just as humanitarian law enriches human rights. The recognition of customary norms rooted in international human rights instruments affects, through application by analogy, the interpretation, and eventually the status, of the parallel norms in instruments of international humanitarian law[9]. The influence of processes followed in the human rights field on the development of customary law by humanitarian law tribunals is well known[10]. The International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) demonstrate how criminal tribunals applying humanitarian law are informed by human rights law. The *ad hoc* criminal tribunals have often adopted human rights approaches to the definition of humanitarian norms. In some situations, however, it may be better to maintain distinct humanitarian or human rights approaches. Take the definition of torture, for

8. Meron, *War Crimes Law Comes of Age*, Chap. XVII and the Epilogue (1998). The ICRC study has not yet been published. I served on its steering committee of experts.

9. Meron, *supra* footnote 7, at 56-57.

10. Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law", in Meron, *supra* footnote 8, at 262.

example, where the requirement of State action under Article 1 of the UN Convention against Torture was found inapplicable to individual criminal responsibility. Thus, in *Prosecutor* v. *Kunarac, Kovac and Vukovic*, the ICTY explained why it found it necessary to depart from human rights approaches to the definition of torture which require State action:

> "The Trial Chamber draws a distinction between those provisions which are addressed to States and their agents and those provisions which are addressed to individuals. Violations of the former provisions result in the responsibility of the State to take the necessary steps to redress or make reparation for the negative consequences of the criminal actions of its agents. On the other hand, violations of the second set of provisions may provide for individual criminal responsibility, regardless of an individual's official status. While human rights norms are almost exclusively of the first sort, humanitarian provisions can be of both or sometimes of mixed nature. This has been pointed out by the Trial chamber in the *Furundžija* case:
>
> > 'Under current international humanitarian law, in addition to individual criminal liability, State Responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to prevent torturers.' " [11]

Of course, even where the prohibition of torture is addressed as a matter of human rights and therefore of State responsibility, the individual torturer and the person under whose orders torture has been perpetrated are subject to criminal liability under national and international law. Indeed, individual criminal liability under international humanitarian law and State responsibility to enforce human rights obligations of States are not mutually exclusive.

The humanization of the law of war received its greatest impetus from the post-UN Charter international human rights instruments

11. Case No. IT-96-23-T & IT-96-23/1-T, paras. 489-490 (2001); Guénaël Mettraux, "Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", 43 *Harv. Int'l LJ* 238, 290-291 (2002). The Appeals Chamber agreed with the Trial Chamber that "the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention". Judgment of 12 June 2002, at para. 148. See also Nina Jørgensen, *The Responsibility of States for International Crimes* (2000).

and the creation of international processes of accountability. The law of war, while focusing on the interests of States and their sovereignty, also contains a prominent component of human beings' protection. Starting in the nineteenth century, that law has been increasingly seen as embodying humanitarian constraints on the conduct of belligerents. In this sense, the classic law of war was not wholly inhumane. The Lieber Code (1863)[12] contained several elements characteristically belonging to the domain of human rights: such elements included the prohibition of rape[13], enslavement and slavery[14], of distinctions between captured enemies on grounds of colour — in effect, a guarantee of equal treatment of captured combatants[15]. The latter prohibition was designed to protect black soldiers of the Union army who might fall into the hands of the Confederate army. It was later incorporated in Article 4 of the Geneva POW Convention (1929) and Article 16 of the Third Geneva Convention (1949) on equality of treatment. In a provision anticipating the Fourth Geneva Convention's prohibition on deportations, the Lieber Code declared that "[p]rivate citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations . . . [as the law makes it possible]"[16].

This humanitarian and humanizing aspect of the law of war is, of course, epitomized by the Martens Clause of the Fourth Hague Convention on the Laws and Customs of War (1899, 1907), which is treated later in this chapter. The Martens Clause invokes the laws of humanity and dictates of public conscience[17].

The atrocities of World War II gave birth to the human rights movement, in the recognition of human rights as a fundamental principle in the UN Charter, in the insistence on individual criminal responsibility, in the judgment of the Nuremberg Tribunal, in the promulgation of the Universal Declaration of Human Rights (1948).

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12. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (24 April 1863). For analysis, see Meron, "Francis Lieber Code and Principles of Humanity", 36 *Colum. J. Trans'l L.* 269, reprinted in Meron, *supra* footnote 8, at 131.
13. *Id.*, Art. 47. See generally, Meron, "Rape as a Crime under International Humanitarian Law", 87 *AJIL* 424 (1993).
14. *Id.*, Art. 43.
15. *Id.*, Arts. 57-58.
16. *Id.*, Art. 23.
17. Meron, "Martens Clause, Principles of Humanity and the Dictates of Public Conscience", 94 *AJIL* 78 (2000).

During the era of the Cold War, human rights instruments, and both governmental and non-governmental bodies designed to investigate and judge human rights violations proliferated. Many of the larger social changes that have fed the burgeoning human rights consciousness — notably the development of television and the elaboration of its increasingly global networks — have helped move public opinion towards greater intolerance for human suffering in times of war as in times of peace. As a result, human rights norms have infiltrated the law of war to a significant degree.

It is thus the post-UN Charter Universal Declaration of Human Rights, followed by a plethora of human rights treaties and declarations, that explain the homocentric focus of the Geneva Conventions and the Additional Protocols. In many norms the influence of human rights on instruments of international humanitarian law has been enormous. These norms include the guarantees of due process of law and the prohibitions of: torture and cruel, inhuman or degrading treatment and punishment; arbitrary arrest and detention; and discrimination on grounds of race, sex, language, or religion. This evolution produced a very large measure of parallelism between the norms, and a growing measure of convergence in their personal and territorial applicability. The fact that the law of war and human rights law have different historical and doctrinal roots has not prevented the principle of humanity from becoming the common denominator of both systems. Current trends point to an even greater reliance on that principle.

The Fourth Geneva Convention reflects the need to enhance protections for individuals and populations, especially of occupied territories. The Hague Convention No. IV contains few rules on the protection of civilians in occupied territory. Of the fifteen articles of the Hague Regulations on "Military Authority over the Territory of the Hostile State", only three relate to the physical integrity of civilian persons. The other provisions deal essentially with the protection of property. The experience of World War II, with the populations of occupied territories bearing the brunt of Nazi atrocities, demonstrated the need for a more protective regime. The Fourth Geneva Convention establishes a new balance between the rights of the occupant and the rights of the population of the occupied country. If the Hague Convention No. IV established important limitations on the occupier's permissible activities, the Fourth Geneva Convention obligates the occupier to assume active responsibility for the welfare

of the population under his control[18]. The Geneva Convention contains detailed provisions on the protection afforded to civilians — aliens, general population, vulnerable groups such as children and women, and internees — in occupied territories.

No preamble was included in the four Conventions because of disagreements on its content. Concern for human rights was nonetheless in the air, as evidenced by a French proposal for a preamble to the draft Convention discussed by the XVIIth Red Cross International Conference (1948)[19].

Although this proposal was not accepted, much of its language can be found in common Article 3. As Joyce Gutteridge predicted, Article 3 would ensure observance of certain fundamental human rights[20]. The International Court of Justice (ICJ) has already paid it the highest tribute by describing it as a reflection of "elementary considerations of humanity"[21].

This Article is a clear demonstration of the influence of human rights law on humanitarian law. The inclusion in the United Nations Charter of the promotion of human rights as a basic purpose of the Organization, the recognition of crimes against humanity as international crimes, the conclusion of the 1948 Genocide Convention and the regulation by a multilateral treaty of non-international armed conflicts for the first time in 1949, all stemmed from this influence[22].

The establishment of mechanisms for the repression of grave breaches and the development of universal criminal jurisdiction also reveal the intent "to go beyond the inter-State level and to reach for the level of the real (or ultimate) beneficiaries of humanitarian protection, i.e. individuals and groups of individuals"[23]. The ICRC Commentary notes that the First and Third Geneva Conventions pro-

18. Lauterpacht, "The Problem of the Revision of the Law of War", [1952-1953] 29 *Brit. YB Int'l L.* 381-382.

19. *Commentary on the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War* 20 (Oscar M. Uhler and Henri Coursier, eds., 1958).

20. Gutteridge, "The Geneva Conventions of 1949", [1949] 26 *Brit. YB Int'l L.* 294, 300.

21. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, Judgment of 27 June 1986, *ICJ Reports 1986* 14, 114.

22. Doswald-Beck, "Implementation of International Humanitarian Law in Future Wars", 52 *Naval War College Rev.* 24, 32-33 (1998).

23. Abi-Saab, "The Specificities of Humanitarian Law", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* 265, 269 (Christophe Swinarski, ed., 1984).

vide for certain mechanisms that permit protected persons, to invoke their rights against the detaining Party without a necessary intervention of their national State[24].

This symbiotic relationship is further stimulated by the work of human rights bodies[25]. In applying humanitarian law, these bodies often lack law of war expertise. They tend to reach conclusions which humanitarian law experts find problematic. Their very idealism and naïvety are, however, their greatest strength. There are only a few judicial and other expert humanitarian bodies charged with the application of humanitarian law. Human rights bodies thus fill an institutional gap and give international humanitarian law an even more pro-human rights orientation.

Not surprisingly, it has become common in some quarters to conflate human rights and the law of war/international humanitarian law. Nevertheless, despite the growing convergence in various protective trends, significant differences remain. The law of war, in contrast to human rights law, allows or at least tolerates the killing and wounding of innocent human beings not directly participating in an armed conflict — such as civilian victims of lawful collateral damage, for example. It also permits certain deprivations of personal freedom without convictions in a court of law. It allows the occupying power to resort to internments and to limit appeal rights of detained persons. It permits limitations of freedoms of expression and assembly.

The law of armed conflict regulates aspects of a struggle for life and death between contestants who operate on the basis of formal equality. Derived as it is from the medieval tradition of chivalry, it guarantees a modicum of fair play. As in a boxing match, pummelling the opponent's upper body is fine; hitting below the belt is proscribed. As long as the rules of the game are observed, it is permissible to cause suffering, deprivation of freedom, and death. This is a narrow, technical vision of legality.

Human rights laws protect physical integrity and human dignity in all circumstances. They apply to relationships between unequal par-

24. *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 84 (Jean S. Pictet, ed., 1952). For the text of the Convention, see 75 *UNTS* 31, 6 *UST* 3114.

25. See for example the case of *Abella et al.* v. *Argentina*, decided by the Inter-American Commission on Human Rights, Case No. 11.137, Report No. 55/97, OEA/Ser/L/V.97 doc. 38, 18 November 1997, paras. 158-161.

ties, protecting the governed from their Governments. Under human rights law, no one may be deprived of life except in pursuance of a judgment by a competent court. The two systems, human rights and humanitarian norms, are thus distinct and, in many respects, different.

To speak of the humanization of humanitarian law or the law of war is thus in many ways a contradiction in terms. Consider, for example, the law of war term "unnecessary suffering".

To genuinely humanize humanitarian law, it would be necessary to put an end to all kinds of armed conflict. But wars have been a part of the human condition since the struggle between Cain and Abel, and regrettably they are likely to remain so.

The renaissance of the law of war in the early 70s was triggered by human rights, and especially by the reports of the Secretary-General of the United Nations on the Respect of Human Rights in Armed Conflict [26] and the Tehran Conference on Human Rights (1968). Law of war experts have recognized that the development of international humanitarian law came dangerously close to stagnation before the impact of the human rights movement was brought to bear.

The humanization of the law of war has also informed developments extending from traditional international wars to non-international armed conflicts and even to all situations the applicability of prohibitions and restrictions on the use of certain weapons. Such is the case, especially, of weapons which cannot be used in ways that distinguish between civilians and combatants and weapons considered abhorrent to public conscience. The first involve anti-personnel land mines; the latter chemical, bacteriological and biological weapons and, perhaps, blinding laser weapons.

B. From an Inter-State to an Individual Rights Perspective: Reciprocity and Reprisals

How much humanitarian law has already departed from its purely inter-State and reciprocal focus can be seen by revisiting the now obsolete *si omnes* clause, and the question of belligerent reprisals.

The *si omnes* clause found in early law of war treaties provided that if one party to a conflict was not a party to the instrument, the

26. Reports of the Secretary-General on Respect for Human Rights in Armed Conflicts, UN docs. A/7720 (1969) and A/8052 (1970).

instrument would not apply in relations between any of the parties to the conflict[27]. The Fourth Hague Convention's *si omnes* clause threatened the integrity of Nuremberg prosecutions. In the *Trial of German Major War Criminals* (Nuremberg 1946), the defence raised the argument that the Convention and its Regulations did not apply because several of the belligerents were not parties to it. The general participation clause barred application of the Convention. In response, the International Military Tribunal (IMT) acknowledged that at the time the Hague Regulations had been adopted, the participating States believed that they were making new law, but found that "by 1939 these rules laid down in the Convention were recognised by all civilized nations, and were regarded as being declaratory of the laws and customs of war"[28]. Thus, it was only by considering the Hague Regulations — inapplicable because of the *si omnes* clause — as a mirror of customary law that the argument of the defence could be answered. The approach of the IMT was endorsed and followed in the Tribunal's decision in *United States* v. *Von Leeb — The High Command Case*, 1948 — in which it described most of the provisions of the Hague Convention, considered in substance, as an expression of the accepted views of civilized nations and as international law binding upon Germany and the defendants in the conduct of the war even against the Soviet Union[29]. Hague Convention No. IV is still in force, but since most of its provisions are now regarded as customary law, the Convention's general participation clause can now be regarded as having fallen in desuetude.

The general participation clause was explicitly reversed in the 1929 Prisoner of War Convention and in the 1929 Convention for

27. E.g. Article 2 of the Hague Convention (IV) on Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277, TS No. 539, 1 *Bevans* 631:

> "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention."

Also Article 24 of the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field:

> "The provisions of the present Convention are obligatory only on the Contracting Powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent Powers should not be signatory to the Convention."

28. *Trial of German Major War Criminals*, Cmd. 6964, Misc. No. 12, at 65 (1946). Meron, *supra* footnote 7, at 38-39.

29. 11 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No*, *10*, at 462 (1948).

the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Article 82 of the POW Convention provided that "[i]n time of war if one of the belligerents is not a party to the Convention, its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto"[30].

Common Article 2 (3) of the 1949 Geneva Conventions went even further. In addition to providing for the application of the Conventions between parties involved in a conflict, even if one of the parties was not a party to the Convention, it specifies that the parties "shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof", i.e., even in the case of the acceptance of the Convention for the specific conflict only. This idea had been broached in 1929 but rejected[31].

Common Article 1 of the 1949 Geneva Conventions, which provides that "The High Contracting Parties undertake to respect and ensure respect for the present Convention *in all circumstances*"[32], epitomizes the denial of reciprocity. The ICRC Commentary to Geneva Convention I further emphasizes the unconditional and non-reciprocal character of the obligations:

> "[a] State does not proclaim the principle of the protection due to wounded and sick combatants in the hope of saving a certain number of its own nationals. It does so out of respect for the human person as such."[33]

Another aspect of common Article 1, which the International Court of Justice has held to be declaratory of customary law[34], also

30. Convention relative to the Treatment of Prisoners of War, 27 July 1929, 47 Stat. 2021, *TS*, No. 846, Art. 82; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929, 47 Stat. 2074, *TS*, No. 847, Art. 25.

31. *Commentary on the Geneva (I) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, *supra* footnote 24, at 30.

32. Abi-Saab, "The Specificities of Humanitarian Law", *supra* footnote 23, at 267. See also the important essay, Condorelli and Boisson de Chazournes, "Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances' ", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* 17 (Christophe Swinarski, ed., 1984).

33. *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, *supra* footnote 24, at 28-29.

34. *Military and Paramilitary Activities in and against Nicaragu*a, *supra* footnote 21, at 114.

derived from the rejection of reciprocity and goes to the heart of accountability for violations of international humanitarian law. The Article may initially have been intended to address the obligation of a party to ensure that its entire civilian and military apparatus respects the Conventions. However, it has subsequently been interpreted as providing standing for States parties to the Convention vis-à-vis violating States. Parties could therefore endeavour to bring a violating party back into compliance, thus promoting universal application. To a large extent, this later interpretation was triggered by the ICRC's commentaries to the Geneva Conventions and the supportive literature generated by them[35]. The exact scope of the rights of third parties under common Article 1 is still unclear, however, as suggested by the continuing controversies regarding conferences of States parties concerning the occupied West Bank. Whether the parties must act jointly or may take individual measures with respect to a violating State is uncertain, as is the precise nature of the actions that may be taken. Nevertheless, common Article 1 can already be seen as the humanitarian law analogue to the human rights principle of *erga omnes*[36].

Another telling manifestation of the reciprocal character of classical international law, and of the law of war in particular, was the concept of reprisals. The classical definition of reprisal in international armed conflict is an act by one belligerent, otherwise in violation of the law of war, in response to an unlawful act of war by another belligerent, and carried out to compel that other belligerent to stop unlawful acts of war and to comply henceforth with its obligations under the laws of war. Yet from the 1929 Convention relative to the Treatment of Prisoners of War to the 1977 Additional Protocol I to the Geneva Conventions, the domain of legitimate reprisals has shrunk dramatically. The 1929 Convention prohibited reprisals against prisoners of war. The 1949 Geneva Conventions prohibited reprisals against persons, installations, or property protected by their

35. *Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, *supra* footnote 19, at 16. See also *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, *supra* footnote 24, at 26, and Meron, *supra* footnote 7, at 27-30. For influential supportive literature, see especially Condorelli and Boisson de Chazournes, *supra* footnote 32, and Abi-Saab, *supra* footnote 23.

36. *Barcelona Traction, Light and Power Co., Ltd. (Belgium* v. *Spain) (New Application)*, *ICJ Reports 1970*, 3, 32, discussed in Meron, *supra* footnote 7, at 188-201.

provisions (including the wounded, the sick and the shipwrecked, medical personnel and objects, prisoners of war, and the civilian population or individuals in the power of a Party), as well as collective punishment and terrorization of the civilian population in occupied territory, and the taking of hostages[37]. Additional Protocol I prohibited reprisals against the entire civilian population, civilian objects, cultural objects (reprisals against cultural property were also prohibited under Article 4 (4) of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict), as well as reprisals against objects indispensable to the survival of the civilian population, the natural environment, and works or installations containing so-called "dangerous forces"[38], such as nuclear or toxic materials.

Modern treaties have thus reduced legitimate reprisals to those against the armed forces. Since attacks against the military are, in any event, lawful under the *jus in bello* of international humanitarian law, hardly any scope is left to the State that wishes to resort to reprisals. International law has failed, however, to provide effective remedies against States that persist in violating the prohibition of attacks against civilians or that egregiously breach the principle of proportionality. Could the victim State resort, in such a case, to prohibited weapons and means of warfare? Or would that use be contrary to hierarchically higher *jus cogens* norms? Would such use be acceptable in response to the use of such prohibited weapons by the enemy?

The complete prohibition of reprisals in Additional Protocol I clearly continues to present a major difficulty. As Aldrich writes, despite the "limitations, risks, and unfairness of reprisals"[39], they

37. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 12 August 1949, 6 *UST* 3114, *TIAS* No. 3362, 75 *UNTS* 31, Art. 46; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), 12 August 1949, 6 *UST* 3217, *TIAS* No. 3363, 75 *UNTS* 85, Art. 47; Convention relative to the Treatment of Prisoners of War, 12 August 1949, 6 *UST* 3316, *TIAS* No. 3364, 75 *UNTS* 135, Art. 13; and Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 12 August 1949, 6 *UST* 3516, *TIAS* No. 3365, 75 *UNTS* 287, Art. 33.

38. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, 1125 *UNTS* 3, reprinted in 16 *ILM* 1391, Arts. 51-56.

39. George Aldrich, "Compliance with International Humanitarian Law", *Int'l. Rev. Red Cross*, No. 282, May-June 1991, at 301.

may be the only remedial measure the victim State can take to coerce the enemy into respecting the law. In extreme circumstances, that State may be compelled to threaten reprisals, and if the threat fails, "to take reprisal action, regardless of the law"[40].

In an ICTY judgment in 2003, Presiding Judge Antonio Cassese suggested that, as a means of inducing compliance with international law, the prosecution and punishment of war crimes and crimes against humanity before national and international courts offers a widely available and fairly efficacious alternative to reprisals[41]. It is far from certain, however, that under present-day circumstances, belligerents subjected to the pressure of persistent attacks on their civilians and civilian objects would agree that the prospects of future prosecution are compelling enough to cause the violating State to cease and desist.

In the same opinion, Judge Cassese considers whether the provisions of Protocol I prohibiting reprisals reflect customary law, as some have suggested. He notes that at the time the Protocol was adopted, the prohibition of reprisals against civilian objects did not appear to be declaratory of international law, and that since then, a body of State practice transforming this prohibition into a general rule of international law has not emerged. He believes, however, that the combined effect of the Martens Clause[42] and *opinio juris* can transform this prohibition into customary law binding on the major military powers that have not ratified Protocol I or have dissented from the prohibition of reprisals[43], even though State practice is scant or inconsistent. Of course, the question of what acts count as reprisals should be taken into the calculus of international practice. Reprisals are strictly defined by law as enforcement measures, in proportional reaction to previous violations by the adversary, and are intended to compel the adversary to desist from further violations. Acts of vengeance pure and simple are always prohibited, although frequently resorted to.

Italy and the United Kingdom have made reservations to Protocol I's provisions on reprisals with regard to States that persist in violating the Protocol's prohibitions of attacks on civilians. Reservations

40. *Id.* at 302.
41. *Prosecutor* v. *Kupreskić*, No. IT-95-16-T, Judgment, para. 530 (14 January 2000).
42. See Meron, *supra* footnote 17.
43. *Kupreskić*, *supra* footnote 41, at paras. 527-531.

have also been made by Egypt, France and Germany. The United States has made statements rejecting the prohibition upon reprisals on the theory that reprisals, or at least threats of reprisals, continue to be necessary in order to deter violations of international humanitarian law, especially against POWs and civilians[44]. Reprisals were openly practised in the Iran-Iraq war. The customary law character of the Protocol's provisions prohibiting reprisals is thus still uncertain, but the proscriptive trend is clear, especially as the condemnations of reprisals are on the increase. In this difficult area, it continues to be difficult to demonstrate the existence of a customary rule prohibiting reprisals, but such a rule may well be emerging under the influence of *opinio juris*.

The influence of human rights on the comprehensive prohibition of reprisals is clear. Indeed, the very idea of reprisals, based as it is on the collective responsibility of the many for violations by a few, is antithetical to the whole notion of individual responsibility that is so fundamental to human rights.

As Frits Kalshoven noted,

> "Belligerent reprisals . . . rest on the idea of solidarity, of holding members of a community jointly and severally liable for the deeds of some of them. It hardly needs emphasizing that this goes to the roots of the concept of human rights, as fundamental rights of the human being as an individual, as distinct from his position as a member of the collectivity."[45]

Experience shows that one reprisal leads to another, creating, in the long run, a vicious circle, in which the "original sin" is often forgotten, enhancing the potential for mutual destruction.

The principle of reciprocity, still prominent in the law of war, has thus undergone important changes. Although reciprocity still applies to the creation of obligations under the Geneva Conventions (e.g. common Article 2 (3) of the Geneva Conventions or Article 4 (2) of the Fourth Geneva Convention), it does not enable the termination of obligations on grounds of breach[46]. For example, the denuncia-

44. Meron, "The Time Has Come for the United States to Ratify Geneva Protocol I", 88 *AJIL* 678 (1994).
45. Kalshoven, "Human Rights, the Law of Armed Conflicts, and Reprisals", *Intl Rev. Red Cross*, No. 121, April 1971, 183, at 186.
46. De Preux, "The Geneva Conventions and Reciprocity", *Int'l Rev. Red Cross*, No. 244, January-February 1985, 25, at 26.

tion clause of the Geneva Conventions (common Article 63/62/142/158) provides that a denunciation cannot take effect until peace has been concluded and the release and repatriation of the persons protected by the Conventions have been completed. Article 60 (5) of the Vienna Convention on the Law of Treaties is also pertinent. This article, while permitting a party which is the victim of a breach of treaty to invoke the breach as a ground for terminating the treaty or for suspending its operation, excludes from termination or suspension provisions in treaties of a humanitarian character relating to the protection of the human person, in particular those that prohibit any form of reprisals against persons protected by such treaties. A breach, and consequently the principle of reciprocity, may therefore not be invoked to justify derogations from humanitarian law with regard to protected persons, especially civilians.

The increasingly objective and normative principles now informing the law of war have caused a major erosion, if not a total prohibition, of permissible reprisals. In reality, of course, reciprocity and reprisals, or the fear of reprisals, remain more significant than acknowledged by the treaty texts. In some situations, such as the 2002 Israeli-Palestinian armed conflict, there has been an unfortunate return to a large-scale resort to reprisals against civilians.

Despite the inequality which often prevails between government forces and rebel forces, reciprocity is still relevant to non-international conflicts, as is shown, for example, by the mutual deterrence that often takes place regarding treatment of captured combatants. Yet, the growing protection extended by the law of war to citizens and residents of a country vis-à-vis their own Government, especially in domestic conflicts, cannot be adequately explained by the operation of reciprocity. Rather it rests on the requirements of humanity, normativity and the objective application of the law. As the ICRC Commentary notes,

> "the Conventions are coming to be regarded less and less as contracts on a basis of reciprocity concluded in the national interest of each of the parties, and more and more as solemn affirmations of principles [and] unconditional engagements"[47].

47. *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, *supra* footnote 24, at 28.

C. The Martens Clause, Principles of Humanity and Dictates of Public Conscience

Together with the principle prohibiting weapons "of a nature to cause superfluous injury" or "calculated to cause unnecessary suffering"[48], the Martens Clause, in the Preamble to the Hague Conventions on the Laws and Customs of War on Land[49], is an enduring legacy of those instruments. In the years since its formulation, the Martens Clause has been relied upon in the Nuremberg jurisprudence, addressed by the International Court of Justice and human rights bodies, and reiterated in many humanitarian law treaties that regulate the means and methods of warfare. It was restated in the 1949 Geneva Conventions for the Protection of Victims of War[50], the 1977 Additional Protocols to those Conventions[51], and the Preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons[52], albeit in slightly different versions. The Martens Clause was paraphrased in Resolution XXIII of the Tehran Conference on Human Rights of 1968[53], and it is

48. These phrases appear, respectively, in Article 23 *(e)* of Hague Convention No. II of 1899 and Hague Convention No. IV of 1907. Convention [No. II] with Respect to the Laws and Customs of War on Land, with annex of regulations, 29 July 1899, 32 Stat. 1803, 1 *Bevans* 247; Convention [No. IV] Respecting the Laws and Customs of War on Land, with annex of regulations, 18 October 1907, 36 Stat. 2277, 1 *Bevans* 631.

49. See generally Helmut Strebel, "Martens Clause", 3 *Encyclopedia of Public International Law* 326 (Rudolf Bernhardt, ed., 1997).

50. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 63, 6 *UST* 3114, 75 *UNTS* 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Art. 62, 6 *UST* 3217, 75 *UNTS* 85; Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 142, 6 *UST* 3316, 75 *UNTS* 135; Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 158, 6 *UST* 3516, 75 *UNTS* 287.

51. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, Art. 1 (2), 1125 *UNTS* 3 (hereinafter Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 12 December 1977, pmbl., para. 4, 1125 *UNTS* 609 (hereinafter Protocol II).

52. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, pmbl., para. 5, 1342 *UNTS* 137.

53. The resolution requested that the Secretary-General urge member States of the United Nations system to ensure that in all armed conflicts the inhabitants and belligerents are protected in accordance with "the principles of the law of nations derived from the usages established among civilized peoples, from the

cited or otherwise referred to in several national military manuals, including those of the United States, the United Kingdom and Germany[54]. Moreover, attempts have recently been made — including by parties before the International Court of Justice — to invoke the Clause, in the absence of specific norms of customary and conventional law, to outlaw the use of nuclear weapons.

What accounts for the continuing currency of this provision? After all, the Martens Clause originated as a supplementary or residual protection, pending a comprehensive codification of the law of war. Its invocation as a legal basis for banning nuclear weapons has triggered controversies over its scope, meaning, and interpretation. I shall attempt to explain its continuing appeal by tracing the history of the Martens Clause and analysing its principal features.

I. The origins of the Clause

As formulated in 1899, the Martens Clause stated

> "that in cases not included in the Regulations . . ., populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience".

The 1907 English version was somewhat different: "inhabitants" replaced "populations", the older term "law of nations" was substituted for "international law", and "requirements" gave way to "dictates". Although both the 1899 and the 1907 versions speak of "laws of humanity", it has become common practice, which I shall follow, to refer to them as "principles of humanity".

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laws of humanity and from the dictates of the public conscience". Final Act of the International Conference on Human Rights, Res. XXIII, para. 2, at 18, UN Sales No. E.68.XIV.2 (1968).

54. For the US manuals, see US Dept. of the Army, *The Law of Land Warfare*, para. 6 (Field Manual No. 27-10, 1956); US Dept. of the Air Force, *International Law — The Conduct of Armed Conflict and Air Operations* 1-7(b) (AFP No. 110-31, 1976). For the British manual, see United Kingdom War Office, *The Law of War on Land, Being Part III of the Manual of Military Law*, paras. 2, 3, 5 (1958) (hereinafter UK Manual). For the German manual, see Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts — Manual*, para. 129 (ZDv 15/2, 1992). Citing the Martens Clause, the German manual adds: "If an act of war is not expressly prohibited by international agreements or customary law, this does not necessarily mean that it is actually permissible."

Proposed by the Russian delegate to the Hague Peace Conference, the eminent jurist F. F. de Martens[55], the Clause has ancient antecedents rooted in natural law and chivalry[56]. The rhetorical and ethical strength of its language perhaps best explains its continuing influence on the formation and interpretation of the law of war and international humanitarian law. These features have compensated for the somewhat vague and indeterminate legal content of the Clause.

The Clause was originally designed to provide residual humanitarian rules for the protection of the population of occupied territories, especially armed resisters in those territories[57]. Since then, a broad understanding has emerged that the Martens Clause reaches all parts of international humanitarian law. Viewed in its original context, the Preamble to the Hague Convention reveals the Clause's object: cases not provided for in the Convention "should [not] for want of a written provision be left to the arbitrary judgment of the military commanders". The Clause has served an important additional goal. Since all codifications omit some matters, especially those that prove to be contested, the Martens Clause, as Georges Abi-Saab has suggested, avoids undermining the customary law status of matters that were not included[58].

At Nuremberg, the Martens Clause was invoked to rebut assertions that the Nuremberg Charter, as applied by the tribunals, consti-

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55. Martens used several names over his lifetime: Fedor Fedorovitsch, Frédéric, and Friedrich. See V. V. Poustogarov, *Au Service de la Paix: Frédéric de Martens et les Conférences internationales de la paix de 1899 et 1907*, at 15 (1999). Regarding the Martens Clause, see *id*. at 174-176.

56. In 1643 the Articles and Ordinances of War for the Present Expedition of the Army of the Kingdom of Scotland concluded with an eloquent provision that established not only custom but also the law of nature as a residual source, and thus enhanced the principle of humanity, which is a part of the law of nature:

> "Matters, that are clear by the light and law of nature are presupposed; things unnecessary are passed over in silence; and other things may be judged by the common customs and constitutions of war; or may upon new emergents, be expressed afterward."

See Francis Grose, *Military Antiquities* 127, 137 (1788), quoted in Meron, *supra* footnote 8, at 10. This provision captures the spirit of the Martens Clause.

57. See Frits Kalshoven, *Constraints on the Waging of War* 14 (2d ed. 1991); Christopher Greenwood, "Historical Development and Legal Basis", in *Handbook of Humanitarian Law in Armed Conflicts* 129 (Dieter Fleck, ed., 1995); Frederick W. Halls, *The Peace Conference at The Hague* 135-138 (1900); Ministère des affaires étrangères, *La Haye*, *Conférence internationale de la Paix 1899*, troisième partie, Deuxième Commission, at 111-116 (1899).

58. Georges Abi-Saab, *"The Specificities of Humanitarian Law", supra* footnote 23, at 265, 274.

tuted retroactive penal legislation. In the *Altstötter* case, for example, the Clause served as additional authority for the proposition that deportation of inhabitants of occupied territories was prohibited by, and constituted a crime under, the customary law of war[59]. In the *Krupp* case, the United States Military Tribunal noted that

> "not only the wording (which specifically mentions the 'inhabitants' before it mentions the 'belligerents'), but also the discussions that took place at the time, make it clear that [the Clause] refers specifically to belligerently occupied country"[60].

Going beyond the context in which it was promulgated in 1899, the Tribunal gave this interpretation to the Martens Clause:

> "The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare."[61]

Lord Wright, the editor of the *Law Reports of Trials of War Criminals* prepared by the United Nations War Crimes Commission, viewed the unspecified war crimes as being subject to

> "the governing effect of that sovereign clause which does . . . really in a few words state the whole animating and motivating principle of the law of war, and indeed of all law, because the object of all law is to secure as far as possible in the mutual relations of the human beings concerned the rule of law and of justice and of humanity"[62].

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59. *Altstötter*, 6 *Law Reports of Trials of War Criminals* 40, 58-59 (United Nations War Crimes Commission, 1948) (US Mil. Trib., 1947). For the customary law underpinnings of rules protecting the population of occupied territories, see General Orders No. 101 issued by the US War Department for the occupation of Santiago de Cuba after the capitulation of the Spanish forces (18 July 1898). The order, cited in the *Altstötter* case, reflects the Lieber Code and anticipates the Hague Regulations, *supra* footnotes 12 and 27. See 1898 *Foreign Relations of the United States* 783-784.

60. *In re Krupp and Others*, 15 Ann. Dig. 620, 622 (US Mil. Trib. 1948).

61. *Id.*

62. 15 *Law Reports of Trials of War Criminals*, *supra* footnote 29, at xiii (1949).

II. The modernization of the Clause

The Geneva Conventions employ a version of the Martens Clause in their denunciation clauses (common Article 63/62/142/158) for a different, but parallel, goal: to make clear that if a party denounces the Conventions, it will remain bound by the principles of the law of nations, resulting from the usages established among civilized peoples, the laws of humanity, and the dictates of public conscience. This provision thus guarantees that international customary law will still apply to States no longer bound by the Geneva Conventions as treaty law[63]. And for quite some time, of course, the status of the Geneva Conventions as customary law has been confirmed by the ICJ and hardly ever contested.

Since the adoption of the Additional Protocols, a "modernized" version of the Clause has been used. Perhaps in recognition of its importance, the clause was moved from the Preamble of the Hague Conventions to the substantive text of Protocol I. Article 1 (2) reads:

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience."[64]

Belgium's delegate explained that the object was to make clear that written humanitarian law could develop only gradually and to show that there was a common law that must be respected. In that sense, the Martens Clause was a principle of interpretation that ruled out "an *a contrario* interpretation since, where there was no formal obligation, there was always a duty stemming from international law"[65]. The ICRC *Commentary* added that the Clause also contains a dynamic factor, "proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology"[66]. That the Clause should be interpreted as reflecting

63. See Abi-Saab, *supra* footnote 23, at 275.
64. Protocol I, *supra* footnote 38.
65. 8 Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts, *Official Records*, doc. CDDH/I/SR.3, para. 11 (1978).
66. ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 39 (Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, eds., 1987).

evolving concepts was reiterated by Judge Shahabuddeen in his dissent from the ICJ's Advisory Opinion on *Nuclear Weapons*:

> "In effect, the Martens Clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community."[67]

The language of Protocol I, however, may have deprived the Martens Clause of its intrinsic coherence and legal logic. By replacing "usages" with "established custom", the Protocol conflates the emerging product (principles of international law) with one of its component factors (established custom).

In his dissenting opinion in the *Nuclear Weapons* case, Judge Shahabuddeen acknowledged the distinction between usages and law[68]. He chose to use the Protocol I version of the Martens Clause to support the proposition that the principles of humanity and the dictates of public conscience constitute principles of international law independently of custom: "Since 'established custom' alone would suffice to identify a rule of customary international law, a cumulative reading is not probable."[69]

In Protocol II, an emasculated version of the Clause was included in the Preamble; it omits the references both to custom and to international law, perhaps because the diplomatic conference that adopted it was reluctant to impose extensive obligations on States with regard to domestic conflicts[70]. That version simply states: "Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience."[71]

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67. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996* 226, 406 (8 July) (Shahabuddeen, J., dissenting) (hereinafter *Nuclear Weapons*).

68. The distinction between usages and custom is recognized, in the context of the Martens Clause, by the UK Manual, *supra* footnote 54. The Manual states that cases beyond the scope of the Hague Convention remain the subject of customary law and usages. *Id*., para. 5. Usages of war, which exist side by side with the customary and written law of war, are not legally binding but have the tendency to harden into legal rules of warfare. *Id*., para. 2.

69. *Nuclear Weapons* Advisory Opinion, *supra* footnote 67, at 406.

70. See Meron, *supra* footnote 7, at 34, 72.

71. Protocol II, *supra* footnote 51, pmbl.

III. The current significance of the Clause

What, then, does the Martens Clause signify for contemporary humanitarian law? It is generally agreed that the Clause means, at the very least, that the adoption of a treaty regulating particular aspects of the law of war does not deprive the affected persons of the protection of those norms of customary humanitarian law that were not included in the codification. The Clause thus safeguards customary law and supports the argument that what is not prohibited by treaty may not necessarily be lawful. It applies to all parts of international humanitarian law, not only to belligerent occupation. It argues for interpreting international humanitarian law, in case of doubt, consistently with the principles of humanity and the dictates of public conscience. As a customary norm which applies to the use of certain types of weapons, the prohibition of unnecessary suffering, and other fundamental principles of international humanitarian law, the Martens Clause should be taken into consideration in evaluating the legality of weapons and methods of war. In appropriate circumstances, it provides an additional argument against a finding of *non liquet*. It reinforces a trend, which is already strong in international institutions and tribunals, toward basing the existence of customary law primarily on *opinio juris* rather than actual battlefield practice. It also reinforces the homocentric focus of international humanitarian law, while reducing the traditional inter-State emphasis of the law of war and the weight of reciprocity. It serves as a powerful vehicle for Governments and especially NGOs to push the law to reflect human rights concerns. Where there is already some legal basis for adopting a more humanitarian position, the Martens Clause enables decision-makers to take the extra step forward.

In the *Nicaragua* case, the ICJ held that

> "even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence"[72].

In armed conflicts, however, belligerents have strong interests and may be sorely tempted to resort to a restrictive reading of the law of

72. *Military and Paramilitary Activities*, *supra* footnote 21, at 95.

war. Read in light of *Nicaragua,* the Martens Clause may state the obvious, but it does serve a humanitarian purpose and is therefore not redundant.

Nevertheless, the Martens Clause does not allow one to build castles of sand. Except in extreme cases, its references to principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war, especially in contested cases.

The principles of humanity and the dictates of public conscience have been restraining factors on the freedom of States to do what is not expressly prohibited by treaty or custom[73]. The Martens Clause has influenced Governments, international conferences, and the media, and has therefore been a significant factor in the work of international standard-setting conferences, tribunals, and United Nations rapporteurs. I am far less confident, however, that the Martens Clause has had any influence on the battlefield, especially in bloody internal conflicts such as those in Algeria, Congo and Sierra Leone.

Additional prohibitions of particularly objectionable weapons and methods of war can best be attained by applying such generally accepted principles of humanitarian law as the requirements of distinction and proportionality and the prohibition of unnecessary suffering. This is preferable to pushing the Martens Clause beyond reasonable limits. Governments are not yet ready to transform broad principles of humanity and dictates of public conscience into binding law. The US Department of the Army found it difficult to agree on the meaning and application of those principles, stating in a publication that "such broad phrases in international law are in reality a reliance upon moral law and public opinion"[74]. Power and reciprocity, the traditional underpinnings of the law of war, still clash with the ethical normativity of the Martens Clause. As Oscar Schachter observed:

> "It had become evident to international lawyers as it had to others that States that made and applied law were not governed by morality or 'natural reason'; they acted for reasons of power

73. See Louise Doswald-Beck, "International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons", *Int'l Rev. Red Cross*, No. 316, January-February 1997, at 35, 49.

74. 2 US Dept. of the Army, *International Law* 15 (No. 27-161-2-1962), quoted in Meron, *supra* footnote 7, at 36.

> and interest. It followed that law could only be ascertained and determined through the actual methods used by the States to give effect to their 'political wills'."[75]

But other trends are equally visible. A US Department of the Air Force publication, in a statement similarly prepared for reference purposes, attributes several trends to the principle of humanity. These include the creation of such basic norms as the prohibition on the infliction of injury or destruction not actually necessary for the accomplishment of legitimate military purposes, and the prohibition on causing unnecessary suffering. According to this publication, the principles of humanity spawned the requirement of proportionality and confirmed the basic immunity of civilians from attack during armed conflict[76]. Whether one agrees with these comments or not, it is undeniable that the principle of humanity has had a major influence on the development of international humanitarian law and that some humanitarian restraints can be regarded as its offspring.

Given the reality of power, reciprocity, and the interests of the parties involved in armed conflicts, it is a wonder that the Martens Clause has attained such centrality in international discourse and that progress in humanizing international humanitarian law, in which this Clause has played an important role, has been so significant. Although this development could not have occurred without the influence of the ICRC, NGOs, the media, and public opinion, the rhetorical and ethical code words of the Martens Clause itself have clearly exerted a strong pull toward normativity.

D. Applicability of International Humanitarian Law

I. The thresholds of applicability of humanitarian law

The thresholds of applicability of international humanitarian law and the characterization of conflicts are among the most difficult and controversial issues in international humanitarian law. The Geneva Conventions distinguish between international conflicts, as defined in common Article 2, and conflicts not of an international character under common Article 3. Conflicts involving lower intensity vio-

75. Oscar Schachter, *International Law in Theory and Practice* 36 (1991).
76. US Dept. of the Air Force, *supra* footnote 54, at 1-6.

lence that do not reach the threshold of an armed conflict are implicitly distinguished from non-international armed conflicts to which the provisions of that Article are applicable. The Additional Protocols distinguish among international armed conflicts as defined in Article 1 of Protocol I, non-international armed conflicts[77] as defined in Article 1 of Protocol II, and "situations of internal disturbances and tensions", which are below the thresholds of applicability of Protocol II. Article 8 (2) *(f)* of the Rome Statute of the International Criminal Court (ICC) has further complicated the picture by declaring that the provisions in Article 8 (2) *(e)* apply to "armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups". This language draws on the ICTY appellate decision in the *Tadić* case (1995). It should not be considered as creating yet another threshold of applicability, but it may well exacerbate the previous lack of clarity[78].

The characterization of the conflict, or the thresholds, determine which, if any, rules of international humanitarian law will be applicable. The first threshold, common Article 2, determines the parameters of international armed conflicts. The second threshold, common Article 3, determines the applicability of international humanitarian law pertaining to non-international armed conflicts in that Article. Since common Article 3 does not provide for a definition of "conflicts not of an international character", it is easy for Governments to contest the Article's applicability[79]. Even with a better definition of non-international armed conflicts, however, a Government might contend that the Article is not applicable to its territory. Distinguishing between international and non-international conflicts is particularly difficult in contemporary conflict situations, which often present aspects of both. These "mixed" or "internationalized" conflicts create special problems, as illustrated by the con-

77. I.e., conflicts

> "which take place in the territory of a [State] between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

78. Meron, *supra* footnote 8, at 309.

79. Minimum Humanitarian Standards: Analytical Report of the Secretary-General Submitted Pursuant to Commission on Human Rights Resolution 1997/21, UN doc. E/CN.4/1998/87, para. 74 (1998).

tradictory decisions initially rendered by different Chambers of the ICTY on the characterization of the conflicts in the former Yugoslavia. There is no agreed-upon mechanism available for characterizing situations of violence.

The threshold triggering the application of Additional Protocol II is very high. The Protocol applies to "situations at or near the level of a full-scale civil war" [80] or belligerency. But States involved rarely recognize such situations. In practice, therefore, Protocol II has seldom been formally applied. Even in international armed conflicts, the applicability of the Fourth Geneva Convention has been contested (in the West Bank, by Israel; in Kuwait, by Iraq; in East Timor, by Indonesia). These are situations in which the applicability of the Geneva Conventions as a whole or of common Article 3 has been denied. The principal difficulty regarding the application of international humanitarian law has been, as George Aldrich observed, the refusal by States

> "to apply the conventions in situations where they should be applied. Attempts to justify such refusals are often based on differences between the conflicts presently encountered and those for which the conventions were supposedly adopted" [81].

As Richard Baxter noted 30 years ago, "[t]he first line of defense against international humanitarian law is to deny that it applies at all" [82].

Fortunately, thresholds of applicability have recently been blurred and, at times, deliberately disregarded. The, as yet unpublished, ICRC study on rules of customary humanitarian law distinguishes only between international and non-international armed conflicts. It does not adopt the three-tiered approach of the Geneva Conventions and the Additional Protocols. Moreover, the ICRC study seeks a broader recognition that many rules are applicable both to international and to non-international conflicts. Many military manuals do not explicitly make the distinction between rules applicable in non-international conflicts and rules applicable in international conflicts

80. *Id.*, para. 79.
81. Aldrich, "Human Rights and Armed Conflict: Conflicting Views", 67 *ASIL Proc.* 141, 142 (1973).
82. Baxter, "Some Existing Problems of Humanitarian Law", in *The Concept of International Armed Conflict: Further Outlook* 1, 2 (Proceedings of the International Symposium on Humanitarian Law, Brussels, 1974).

(although they often indicate the relevant treaty provision). Some armed forces now recognize that the same rules of international humanitarian law should be applicable in all situations involving armed conflict. Thus, an Instruction issued by the Chairman of the US Joint Chiefs of Staff states that "[t]he Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized"[83]. The regulations promulgated by the Secretary-General of the United Nations on the observance of international humanitarian law by UN forces restate a broad set of protective norms distilled from humanitarian law treaties without making any distinction between international and non-international conflicts[84]. The US approach brings about a comprehensive application of international humanitarian law and should be emulated by other countries. The trend toward disregarding the need to characterize an armed conflict as international or not is apparent with regard to both general principles of humanitarian law and limitations or prohibitions in the regulation of weapons and methods of war. Both are increasingly being applied to internal armed conflicts governed by common Article 3. Such is the case with the revised Protocol II (to the 1980 Convention on Certain Conventional Weapons) on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices (1996). Some instruments impose rules for all circumstances, including the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997), the Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (a 1972 arms control treaty) and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1993, which concerns both arms control and use).

The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict applies

83. Chairman, Joint Chiefs of Staff Instr. 5810.01, Implementation of the DOD Law of War Program (12 August 1996), quoted in Corn, "When Does the Law of War Apply : Analysis of Department of Defense Policy on Application of the Law of War", *The Army Lawyer*, June 1998, 17.

84. UN Secretary-General, Bulletin on the Observance by UN Forces of International Humanitarian Law, UN doc. ST/SGB/1999/13, reprinted in 38 *ILM* 1656 (1999).

also to non-international armed conflicts [85]. Even more recently, in December 2001, at the suggestion of the United States, the scope of the Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects was amended to apply also to common Article 3 situations. The Convention will thus apply in any international or non-international armed conflict to which the Geneva Conventions apply [86]. The amended Article 1 (7), however, leaves open the scope of the application of future protocols to the Weapons Convention. Unless it otherwise provides, a new protocol would apply to both international and non-international armed conflicts.

The ICTY Appeals Chamber has encouraged the blurring of the distinction between international and non-international conflicts. According to the Chamber, one of the factors leading to this development has been

> "the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, [which] has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between inter-State wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence . . . when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State?" [87]

85. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 38 *ILM* 769 (1999).

86. David Kaye and Steven A. Solomon, "The Second Review Conference of the 1980 Convention on Certain Conventional Weapons", 96 *AJIL* 922, 929 (2002).

87. *The Prosecutor* v. *Tadić,* Case IT-94-AR72, para. 97 (1995).

In the same vein, in the recent case of the *Prosecutor* v. *Delalić* (*Čelebići* case) (Judgment of 20 February 2001), the Appeals Chamber held that because the majority of contemporary conflicts are internal, it would be against the very purpose of the Geneva Conventions, which is to protect the dignity of the human person, to maintain a distinction between the regime of international and of non-international armed conflicts and their criminal consequences.

Progress in the identification of customary rules and in States' readiness to recognize the extension of rules to non-international armed conflicts has been quite remarkable in recent years. The establishment of the two *ad hoc* international criminal tribunals and their subsequent jurisprudence, the drafting and the adoption of the Statute of the International Criminal Court, and even the ICRC study of customary rules of international humanitarian law, have contributed to this progress[88]. A few years ago, the UN Secretary-General concluded that

> "it might well be that the identification of customary rules obviates some of the problems which exist in the scope of the existing treaty law, and will assist in the identification of fundamental standards of humanity"[89].

Finally, the codification in the ICC Statute of the principle that crimes against humanity can be committed in all situations, without regard to thresholds of armed conflicts, and that they can be committed not only by States, but also in furtherance of the policy of non-State entities, is a significant achievement.

II. Personal applicability of humanitarian law treaties: redefining "protected persons"

Because of its inter-State, reciprocity-based origins, the law of war has, traditionally, protected enemy persons, but not nationals of a State from their own Government. Although this paradigm still prevails in some respects, it is changing by means of a process in which the application of the law of war is being assimilated to human rights, a system which addresses responsibility of Govern-

88. Minimum Humanitarian Standards, *supra* footnote 79, paras. 86-87.
89. *Id.*; also Fundamental Standards of Humanity: Report of the Secretary-General Submitted Pursuant to Commission Resolution 1998/29, UN doc. E/CN.4/1999/92, paras. 23-34 (1999).

ments vis-à-vis populations over which they exercise power, authority or jurisdiction, regardless of nationality. Segments of the Geneva Conventions and Protocols, for example, now apply to the relations between a State and its citizens, especially in internal conflicts[90].

Pursuant to Article 4 of the Geneva Convention IV, which reflects the traditional State-centric, reciprocity-based approach of the law of war, the Convention applies only to protected persons, that is, persons who find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals. In such cases, nationals of a State bound by the Convention are protected. Nationals of a neutral State who find themselves in the territory of a belligerent State and nationals of a cobelligerent State are not protected persons while their State of nationality maintains normal diplomatic representation in the State where they are found.

A literal interpretation of Article 4's requirements could lead to a denial of protected status to people in Bosnia-Herzegovina during the war that took place in that country in the early 1990s. In the ICTY Appeals Chamber's 1995 *Tadić* decision, the Appeals Chamber insisted that Bosnian Muslims in the power of Bosnian Serbs were not "persons in the hands of a party to the conflict of which they are not nationals" and thus could not be "protected persons" under Convention IV[91]. In a later (1997) decision, Trial Chamber II, applying a particular interpretation of the *Nicaragua* imputability test, held that "the forces of *Republika Srpska* could not be considered as *de facto* organs or agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)"[92] and hence, the conflict did not constitute an international armed conflict to which the grave breaches provisions of the Geneva Conventions would apply. These decisions were mistaken[93]. Given the character and the scope of FRY's involvement in the conflict, the conflict could be

90. See generally, Meron, *Human Rights in Internal Strife*, *supra* footnote 4, at 30-33.

91. *Prosecutor* v. *Duško Tadić*, Case No. IT-94-1-A72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 76.

92. *Prosecutor* v. *Duško Tadić*, Case No. IT-94-1-T, Judgment of 7 May 1997, para. 607.

93. See Meron, "Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout", 92 *AJIL* 236 (1998), reprinted in Meron, *supra* footnote 8, at 286. On classification of the conflicts in the Former Yugoslavia, see also Meron, "War Crimes in Yugoslavia and the Development of International Law", 88 *AJIL* 79 (1994).

seen as an international armed conflict[94]. Of course, in these cases, two interrelated but distinct questions arose. One concerned the qualification of the conflict as international. The other was the definition of protected persons.

The literal application of Article 4 in the Yugoslav context was unacceptably legalistic. This would also be true of other cases involving conflicts among contesting ethnic or religious groups. In many contemporary conflicts, the disintegration of States and the quest to establish new ones make nationality too impractical a concept on which to base the application of international humanitarian law.

In light of the protective goals of the Geneva Conventions, in situations like the one in the former Yugoslavia, Article 4's requirement of a different nationality should be construed as referring to persons in the hands of an adversary. Indeed, the ICRC's Commentary to Article 4 states that a country's own nationals were excluded from the definition of protected persons to avoid interfering in a State's relations with its nationals[95], a concern obviously not relevant to the circumstances of the *Tadić* case, in which each ethnic group considered members of other ethnic groups as enemies and, often, foreigners. The interpretation of international humanitarian law should be directed at serving protective goals and avoid paralyzing the legal process.

In the *Čelebići* case, an ICTY Trial Chamber moved in this direction. First, it concluded that the conflict was an international one. Second, it clarified the application of the nationality test in Article 4, stressing that

> "[i]t would, indeed, be contrary to the intention of the Security Council . . . for the International Tribunal to deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship status under domestic law".

The Chamber added:

> "This interpretation of the Convention is fully in accordance with the development of the human rights doctrine which has

94. See *id.*
95. *Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, *supra* footnote 19, at 46.

> been increasing in force since the middle of this century. It would be incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of article 4, that was apparently inserted to prevent interference in a State's relations with its own nationals. Furthermore, the nature of the international armed conflict in Bosnia and Herzegovina reflects the complexity of many modern conflicts and not, perhaps, the paradigm envisaged in 1949. In order to retain the relevance and effectiveness of the norms of the Geneva Conventions, it is necessary to adopt the approach here taken." [96]

The purpose of the Geneva Conventions and Protocols is to protect all persons on the adverse side who "find themselves in the hands of a Party to a conflict" as prisoners of war, medical personnel or civilians. Article 50 of Additional Protocol I defines a civilian as

> "any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."

The ICRC Commentary to the Fourth Geneva Convention notes:

> "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no 'intermediate' status; nobody in enemy hands can be outside the law." [97]

In accepting a broader interpretation of the grave breaches provisions, the ICTY in the *Čelebići* case [98] quoted the ICRC Commentary to the Fourth Convention, namely that "the Conventions have been

96. *Prosecutor* v. *Zejnil Delalić et al.*, Case IT-96-21-T, Judgment of 16 November 1998, paras. 263-266 (footnotes omitted).
97. *Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, *supra* footnote 19, at 51.
98. *Prosecutor* v. *Zejnil Delalić et al.*, *supra* footnote 96, paras. 271-273.

drawn up first and foremost to protect individuals, and not to serve State interests" [99].

In the appeal of the *Tadić* case (15 July 1999), the ICTY Appeals Chamber gave its imprimatur to a new interpretation of protected persons [100]. First, departing from the Trial Chamber's use of Nicaragua's imputability test, the Appeals Chamber found that, "for the period material to this case (1992), the armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the FRY". It therefore concluded that "even after 19 May 1992 [declaration by FRY of the withdrawal of its forces from Bosnia] the armed conflict in Bosnia and Herzegovina must be classified as an *international* armed conflict" [101].

It followed that even if the victims and the perpetrators were nationals of Bosnia and Herzegovina, the Bosnian Serb forces acted as *de facto* organs of another State, the FRY. Since the victims found themselves in the hands of armed forces that were in effect of a State of which they were not nationals, they were therefore protected persons.

Abandoning the literal/legalistic approach requiring different nationalities for the definition of protected persons, the Appeals Chamber held that Article 4 of Geneva Convention IV was predicated on conditions of effective diplomatic protection and allegiance. The formal bond of nationality was less important than substantial allegiance, which could be based on ethnicity. Since the victims did not owe allegiance to and did not enjoy diplomatic protection from the authority of the Republika Srpska, they could be regarded as possessing different nationalities for Article 4's purposes [102]. It followed, therefore, that even if all the nationals of the FRY had the same nationality, as they had before the adoption of a citizenship act by Bosnia and Herzegovina, Article 4 would apply and the victims would still be protected persons. The Appeals Chamber stated:

> "This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-

99. *Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, *supra* footnote 19, at 21.

100. *Prosecutor* v. *Duško Tadić*, International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber), Case No. IT-94-1-A, Judgment of 15 July 1999.

101. *Id.*, at paras. 160, 162.

102. *Id.*, at para. 169.

day armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the ground for allegiance . . . Allegiance to a party to the conflict and, correspondingly, control by this Party over persons in a given territory may be regarded as a crucial test."[103]

"The Bosnian armed forces acted as *de facto* organs of another State, namely, the FRY. Thus, the requirements set out in Article 4 of Geneva Convention IV are met: the victims were 'protected persons' as they found themselves in the hands of armed forces of a State of which they were not nationals.

It might be argued that before 6 October 1992, when a 'Citizenship Act' was passed in Bosnia and Herzegovina, the nationals of the FRY had the same nationality as the citizens of Bosnia and Herzegovina, namely the nationality of the Socialist Federal Republic of Yugoslavia. Even assuming this proposition is correct, the position would not alter from a legal point of view . . . Article 4 . . ., if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy diplomatic protection, and correlatively are not subject to the allegiance and control of the State in whose hands they may find themselves . . ."[104]

Subsequent jurisprudence has confirmed the *Tadić* approach. In *Prosecutor* v. *Aleksovski*, the Appeals Chamber agreed that "in certain circumstances, Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors"[105]. In the *Čelebići* case, the Appeals Chamber similarly stated that

"[t]he nationality of the victims for the purpose of the applica-

103. *Id.*, at para. 166.
104. *Id.*, at paras. 167-168.
105. Case IT-95-14/1-A, Judgment of 24 March 2000, para. 151.

> tion of Geneva Convention IV should not be determined on the basis of formal national characterisations, but rather upon an analysis of substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State" [106].

These decisions reflect a realistic concern for the protection of victims of armed conflicts and enhance the humanization of international humanitarian law.

E. Protection of Victims

I. Individual rights and duties and the inalienability of rights

While even the early Geneva Conventions conferred protections on individuals, as well as on States, whether those protections belonged to the contracting States or to the individuals themselves was unclear at best. The treatment to which those persons were entitled was not necessarily seen as creating a body of rights. The 1929 Geneva Prisoners of War Convention paved the way for recognition of individual rights by using the term "right" in several provisions [107]. It was not until the 1949 Conventions, however, that "the existence of rights conferred on protected persons was affirmed" [108] through several key provisions. These provisions are of cardinal importance: they clarified that rights are granted to the protected persons themselves and they introduced into international humanitarian law or the law of war an analogy to *jus cogens*, which is so central to human rights law. This analogue in humanitarian law preceded by two decades the recognition of *jus cogens* in the Vienna Convention on the Law of Treaties. According to common Article 6/6/6/7, treaties or agreements by which either States or the individuals themselves purport to restrict the rights of protected persons under the Conventions will have no effect.

Humanitarian law's notion of *jus cogens* differs conceptually from that in Article 53 of the Vienna Convention on the Law of Treaties.

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106. Case No. IT-96-21-A, Judgment of 20 February 2001, para. 84.
107. *Supra* footnote 30, Arts. 42, 62 and 64.
108. *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, *supra* footnote 24, at 82.

Like *jus cogens*, it is supposed to bring about the nullity of the proscribed agreements. Unlike *jus cogens*, however, it derives from explicit provisions in the Geneva Conventions, raising potential conflicts between invalidity of the subsequent agreement and responsibility for violations of the Conventions. Of course, most provisions of the Geneva Conventions are declaratory of customary law and some, but only some, rise to the level of *jus cogens*. Agreements restricting rights of protected persons may thus in some, but not all, cases violate the classic concept of *jus cogens*.

Common Article 6/6/6/7 was adopted in reaction to agreements during World War II between belligerents, such as that between Germany and the Vichy Government which, under pressure by the former, deprived French prisoners of war of certain protections under the 1929 POW Convention. States participating in the 1949 conference resolved not to leave the product of their labour to "the mercy of modifications dictated by chance, events or under the pressure of wartime circumstances"[109]. Common Article 7/7/7/8 further provided that

> "[protected persons] may in no circumstances renounce in part or in entirety *the rights secured to them* by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be."

A proposal at the Conference to replace the phrase "confers upon them" in common Article 6/6/6/7 by the phrase "stipulates on their behalf" was rejected and the wording proposed in the ICRC draft was maintained[110]. The ICRC Commentary recognizes that:

> "In selecting this term the International Committee had doubtless been influenced by the concomitant trend of doctrine, which also led to the universal proclamation of Human Rights, to define in concrete terms a concept which was implicit in the earlier Conventions. But it had at the same time complied with the unanimous recommendation of the Red Cross Societies, meeting in conference in Geneva in 1946, to confer upon the rights recognized by the Conventions 'a personal and intangible

109. *Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, *supra* footnote 19, at 71.

110. *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, *supra* footnote 24, at 83.

character allowing' the beneficiaries 'to claim them irrespective of the attitude adopted by their home country'." [111]

The ICRC Commentary states that the prohibition upon renunciation of rights is absolute. This prohibition was adopted in light of experience showing that persons may be pressured into making a particular choice, but that proving duress or pressure is difficult. Several provisions of the Geneva Conventions, Articles 5 and 27 of the Fourth Geneva Convention for example, similarly use the language of "rights", "privileges" "entitlements" or "claims". States may not waive such rights. Article 5 of the Third Geneva Convention confers on persons who have committed belligerent acts and fallen into the hands of the enemy the protection of the Convention until such time as their status has been determined by a competent tribunal. Obviously, such persons thus have the right of access to a competent tribunal. Article 75 of Additional Protocol I contains a broad catalogue of human rights to which individuals are entitled even against their own State.

The principle that States may through treaties grant to individuals direct rights or impose direct obligations on them without a previous act of transformation of norms of international law into national law was recognized already by the Permanent Court of International Justice in its Advisory Opinion concerning *Jurisdiction of the Courts of Danzig* (1928) [112]. Direct rights for individuals, and sometimes direct obligations, are now commonplace in human rights treaties and declarations. They are invoked and enforced by international bodies and, frequently, by national courts. The Permanent Court's assumption, in 1928, was that such rights and duties as were conferred upon individuals by treaties would be enforced by national courts.

The law of war has always operated on the assumption that its rules bind not only States but also their nationals [113]. Traditionally,

111. *Id.*, citing the Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems relative to the Red Cross (Geneva, 26 July-3 August 1946), Geneva, 1947, p. 71.

112. *PCIJ, Ser. B. No. 15*, at 17-18 (Advisory Opinion of 3 March 1928); Rosalyn Higgins, "Conceptual Thinking about the Individual", in *International Law: A Contemporary Perspective* 476 (Richard Falk, Friedrich Kratochwil and Saul H. Mendlovitz, eds., 1985); Janis, "Individuals as Subjects of International Law", 17 *Cornell Int'l LJ* 61 (1984), For a discussion of the rights and obligations of individuals in human rights and humanitarian law, see Meron, *Human Rights in Internal Strife*, *supra* footnote 4, at 33-40.

113. Lassa Oppenheim, 1 *International Law* 341 (Hersch Lauterpacht, ed., 1955).

violations of the laws and customs of war by soldiers could only be prosecuted by either their national State or the captor State. Increasingly, however, violations of the laws and customs of war, genocide and crimes against humanity are recognized as justifying third-country prosecution under the principle of universality of jurisdiction [114]. Under the Geneva Conventions, all Contracting Parties have the duty either to prosecute or to extradite persons alleged to have committed grave breaches, or to have ordered that they be committed.

The creation of the two *ad hoc* international criminal tribunals for the former Yugoslavia and for Rwanda, and the adoption, in July 1998, of the Rome Statute of the International Criminal Court signal an important change in the status of individuals as subjects of international law. Their violations of the law of war, and of certain fundamental human rights, including those protected by common Article 3, and crimes against humanity, which could under some national laws be prosecuted before national courts [115], can now be prosecuted directly before international tribunals without the interposition of national law. This is an important advance, especially given the high standards of due process applied by international courts. Under the Rome Statute establishing a crime against humanity no longer requires any nexus with an armed conflict. The jurisprudence of the ICTY recognizes that such a nexus is not required by customary law, even though it is required by its Statute. The norms protected in are in fact indistinguishable from fundamental human rights. International humanitarian law/law of war and their institutions have thus become central to the protection of human rights. Moreover, the establishment of direct criminal responsibility for members of rebel forces and members of organizations committing crimes against humanity will lessen the impact of the theoretical difficulties of coherently explaining the obligations of such persons under international law when acting for non-State entities [116].

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114. Meron, "International Criminalization of Internal Atrocities", 89 *AJIL* 554 (1995), *reprinted in* Meron, *supra* footnote 8, at Chap. XIII.

115. E.g., Under the Criminal Code of the Socialist Republic of Yugoslavia, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor* v. *Tadić,* Case IT-94-AR72, para. 135 (1995).

116. *Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, *supra* footnote 19, at 36; Baxter, "*Jus in Bello Interno:* The Present and Future Law", in *Law and Civil War in the Modern World* 518, 527-528 (John Moore, ed., 1974).

II. Repatriation of prisoners of war and personal autonomy

Human rights, personal autonomy and freedom of choice were critical not only in the drafting of the 1949 Geneva Conventions, but also in their evolving interpretation. The notion of rights, and the idea that those rights belong to the individual, particularly affected the interpretation of the Third Convention's language governing the repatriation of prisoners of war at the end of hostilities. The Regulations annexed to the Hague Convention IV on the Laws and Customs of War (1899/1907) provided only that the repatriation of prisoners of war should be carried out as quickly as possible after the conclusion of peace [117]. But as World War I had shown, the conclusion of peace could come considerably later than the actual end of hostilities. The 1929 Convention relative to the Treatment of Prisoners of War attempted therefore, "to expedite repatriation by stipulating that it should, if possible, take place as soon as an armistice had been concluded" [118]. World War II further "exposed the inadequacies of both the Hague and the Geneva formulation" [119]. No formal armistice or peace treaty was concluded at the end of the war, and only the Paris Peace Treaties of 1947 and the 1955 Austrian State Treaty included clauses concerning the repatriation of prisoners of war [120].

Article 118 of the Third Geneva Convention therefore provides that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities" [121]. Their repatriation is not conditional on the conclusion of an armistice or a peace treaty [122]. If no agreement is concluded, prisoners of war must be

117. Hague Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention No. IV, *supra* footnote 27, Art. 20.

118. *Commentary on the Geneva Convention (III) relative to the Treatment of Prisoners of War* 541 (Jean de Preux, ed., Jean Pictet, gen. ed., 1960). See Convention relative to the Treatment of Prisoners of War, 27 July 1929, *supra* footnote 30, Art. 75.

119. Dinstein, "The Release of Prisoners of War", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* 37, 43 (Christophe Swinarski, ed., 1984).

120. *Id.*, at 44.

121. Geneva Convention relative to the Treatment of Prisoners of War, *supra* footnote 37, Art. 118. See generally, Christiane Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities: A Study of Article 118, Paragraph 1 of the Third Geneva Convention relative to the Treatment of Prisoners of War* (1977).

122. Dinstein, "The Release of Prisoners of War", *supra* footnote 119, at 44.

released unilaterally [123]. In practice, however, negotiations and some kind of mutuality have proved necessary.

The language of Article 118 is categorical and no reference is made to the wishes of the prisoners themselves, thus presenting a major human rights dilemma. The prisoner has a clear right to be repatriated; the detaining country has a similar obligation to return the prisoner to his country. These provisions protect prisoners from pressure by the detaining country to reject repatriation. But they take no account of a prisoner of war who genuinely refuses to be repatriated to his own country, and especially a prisoner who fears persecution in that country for reasons such as race, religion, or political views. The Soviet Union's insistence on the unconditional repatriation from Germany of World War II Soviet prisoners was of course a major factor in the adoption of Article 118.

The most difficult question raised by Article 118 is whether prisoners of war may be repatriated without their consent. Should rights of the State of nationality prevail over personal choice (leaving aside the question of the right to asylum)? At the 1949 Conference, forced repatriations were not condemned [124]. A large majority rejected an Austrian proposal to add to Article 118: "prisoners of war shall be entitled to apply for their transfer to any other country [than their country of origin] which is ready to accept them" [125]. The reasons for this rejection were, however, related to the availability of asylum and the fear of abuse by the detaining powers [126].

The repatriation of North Korean and Chinese prisoners of war was one of the major issues in the armistice negotiations at the end of the hostilities of the Korean War [127].

North Korea, China and the USSR contended that under Article 118 of the Third Geneva Convention, the obligation to repatriate all prisoners of war was absolute and that Article 7 provided that prisoners of war could not waive their rights. The UN Command

123. *Id.*

124. Charmatz and Witt, "Repatriation of Prisoners of War and the 1949 Geneva Convention", 62 *Yale LJ* 391, 401 (1953).

125. *Commentary on the Geneva Convention (III) relative to the Treatment of Prisoners of War*, *supra* footnote 118, at 542.

126. Mayda, "The Korean Repatriation Problem and International Law", 47 *AJIL* 414, 433 (1953); also Charmatz and Witt, *supra* footnote 124, at 402-405.

127. Special Report by the Unified Command under the United States, Letter dated 18 October 1952 from the Chairman of the United States Delegation to the General Assembly of the United Nations, addressed to the Secretary-General, 18 October 1952, UN doc. A/2228, at 2-3.

argued that "forcible repatriation was inconsistent with the humanitarian basis, and thus the spirit, of the Geneva Convention"[128].

As Mayda has observed, the interpretation of Article 118 rested on whether the right corresponding to the duty of the State to repatriate prisoners of war was "a right of the prisoner to be repatriated" or "the right of his State to have him repatriated". The USSR's view was that the duty is owed to the State of origin, and consequently, "they must be repatriated 'irrespective of their wishes'"[129]. The other view, based on Article 6 (rights conferred on POWs), could lead to the conclusion that

> "the convention must be read in the context of contemporary international law which has established human rights, such as personal freedom and inviolability, as legal rights under the United Nations Charter, and is in the stage of their specification in the Declaration of Human Rights and the *de lege ferenda* Covenant on Human Rights"[130].

The General Assembly supported the Unified Command's position and affirmed that "force shall not be used against prisoners of war to prevent or effect their return to their homelands, and that they shall at all times be treated humanely"[131]. The issue was finally resolved in mid-1953 by a special agreement. "[T]he prisoners who [had] not exercised their right to be repatriated"[132] were taken into the custody of a Neutral Nations Repatriation Commission. Representatives of the States of origin were entitled to have access to the prisoners, explain their rights and inform them about "their full freedom to return home". Dinstein has noted that

> "the point of departure is that every prisoner of war has, by right, a free choice whether or not to return to his motherland. . . . The option of repatriation is granted to the prisoner of war individually rather that to one of the two concerned States (the Power of Origin and the Detaining Power)"[133].

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128. *Id.*, at 18-19.
129. Mayda, *supra* footnote 126, at 435.
130. *Id.*
131. General Assembly resolution 610 (VII), 7 *GAOR* (Supp. No. 20), at 3, UN doc. A/2361, para. 2. (1952).
132. Agreement on Prisoners of War, signed at Panmunjom, 8 June 1953, reprinted in 47 *AJIL*, Supp., 180, 182.
133. Dinstein, *supra* footnote 119, at 41.

Although the initial position of the United Nations Command was the principle of "voluntary repatriation", the governing principle was later transformed into the more limited "no forced repatriation", i.e., repatriation that was not resisted by force.

The question of forced repatriation arose again after each of the two Gulf Wars [134]. Both the ICRC and UN investigators found that Iraqi prisoners taken during the Iran-Iraq war were "subjected to ideological and political pressure, contrary to the Convention" and "forced [to participate] in demonstrations decrying the Iraqi Government" [135]. Some Iranian prisoners asked UN investigators whether at the end of the hostilities they would be returned to Iran without their consent [136]. The ICRC questioned prisoners as to their wishes. Those wishing to remain in the territory of the detaining State were allowed to do so [137]. Noting that some Iraqi prisoners of war had been released locally without notification to the ICRC or to Iraq, the ICRC considered that "these people retain prisoner-of-war status and must be allowed to decide, in particular when a general repatriation takes place, whether or not they wish to return to their country of origin" [138].

Thus, from a "right not to be repatriated by force" in the Korean war, the practice has evolved to a "right of free choice". That latter right was applied after the Second Gulf War, when the ICRC interviewed, without witnesses, Iraqi prisoners of war "to ascertain the willingness of each prisoner to be repatriated" [139]. Prisoners who had not been repatriated at the end of the repatriations period and were still in camps came under the protection of the Fourth Geneva Convention as civilians and were granted the status of refugees by Saudi Arabia [140].

In the Dayton Peace Agreement, the ICRC was similarly entrusted with the task of privately interviewing and determining the "onward

134. See generally, Meron, "Prisoners of War, Civilians and Diplomats in the Gulf Crisis", 85 *AJIL* 104 (1991).

135. Quigley, "Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War after the Close of Hostilities", 5 *Am. UJ Int'l & Pol'y* 73, at 81 (citing ICRC communiqués) (1989). Also, Report of the Mission despatched by the Secretary-General on the situation of prisoners of war in the Islamic Republic of Iran and Iraq, UN. doc. S/20147, Annex, para. 78 (1988).

136. Quigley, *supra* footnote 135, at 82.

137. *Id.*; International Committee of the Red Cross, *1991 Annual Report*, at 112.

138. International Committee of the Red Cross, *1989 Annual Report*, at 87.

139. International Committee of the Red Cross, *1991 Annual Report*, at 100.

140. *Id.*, at 102.

destination of each prisoner". The Agreement further provided that "the Parties shall take no reprisals against any prisoner or his/her family in the event that a prisoner refuses to be transferred" [141].

Practice has in fact recast Article 118. Interpretation has drastically modified its categorical language, yielding to an individual autonomy based approach. This adjustment exemplifies the potential of developing the law through interpretation and custom. Of course, respecting the will of the prisoner of war regarding repatriation is predicated both on assurances that the detaining power will not abuse the system by unduly influencing the prisoner's choice and on the readiness, at least of some Governments, to allow the prisoners to enter or stay in their countries.

III. Convergence of protection afforded under human rights and international humanitarian law

Human rights law has influenced the provisions of the Geneva Conventions and of the Additional Protocols. Parallelism of content was attained in such matters as: right to life; prohibition of torture, cruel, inhuman or degrading treatment or punishment; arbitrary arrest or detention; discrimination on grounds of race, sex, language or religion; and due process of law [142]. This parallelism and growing convergence enriches humanitarian law, as it does international human rights. Thus, for example, common Article 3 refers to a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" with regard to trials in non-international armed conflicts. Similarly, Article 84 of Geneva Convention III states that a prisoner of war may be tried only by a court that offers "essential guarantees of independence and impartiality as generally recognized". These terms will inevitably be interpreted and applied by drawing on human rights law. To the extent that the Fourth Geneva Convention cannot adequately resolve problems faced by prolonged military occupations [143], the applicable human rights protections should be resorted to to fill the void.

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141. General Framework Agreement for Peace in Bosnia and Herzegovina, done at Paris, 14 December 1995, Annex 1A, Military Aspects of the Peace Settlement, reprinted in 35 *ILM* 75, 91 (1996), Art. IX.

142. Meron, *Human Rights in Internal Strife*, *supra* footnote 4, at 12-28.

143. Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories since 1967", 84 *AJIL* 44, 70-74 (1990).

The ICJ has authoritatively determined that human rights provisions continue to apply in time of armed conflict, unless a party has lawfully derogated from them. In its Advisory Opinion on *Nuclear Weapons*, the ICJ stated:

> "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in time of national emergency" [144].

The Court also clarified the relationship between the right to life under Article 6 of the ICCPR and the protection of life under international humanitarian law. On the basis of the legislative history of that Article, most commentators agree that

> "to the extent that in present international law lawful acts of war are recognized, such lawful acts are deemed not to be prohibited by Article 6 . . . if they do not violate internationally recognized laws and customs of war" [145].

The ICJ gave its imprimatur to this position. It held that a *renvoi* to the applicable *lex specialis,* the law of armed conflict, was necessary in order to determine the legality of a deprivation of life. While the prohibition of arbitrary deprivation of life continues to apply, the test of such an act is the province of the *lex specialis*

> "namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself" [146].

In the *Furundžija* case, the ICTY emphasized that the general principle of respect for human dignity is the basic underpinning and indeed

144. *Nuclear* Weapons Advisory Opinion, *supra* footnote 67, at 240.

145. Respect for Human Rights in Armed Conflicts. Report of the Secretary-General, UN doc. A/8052, at 104 (1970); see also *id.*, at 98-101, 37 UN, *GAOR* (Supp. No. 40) at 93, UN doc. A/37/40 (1982) (general comments of the Human Rights Committee). See also Meron, *Human Rights in Internal Strife*, *supra* footnote 4, at 24.

146. *Supra* footnote 67.

the very raison d'être of international humanitarian law and human rights law [147]. Similarly in the *Čelebići* case, the Tribunal stated that

> "The four Geneva Conventions of 1949 . . . provide the basis for the conventional and much of the customary international law for the protection of victims of armed conflict." [148]

In the *Abella* case, the Inter-American Commission of Human Rights argued that its authority to apply international humanitarian law derived from the overlap between norms of the American Convention and the Geneva Conventions. The Commission stated:

> "Indeed, the provisions of common Article 3 are essentially pure human rights law. Thus, as a practical matter, application of common Article 3 by a State party to the American Convention involved in internal hostilities imposes no additional burdens on [a State], or disadvantages its armed forces *vis-à-vis* dissident groups." [149]

Because human rights law — at a minimum its non-derogable core — continues to apply in time of armed conflict, gaps in protection can be filled where, for some reason, protection offered by the law of war is unavailable. Thus, persons who are not protected persons during an armed conflict because their Government maintains normal diplomatic relations with the power in whose hands they find themselves, would still benefit from at least the non-derogable provisions of the Political Covenant, if the State concerned is a party. Conversely, a person could benefit from the protection of humanitarian law, which does not allow for derogations on grounds of emergency and which was developed precisely for situations of highest emergency [150].

147. *Prosecutor* v. *Anto Furundžija*, Case IT-95-17/1-T, Judgment of 10 December 1998, para. 183.

148. *Prosecutor* v. *Zejnil Delalić et al.*, *supra* footnote 96, para. 200.

149. *Abella et al.* v. *Argentina*, *supra* footnote 25, para. 158, note 19. This position was criticized as failing to distinguish between the substance of norms and their supervisory mechanisms. Zegveld, "The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case", *Int'l Rev. Red Cross*, No. 324, September 1998, at 505.

150. Humanitarian law contains, however, some exceptions based on imperative military reasons, or military necessity, or reasons of security (e.g. Articles 49 (2) 64 (1) or 78 (1) of the Fourth Geneva Convention, *supra* footnote 37), or specific derogations with regard to particular persons (e.g., Article 5 of the Fourth Convention or Article 45 (3) of Additional Protocol I, *supra* footnote 38), derogations rather similar to limitation clauses under the Political Covenant.

As previously noted, the ICJ in the Advisory Opinion on *Nuclear Weapons* recognized that human rights do not cease to apply in situations of armed conflicts — although some human rights are subject to derogations on ground of emergency. This, for some time now, has been both the accepted theory and the growing practice. It was soon after the Tehran International Conference on Human Rights (1968) that the United Nations General Assembly adopted resolution 2444 (XXIII) entitled *Respect for Human Rights in Armed Conflicts,* which "recognized the necessity of applying basic humanitarian principles in all armed conflicts" [151]. The subsequent reports of the Secretary-General on human rights in armed conflicts, which were based on the UN Charter, the Universal Declaration and the Covenants, emphasized that human rights were applicable in times of armed conflicts [152]. The 1970 report noted that:

> "United Nations instruments already in force and those which still require ratifications in order to become fully operative may be invoked to protect human rights at all times and everywhere and thus complete in certain respects and lend support to the international instruments especially applicable in conditions of war or armed conflicts." [153]

A legal opinion of the US State Department considered that grave breaches of the Geneva Conventions could also be seen as "gross violations of human rights" for the purposes of the Foreign Assistance Act (1974), which provides that security assistance to any Government "which engages in a consistent pattern of gross violations of internationally recognized human rights" shall be reduced or terminated [154].

As early as 1967, the Security Council considered that "essential and inalienable human rights should be respected even during the vicissitudes of war" [155]. The Security Council resolution 1041 (1996)

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151. General Assembly resolution 2444 (XXIII), 23 UN, *GAOR* (Supp. No. 18), at 50, UN doc. A/7218, preamble (1969).

152. Respect for Human Rights in Armed Conflicts: Report of the Secretary-General, UN doc. A/7720, paras. 23-31 (1969); Respect for Human Rights in Armed Conflicts: Report of the Secretary-General, UN doc. A/8052, Annex I (1970).

153. *Id.*, A/8052, para. 16.

154. Memorandum by Monroe Leigh, Legal Adviser of the State Department (1975), reprinted in US Department of State, *Digest of United States Practice in International Law* 221-222 (prepared by Eleanor C. McDowell, 1975).

155. Security Council resolution 237 (14 June 1967), preamble.

illustrates the parallel application of human rights law and humanitarian law in situations of armed conflicts. That resolution called on all factions in Liberia to respect both humanitarian law and human rights law in Liberia [156]. Under a general item entitled "protection of civilians in armed conflict", the Security Council, in a Presidential statement,

> "condemn[ed] attacks against civilians, especially women, children and other vulnerable groups, including also refugees and internally displaced persons, in violation of the relevant rules of international law, including those of international humanitarian and human rights law" [157].

A number of human rights guarantees have been applied to prisoners of war in situations of international armed conflicts. Missions despatched by the Secretary-General to enquire into the situation of prisoners of war in Iran and Iraq in 1985 and 1988 essentially investigated alleged violations of the Third Geneva Convention. The bulk of their reports thus concerned conditions of detention and alleged ill-treatment. But they also dealt with liberty of opinion and liberty of conscience, because Iran was accused of indoctrinating and "brainwashing" Iraqi prisoners. Freedom of conscience and of opinion is not specifically protected under the Third Geneva Convention. (At the time of the negotiation of the Convention, it seemed too difficult to define what type of propaganda should be prohibited [158].) But it could be encompassed by Article 14 (respect for the person of prisoners). The 1985 Mission demanded that:

> "The freedom of thought, religion and conscience of every prisoner of war should be strictly respected. No ideological, religious or other pressure should be brought to bear on prisoners." [159]

As for Iraq, the Parliamentary Assembly of the Council of Europe condemned "Iraq's record of disregard for human rights and inhu-

156. Security Council resolution 1041 (29 January 1996); also resolutions 1059 (31 May 1996), 1071 (31 August 1996) and 1083 (27 November 1996).

157. Security Council Presidential Statement 1999/6 (12 February 1999), para. 2; also para. 7.

158. *Commentary on the Geneva Convention (III) relative to the Treatment of Prisoners of War*, *supra* footnote 125, at 144-145.

159. Report of a Mission Dispatched by the Secretary-General to Inquire into the Situation of Prisoners of War in the Islamic Republic of Iran and the Republic of Iraq, UN doc. S/16962, Annex, para. 294 (1985).

man treatment of prisoners of war . . .[160]. The Inter-American Commission, in its country reports, discussed situations involving armed conflicts, e.g., in the Dominican Republic, El Salvador, and Haiti following the military coup. In response to arguments that human rights violations are an inevitable by-product of conflict involving armed groups, the Commission emphasized that unqualified respect for human rights must be a fundamental part of any anti-subversive strategies[161].

IV. Application of humanitarian law by human rights organs

The Commission on Human Rights has condemned violations of human rights and humanitarian law, both in international and non-international conflicts, e.g., in resolutions on Kuwait, the former Yugoslavia, and Rwanda[162]. The report by a Special Rapporteur designated at the request of the Commission on Human Rights to report on "human rights violations committed in occupied Kuwait by the invading and occupying forces of Iraq", is of particular importance. In defining his mandate, the Rapporteur noted that the Commission's resolution referred to

> "the principles embodied in the Charter of the United Nations, the International Covenants on Human Rights and other relevant legal instruments, including civil and political rights, economic, social and cultural rights, and principles of humanitarian law".

He concluded that his mandate "should be understood in a broad sense as to include all violations of all guarantees of international law for the protection of individuals relevant to the situation"[163].

Even in the absence of explicit mandates, human rights rapporteurs have referred to humanitarian law to examine issues that

160. Council of Europe, Parliamentary Assembly, 42nd Ordinary Sess. (Third part), Texts Adopted by the Assembly, Resolution 954 (1991) on the Gulf Conflict, para. 5 (1991).

161. Annual Report of the Inter-American Commission of Human Rights (1990-1991), OEA/Ser.L/V/II.79 Rev. 1, at 512 (1991).

162. UN Commission on Human Rights, *inter alia*, resolution 1991/67, ECOSOC, *Off. Rec.* (Supp. No. 2), at 154, UN doc. E/1991/22, E/CN.4/1991/91 (1991) (on Kuwait); resolution 1995/91, ECOSOC, *Off. Rec.* (Supp. No. 4), at 275, para. 2, UN doc. E/1995/23, E/CN.4/1995/176 (1995) (on Rwanda); resolution 1995/89, *id.*, at 262, para. 10 (on Bosnia-Herzegovina).

163. Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, UN doc. E/CN.4/1992/26, para. 12 (1992).

human rights law can address only indirectly, such as the use of certain means or methods of warfare including chemical weapons or land mines. The Special Rapporteur on Iraq thus sought authority in the Land Mines Protocol (II) to the Conventional Weapons Convention (1980) and the Geneva Protocol (1925) [164]. Similarly, when non-State entities committed objectionable conduct, special rapporteurs have looked to humanitarian law. For the Special Rapporteur on Sudan, common Article 3 served as the basis for the condemnation of indiscriminate attacks, rape, mutilation, looting, the seizing of an ICRC airplane and the detention of the crew and passengers as hostages by the Sudan People's Liberation Army (SPLA) [165].

When human rights law and humanitarian law rules could be applied cumulatively, UN rapporteurs invoked humanitarian rules when their application seemed more pertinent to the situation prevailing in the country concerned. For example, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, in his report on Colombia (1990), observed that

> "in the counter-insurgency campaign, the forces of law and order were failing to comply with certain basic principles of international humanitarian law, such as the principle of not engaging in violence against the civilian populations" [166].

He named such violations as killings of civilians by military units, summary executions and forced displacement. A particular conduct may thus violate both human rights and humanitarian law [167] without being subject to limitations or derogations allowed by human rights law.

Since the 1970s, the United Nations has concerned itself with important aspects of international humanitarian law in human rights contexts, in particular through the activities of the Human Rights Commission and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Thematic rapporteurs have been requested to analyse issues that mainly concern situations of armed conflict. Such themes as the use of mercenaries, sexual violence

164. O'Donnell, "Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms", *Int'l Rev. Red Cross*, No. 324, September 1998, at 481, 482-483 (citing UN doc. E/CN.4/1993/45, para. 113, and E/CN.4/1994/58, paras. 112-116).

165. *Id.*, at 489 (citing UN doc. E/CN.4/1994/48, para. 115, and E/CN.4/1997/58, para. 27).

166. *Id.*, at 485 (citing UN doc. E/CN.4/1990/22/Add.1, para. 50).

167. *Id.*, at 485-486.

during armed conflicts and children in armed conflicts have been the subject of special reports to the Commission and the General Assembly. At times, country rapporteurs have also made extensive reference to humanitarian law norms in their reports.

Although most human rights implementation bodies lack an explicit mandate to apply international humanitarian law, atrocities in the context of armed conflicts have often led them to examine certain abuses in the light of humanitarian law [168]. Reference to international humanitarian law by human rights rapporteurs has not gone unchallenged. The Government of Turkey questioned the mandate of the Rapporteur on Extrajudicial, Summary or Arbitrary Executions to address aspects of the conflict with the Kurdistan Workers' Party, stating that UN human rights mechanisms were not intended to "encroach upon the field of international humanitarian law, unless specifically provided otherwise by that law" [169].

Some UN human rights bodies have been given mandates covering both human rights and humanitarian law violations. A case in point is the UN Observer Mission in El Salvador (ONUSAL) [170]. The parties to the San José Agreement (1991) requested the United Nations to start its mission before a cease-fire was concluded. As a result, ONUSAL's first reports extensively discussed humanitarian law violations by both parties [171]. The Mission endeavoured to investigate such violations of international humanitarian law as

— attacks on the civilian population as such and on civilians;
— acts or threats of violence whose main purpose is to intimidate the civilian population;
— acts involving attacks on material goods essential to the survival of the civilian population or the obstruction of relief operations; and
— arbitrary relocation of the civilian population" [172].

The Mission also investigated summary executions by the guerillas and the indiscriminate use of land mines.

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168. *Id.*, at 482.
169. Extrajudicial, Summary or Arbitrary Executions. Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, UN doc. E/CN.4/1996/4, para. 493.
170. O'Donnell, *supra* footnote 164, at 484. The Mission was established by Security Council resolution 693 (20 May 1991).
171. First Report of the United Nations Observer Mission in El Salvador, UN doc. A/45/1055-S/23037, Annex, paras. 17-19 (1991).
172. *Id.*, paras. 50-52.

The United Nations Verification Mission in Guatemala (MINUGUA) was established with a mandate to verify implementation of the Comprehensive Agreement on Human Rights, signed by the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG) in 1994. The Agreement provided that

> "[u]ntil such time as the Agreement on a Firm and Lasting Peace is signed and, hence, as long as military operations continue, the Mission must verify the commitment made by both parties to respect the human rights of wounded, captured or disabled combatants and to put a stop to the suffering of the civilian population".

The parties further agreed that they understood human rights as meaning those rights which are recognized in the Guatemalan legal order, including international treaties, conventions and other instruments on the subject to which Guatemala is a party [173].

In a case brought before the Inter-American Commission on Human Rights arising from military action taken by the United States in Panama in December 1989, the United States Government contended that the scope of the Commission's jurisdiction did not extend to the law of armed conflicts, arguing that the OAS Member States did not expressly or implicitly consent to the competence of the Commission through its Statute to adjudicate matters concerning that complex and discrete body of law and that those legal authorities were "extraneous to and fall outside the scope of the Commission's jurisdiction to interpret and apply". It maintained that the Commission was not an appropriate organ to apply the provisions of the Fourth Geneva Convention to the United States since the United States has not given "express authority" to the Commission to do so [174].

The Commission maintained, however, that it was competent to consider the matter under the American Declaration, avoiding a clear statement on the Fourth Geneva Convention [175].

In a case concerning an attack launched by an armed group on a barracks of the Argentine Armed Forces, the Inter-American Com-

173. Comprehensive Agreement on Human Rights, 19 March 1994, UN doc. A/48/928-S/1994/448, Annex I, Sections I, IX and X.

174. *Salas and Others* v. *United States*, Inter-American Commission on Human Rights, Case 10.573, Report 31/93 of 14 October 1993, Annual Report — 1993, OEA/Ser.L/V/II.85 Doc. 9 rev., at 312, 317 (1994).

175. *Id.*, 329.

mission considered complaints from some of the participants in the attack alleging violations of the American Convention and of rules of international humanitarian law by members of the Government armed forces. The Commission considered whether it was competent to apply international humanitarian law directly :

> "to properly evaluate the merits of the petitioner's claim . . . it must first determine whether the armed confrontation at the base was merely an example of an 'internal disturbance or tensions' or whether it constituted a non-international or internal armed conflict within the meaning of Article 3 common to the four Geneva conventions, . . . [since] the legal rules governing an internal armed conflict vary significantly from those governing situations of internal disturbances or tensions . . ." [176].

The Commission concluded that the attack constituted a non-international armed conflict within the meaning of common Article 3. It found that the

> "concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces and the nature and level of violence attending the events in question [and the fact that] the attackers involved carefully planned, coordinated and executed an armed attack . . . against a quintessential military objective — a military base"

distinguished these events from internal disturbances [177]. One of the criteria commonly applied to characterize a situation as being governed by common Article 3, the duration of the conflict, was not considered a decisive factor.

The Commission invoked various grounds to establish its competence to apply humanitarian law. It argued that because human rights instruments were not specifically designed to apply in time of armed conflicts, reference to a set of rules specifically elaborated to apply in those situations was necessary :

> "Claims alleging arbitrary deprivations of the right to life attributable to State agents are clearly within the Commission's jurisdiction. But the Commission's ability to resolve claimed violations of this non-derogable right arising out of an armed

176. *Abella et al.* v. *Argentina*, *supra* footnote 25, para. 148.
177. *Id.*, paras. 154-156.

> conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations." [178]

This reasoning recalls the *Nuclear Weapons* Advisory Opinion, in which the Court concluded that a determination that a particular loss of life in warfare is an arbitrary deprivation, contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflicts and not deduced from the terms of the Covenant itself [179].

The Commission also relied on three provisions of the American Convention on Human Rights: Article 29 *(b)*, which provides that a State may not invoke the American Convention to restrict the enjoyment of a right or freedom provided under national law or under another international convention to which the State is party; Article 25, which provides for an effective remedy before a national court "for protection against acts that violate [the] fundamental rights recognized by the constitution or laws of the State concerned"; and Article 27 *(l)*, which states that measures of derogation in time of emergency may "not be inconsistent with a State's other international obligations" [180].

The American Court of Human Rights did not go as far as the Commission [181]. It held that it was only competent to determine whether the acts of States were compatible with the American Convention and not with the Geneva Conventions [182]. However, it took the view that it could

> "observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the

178. *Id.*, para. 161.
179. *Supra* footnote 144.
180. Signed 22 November 1969, OAS, *TS* No. 36, at 1; OAS, *Off. Rec.*, OEA/Ser.L/V/II.23 doc. Rev. 2.
181. *Las Palmeras* case, Preliminary Objections, 4 February 2000, *ACHR Reports*, Series C, No. 67, para. 33.
182. *Id.*

protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3" [183].

V. Application of human rights treaties in humanitarian law contexts

The European Court and Commission on Human Rights have examined complaints — discussed also in the chapter on international tribunals — concerning situations in which the law of armed conflicts was pertinent. Complaints arising from an international armed conflict, for example, were raised after the Turkish invasion and occupation of Northern Cyprus. Complaints concerning states of emergency and internal conflicts have included those from Northern Ireland and South-eastern Turkey [184]. Neither the United Kingdom nor Turkey recognized the applicability of common Article 3 or Additional Protocol II to the situation in Northern Ireland or South-eastern Turkey.

Issues concerning the destruction of property and the eviction and ill-treatment of civilians (including rape of women) have been examined in a number of cases arising out of the occupation of northern Cyprus by Turkish armed forces. In applications submitted by Cyprus in 1974 and 1975, the European Commission of Human Rights found violations of the European Convention on Human Rights but chose not to refer to humanitarian law. It declined to examine the treatment of prisoners of war because such persons had been visited by delegates of the ICRC [185]. The Commission also decided that it did not need to examine the movement of persons caused by the military operations, since it found that Turkey's refusal to allow the return of refugees violated Article 8 of the Convention [186]. In a separate opinion, Commissioners Sperduti and Trechsel suggested that the Geneva Conventions and the Hague Regulations could assist the Commission in assessing the right of derogation under Article 15 in a situation of occupation [187]. In these

183. *Bámaca Velásquez* case, Judgment of 25 November 2000, *ACHR Reports*, Series C, para. 208.

184. Reidy, "The Approach of the European Commission and Court of Human Rights to International Humanitarian Law", *Int'l Rev. Red Cross,* No. 324, September 1998, 513, 516, note 11.

185. *Cyprus* v. *Turkey*, European Commission of Human Rights, Appl. 6780/74 and 6950/75, Report of 10 July 1976, 4 *Eur. HR Rep.* 482, para. 313 (1982).

186. *Id.,* para. 202.

187. Reidy, *supra* footnote 184, at 518.

cases, the Strasbourg institutions applied the European Convention on Human Rights even though the Geneva Conventions were applicable. In one case, the European Commission of Human Rights declared admissible a petition filed by Cyprus against Turkey, alleging murders of civilians, repeated rapes, forcible eviction, looting, robbery, unlawful seizure, arbitrary detention, torture and other inhuman treatment, forced labour, destruction of property, forced deportations and separation of families in the context of occupation[188]. In another case involving the attribution of responsibility for acts committed in the northern part of Cyprus, the Commission concluded that:

> "Authorised agents of a State, including armed forces, not only remain under its jurisdiction . . . but also bring any other persons 'within the jurisdiction' of that State to the extent that they exercise authority."[189]

The European Court of Human Rights similarly held:

> "Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action — whether lawful or unlawful — it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through subordinate local administration."[190]

The Court took note that the applicant (whose submissions were endorsed by the Government of Cyprus) contended that:

> "A State is, in principle, internationally accountable for violations of rights occurring in territories over which it has physical control . . . International law recognizes that a State which is thus accountable with respect to a certain territory remains so

188. *Cyprus* v. *Turkey*, *supra* footnote 185.
189. *Chrysostomos and Papachrysostomos* v. *Turkey*, European Commission of Human Rights, Appl. 15299/89 and 15300/89, Report of 8 July 1993, 86 *Eur. Comm'n Dec. & Rep.* 4, at para. 96.
190. *Loizidou* v. *Turkey* (Preliminary Objections), European Court of Human Rights, Judgment of 23 March 1995, 1995 *Eur. Ct. HR Rep.* (Ser. A), No. 310, para. 62.

> even if the territory is administered by a local administration. This is so whether the local administration is illegal, in that it is the consequence of an illegal use of force, or whether it is lawful, as in the case of a protected State or other dependency." [191]

This jurisprudence can be explained by the trend toward interpreting human rights treaties as applicable wherever a State exercises power, authority or jurisdiction over people and not simply in its national territory, and thus to derive protection from human rights treaties where the competence of international organs could not be grounded in the Geneva Conventions [192]. As Hampson has remarked, "[i]t is the nexus between the person affected, whatever his nationality, and the perpetrator of the alleged violation which engages the possible responsibility of the State and not the place where the action takes place" [193]. In the more recent *Banković* case, the European Court interpreted its geographical jurisdiction more narrowly.

Human rights bodies and courts have also applied, or referred to, such classical concepts of the law of war as proportionality and distinction [194]. The European Court of Human Rights [195] used such concepts to interpret the State obligations under the European Convention on Human Rights. The Inter-American Commission [196] and Court of Human Rights [197] have followed suit.

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191. *Id.*, para. 57. See also *Cyprus* v. *Turkey*, Appl. No. 25781/94, European Court of Human Rights, Grand Chamber (10 May 2001).

192. Meron, "Extraterritoriality of Human Rights Treaties", 89 *AJIL* 78 (1995).

193. Hampson, "Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts", 31 *Revue de droit militaire et de droit de la guerre* 119, 122 (1992).

194. See, e.g., Report of the Director of the United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala, UN doc. A/49/856, paras. 133-137.

195. *Ergi* v. *Turkey*, European Court of Human Rights, Judgment of 28 July 1998, 1998-IV *Eur. Ct. HR Rep.*, paras. 79, 81 and 86; *McCann* v. *United Kingdom*, European Court of Human Rights, Judgment of 5 January 1995, *Eur. Ct. HR Rep.* (Ser. A), No. 324, paras. 194, 200 and 213.

196. *Feldman* v. *Colombia*, Inter-American Commission on Human Rights, Case 11.010, Report 15/95 of 13 September 1995, Annual Report — 1995, OEA/Ser.L/V/II.91 Doc. 7, at 57 (1996).

197. *Neira-Alegria* v. *Peru*, Inter-American Court of Human Rights, Judgment of 19 January 1995, 1995 *Inter-Am. Ct. HR Rep.* (Ser. C) No. 20, paras. 74-76.

VI. Minimum humanitarian standards: fundamental standards of humanity

Despite the progress made in the humanization of humanitarian law and the growing convergence between human rights and humanitarian law, the blurring of thresholds of applicability and the expansion of both systems of protection, significant gaps in protection still remain.

The Geneva Conventions for the protection of war victims and their additional protocols, as well as various law of war treaties and customary international law, protect victims of international wars and offer some protection for victims of internal wars, but characterization of conflicts continues to present difficulties. Human rights treaties, declarations and mechanisms protect the individual from abuses by Governments in time of peace, but some protections can be derogated from in times of emergency. Moreover, in many situations of armed conflict of varying intensity, authorities other than Governments exercise control over people while habitually denying that they are bound by international standards. In situations that fall short of an armed conflict, that is, those below the threshold of common Article 3, humanitarian law might not apply, but internal violence might lead a State to declare a public emergency and suspend many essential protections. As Christopher Greenwood has written:

> "The question of exactly what constitutes such an emergency has frequently proved controversial but it is clear that the situation within a State can reach the stage at which that State may invoke the derogation clauses of the human rights treaties but still not amount to an armed conflict within the generally accepted sense of that term. It is possible, therefore, that a State might legitimately invoke the derogation provisions of the human rights treaties to which it is a party (though not all) of the protections afforded by those treaties), while still not being required to observe the limitations of the laws of war. There is no logical justification for this state of affairs, since there is no reason why, in a state of emergency falling short of an internal armed conflict, a State should be permitted to engage in conduct which is forbidden to it in normal times and in the more serious conditions of civil war. The obvious desirability of closing that gap has led to the production of the Declaration of Minimum Humanitarian Standards ('the Turku Declaration')

> and other moves to elaborate a set of non-derogable standards drawn from both human rights law and the laws of war." [198]

Among the essential rights commonly regarded as subject to derogations are guarantees of due process, personal liberty, and freedom of movement and displacement. Of course, the list of non-derogable rights is not the exclusive guide to the parameters of derogations. All States must also respect key procedural safeguards such as proportionality ("to the extent strictly required") and non-discrimination, as stated, for example in Article 4 (1) of the Covenant on Civil and Political Rights.

There are many existing treaties and identifiable standards. Significant problems remain, however, in four areas:

(1) where the threshold of applicability of international humanitarian law is not reached or its applicability is disputed;
(2) where the State in question is not a party to the relevant treaty or instrument;
(3) where derogation from the specified standards is invoked; and
(4) where the actor is not a government, but some other group.

As noted by the UN Secretary-General,

> "The rules of international humanitarian law are different depending on the nature and intensity of the conflict. There are disagreements concerning the point at which internal violence reaches a level where the humanitarian law rules regulating internal armed conflicts become operable. . . .
>
> Further, until now, the rules of international human rights law have generally been interpreted as only creating legal obligations for Governments, whereas in situations of internal violence it is also important to address the behaviour of non-State armed groups. It is also argued that some human rights norms lack the specificity required to be effective in situations of violent conflict. Finally, concern has been expressed about the possibilities for Governments to derogate from certain obligations under human rights law in these situations." [199]

198. Christopher Greenwood, "International Humanitarian Law and the Laws of War", Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference 1899, at 60-61 (June 1998).
199. Minimum Humanitarian Standards, *supra* footnote 79, at paras. 8-9.

Additional difficulties remain. Some States have not as yet ratified Protocol II or some important human rights treaties; common Article 3 lists only a few protective norms; and the recognition that the Hague Law on the conduct of hostilities, or at least its fundamental principles, should be applied in non-international armed conflicts has only recently begun to consolidate.

For these reasons, attempts have been made to promote a declaration of minimum humanitarian standards or fundamental standards of humanity from which there can be no derogation and the applicability of which would not depend on the characterization of the conflict. Such a declaration would state norms derived from human rights law and from both the Hague and the Geneva prongs of international humanitarian law. The international community would expect all parties to apply such norms, at a minimum, in all situations, and especially in situations of endemic internal violence. These problems and the need for such a declaration were identified as early as 1983[200]. The initiative took shape in the Turku Declaration (1990), which was drafted by a group of individual experts in humanitarian and human rights law, and submitted to the United Nations Human Rights Commission. It was discussed in meetings of experts convened in Oslo (Norwegian Institute of Human Rights), Vienna (OSCE) and Capetown (UN workshop), and has obtained some recognition by Governments, organizations and experts. Over the years, analytical reports of the Secretary-General of the United Nations have given it additional currency[201]. But it has encountered opposition from some Governments, and, particularly, some human rights NGOs, who fear that such a declaration would provide Governments with the excuse that they need apply only minimum standards. Moreover, some have argued that problems of inadequate

200. Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument", 77 *AJIL* 589 (1983); "Towards a Humanitarian Declaration on Internal Strife", 78 *AJIL* 859 (1984); "Draft Model Declaration on Internal Strife", *Int'l Rev. Red Cross*, No. 262, January-February 1988 at 59; *Human Rights in Internal Strife*, *supra* footnote 4; Meron and Rosas, "A Declaration of Minimum Humanitarian Standards", 85 *AJIL* 375 (1991); Eide, Rosas and Meron, "Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards", 89 *AJIL* 215 (1995).

201. Minimum Humanitarian Standards, *supra* footnote 79; Fundamental Standards of Humanity: Report of the Secretary-General submitted pursuant to Commission resolution 1998/29, UN doc. E/CN.4/1999/92. See comment by Petrasek, "Moving Forward on the Development of Minimum Humanitarian Standards", 92 *AJIL* 557 (1998).

compliance of the law could be better addressed by more effective enforcement methods.

The Turku Declaration reaffirms an irreducible core of humanitarian and human rights norms which must be respected in all situations and at all times. It creates a safety net that could not be dismantled by assertions that a particular conflict is below the threshold of applicability of international humanitarian law and is not addressed by existing international law. Following the tradition of humanitarian law, derogations are prohibited. The importance of the Declaration goes beyond the technical problems of states of emergency and derogations. It would apply in all situations of internal violence and in the gray zone between war and peace. With a focus on the nature of contemporary conflicts, which so often concern groups not recognized as Governments, the draft of the declaration provides that "[t]hese standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination". The prospects of humanizing internal violence are greatly improved by urging all sides, including non-governmental actors, to abide by essential humanitarian principles.

Among the standards incorporated in the Declaration are core judicial or due process guarantees, limitations on excessive use of force and on means and methods of combat, the prohibition of deportation, rules pertaining to administrative or preventive detention, humane treatment and guarantees of humanitarian assistance.

The Declaration could become a useful source of indicators for early warnings of mass violations of humanitarian and human rights norms. The Declaration could also become an important tool for education, dissemination, monitoring, implementation and enforcement. The advantages of the Declaration include : simplicity, clarity ; the fact that it draws on humanitarian and human rights instruments, on customary law and on standards of humanity ; and the fact that it avoids problems of definition of conflicts and recognition of authorities.

A concern sometimes expressed is that because the declaration is not a treaty, it will not be legally binding and will thus be ineffective. But the Helsinki Declaration [202] has shown how effective political and moral commitments can be. The blurring of thresholds for

202. Conference on Security and Co-operation in Europe, Final Act, 1 August 1975, reprinted in 14 *ILM* 1292 (1975).

the applicability of international humanitarian law, discussed above, serves some of the objects advanced by the Declaration of Minimum Humanitarian Standards.

F. Means and Methods of Warfare and Protection of Combatants

I. The principle of proportionality

The principle of proportionality has different meanings. One is proportionality in general international law, in self-defence and thus in the *jus ad bellum* context.

Classical international law allowed a State which had a just cause for war to apply the maximum degree of force and destruction to bring about a speedy victory. Francis Lieber thus argued that "[t]he more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief". To this end, the law of war should impose certain limitations on the basic "principles of justice, faith and honor"[203]. Lieber's concern for not unduly limiting the military's discretion or curtailing its ability to win a victory swiftly led him to articulate a number of principles that appear excessively harsh to the modern commentator, including causing the starvation of the adversary.

Modern international law has insisted on some principle of necessity or proportionality even in the context of *jus ad bellum*. It is in this context that Schachter discussed proportionality for military operations authorized by the Security Council under Chapter VII of the UN Charter in the second Gulf War:

> "Resort to collective self-defense *(jus ad bellum)* is also subject to requirements of necessity and proportionality, even though these conditions are not expressly stated in Article 51. Both requirements were discussed in the Security Council and by the governments concerned for several months.
>
> . . . . . .
>
> The criterion of necessity thus debated is quite different from the view previously accepted that an illegal armed attack

203. Lieber Code, *supra* footnote 12, at Arts. 29-30. See also Meron, *Francis Lieber's Code and Principles of Humanity*, reprinted in Meron, *supra* footnote 8, at 133.

> on a large scale is in itself sufficient to meet the requirement of necessity for self-defense. Thus, when the Japanese attacked Pearl Harbor or when the Germans invaded Poland to begin World War II, it was taken for granted that armed self-defense by the victim States met the requirement of necessity." [204]

Proportionality for purposes of *jus in bello* has a more traditional sense. This strain of proportionality was at the centre of controversy when invoked to justify so-called collateral damage caused by bombing of Iraqi targets during Gulf War II and especially the strategic bombing of objects that support military capacity, but also serve civilian needs, such as power plants and bridges [205]. Similar controversies arose over the allied bombing of former Yugoslavia during the Kosovo crisis (1999). The International Court of Justice gave its judicial imprimatur to the distinctions between the two kinds of proportionality in its Advisory Opinion on *Nuclear Weapons*:

> "41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* . . . 'there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law'. This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.
>
> 42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force which is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law." [206]

The principle of proportionality in *jus in bello*, that I shall be discussing here, requires that civilian losses resulting from a military

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204. Schachter, "United Nations Law in the Gulf Conflict", 85 *AJIL* 459, 460-461 (1991).
205. *Id*. at 466.
206. *Nuclear Weapons* Advisory Opinion, *supra* footnote 67, at paras. 41-42.

act should not be excessive in relation to the anticipated military advantage. It obligates the belligerents to balance military advantage against reasonably expected collateral injury to civilians and civilian objects. Although the broad parameters of the principle of proportionality are widely accepted, its application in specific situations is frequently disputed.

Proportionality is closely related to the principle of distinction between combatants and non-combatants which prohibits attacks on the civilian population and objects. The notion that war is waged between soldiers and that the civilian population should, as far as possible, remain untouched by the hostilities is of long standing. It was clearly articulated as early as the Lieber Code (1863) which, in Article 22, underlines "the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms", stressing that "[t]he principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit".

In its Advisory Opinion on *Nuclear Weapons*, the ICJ characterized these principles as intransgressible principles of international customary law. As Hays Parks has noted, however, the belief in the effectiveness of attacks on "civilian morale" by strategic bombing, prevalent during World War II, has persisted up to recent times, for example during the "war of the cities" in the Iran-Iraq war[207]. NATO bombings in the former Yugoslavia during the 1999 Kosovo crisis demonstrated that in practice economic objectives and dual-use objectives, such as bridges, power stations, and broadcasting facilities continue to be attacked. Additional Protocol I gives predominant weight to the protection of civilians from indiscriminate or collateral damage. Some military experts might feel that the Protocol has not been equitably calibrated, especially with regard to economic and strategic infrastructure and dual-use objectives. This is an area where the gap between theory and practice may be particularly wide. Nonetheless, a generous respect for the protection of civilians under the principle of proportionality is vital to the survival of humanity and of our cultural heritage.

The principle of proportionality, although widely recognized as a

207. Hays Parks, "The Protection of Civilians from Air Warfare", *Israel YHR* 65, at 77-83 (1998).

basic rule of the law of war, was not codified in the Hague Conventions (1899, 1907) or in the Geneva Conventions (1949). In trying to spare soldiers unnecessary or excessive suffering, the Hague Conventions of 1899 and 1907 restricted use of poison and bullets which expand or flatten in the body ("dum-dum" bullets). They established only minimal restraints (such as the prohibition on attacking or bombarding undefended places, the injunction to respect religious, cultural and medical buildings, and the prohibition of pillage) aimed at protecting the civilian population from the effects of hostilities.

Some provisions may be viewed as particular applications of the proportionality principle. For example, Article 23 *(g)* of the Hague Regulations refers to the prohibition on destroying or injuring of enemy property, unless such destruction or seizure be imperatively demanded by the necessities of war. Article 27, in particular, requires the sparing, as far as possible, of buildings dedicated to cultural, religious and medical activities in sieges and bombardments. These provisions prohibit collateral damage to civilian objects or injury to non-combatants that is clearly disproportionate to the military advantage gained in an attack on military objectives [208].

Those minimal Hague Convention IV rules became inadequate with the development of air power and long-range missiles, which enlarged and deepened the geographical scope of battle zones [209]. Attempts were made to bring up to date the regulation of means and methods of warfare ("Hague Law") [210]. The goal of the 1949 Diplomatic Conference was not to revise the Hague Regulations. The 1949 Geneva Conventions were primarily concerned with helping "protected persons" in the hands of a hostile party (POWs, the wounded, sick and shipwrecked, the civilian population in occupied territory). Only a brief part of the Fourth Convention provides measures to protect the whole of the population against the effects

208. Conduct of the Persian Gulf War, United States of America Department of Defense, Final Report to Congress, April 1992, Appendix O, The Role of the Law of War at O-9.

209. M. Bothe, K. Partsh and W. Soft, *New Rules for Victims of Armed Conflicts* 274-275 (1982).

210. Article 24 (4) of the 1923 Draft Air Warfare Rules adopted by the International Commission of Jurists provided for example that:

> "In the immediate vicinity of the operations of the land forces, the bombardment of cities, towns, villages, habitations and buildings is legitimate, provided there is a reasonable presumption that the military concentration is important enough to justify the bombardment, taking into account the danger to which the civil population will thus be exposed."

of hostilities[211]. The ICRC Commentary on the Fourth Geneva Convention thus notes,

> "the main object of the Convention is to protect a strictly defined category of civilians from arbitrary action on the part of the enemy, and not from the dangers due to the military operations themselves. Anything tending to provide such protection was systematically removed from the Convention."[212]

Because the Hague Regulations were not brought up to date in 1949, a serious gap remained in codified humanitarian law. As Maurice Aubert, a vice-president of the ICRC has suggested, "if protection for the wounded, the shipwrecked and especially the civilian population is to be rendered more effective . . ., it must also include limitations on methods . . . of combat"[213]. This consideration led the ICRC to draw up Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956), which reaffirmed some of the principles of customary law and offered concrete solutions to resolve problems resulting from changes and developments in weaponry. These draft Rules were submitted to the XIXth International Conference of the Red Cross (New Delhi, 1957). They contained an explicit proposal to prohibit the use of nuclear, bacteriological and chemical weapons[214]. Although approved in principle, the draft rules had few practical results, probably because of the refusal of nuclear powers to consider the issue of the development and use of nuclear weapons[215].

Adopting another approach, at the XXth International Conference of the Red Cross (Vienna, 1965) the ICRC proposed simply to reaffirm certain basic principles. Resolution XXVIII of that Conference declared that:

> "all Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:

211. Bothe *et al.*, *supra* footnote 209, at 275; Sandoz *et al.*, *Commentary on the Additional Protocols*, *supra* footnote 66, paras. 1830-1831.
212. *Supra* footnote 19, at 10.
213. Aubert, "The International Committee of the Red Cross and the Problem of Excessively Injurious or Indiscriminate Weapons", *Int'l Rev. Red Cross*, 477, 479 (1990).
214. Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War (1956), Art. 8-9.
215. Bothe *et al.*, *supra* footnote 209, at 275.

— that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
— that it is prohibited to launch attacks against the civilian populations as such;
— that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
— that the general principles of the Law of War apply to nuclear and similar weapons".

These developments, which took place in the Red Cross — especially the demands to revise the law of privileged combatants in anti-colonial wars and in wars against racist regimes and grant such combatants prisoner of war privileges — attracted the attention of the United Nations. Up to that time, the United Nations had maintained a reserve towards treatment of the law of armed conflict[216], fearing that a codification of that law might not be compatible with the prohibition of threat or use of force in the UN Charter. This explains, perhaps, why the International Law Commission decided early on (1949) to exclude the law of war from its subjects for codification. The International Conference on Human Rights, held in Tehran in 1968, marked, in this respect, an important change. Resolution XXIII requested

> "the General Assembly to invite the Secretary-General to study:
> *(a)* Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;
> *(b)* The need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare."[217]

In resolution 2444 (XXIII) (1969) entitled "Respect for Human

216. Respect for Human Rights in Armed Conflicts. Report of the Secretary-General, A/7720, para. 19 (1969).
217. Tehran Conference on Human Rights (1968), Resolution XXIII.

Rights in Armed Conflicts", the UN General Assembly, concurring with the principles laid down by the Tehran Conference, declared

> "*(a)* That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
> *(b)* That it is prohibited to launch attacks against the civilian population as such;
> *(c)* That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible . . ."[218]

This resolution, which the United States considered as declaratory of customary law[219], was followed by other General Assembly resolutions stating similar principles. The Secretary-General noted that resolution 2444 was the

> "[f]irst pronouncement and decision by a principal organ of the United Nations which endorse[d] general standards and initiat[ed] comprehensive United Nations studies as regards the application of basic humanitarian principles in armed conflicts"[220].

The resolution "manifest[ed] the concern of the United Nations for the initiation of constructive international action with a view to safeguarding basic human rights even during periods of armed hostilities"[221]. In his 1970 Report, the Secretary-General added:

> "It is the understanding of the Secretary-General that the purpose of the General Assembly in examining the question of respect for human rights in armed conflicts is a humanitarian one, independent of any political considerations which may relate to specific conflicts. It is an endeavour to provide a greater degree of protection for the integrity, welfare and dignity of those who are directly affected by military operations pending the earliest possible solutions of such conflicts."[222]

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218. General Assembly resolution 2444 (XXIII).
219. Meron, *supra* footnote 7, at 69-70.
220. Respect for Human Rights in Armed Conflicts. Report of the Secretary-General, A/7720, para. 20 (1969).
221. *Id.*, para. 21 (1969).
222. Respect for Human Rights in Armed Conflicts. Report of the Secretary-General, A/8052, para. 13 (1970).

The two reports of the Secretary-General amounted to a detailed study of humanitarian law rules and recommendations to ensure full protection for civilians, combatants and prisoners of war. From 1968 to 1977, the General Assembly adopted at least one annual resolution on the reaffirmation and development of humanitarian law at each of its sessions[223].

The principles laid down by resolution 2675 (XXV) (1970), entitled Basic Principles for the Protection of Civilian Populations in Armed Conflicts, were largely incorporated in Additional Protocol I[224]. The influence of human rights thinking on the revision of the law of war was central.

Draper thus wrote in 1972 that the law of war and the regime of international human rights

> "have met, are fusing together at some speed, and that in a number of practical instances the regime of International Human Rights is setting the general direction, as well as providing the main impetus of the revision of the Law of War"[225].

Another humanitarian law scholar, Dietrich Schindler, also recognized this development:

> "Humanitarian law had also acquired increased relevance as a result of its growing connection with human rights law. After remaining during the early years of the United Nations outside the field of interest of the Organization, it had, starting in the late 1960's, slowly become a companion of, and a complement to, human rights law."[226]

The draft protocol submitted by the ICRC at the 1974-1977 Conference was based on the 1956 ICRC Draft Rules for the Limitation on Dangers to the Civilian Population in Times of War. The proposal to codify the principle of proportionality was criticized by some States as rendering illusory the prohibition of attacks against civilians and civilian objects. These critics warned that the principle of

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223. General Assembly resolutions 2676 (XXV), 2677 (XXV), 2853, 2853, 3032 (XXVII), 3102 (XXVIII), 3319, 3500, 31/19 and 32/44.

224. General Assembly resolution 2675 (XXV).

225. Draper (1972), cited in Robblee, "The Legitimacy of Modern Conventional Weaponry", in *Revue de droit pénal militaire de droit de la guerre* 389, 408-409 (1977).

226. *Proceedings of United Nations Congress on Public International Law: International Law as a Language of International Relations* 472 (1996).

proportionality would set a seal of approval on incidental civilian casualties. The ICRC replied that it:

> "constantly had to bear in mind the fact that the ideal was the complete elimination, in all circumstances, of losses among the civilian population. But to formulate that ideal in terms of impracticable rules would not promote either the credibility or the effectiveness of humanitarian law. In order to establish a balance between the various factors involved, the ICRC was proposing a limited rule, the advantage of which was that it would be observed."[227]

This exchange reflects the recurrent clash (in the Rome Conference, for example) between those, especially in the human rights community, who seek a total prohibition on civilian losses and those who seek to limit such losses through the principle of proportionality. Unfortunately, as long as armed conflicts occur, civilian losses will be inevitable. Regulating such losses is therefore more constructive than declaring a wholly illusory principle.

In a study of State practice from World War II, Hays Parks noted that "concern for collateral enemy civilian casualties [was] a relatively new phenomenon, and one exercised by few nations to date"[228]. It has been voiced mainly about air attacks. The increasing public concern for civilian collateral injuries in the Post-World War II period has, however, been abused by increasing resort to the use of human shields in some conflicts.

The main provisions on proportionality in Additional Protocol I are Articles 51 and 57. The principle, as stated in Article 51 (5) *(b)*, prohibits

> "[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

Under Article 49 (2), the Protocol's provisions on attacks are applicable both to indiscriminate attacks and to attacks which violate the principle of proportionality, "in whatever territory conducted,

227. CDDH, *Official Records*, CDDH/III/SR.21, para. 7, cited in Bothe (1982), at 361.

228. Hays Parks, "The Protection of Civilians from Air Warfare", [1998] *Israel YB Hum. Rights* 65, 97.

including the national territory belonging to a Party to the conflict but under the control of an adverse Party". These provisions are thus applicable also to defensive attacks which may affect a party's own civilian population. This contrasts with the traditional law of war, in which the regulation of methods of warfare was largely restricted to protecting persons and property of the adverse party.

The language of the Protocol has given rise to controversy about assessing collateral damage in relation to the scope, dimensions, and duration of the military attack. For the specific purpose of defining war crimes, the Statute of the International Criminal Court restated the principle of proportionality by inserting a reference to the context of an "overall" military advantage and intention. Article 8 (2) *(b)* (iv) thus prohibits

> "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated".

The requirement of knowledge was added to protect military commanders who make honest mistakes from war crimes prosecutions. Both the use of the term "overall" to define the parameters of the attack within which the overall military advantage is assessed and the requirement of knowledge present difficult questions. The elements of crime adopted by the ICC Preparatory Commission ("[s]uch advantage may or may not be temporally or geographically related to the object of the attack"), have attempted, perhaps not very successfully, to clarify the term "overall".

II. Weapons of a nature to cause unnecessary suffering or to be inherently indiscriminate

Apart from weapons the prohibition of which has been triggered by moral abhorrence, the history of the law of war has been that of the shifting balance between "the requirements of humanity" and "military necessity". As Georges Abi-Saab has observed,

> "The one is subjective, depending on the dominant moral ideas and degree of community feeling obtaining among major contenders in society; the other is objective, depending on the

> evolution of military technology and strategic thought. It is the dialectical relation between these two forces, in light of historical experience, which determines the contents, contours and characteristics of the law of war at any moment in time." [229]

The two basic principles of the law of armed conflicts concerning the use of weapons are that weapons should neither cause unnecessary suffering to combatants nor be used in a manner that will indiscriminately affect both combatants and non-combatants [230]. These rules are now codified in Articles 35 and 51 (4) of Additional Protocol I.

(a) *Weapons of a nature to cause unnecessary suffering*

The prohibition against the use of weapons causing unnecessary suffering stems from the principle that the right of belligerents to adopt means of combat is not unlimited. This principle was first articulated in the Preamble of the 1868 Declaration of Saint Petersburg:

> "That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity."

The Declaration thus dealt with a central issue of the law of war: the equilibrium between military necessity and the requirements of humanity. As Greenwood puts it, "humanitarian law accepts that one of the legitimate objects of warfare is to disable enemy combatants . . . but it

229. Abi-Saab, *supra* footnote 23, at 265. He cites the St. Petersburg Declaration of 1868 which refers to "the technical limits at which the necessities of war ought to yield to the requirements of humanity . . .", and the preamble of the 1899 Hague Convention (II) which reads in part: "as inspired by the desire to diminish the evils of war, as far as military requirements permit".

230. Fenrick, "The Conventional Weapons Convention: A Modest but Useful Treaty", *Int'l Rev. Red Cross*, No. 279 (November-December 1990), 498, 499.

rejects the use of weapons which cause additional suffering for no military gain"[231].

The Declaration did not prohibit all use of explosive munitions. It distinguished between "anti-personnel" (certain specified small calibre rifle bullets) and "anti-material" (artillery shells) munitions. Kalshoven thus rightly observed that if the injuries artillery shells can inflict on individual soldiers are judged indispensable there can be no question of their being sacrificed on the altar of "humanity"[232].

Two different tests can be used to characterize a weapon as causing unnecessary suffering. The first is linked to the principle of proportionality. The principle of unnecessary suffering aims at prohibiting or limiting the use of weapons which inflict suffering unnecessary to the accomplishment of legitimate military objectives. The US Air Force Manual (1976) thus states:

> "Weapons are lawful, within the meaning the prohibition against unnecessary suffering, so long as the foreseeable injury and suffering associated with wounds caused by such weapons are not disproportionate to the necessary military use of the weapons in terms of factors such as effectiveness against particular targets and available alternative weapons . . . The critical factor in the prohibition against unnecessary suffering is whether the suffering is needless or disproportionate to the military advantages secured by the weapon, not the degree of suffering itself."[233]

On this general proposition there has been general agreement. But there is no agreement on the criteria to evaluate where the balance should be struck. The evaluation is, thus, highly subjective. In practice legality turns on the intended purpose of the weapon[234]. When assessing the military advantage, there is controversy as to whether "the disablement of the greatest possible number of enemy combatants" is the sole consideration or whether other military requirements may be factored in. The latter position is reflected in the

231. Greenwood, in Fleck *et al., supra* footnote 57, at para. 119.
232. Frits Kalshoven, "Arms, Armaments and International Law", 191 *Recueil des cours*, at 208 (1985).
233. US Air Force Pamphlet 110-31, 19 November 1976, para. 6.
234. Doswald-Beck, "International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons", *Int'l Rev. Red Cross*, No. 316, 35 (1997), at 45.

United States representative's formulation of the proportionality test at the Lucerne Conference (1974):

> "in determining whether weapons cause unnecessary suffering one must consider the military utility of the weapon and determine whether the incidental suffering is needless, superfluous or disproportionate to the military advantage expected from the weapon. The importance of military utility in this balance makes it essential that we not oversimplify that part of the equation.
>
> In applying the legal test of the Hague Regulation Article 23 *(e)* we must bear in mind that weapons are designed and produced to be used to attain military requirements. Some examples of such requirements include the disablement of the greatest possible number of enemy combatants, the destruction or neutralization of his military material, restriction of his military movement, the interdiction of his military lines of communication, the weakening of his military resources, and the enhancement of the security of friendly forces."[235]

To render the concept of military advantage more objective, resort to comparison with existing weapons has been suggested. A legal memorandum of the US Department of the Army on the legality of "open-tip" ammunition (1990) thus states:

> "What is prohibited is the design (or modification) and employment of a weapon for the purpose of increasing or causing suffering beyond that required by military necessity. In conducting the balancing test necessary to determine a weapon's legality, the effects of a weapon cannot be viewed in isolation. They must be examined against comparable weapons in use on the modern battlefield, and the military necessity for the weapon or projectile under consideration."[236]

The second test, also derived from the Saint Petersburg Declaration, focuses on the effects of weapons. In the wording of the Declaration, weapons causing unnecessary suffering are weapons that render death inevitable. Cassese has noted that:

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235. Statement of the Chief of the International Affairs Division (W. Solf), at the Lucerne Conference at 709 [1974] *Digest of United States Practice in International Law* 708-709 (Arthur W. Rovine, ed.).

236. Memorandum of Law on Sniper use of Open-Tip Ammunition (1990), in *US Practice Report (ICRC Study)*, Annex 3-14, at 3.

> "Weapons are to be deemed unlawful when they are such as to produce death whenever and in whatever manner they hit the enemy. Put it another way, a weapon is legitimate if, by striking the adversary, it can either kill or wound him, depending on the circumstances. By contrast, it is not in keeping with international law if it *always* results in *killing all* persons who in some way happen to be struck by it." [237]

Some participants at the 1899 Hague Conference had taken the view that weapons causing "incurable wounds" were also unlawful [238]. They urged support for such humanitarian factors as the degree of disability, the risk of death, the overburdening of medical resources, and public opinion [239]. This approach has not prevailed, perhaps because regulation of the use of weapons was seen as a question of technology rather than of weapons' effects on humans [240]. Nevertheless, the German Military Manual adopts a test based on the effects on humans to define prohibited weapons [241].

The ICRC has sought to find a more objective measurement of the effects of the use of weapons on humans. To this end, the ICRC has undertaken a project which aims at quantifying which weapons cause superfluous injury or unnecessary suffering on the basis of their effects on human health. From a study of the effects of conventional weapons using data collected from ICRC hospitals, the ICRC has attempted to define criteria as to what constitutes a weapon of a nature to cause unnecessary suffering [242]. The ICRC argued that all weapons the use of which is specifically controlled or prohibited exceed the baseline of injuries seen in recent conflicts. The ICRC proposed that States, when reviewing the legality of a weapon, take the ICRC baselines into account by establishing whether the weapon in question would cause any of the negative effects listed as a function of its design. When such effects are produced, the State should weigh the military utility of the weapon against these effects and determine whether the same military pur-

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237. Cassese, "Weapons Causing Unnecessary Suffering: Are they Prohibited?", 58 *Rivista di Diritto Internazionale* 12, 18 (1975),
238. *Id.*, at 17.
239. Robblee, *supra* footnote 225, at 418.
240. Robin M. Coupland , *The SirUS Project* (1997), at 14.
241. Meyrovitz, "The Principle of Superfluous Injury or Unnecessary Suffering", *Int'l Rev. Red Cross*, No. 299, 98 at 118 (March-April 1994).
242. Coupland, *supra* footnote 240, at 14.

pose could reasonably be achieved by other lawful means that do not have such effects. An important aspect of the ICRC proposals was that its beneficiaries would primarily be combatants.

Whether States will be ready to base weapon prohibitions on such criteria is doubtful. The ICRC approach would lead to the presumptive illegality of nuclear weapons, which the nuclear States would strongly resist. Of course, any effort which would lead to reduction of death and suffering is to be welcomed. Medical guidelines for the use of Governments in developing new weapons could be helpful. But Governments are unlikely to agree that such guidelines should be either exclusive or dispositive of legality. In some cases of weapons considered inherently abhorrent (e.g., blinding laser weapons), Governments have agreed to absolute prohibitions. But the more typical approach has been to balance military necessity with unnecessary suffering. Christopher Greenwood puts it well:

> "It is, however, important to realize that the fact that a particular weapon meets one of these criteria is not, in itself, sufficient to brand it as unlawful without consideration of the military advantages which that weapon may offer. For example, the fact that soldiers cannot take cover from a particular type of weapon will . . . heighten the reaction of abhorrence produced by such a weapon but it is also the very inability of soldiers to take cover that means that the weapon will, in the language of the 1868 Declaration, disable the greatest possible number of enemy combatants and which thus gives it military effectiveness when compared with other weapons."[243]

Although the general principle prohibiting weapons of a nature to cause unnecessary suffering is well established, rare are the cases of weapons declared illegal solely on the basis of that principle. Decline in or prohibition of use of weapons is sometimes caused by the humanizing effect of public opinion[244] or by limited military effectiveness. Maurice Aubert thus has written that:

> "To date, a ban on such weapons [conventional weapons] has been accepted only for those which, in view of the dispar-

243. Greenwood, International Humanitarian Law and the Laws of War: Preliminary Report for the Centenial Commemoration of the First Hague Peace Conference 1899, at 43 (1998).

244. Doswald-Beck, *supra* footnote 22, at 30.

> ity between their military effectiveness and the degree of superfluous injury and unnecessary suffering they cause, are without any real interest as means of combat (i.e. dum-dum bullets, non-detectable fragments, exploding booby-traps in the form of harmless-looking objects). As regards militarily effective weapons (incendiary devices and mines), we cannot but hope that their use will be confined as far as possible to the actual combatants so as to avoid indiscriminate harm to civilians, civilian objects and the environment."[245]

In contrast to a "reasonable acceptance of the need to protect civilians from the effect of hostilities, there is a lack of will on the part of a number of leading States to seriously consider the fate of combatants"[246].

(b) *Weapons that are inherently indiscriminate*

The prohibition of indiscriminate attacks is distinct from, but closely related to, the principle of proportionality[247]. In the *Nuclear Weapons* case, the Court held that "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets"[248]. Doswald-Beck wrote that the Court thus assimilated an indiscriminate attack to a direct attack on civilians[249]. Indiscriminate means and methods of warfare are defined in Additional Protocol I as:

> "*(b)* those which employ a method or means of combat which cannot be directed at a specific military objective; or
>
> *(c)* those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
>
> and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction"[250].

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245. Aubert, *supra* footnote 213, at 477-478.
246. Louise Doswald-Beck and Gérald Cauderay, "The Development of New Anti-Personnel Weapons", *Int'l Rev. Red Cross*, No. 279, at 575 (1990).
247. Doswald-Beck, *supra* footnote 234, at 38.
248. *Nuclear Weapons* Advisory Opinion, *supra* footnote 65, at para. 78.
249. Doswald-Beck, *supra* footnote 234, at 38.
250. Additional Protocol I, *supra* footnote 38, at Art. 51 (4).

One of the criteria for labelling a weapon to be inherently indiscriminate is that it cannot be directed at a specific military objective. This prohibition does not depend on the principle of proportionality or collateral damage. Instead, as suggested by Doswald-Beck, it depends on the principle of distinction. This is the case where the weapon, even when aimed accurately and functioning correctly, "is likely to . . . randomly hit combatants and civilians to a significant degree"[251]. It may be recalled that Article 14 of the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956) provided that

> "Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects — resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents — could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population."[252]

Even weapons which are not inherently indiscriminate can be used to strike without distinction. Such use is, of course, proscribed.

Kalshoven has noted that the prohibitions of unnecessary suffering and of weapons of an indiscriminate character are useful guidelines[253], as in the case for the prohibition of dum-dum bullets in 1899 and the restrictions on the use of certain weapons in the Protocols of the 1980 Convention. The US military manual suggests an empirical approach: what weapons cause "unnecessary suffering can only be determined in light of the practice of States in refraining from the use of a given weapon because it is believed to have that effect"[254].

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons,* the ICJ confirmed that weapons whose use violates these principles are illegal.

> "[H]umanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect

251. Doswald-Beck, *supra* footnote 234, at 41.
252. Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956), Art. 14.
253. Kalshoven, "The Conventional Weapons Convention: Underlying Legal Principles", *Int'l Rev. Red Cross*, No. 279, November-December 1990, 510, 517.
254. US Manual (FM27-10), *supra* footnote 54, para. 34.

> on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law." [255]

No specific prohibition on the use of nuclear weapons was found. But were nuclear weapons prohibited by implication from generally accepted customary rules of international humanitarian law? Some States argued that any use of nuclear weapons would violate the rule against the use of weapons which by their nature cause unnecessary suffering [256]. They suggested that such use would also violate principles of proportionality and limiting collateral damage. The United States and some others States responded, as Matheson wrote, that

> "this rule was intended to preclude weapons designed to increase suffering beyond that necessary to accomplish any legitimate military objective, and that the use of nuclear weapons would accordingly not be prohibited if it were required to accomplish a legitimate military mission, even if severe injuries were caused" [257].

Regarding the legality of collateral damage, the United States argued that this depended on the principle of proportionality, requiring a case-by-case assessment [258]. While declining to decide whether all uses of nuclear weapons were prohibited by principles of international humanitarian law, the Court stated that, in view of their characteristics, the use of nuclear weapons seemed "hardly reconcilable" with those principles [259].

Some States argued that any use of nuclear weapons would violate the principle of distinction [260]. Thus, Egypt suggested that

> "[t]he use of nuclear weapons is prohibited not because they

255. *Nuclear Weapons* Advisory Opinion, *supra* footnote 67, at paras 78-79.
256. Matheson, "The ICJ Opinions on Nuclear Weapons", 7 *Transnational Law & Contemporary Problems* 354 (1997), at 363 (at note 49) (discussing Egypt, India, Mexico, Sweden).
257. *Id.* (at footnote 52) (discussing Netherlands, Russia, the United Kingdom).
258. *Id.,* at 362.
259. *Nuclear Weapons* Advisory Opinion, *supra* footnote 67, para. 95.
260. Matheson, *supra* footnote 256, at 362 (at note 45) (discussing Egypt, India, Mexico, Solomon Islands).

> are or they are called nuclear weapons. They fall under the prohibition of the fundamental and mandatory rules of humanitarian law which predate them, *by their effects*, not because they are nuclear weapons, but because they are indiscriminate weapons of mass destruction."[261]

The United States and the United Kingdom responded:

> "this principle prohibits the directing of attacks against non-military targets and the use of weapons that cannot be directed against specific military targets . . . but does not prohibit the use of nuclear weapons, which can be accurately directed to their targets by modern delivery systems"[262].

The United States further asserted that

> "[u]nder the law of armed conflict, in the absence of an express prohibition, the legality of the use of any weapons is fundamentally dependent on the facts and circumstances of the use in question"[263].

Advancing a contextual approach, it maintained that

> "The reality . . . is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which causes comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties."[264]

The United States' argument was that nuclear weapons can be used in a manner limited to military objectives. The Court declined to make a determination on the legality of the use of nuclear weapons under certain circumstances, considering that

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261. Verbatim Record, 1 November, at 39; in Burroughs, *The Legality of Threat or Use of Nuclear Weapons* 102 (1998).
262. Matheson *supra* footnote 256, at 362 (at note 46).
263. Verbatim Record, 15 November 1995, at 85; in Burroughs, *supra* footnote 261, at 96.
264. United Kingdom, Written Statement, p. 53, para. 3.70; United States of America, Oral Statement, CR95/34, pp. 89-90, cited in the *Nuclear Weapons* Advisory Opinion, *supra* footnote 67, at para. 94.

> "it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance" [265].

Judge Guillaume agreed that "the prohibition of so-called 'blind' weapons which are incapable of distinguishing between civilian targets and military targets" was absolute, but considered that nuclear weapons did not fall into this category. He did not think that nuclear weapons violated the prohibition of excessive collateral injuries in all circumstances:

> "nuclear weapons could not be regarded as illegal by the sole reason of the suffering which they are likely to cause. Such suffering must still be compared with the 'military advantage anticipated' or with the 'military objectives' pursued" [266].

Whether nuclear weapons have reached the degree of widespread public abhorrence which characterizes reactions to bacteriological or chemical weapons is still unclear. Perhaps many believe that nuclear weapons have served to keep the peace during the Cold War, or because only a few countries have operational nuclear weapons. Whatever the reason, the Advisory Opinion does not declare nuclear weapons to be totally prohibited.

As Matheson puts it:

> "The Court was clear in its conclusions that international law does not specifically prohibit the threat or use of nuclear weapons, and that international law applicable to the use of force — including the relevant provisions of the Charter and the law of armed conflict — applies to nuclear weapons as to any other type of weapon. However, on the question of whether the threat or use of nuclear weapons would in fact be consistent with the law applicable to the use of force, the Court was only able to find (by a vote of 7-7) that such threat or use would 'generally' be contrary to the rules applicable in armed conflicts. It could not conclude whether this would be so in an 'extreme circumstance of self-defence, in which the very survival of a State would be at stake'. Further, the Court expressly

265. *Nuclear Weapons* Advisory Opinion., *supra* footnote 67, at paras. 94-95.
266. *Id.*, separate opinion of J. Guillaume, at 59.

declined to state a view on the legality of the policy of nuclear deterrence, or of belligerent reprisals using nuclear weapons."[267]

Nevertheless, except for the extreme circumstance of self-defence in which the very survival of a State is at stake, the ICJ held that the threat or use of nuclear weapons would generally be contrary to the principles and rules of international humanitarian law.

In the view of the ICRC, the total prohibition of certain weapons, from exploding bullets to chemical and bacteriological weapons, "was not based on an objective analysis of the suffering caused by the weapons concerned; such means of warfare were simply deemed 'abhorrent' or 'inhuman'"[268]. In such cases, no proportionality test or military advantage questions were deemed relevant.

Nevertheless, these bans did not automatically flow from general principles or customary law, or from an absence of authorization, but from treaties specifically prohibiting the use of certain weapons of mass destruction[269]. The Rome Statute of the ICC followed the same approach, refusing to prohibit categories of weapons as inherently indiscriminate by simply drawing on such general principles. Of course, the ICC reflects the needs of criminal law, where the greatest specificity is required.

G. Limitations to laws' effectiveness

The tremendous progress in the humanization of the law of war brings into sharp relief the stark contrast between promises made in treaties and declarations and the rhetoric often accompanying their adoption, on the one hand, and the harsh, often barbaric practices actually employed on the battlefield. Bosnia, Kosovo, Sierra Leone, Congo, Somalia, and earlier Afghanistan, Cambodia, Kuwait and other situations present a picture of massacres, rapes and mutilations. The gap between the norms and the practice in war has always been wide; but never before have we had such a rich arsenal of norms accompanied by an emerging system of international criminal

267. *Supra* footnote 256.

268. *Id.*, Report of the ICRC for the Review Conference of the 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, February 1994, at 132; Coupland, *supra* footnote 240, at 12.

269. *Nuclear Weapons* Advisory Opinion, *supra* footnote 67, at paras. 52, 57.

courts. Problems have not been limited to the South, as demonstrated by atrocities in Bosnia and Kosovo. As regards the conduct of war by the most advanced countries, the bombing of targets in Belgrade was, fortunately, light years away from the horror of Dresden. Smart bombs and strict orders to limit collateral damage to civilians have resulted in relatively small numbers of civilian casualties.

The selection of targets, however, presents a more complex picture. In the NATO bombing of Yugoslavia, it would seem that most of the targets either were strictly military or served both military and civilian uses, such as bridges, highways, and electric-power installations, and infrastructure. Attacking dual-use objects is not necessarily unlawful, provided that they meet the definition of military objectives in Article 52 (2) of Protocol I, the principle of proportionality is observed, and collateral damage is minimized. But the attacks on television studios in Serbia are a different matter. Did the television studios make an effective contribution to Serbian military action and did the attacks offer a definite military advantage? Aldrich's assessment seems accurate:

> "if the television studios were not . . . used [for military transmissions] and were targeted merely because they were spreading propaganda to the civilian population, even including blatant lies about the armed conflict, it would be open to question whether such use could legitimately be considered an 'effective contribution to military action' "[270].

He adds that

> "[e]ven if . . . one were to conclude that certain television studios in Yugoslavia were, through their propaganda, making an effective contribution to military action, it would not necessarily follow that their destruction 'offers a definite military advantage', as required by Article 52 of Protocol I"[271].

Since in both the second Persian Gulf War and the Yugoslavia bombings, dual-use objects were frequently attacked with major consequences for the civilian population, new reflection should be given to the adequacy of the criteria stated in Additional Protocol I for attacks on such objects. Experience in Chechnya shows that even

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270. George Aldrich, "Yugoslavia's Television Studios as Military Objectives", 1 *Int'l LF* (1999), at 150.

271. *Id.*

technologically advanced countries may choose not to use smart munitions to reduce civilian casualties.

In confronting racial, ethnic, or religious hatreds and State interests of various kinds, the normative has been giving way. International and national criminal tribunals have, so far, not produced much demonstrable deterrence worldwide though the danger of being brought to account is more real than ever before. Laws have largely failed to perform their function. Humanization may have triumphed, but largely rhetorically.

The attack on the twin towers on 11 September 2001 generated additional stresses on international law. Deliberate terrorist attacks on civilians, accompanied by complete disregard of international law, diminish the incentive for other parties to comply with the principles of international humanitarian law and increase pressure for deconstruction and revision of the law, or simply disregard of the rules. International humanitarian law works well when its basic precepts and goals are shared by the adversaries and when there is at least rough symmetry in military capacity between the parties, but not when there are no shared values, as is often the case in ethnic and religious conflicts. This was true even before the emergence of the phenomenon of terrorism. For example, during World War II, having decided not to treat countries such as the Soviet Union and Poland as equals to itself, but as fit for exploitation, Nazi Germany refused to apply either the Hague Convention (IV), or the 1929 Geneva POW Convention on the eastern front[272].

International humanitarian law has been based on a fundamental neutrality — colour blindness if you will — of rules governing the conduct of war. The legality of recourse to war, the *jus ad bellum,* had no consequences on how wars were to be fought, for the *jus in bello*. The elementary chivalry that characterizes these rules includes principles prohibiting attacks on civilians and establishing the rule of proportionality to govern the scope of permissible damage to civilians.

These fundamental rules were based on the assumption of symmetry. In particular, it was assumed that conflicts would be fought between sovereign States. As a result, POW status and privileges and due process for trials could almost be taken for granted. Indeed, even in civil wars, the model was a Government fighting against a rebel

272. Meron, *supra* footnote 7, at 38-40.

entity seeking power and legitimacy and thus willing to abide by at least the basic rules. Most of these fundamentals are now called into question. Can international law perform well also in asymmetrical situations? When terrorists practice and even proclaim complete disregard of international law, what is the incentive for anti-terrorist forces to abide by the law? The moral philospher Michael Walzer has written that the very definition of "terrorism is the deliberate violation" of those norms[273].

Will reactions conform to the humanitarian law of war, and how strictly? Will rules be ignored, revised, bent? The same kinds of questions arise for the conduct of trials and the treatment of prisoners. Effective action against terrorism should be balanced against the need to avoid eroding and endangering norms which are essential for the protection of civilized humanity.

Atrocities are often committed by non-governmental actors, whose rights and obligations have not yet been defined by international law. The leaders of non-governmental entities involved in cruel internal conflicts and heads of terrorist movements must be warned that under the Rome Statute of the ICC they may be responsible for crimes against humanity.

The allied bombing campaign in Afghanistan (2001-2002) appears to have complied with the basic principles of distinction, but it is still too early to assess whether excessive collateral damage was inflicted. The applicability of the Geneva Conventions to captured Taliban and Al-Qaeda fighters has proved more problematic. After initial reluctance, the United States recognized that the Third Geneva Convention does apply to the conflict in Afghanistan between the United States and the Taliban, but it maintained that, under the provisions of the Convention, Taliban combatants do not qualify for POW status. It also argued that the Convention does not apply in Afghanistan and in other countries to the conflict with Al Qaeda terrorists. The argument with regard to Al Qaeda is persuasive, that with regard to the Taliban is not. Taliban soldiers appear entitled to the privileges of Article 4 (1) of the 1949 Geneva POW Convention[274]. In any event, there is no reason why Article 5 of Geneva Convention III should not be complied with. That Article provides

273. Michael Walzer, *Just and Unjust Wars* 203 (1977).

274. See "Agora: Military Commissions", 96 *AJIL* 320 (2002); Aldrich, *"The Taliban, Al Qaeda, and the Determination of Illegal Combatants", id.* at 891.

that persons having committed belligerent acts and having fallen into the power of the enemy shall enjoy the protection of the Convention, until such time as their status has been determined by a competent tribunal. The United States accepted, however, that both categories of detainees are entitled to humane treatment, consistent with the general principles of the Geneva Conventions and customary law.

The wars in Afghanistan and Iraq and the "war on terrorism" in 2002 and 2003 have compelled revisiting the notions of "direct participation in hostilities", especially the implications for civilians of the bearing of arms, of intelligence activities and guard duties, of logistical and political support for combatants, of civil defence committees, and of computer networks attacks. Whether such activities bring about a loss of civilian immunity against attack, the duration of such a loss of immunity, the entitlement to POW status, and the exposure to penal prosecutions and/or internment are now hotly contested. The humanitarian but somehow simplistic answers provided by Additional Protocol I to the Geneva Convention may well undergo some refinement in light of the emerging practice of States. Such refinement is preferable to embarking on more ambitious codification projects, which may result in undermining the existing humanitarian conventions.

The stress on the system caused by terrorism is liable to bring about a retrogression in the trend to humanize the law. The law of State responsibility has failed to deal effectively with terrorism and its suppression. International co-operation in criminal law enforcement appears to have been more successful. Al Qaeda's type of terrorism is also causing major stresses on the *jus ad bellum,* affecting the traditional understanding of concepts of self-defence in the UN Charter, of war itself, and of the legitimate parties to war[275].

Yet, humanitarianism in the application of the law of war must continue and become a part of public consciousness if respect for the rules is to be ensured. The core of the difficulties is not the inadequacy of the law, but a lack of shared values. Education, training, persuasion and emphasis on values that lie outside the law, such as ethics, honour, mercy and chivalry, must be vigorously pursued.

275. Steven Ratner, "*Jus ad Bellum* and *Jus in Bello* after September 11", 96 *AJIL* 905 (2002); Mark A. Drumble, "Victimhood in our Neighbourhood: Terrorism, Crime, Taliban Guilt, and the Assymmetries of the International Legal Order", 81 *North Carolina L. Rev.* 1 (2002).

Values of humanity must gain dominance if barbarism is to be contained, if not vanquished. Organizations and individuals deliberately flouting the most basic humanitarian rules should be universally condemned, delegitimized, shamed[276]. The creation of a culture of values is thus indispensable. This job cannot be left to lawyers alone.

276. Nicholas D. Kristof, "A Toast to Moral Clarity", *NYT*, 27 December 2002.

CHAPTER II

CRIMINALIZATION OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

A. Introduction

In this chapter, I shall discuss the influence of human rights on the criminalization of violations of international humanitarian law.

For nearly half a century, the Nuremberg and Tokyo trials and national prosecutions of World War II cases remained the major instances of criminal prosecution of offenders against fundamental norms of international humanitarian law. The heinous activities of the Pol Pot regime in Cambodia and the use of poison gas by Iraq against its Kurdish population are just two among the many atrocities left unpunished by either international or national courts. Some treaties were adopted that provide for national prosecution of offences of international concern and, in many cases, for universal jurisdiction; but, with a few exceptions, these treaties were not observed until recently. Notwithstanding the absence of significant prosecutions, an international consensus on the legitimacy of the Nuremberg Principles, the applicability of universal jurisdiction to international crimes, and the need to punish those responsible for egregious violations of international humanitarian law slowly solidified.

The habit of legal inaction in the face of mass atrocities has been changing however. The end of the Cold War, the spread of democracy and greater super-power co-operation in the Security Council, have encouraged a greater willingness to investigate crimes committed by previous regimes (South Africa, some Central and South American countries, Ethiopia, Indonesia). Along with the more rapid and widespread exposure of atrocities in the former Yugoslavia and Rwanda by the electronic media, these were among the factors which led to the establishment of the two *ad hoc* international criminal tribunals[277].

A number of prosecutions linked with World War II events took place (Australia, Canada, United Kingdom, Latvia, Italy). Prosecu-

277. "Developments in the Law — International Criminal Law", 114 *Harvard L. Rev.* 1943, 1952-1954.

tions of persons accused of more recent violations of international humanitarian law took place in the former Yugoslavia, in Rwanda and in Ethiopia. The arrest and the extradition proceedings of Pinochet in the United Kingdom (despite his eventual release on humanitarian/health grounds) have shown that the universality of jurisdiction provisions of conventions such as the 1984 UN Convention against Torture are beginning to be enforced, that the impunity of leaders — even of former heads of State — cannot be taken for granted, and that claims of immunity do not protect them from the reach of that convention[278]. The trial of Slobodan Milosević and the forthcoming trial of Milan Milutonović in the ICTY and the trials of major Rwandan leaders in the ICTR for serious violations of international humanitarian law point to the end of impunity of leaders or heads of State and Government.

It is, of course, the frequent failure of national justice in countries where atrocities are committed that makes the case for international tribunals and for third country prosecutions so compelling.

As long as international humanitarian law was primarily State-centric, it was not surprising that the sovereignty of States and their insistence on maintaining maximum discretion in dealing with those who threaten their "sovereign authority" have combined to limit the reach of international humanitarian law applicable to non-international armed conflicts[279]. Governments have been determined to deal

278. See "Current Developments", 48 *ICLQ* 937, 937-965 (1999). In February 2000, a Senegalese court indicted Chad's former dictator, Hissène Habré, on charges of torture. The indictment was quashed on appeal though because the acts had been committed before legislation was passed to implement the torture convention.

279. This applies even more to situations of lower-intensity internal strife. For a discussion of the norms applicable in non-international armed conflicts and internal strife and the problem of characterizing conflicts, see generally Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument", 77 *Am. J. Int'l L.* 589 (1983); Meron and Rosas, "A Declaration of Minimum Humanitarian Standards", 85 *Am. J. Int'l L.* 375 (1991); Eide, Rosas and Meron, "Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards", 89 *Am. J. Int'l L.* 215 (1995). See also Antonio Cassese, *International Criminal Law* 43 (2003); Steven R. Ratner and Jason C. Abrams, *Accountability for Human Rights Atrocities in International Law* 91-101 (1997).

For descriptions of non-international armed conflicts, see common Article 3 of the Geneva Conventions, *infra* footnote 280, and Article 1 of Additional Protocol II to the Geneva Conventions, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 12 December 1977, 1125 *UNTS* 609, reprinted in 16 *ILM* 1442 (hereinafter Protocol II).

with rebels harshly and to deny them legal recognition and political status. They have refused to be reassured by treaty language, such as Article 3 (2) common to the Geneva Conventions for the Protection of Victims of War[280], which explicitly states that the application of listed protective norms will not affect the legal status of the parties.

The emphasis on the protection of State sovereignty is now being attenuated by the heightened impact of human rights law and acceptance of the principle that human rights are a matter of international concern. The extension of protective norms to non-international conflicts is clearly compelled by human rights of individuals and populations. Recent norm-making conferences, including the Rome Conference, and customary rules of international humanitarian law have already greatly expanded the applicability of international humanitarian law to such conflicts.

Atrocities in the former Yugoslavia and Rwanda shocked the conscience of people everywhere, triggering, within a short span of time, several major legal developments: the promulgation by the Security Council, acting under Chapter VII of the United Nations Charter, of the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the adoption by the International Law Commission of a treaty-based statute for an international criminal court, the convening of a series of conferences in the United Nations leading to the Rome Conference (1998) for the adoption of the Rome Statute of the International Criminal Court (ICC), and a series of meetings of the Preparatory Commission designed to complete the remaining work necessary to bring the Rome Statute into force. Such a court is now in place.

The Security Council's Statutes for the Criminal Tribunals for the former Yugoslavia and Rwanda have contributed significantly to the

280. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), 12 August 1949, 6 *UST* 3114, 75 *UNTS* 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), 12 August 1949, 6 *UST* 3217, 75 *UNTS* 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), 12 August 1949, 6 *UST* 3316, 75 *UNTS* 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), 12 August 1949, 6 *UST* 3516, 75 *UNTS* 287. See also Hague Convention on the Protection of Cultural Property, 14 May 1954, Art. 19 (4), 249 *UNTS* 240; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, Art. 4, 1125 *UNTS* 3, reprinted in 16 *ILM* 1391 (1977) (hereinafter Protocol I).

development of international humanitarian law and its extension to non-international armed conflicts[281], especially through the seminal 1995 decision in the *Prosecutor* v. *Duško Tadić* interlocutory appeal on jurisdiction. This advance can be explained by the pressure, in the face of atrocities, for a rapid adjustment of law, process and institutions[282]. They constitute the first successful efforts of the international community to establish institutions to impose individual criminal responsibility since the Nuremberg trials. No matter how many atrocities cases these international tribunals may eventually try, their very existence sends a powerful message. Their statutes, rules of procedure and evidence, and practice stimulate the development of the law. The possible fear by States that the activities of such tribunals might preempt national prosecutions could also have the beneficial effect of spurring prosecutions before national courts for serious violations of humanitarian law. These developments have largely been driven by human rights and humanitarian concerns.

The salutary aspects of the Security Council's establishment of the International Tribunals for Yugoslavia[283] and Rwanda and, especially, their power derived from Chapter VII of the Charter to overcome lack of State consent to jurisdiction, must be balanced against the selectivity involved in a system where the establishment of a tribunal for a given conflict situation depends on whether consensus to apply Chapter VII of the UN Charter can be obtained. What is needed is a uniform and definite corpus of international humanitarian law that can be applied apolitically to atrocities everywhere, combined with adequate international jurisdiction[284]. The adoption of the ICC Statute is a major step in this direction[285].

The enforcement of international humanitarian law cannot, however, depend on international tribunals alone. National systems of

281. See James C. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", 87 *Am. J. Int'l L.* 639 (1993); Meron, "War Crimes in Yugoslavia and the Development of International Law", 88 *Am. J. Int'l L.* 78 (1994).

282. See Meron, "Rape as a Crime under International Humanitarian Law", 87 *Am. J. Int'l L.* 424 (1993).

283. See Meron, "The Case for War Crimes Trials in Yugoslavia", *Foreign Aff.*, Summer 1993, at 122.

284. See James Crawford, "The ILC Adopts a Statute for an International Criminal Court", 89 *Am. J. Int'l L.* 404, 416 (1995).

285. See generally Leila Sadat, *The International Criminal Court and the Transformation of International Law* (2001); William Shabas, *An Introduction to the International Criminal Court* (2001).

justice have a vital, indeed, the principal, role to play here. It is increasingly recognized that the role of international tribunals will always be complementary to that played by national justice systems. The ICC Statute may eliminate some need for establishing more *ad hoc* tribunals. Through the principle of complementarity, the ICC Statute enshrines the primacy of jurisdiction of national tribunals.

B. Crimes against Humanity

As noted by the Secretary-General in his Report on the Statute of the ICTY, crimes against humanity were first recognized in the Nuremberg Charter and in the trials of war criminals following World War II[286]. The offence was defined in Article 6 *(c)* of the Nuremberg Charter and that definition was repeated in the 1948 General Assembly resolution affirming the Nuremberg principles. Defining crimes against humanity was the Nuremberg Charter's most revolutionary contribution to international law. For the first time, international criminal responsibility was established for atrocities committed in one country, even as between its citizens. A reaction to atrocities committed in Germany and by Germany in the years leading up to and during World War II, this development was mitigated by its linkage with other crimes within the jurisdiction of the Tribunal. In this way, crimes against humanity were effectively reduced to war time atrocities. Article 6 *(c)* defined crimes against humanity subject to the jurisdiction of the Nuremberg Tribunal as:

> "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal,* whether or not in violation of the domestic law of the country where perpetrated"[287].

Although departing from the law of war tradition of extending protection only to people who belong to the enemy, the Nuremberg

286. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council resolution 808 (1993), UN doc. S/25704, para. 47 (1993) (hereinafter Report of the Secretary-General).

287. 82 *UNTS* 280 (emphasis added).

Charter thus maintained the law of war imprint by limiting the crimes to wartime crimes.

"Principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" were affirmed by the General Assembly[288]. The definition of crimes against humanity, as formulated by the International Law Commission, reiterated the requirement of a nexus with an armed conflict. The required nexus was, however, eliminated in Article II (1) *(c)* of Allied Control Council Law No. 10 (1945), the law adopted to establish a uniform legal basis for the prosecution of war criminals in occupation courts in Germany[289], and in subsequent conventions. The Genocide Convention (1948) thus provides that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish"[290]. Similarly, the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) applies to "crimes against humanity, whether committed in time of war or in time of peace, as they are defined in the Charter of the International Military Tribunal . . ."[291]. The Apartheid Convention (1973), which declared apartheid a crime against humanity, does not contain any reference to an armed conflict[292]. Dispensing with the requirement of a nexus to an armed conflict in the Genocide Convention is of particular significance because crimes against humanity overlap to a considerable extent with the crime of genocide. Indeed, the latter can be regarded as one species within the broader genus of crimes against humanity.

Article 5 of the ICTY Statute defines crimes against humanity subject to the jurisdiction of the Tribunal as certain crimes "committed in armed conflict, whether international or internal in charac-

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288. General Assembly resolution 95 (I): Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, 11 December 1946, Resolutions Adopted by the General Assembly during the Second Part of its First Session, UN doc. A/64/Add.1, at 188 (1947).

289. Allied Control Council Law No. 10 Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 1946, reprinted in 1 *Ferencz* 488; 1 *Friedman* 908, Art. II.

290. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 *UNTS* 277, Article 1.

291. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968, 754 *UNTS* 73, Art. 1.

292. International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 *UNTS* 243, Art. I.

ter"[293]. Thus, the ICTY Statute appears to resurrect the requirement of a nexus with an armed conflict. But in his comments on this provision, the Secretary-General appeared to abandon the war nexus, stating that "[c]rimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character"[294]. The Prosecutor of the ICTY has taken the same view, arguing that the war nexus required by the Nuremberg Charter was

> "not intended as an inherent or general restriction on the scope of crimes against humanity under general international law since the *ad hoc* jurisdiction of the Tribunal was limited to the 'just and prompt trial and punishment of the major war criminals of the European Axis' "[295].

The Appeals Chamber agreed:

> "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, . . ., customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law."[296]

Of course, the Tribunal's jurisdiction is defined by the terms of the Statute. But the decisions of the Tribunal have been important in establishing the proposition that a war nexus is not required under customary law.

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293. Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted pursuant to Security Council resolution 827 (1993) in Report of the Secretary-General, Annex, reprinted in 32 *ILM* 1192 (1993), Art. 5 (hereinafter ICTY or Yugoslavia Statute).

294. Report of the Secretary-General, *supra* footnote 286, para. 48.

295. *Prosecutor* v. *Duško Tadić*, International Criminal Tribunal for the Former Yugoslavia, Case IT-94-1-T, Response to the Motion of the Defence on the Jurisdiction of the Tribunal, 7 July 1995, at 54.

296. *Prosecutor* v. *Duško Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 141. Guénaël Mettraux, "Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", 43 *Harv. Int'l. LJ* 239, 266-267 (2002).

The Statute of the ICC confirms that no nexus with an armed conflict is required[297]. Under Article 7 of the Statute, crimes against humanity are defined as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"[298]. Crimes against humanity can thus be committed in all situations — international wars, internal wars of whatever intensity, and peacetime situations.

Before the Rome Statute, no instrument had established an exhaustive list of offences considered crimes against humanity. The Allied Control Council Law No. 10 established a list including ("but not limited to") those of the Nuremberg Charter and adding imprisonment, torture and rape. Article 5 of the ICTY Statute similarly listed murder, extermination, enslavement, deportation, imprisonment, torture and rape and other inhuman acts.

The trend towards considering systematic gross violations of human rights directed against civilians as crimes against humanity culminates in the ICC Statute. But the developments leading to the ICC list started much earlier. They are rooted in the norms and mechanisms developed in the United Nations since the early 1980s to combat the causing of disappearances, increasingly regarded as crimes against humanity. The Statute of the ICC includes a wide-ranging list of acts that, when committed as part of a widespread or systematic attack directed against any civilian population, constitute a crime against humanity[299]. The Statute defines several of those crimes: extermination, enslavement, deportation or forcible transfer of population, torture, forced pregnancy, persecution, apartheid and

297. Robinson, "Defining 'Crimes against Humanity' at the Rome Conference", 93 *AJIL* 43, 45-46 (1999).

298. Statute of the International Criminal Court, adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome), opened for signature on 17 July 1998, UN doc. A/CONF.183/9 (1998), reprinted in 37 *ILM* 1002 (1998), Art. 7.

299. These acts include murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law; enforced disappearance of persons; the crime of apartheid and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

enforced disappearances of persons[300]. In contrast to the ICTR Statute and to the early interpretation of the ICTY Statute by an ICTY Trial Chamber[301], the ICC Statute does not require a discriminatory motive, except for the crime of persecution[302]. The same view has been embraced by the ICTY Appeals Chamber in the *Tadić* case:

> "The Prosecution was correct in submitting that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 *(h)* concerning various kinds of persecution."[303]

Of all the crimes against humanity, the crime of causing disappearances and the crime of persecution best epitomize gross violations of human rights now included in an instrument criminalizing violations of international humanitarian law. At Nuremberg, only persecution committed on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal qualified as a crime against humanity. In Rome, the grounds were expanded to include:

> "political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court"[304].

Formally, of course, the ICC Statute does not criminalize violations of human rights, but only of international humanitarian law. Robinson thus noted that "[a]ll delegations agreed that the court's jurisdiction relates to serious violations of international criminal law, not international human rights law"[305]. Given the list of acts regarded as crimes against humanity, the factors distinguishing such crimes from serious violations of human rights seem to be their egregiousness and

300. *Id.*, Art. 7 (2).
301. See Meron, "War Crimes Law Comes of Age", in Meron, *War Crimes Law Comes of Age* 296, 299 n. 16 (1998).
302. Robinson, *supra* footnote 297, at 46-47.
303. *Prosecutor* v. *Duško Tadić*, Case No. IT-94-1-A, 15 July 1999, at para. 305.
304. *Supra*, footnote 298, Article 7 (1) *(h)*.
305. Robinson, *supra* footnote 297, at 53.

systematic nature as well as criminal intent *(mens rea)*. There is no question, however, that the offences included in the ICC Statute under crimes against humanity and under common Article 3 are virtually indistinguishable from major human rights violations. The tangled meshing of crimes against humanity and human rights violations supports the view that the former need not be linked with war[306].

Article 3 of the ICTR Statute does not require any nexus with armed conflicts. This positive element is balanced however, by a somewhat more complicated definition of crimes against humanity. Thus, in contrast to the Nuremberg definition, the ICTR Statute requires proof that all such crimes were committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" (Art. 3, chapeau)[307]. While Article 3 *(h)* is based on the Nuremberg Charter ("[p]ersecutions on political, racial and religious grounds"), the chapeau draws on the Secretary-General's commentary to Article 5 of the ICTY Statute. To prosecute crimes against humanity under Article 5 of the ICTY Statute, it is required to show only that the crimes listed in that article were "directed" against any civilian population. The requirement of establishing the large-scale, systematic nature of attacks against a civilian population appears in the jurisprudence of Nuremberg[308].

Clearly, crimes against humanity overlap to a considerable extent with the crime of genocide[309]. Crimes against humanity are crimes under customary law. Genocide is a crime under both customary law and a treaty. The core prohibitions of crimes against humanity and the crime of genocide constitute *jus cogens* norms.

C. The Yugoslavia and Rwanda Provisions on Internal Atrocities and the Tension between the Nullum Crimen *Principle and Customary Law*

Acting both on the basis of Chapter VII of the UN Charter and in pursuance of a request of the Government of Rwanda, the Security

306. For further discussion, see Meron, *supra* footnote 281, at 85.
307. Rwanda Statute, UN doc. S/RES/955 (8 November 1994), Art. 3.
308. See Meron, "The Case for War Crimes Trials in Yugoslavia", *Foreign Affairs*, Summer 1993, at 130; 15 *Law Reports of Trials of War Criminals* 135-36 (1949).
309. See generally William Schabas, *Genocide in International Law* (2000); Cherif Bassiounni, *Crimes against Humanity in International Criminal Law* (1999).

Council adopted a Statute for the International Tribunal for Rwanda in 1994[310]. The Statute constitutes an extremely important development of international humanitarian law with regard to the criminal character of internal atrocities. The Statute of the ICTY[311], in the view of some commentators, treats the ensemble of conflicts in the former Yugoslavia as international[312]. For others, it leaves the question of the characterization of each conflict open. The ICTR Statute, in contrast, is predicated on the assumption that the conflict in Rwanda is a non-international armed conflict.

Subject matter jurisdiction under the ICTR Statute encompasses three principal offences. First, like the ICTY Statute, the ICTR Statute grants the Tribunal the power to prosecute persons who have committed genocide[313]. The criminal nature of genocide committed in internal conflicts has never been doubted; the customary law character of the peremptory prohibitions stated in the Genocide Convention which do not require a connection to an armed conflict of any sort[314] was affirmed long ago by the International Court of Justice[315]. And the possible prosecution of perpetrators before an international penal tribunal is envisaged by Article VI of the Convention. Second, the ICTR Statute — following the example set by the ICTY Statute — confers on the Tribunal the power to prosecute persons who have committed crimes against humanity, discussed above. Third, the ICTR (Article 4 of the Statute) may prosecute violations of common Article 3 and of Additional Protocol II to the Geneva Conventions. Proof of systematic and deliberate planning is not required to establish these violations[316].

Apart from Article 2, on grave breaches of the Geneva Conventions, which addresses international armed conflicts, the ICTY's

310. Rwanda Statute, *supra* footnote 307.

311. Yugoslavia Statute. The first annual report of the Yugoslav Tribunal states that the Tribunal is empowered to adjudicate cases of crimes committed in both inter-State wars and internal strife. UN doc. A/49/342-S/1994/1007, para. 19 (1994).

312. O'Brien, *supra* footnote 281, at 647.

313. Rwanda Statute, *supra* footnote 307, Art. 2.

314. Genocide Convention, *supra* footnote 290.

315. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *ICJ Reports 1951* 15, 23 (Advisory Opinion of 28 May 1951), discussed in Meron, *Human Rights and Humanitarian Norms as Customary Law* 10-11 (1989).

316. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 12 December 1977, 1125 *UNTS* 609, reprinted in 16 *ILM* at 1442 (hereinafter Protocol II).

subject matter jurisdiction also covers rules of international humanitarian law that are applicable to both international and non-international armed conflicts and that are declaratory of customary law. The jurisprudence of the ICTY has interpreted Article 3 of the ICTY Statute, which concerns violations of the laws and customs of war as including common Article 3 of the Geneva Conventions, which is declaratory of customary humanitarian law applicable in non-international armed conflicts[317]. The ICTY has been applying Article 3 of its Statute both to international and non-international armed conflicts. The jurisdiction of the ICTR (Art. 4) also *explicitly* draws from instruments governing non-international armed conflicts (common Article 3 and Additional Protocol II). This text thus has a major normative importance. The jurisprudence of the ICTR has, however, largely focused on genocide and crimes against humanity rather than on Article 4.

Could Article 4 of the Rwanda Statute be challenged as contrary to the principle prohibiting retroactive penal measures ? The prohibition of retroactive penal measures (Article 15 of the ICCPR) is a fundamental principle of criminal justice and a customary, even peremptory, norm of international law that must be observed in all circumstances by national and international tribunals[318]. The Security Council could not have intended in resolution 955 to oblige the Tribunal to act contrary to this fundamental principle.

In arguing against any challenge to prosecutions of violations of these provisions on *ex post facto* grounds, one must emphasize that common Article 3 and Additional Protocol II are treaty obligations binding on Rwanda, that they clearly proscribe certain acts, and that those acts are also prohibited by the criminal law of Rwanda, albeit in different terms. Common Article 3 and Protocol II impose important prohibitions on the behaviour of participants in non-international armed conflicts, be they Governments, other authorities and groups, or individuals. The fact that these proscribed acts are not considered grave breaches has implications for discretionary versus obligatory prosecution or extradition, and, for some commentators, universal jurisdiction, but not criminality.

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317. *The Prosecutor* v. *Duško Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-AR72, 2 October 1995, paras. 89-94.

318. Meron, *Human Rights and Humanitarian Norms as Customary Law* 96 (1989).

The egregious acts listed in Article 4 of the Rwanda Statute, such as murder, the taking of hostages, pillage, degrading treatment and rape, constitute offences under both international law and the national law of the perpetrators. Therefore, no person who has committed such acts, in Rwanda or elsewhere, could claim in good faith that he or she did not understand that the acts were criminal. And the principle of *nullum crimen sine lege* is designed to protect a person only from being punished for an act that he or she reasonably believed to be lawful when committed. That common Article 3 imposes individual criminal responsibility has been established, of course, in the constant jurisprudence of the ICTY.

It is true that neither common Article 3 nor Additional Protocol II says anything about penalties. However, those provisions of the Geneva Conventions whose violation constitutes a grave breach also say nothing about penalties, and they incontestably establish a basis for the perpetrators' individual criminal responsibility, and even for universal jurisdiction. The Geneva Conventions define offences but leave it to the contracting States and to international tribunals to determine penal sanctions. Although Rwandan law allows for capital punishment, the penalties imposed by the ICTR are limited to imprisonment. Article 23 of the ICTR Statute states that, in determining the terms of imprisonment, the trial chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda[319]. It follows, therefore, that the principal requirements of Article 15 (1) of the International Covenant on Civil and Political Rights[320] prohibiting *ex post facto* penal measures are satisfied: the acts were previously prohibited under both international and national law; and the penalty that is authorized under the ICTR Statute does not exceed the one provided for under national law and is, in fact, lighter.

The fact that some trials would be the subject of international, rather than national, jurisdiction does not challenge fundamental principles of justice. As the post-World War II United Nations War Crimes Commission concluded, "a violation of the laws of war constitutes both an international and a national crime, and is therefore justiciable both in a national and international court"[321]. The fact

319. See Meron, *supra* footnote 283, at 127. A similar provision is contained in Article 24 (1) of the Yugoslavia Statute.

320. Opened for signature 16 December 1966, 999 *UNTS* 171.

321. *History of the United Nations War Crimes Commission and the Development of the Laws of War* 232 (1948).

that offences *ex jure gentium* that normally would be enforced by national courts — such as violations of the Geneva Conventions — would be enforced by an international tribunal directly vis-à-vis individuals, does not raise *ex post facto* problems.

Article 15 (2) of the Political Covenant is particularly pertinent. It provides that the article's prohibition on *ex post facto* penal measures shall not

> "prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations".

The legislative history of this provision suggests that the goal was to "confirm and strengthen" the principles of Nuremberg and Tokyo and to "ensure that if in the future crimes should be perpetrated similar to those punished at Nuremberg, they would be punished in accordance with the same principles"[322]. There is no doubt that the ethnic killings in Rwanda were criminal according to the general principles of law recognized by the community of nations. Murder is murder all over the world.

The authority of the Nuremberg Tribunals can also be invoked here. As the US Tribunal established under Control Council Law No. 10 stated in the *Ohlendorf* trial, in the context of crimes against humanity,

> "Murder, torture, enslavement, and similar crimes which heretofore were enjoined only by the respective nations now fall within the prescription of the family of nations. Thus murder becomes no less murder because directed against a whole race instead of a single person."[323]

Of course, the recognition that certain types of conduct are and have been criminal according to the principles of both national law and international law, and are thus crimes *ex jure gentium*, serves not

322. Marc J. Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* 331-332 (1987).

323. 4 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 497 (1949). As Judge B. V. A. Röling put it,

> "The crime against humanity is new, not in the sense that those acts were formerly not criminal . . . The newness is not the newness of the crime, but rather the newness of the competence to try it." B. V. A. Röling, "The Law of War and the National Jurisdiction Since 1945", 100 *Recueil des cours* 325, 345-46 (1960).

only to answer potential *ex post facto* challenges but also to support the principle of universal jurisdiction, the right of third States to prosecute those who commit international offences.

The International Military Tribunal (IMT) emphasized that, long before the fourth Hague Convention was adopted in 1907, many of the prohibitions in the Convention had been enforced by military tribunals in the trial and punishment of individuals accused of violating the rules of land warfare stated in the Convention:

> "The law of war is to be found not only in treaties, but in the customs and practices of States which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts." [324]

Elsewhere the Tribunal, in referring to war crimes mentioned in Article 6 *(b)* of its Charter, underscored that, under certain provisions of the Hague and Geneva Conventions, their commission "constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument" [325].

Or, as the Military Tribunal under Control Council Law No. 10 stated in the *High Command* case, the Geneva Convention and the Hague Convention "were binding insofar as they were in substance an expression of international law as accepted by the civilized nations of the world" [326]. The Tribunal emphasized that

> "[i]t is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally. If the acts charged were in fact crimes under international law when committed, they cannot be said to be ex post facto acts or retroactive pronouncements." [327]

In the *RuSHA* case, the Tribunal added that the acts of which the defendants were accused were in violation

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324. Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, 1 *Official Documents Trial Documents*, at 220-221 (1947).

325. *Id.*, at 253.

326. 11 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, at 534 (1948).

327. *Id.*, at 759, 1239 (describing *United States* v. *List (The Hostage Case))*.

> "of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of all civilized nations, of the internal penal laws of the countries in which such crimes were committed" [328].

Can anyone doubt that the atrocities in Rwanda were, in the language of Article 15 (2) of the Political Covenant, "criminal according to the general principles of law recognized by civilized nations"?

The language of common Article 3 and of the relevant provisions of Protocol II is clearly prohibitory; it addresses fundamental offences such as murder and torture, which are prohibited in all States. The Geneva Conventions have been universally ratified and are largely declaratory of customary law. On the authority of the International Court of Justice, the latter is true of common Article 3. Protocol II has also been ratified by a large number of States. The substantive international offences covered by common Article 3 and Protocol II may, to a certain extent, overlap with crimes against humanity. Their criminality cannot be questioned. Article 4 of the Rwanda Statute does not try to create new categories of grave breaches. It uses the different, and perhaps broader, term "serious violations", which obviously are matters of international concern. The meshing of the criminality of the acts prohibited under international law with their punishability under the laws of Rwanda suggests that the Statute respects the prohibition against retroactive legal measures.

Common Article 3 and Article 4 of Additional Protocol II cover areas — such as prohibition of torture — also addressed by human rights law, in some cases even by peremptory norms. The Statute thus enhances the prospects for treating egregious violations of human rights law — not only of international humanitarian law — as offences under international law.

It is not surprising that the understanding of common Article 3 as providing a basis for individual criminal responsibility has given rise to claims of violation of the principle of *nullum crimen sine lege* and has figured prominently in the jurisprudence of the ICTY, and rather less in that of the ICTR. Beyond the immediate question presented by common Article 3, the Tribunals' discussion throws some light on the compatibility of applying customary law in its infinite variety of

328. 4 *id.*, at 597, 618.

hitherto unarticulated formulations to specific cases and the respect for the principle of *nullum crimen*. There is some similarity here with the evolution of the common law in its early stages.

It may be noted that the Tribunals have focused more on the question whether a particular norm is customary than on the related question whether the norm concerned involves individual criminal responsibility.

In the case of *Prosecutor* v. *Aleksovski,* the accused argued that reliance cannot be placed on a previous decision of the Tribunal as a statement of the law, since that decision would necessarily have been made after the commission of the crimes, and thus not meet the requirements of the principle of legality. In its Judgment of 24 March 2000, the ICTY Appeals Chamber distinguished between the interpretation and clarification of customary law, on the one hand, which is permissible, and the creation of new law, which would violate the *ex post facto* prohibition:

> "[T]he principle of *nullum crimen sine lege* . . . does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime."[329]

In the *Čelebići* case, the Appeals Chamber confirmed the *Aleksovski* decision, concluding that the principle of *nullem crimen sine lege* does not prevent a court from interpreting and clarifying the elements of a particular crime[330].

The case of the *Prosecutor* v. *Vasiljević* adds importantly to the clarification of the law on the subject. The Trial Chamber first confirmed the earlier case-law, adding that the interpretation and clarification of existing law does not preclude progressive development of the law. Venturing further, the Tribunal stated that the principle of *nullum crimen* proscribes creating new offences, even offences stated in the Statute if they were not recognized by customary law at the time the alleged crime was committed, or which were not defined with sufficient clarity so as to be foreseeable:

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329. Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000, paras. 126-127.

330. IT-96-21-A, 20 February 2001, paras. 160, 173-174.

> "[U]nder no circumstances may the court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable and punishable, or by criminalizing an act which had not until the present time been regarded as criminal.
>
> . . . The scope of the Tribunal's jurisdiction *ratione materiae* is determined by customary international law as it existed at the time when the acts charged in the indictment were allegedly committed. This limitation placed upon the jurisdiction of the Tribunal is justified by concerns for the principle of legality . . .
>
> . . . The fact that an offence is listed in the Statute, or comes within Article 3 of the Statute through common Article 3 of the Geneva Conventions, does not therefore create new law, and the Tribunal only has jurisdiction over any listed crime if it was recognised as such by customary international law at the time the crime is alleged to have been committed." [331]

Applying these principles to the case at hand, the Tribunal held that the term "violence to life and person" which appears in the Statute through *renvoi* to common Article 3 does not necessarily reflect customary law and, in any event, does not provide for a sufficiently clear definition of a crime. It decided therefore to refrain from exercising the jurisdiction provided by the Statute and to acquit the accused of the crime concerned [332].

In a recent interlocutory appeal (May 2003), the Appeals Chamber rejected the claim that joint criminal liability infringes the principle *nullum crimen sine lege.* The Appeals Chamber observed:

> "In his Report to the Security Council, the Secretary-General of the United Nations proposed that the International Tribunal shall apply, as far as crimes within its jurisdiction are concerned, rules of international humanitarian law which are 'beyond any doubt part of customary international law'. The fact that an offence is listed in the Statute does not therefore create new law and the Tribunal only has jurisdiction over a listed crime if that crime was recognized as such under

331. Trial Chamber Judgment, IT-98-32-T, 29 November 2002, paras. 196-199.

332. *Id.*, at paras 203-204.

customary international law at the time it was allegedly committed."[333]

It held that the "joint criminal liability" or "joint criminal enterprise" in question was sufficiently foreseeable at the time the acts charged were committed and that the principle *nullum crimen* does not prevent the court from interpreting or clarifying the elements of a particular crime. While a certain measure of judicial interpretation is inevitable, a court may neither create new law nor carry the interpretation of the existing law beyond reasonable limits[334].

Most recently, in the *Hadžihasanović* Interlocutory Appeal ((IT-01-47AR 72) (July 2003), the Appeals Chamber emphasized that, in considering the issue of whether command responsibility (with regard to the duty to investigate and punish) exists in relation to crimes committed by a subordinate prior to an accused's assumption of command over that subordinate, it has always been the approach of the Tribunal not to rely merely on a construction of the Statute to establish the applicable law on criminal responsibility, but to ascertain the state of customary law in force at the time the crimes were alleged to have been committed. The Chamber found (by a majority decision) that no practice could be found, nor was there any evidence of *opinio juris* that would sustain the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate. The Appeals Chamber thus held that an accused could not be charged under Article 7 (3) of the Statute for crimes committed by a subordinate before the accused assumed command over that subordinate. The Appeals Chamber noted that it could impose criminal responsibility only if the crime charged was clearly established under customary law at the time the events in issue occurred. In case of doubt, criminal responsibility could not be found to exist, thereby preserving full respect for the principle of legality. Two dissenting judges argued that the general principle that commands responsibility includes a duty to punish crimes committed before the assumption of command had been clearly established at the relevant time. They contended that prosecuting a commander for failing to punish crimes committed before he assumed command represented merely the

333. *Prosecutor* v. *Milan Milutonović*, Appeals Chamber, Case No. IT-99-37-AR72, para. 9.
334. *Id.*, at paras. 37-38.

application of that well-established customary principle to a novel factual situation reasonably falling within the principle's scope.

The situation in the ICTR is somewhat different. I have already mentioned the report of the Secretary-General, which stated that the substantive law in the ICTY Statute was intended to be wholly customary. The UN Secretary-General viewed differently the customary law foundations of Article 4 of the ICTR Statute. He took the position that:

> "included within the subject-matter jurisdiction of the Rwanda Tribunal [were] international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common Article 3 . . ."[335]

The listed violations draw on both Article 4 of Protocol II (the "Fundamental guarantees" clause) — an important statement essentially of human rights — and common Article 3. The fact that the whole of Protocol II may not have been declaratory of customary law, was, however, compensated for by its being a part of the law of Rwanda, and thus, not *ex post facto* in Rwanda. In discussing the *nullum crimen* principle in the case of the *Prosecutor* v. *Akayesu*, an ICTR Trial Chamber reaffirmed the customary law character of common Article 3:

> "It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3."[336]

The Tribunal then relied on the ICTY jurisprudence upholding the customary law character of common Article 3. As regards Additional Protocol II, the Chamber agreed with the Secretary-General that the Protocol, as a whole, has not been universally recognized as custom-

335. UN doc. S/1995/134, para. 12 (1995).
336. Case No. ICTR-96-4-T, Judgment of 2 September 1998, para. 608.

ary law. However, Article 4 of the Protocol, on fundamental guarantees, reaffirms and supplements common Article 3 and thus, at the time of the events alleged in the indictment, formed part of customary law[337]. In the case of *Prosecutor* v. *Kayishema*, the Trial Chamber held it unnecessary to consider the customary law nature of Article 4 of the Statute, because the offences listed constituted crimes under the law of Rwanda and the violators were thus subject to prosecution[338]. Other ICTR cases have usually followed the *Akayesu* approach[339].

D. Criminality of Violations of Humanitarian Law

Until recently, the accepted wisdom was that neither common Article 3 (which is not among the grave breaches provisions of the Geneva Conventions) nor Additional Protocol II (which contains no provisions on grave breaches) provided a basis for universal jurisdiction, and that they constituted, at least on the international plane, an uncertain basis for individual criminal responsibility[340]. Moreover, it has been asserted that the normative customary law rules applicable in non-international armed conflicts do not encompass the criminal element of war crimes. In its comments on the proposed draft statute for the ICTY, the International Committee of the Red Cross thus "underlined the fact that, according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflict"[341]. In its final report, the United Nations War Crimes Commission (for Yugoslavia) was equally categorical[342].

337. *Id.*, at para. 610.

338. Case No. ICTR-95-1-T, Judgment of 21 May 1999, para. 157.

339. See, for example, *Prosecutor* v. *Musema*, Case No. ICTR-96-13, Judgment of 27 January 2000, para. 240.

340. One of the legal advisers of the International Committee of the Red Cross thus wrote: "IHL applicable to non-international armed conflicts does not provide for international penal responsibility of persons guilty of violations." Denise Plattner, "The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts", 30 *Int'l L. Rev. Red Cross* 409, 414 (1990). The chapter on execution of the Convention in each of the 1949 Geneva Conventions contains provisions on penal sanctions. For example, for the grave breaches provisions of the Fourth Geneva Convention, *supra* footnote 280, see Art. 129-130.

341. Unpublished comments (25 March 1993).

342. The UN War Crimes Commission reported:

> "[T]he content of customary law applicable to internal armed conflict is debatable. As a result, in general . . . the only offences committed in inter-

As early as the discussions of the ICTY Statute, however, voices urging international criminalization of violations of common Article 3 and Additional Protocol II had been heard. In the Security Council, Ambassador Albright explained the US understanding that the "laws or customs of war" in Article 3 of the Statute (which is illustrative and not exclusive)

> "include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions" [343].

An additional basis for considering that common Article 3 is applicable to the Yugoslav conflicts is the International Court of Justice's dictum that Article 3 contains rules that "constitute a minimum yardstick" [344], or a normative floor, for international conflicts.

The US Joint Chiefs of Staff proposed defining "other inhumane acts" referred to in Article 5 of the Yugoslavia Statute (crimes against humanity) as encompassing various offences stated in common Article 3 of the Geneva Conventions, which "are part of

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nal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification.

. . . . . .

[T]here does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes.

. . . . . .

It must be observed that the violations of the laws or customs of war referred to in article 3 of the statute of the International Tribunal [for the former Yugoslavia] are offences when committed in international, but not in internal armed conflicts." UN doc. S/1994/674, Annex, paras. 42, 52, 54 (1994).

343. UN doc. S/PV.3217, at 15 (25 May 1993). The prosecution at the Yugoslavia Tribunal has followed this approach in treating forcible sexual intercourse as cruel treatment or torture in violation of common Article 3 (1) *(a)*. The prosecution brings actions for violations of common Article 3 as if they were violations of the laws or customs of war. Thus, Indictment No. 1 against Nicolić (7 November 1994) states at paragraph 16.2 that Nicolić "violated the Laws or Customs of War, contrary to Article 3 (1) *(a)* of the [Fourth] Geneva Convention" by participating in cruel treatment of certain victims. More generally, the indictment charges the accused with "[v]iolations of the Laws and Customs of War including those recognized by Article 3 of the Fourth Geneva Convention". On common Article 3 in the Yugoslavia Statute, see also O'Brien, *supra* footnote 281, at 646.

344. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, Merits, *ICJ Reports 1986,* 14, 114 (27 June).

customary international law and, therefore, [are] consistent with the principle of *nullum crimen sine lege*"[345]. The International Law Section of the American Bar Association took a similar position[346].

There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars. Ambassador Albright's statement was therefore a welcome attempt to extend the concept of war crimes under international law to abuses committed in non-international armed conflicts.

The trend toward regarding common Article 3 and Additional Protocol II as bases for individual criminal responsibility was accentuated in reports concerning atrocities in Rwanda[347]. Having determined that the conflict in Rwanda constituted a non-international armed conflict, the Independent Commission of Experts on Rwanda stated that common Article 3 and Additional Protocol II[348], and the principle of individual criminal responsibility in international law[349], were applicable.

In contrast to the ICTY Statute, on which there is abundant contemporaneous documentation, the ICTR Statute is lacking in documented legislative history. Perhaps because it was realized that the crime of genocide and crimes against humanity might not adequately cover the field and that, for practical reasons, the safety net of common Article 3 and Protocol II was needed, there was no opposition in the Security Council to treating violations of common Article 3 and Additional Protocol II as bases for the individual criminal responsibility of perpetrators. Objections to the subject matter jurisdiction of the Tribunal based on the arguably *ex post facto* character of Article 4 of the Statute have not been raised either.

In his commentary on the ICTY Statute, the Secretary-General stated that the principle of *nullum crimen sine lege* requires that the Tribunal "apply rules of international humanitarian law which are

345. Office of the Chairman, Joint Chiefs of Staff, Memorandum for the DoD General Counsel, Appendix (25 June 1993) (unpublished, on file with author).

346. See Task Force of the ABA Section of International Law and Practice, Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia 15 (1993).

347. See Rene Degni-Sequi, Report on the Situation of Human Rights in Rwanda, UN doc. E/CN.4/1995/7, para. 54 (1994).

348. See UN doc. S/1994/1125, Annex, paras. 90-93 (1994). Rwanda has been a party to Protocol II since 1984.

349. See *id.*, paras. 125-28.

beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise"[350]. Because Rwanda is a party to both the Geneva Conventions and the Additional Protocols, the customary law character of common Article 3, which has been explicitly recognized by the International Court of Justice[351], and of Protocol II was not an issue for the Rwanda Statute.

Those who reject common Article 3 and Additional Protocol II as bases for individual criminal responsibility tend to confuse criminality with jurisdiction and penalties. The question of what actions constitute crimes must be distinguished from the question of jurisdiction to try those crimes. Historically, failure to distinguish between substantive criminality and jurisdiction has weakened the penal aspects of the law of war[352]. Treaties typically obligate contracting States to enforce their norms and punish those who commit listed offences[353]. A treaty may specify the State or States competent to exercise jurisdiction. When it does not, it may be necessary to resort to other treaties or customary law to ascertain whether certain States only or all States may exercise jurisdiction over the offence.

Treating violations of common Article 3 as a basis for individual criminal responsibility is affirmed by some national military manuals or laws. The US Department of the Army's Field Manual, for example, lists common Article 3[354] together with other provisions of the Geneva Conventions and the Hague Convention Respecting the Laws and Customs of War on Land and proclaims that "every violation of the law of war is a war crime"[355]. The US Army thus regards violations of Article 3 as encompassed by the notion of war crimes. It may prosecute captured military personnel accused of breaches of

350. Report of the Secretary-General, *supra* footnote 286, para. 34.

351. See *Military and Paramilitary Activities in and against Nicaragua*, *supra* footnote 344, *ICJ Reports 1986* at 114. The Court also decided that the obligation of States under common Article 1 to respect and to ensure respect for the Geneva Conventions applies to common Article 3.

352. See G. I. A. D. Draper, "The Modern Pattern of War Criminality", 6 *Isr. YB Hum. Rts.* 9, 22 (1976).

353. See Yoram Dinstein, "International Criminal Law", 20 *Isr. L. Rev.* 206, 221-222 (1985).

354. US Dept. of the Army, *The Law of Land Warfare*, para. 11 (Field Manual No. 27-10, 1956).

355. *Id.*, para. 499. The British Military Manual states that "all other violations of the Conventions not amounting to 'grave breaches' are also war crimes". UK War Office, *The Law of War on Land, Being Part III of the Manual of Military Law*, para. 626 (1958).

Article 3 for war crimes[356]. The recent German Military Manual actually describes some violations of common Article 3 and Protocol II as "grave breaches of international humanitarian law"[357]. On 27 April 2001 the Swiss Military Court of Cassation confirmed the conviction of a Rwandan national under Article 109 of the Military Penal Code for murder, attempted murder and grave breaches of the international conventions relating to the conduct of hostilities and the protection of persons and property, including common Article 3 and Additional Protocol II.

Since the readiness of the Nuremberg Tribunals to proceed against violations of the 1907 Hague Convention Respecting the Laws and Customs of War on Land[358] and the 1929 (Geneva) Convention Relative to the Treatment of Prisoners of War[359], neither of which contains provisions on punishment of breaches or penalties, it has not been seriously questioned that some acts of individuals that are prohibited by international law constitute criminal offences, even when there is no accompanying provision for the establishment of the jurisdiction of particular courts or a scale of penalties.

Whether international law creates individual criminal responsibility depends on such considerations as whether the prohibitory norm in question, which may be conventional or customary, is directed to individuals, States, groups or other authorities, and/or to all of these[360]. The extent to which the prohibition is addressed to individuals, whether the prohibition is unequivocal in character, the gravity

356. Regarding the exercise of jurisdiction over war crimes, see US Dept. of the Army, *supra* footnote 354, para. 505 *(d)*. Regarding the law to be applied, see *id.*, para. 505 *(e)*. See also 10 USC § 802 *(a)* (9)-(10) (1988) (listing the following persons, among others, subject to the UCMJ: prisoners of war in custody of the armed forces and, in time of war, persons serving with or accompanying an armed force in the field). See also *id.* § 818 ("General courts martial shall have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war"). Although the US authority under international law to prosecute violators is, in my view, clear, the US statutory authority to prosecute is less so. The United States would typically not be interested in prosecuting alien violators of common Article 3 when the offences occurred in civil wars in other countries.

357. Federal Republic of Germany, Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts Manual*, para. 1209 (1992).

358. 18 October 1907, 36 Stat. 2277, 118 *LNTS* 343 (hereinafter Hague Convention No. IV).

359. Opened for signature 27 July 1929, 47 Stat. 2021 (1932).

360. See generally Nguyen Quoc Dinh, *Droit international public* 621 (Patrick Daillier and Alain Pellet, eds., 5th ed., 1994); Meron, *Human Rights and Humanitarian Norms as Customary Law* 208-215 (1989).

of the act, and the interests of the international community are all relevant factors in determining the criminality of various acts.

That an obligation is addressed to Governments is not dispositive of the penal responsibility of individuals, if individuals clearly must carry out that obligation. The Nuremberg Tribunals thus considered as binding not only on Germany, but also on individual defendants, those provisions of the 1929 Geneva Convention and the 1907 Hague Convention that were addressed to "belligerents", the "occupant" or "an army of occupation"[361]. In light of this jurisprudence and the rudimentary nature of instruments of international humanitarian law as penal law, there is no justification for contesting the criminality of common Article 3 on the ground that it speaks of the obligations of "each Party to the conflict". As the International Military Tribunal so eloquently stated, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[362] This principle should, however, not obscure the fact that in some crimes States play a critical role, and that the principle of responsibility of individuals should not obscure the principle of State responsibility and prevent the possibility of also making States answerable for such collective crimes as those committed by the Nazis during World War II.

Typically, norms of international law have been addressed to States. They have engaged, in case of violation, the international responsibility of the State[363]. With increasing frequency, however, international law, and especially the law of war, has directed its proscriptions both to States and to individuals and groups. Moreover, there has been increasing willingness to interpret treaties as creating not only State responsibility but individual criminal liability as well. The trend towards imposing individual criminal responsibility for violations of an increasing number of norms of international law is clearly ascendant. Modern international humanitarian law imposes, and is perceived as imposing, criminal responsibility on individuals, often in addition to the State's international responsibility. Interna-

361. *United States* v. *von Leeb*, 11 *Trials of War Criminals*, *supra* footnote 323, at 462, 537, 539-540 (1948) ("The High Command Case").

362. *Trial of the Major War Criminals*, *supra* footnote 324, at 223.

363. Cf. crimes of State in the meaning of Article 19 of the ILC's draft Articles on State responsibility (Part One), adopted by the ILC on first reading, [1976] 2 *YB Int'l L. Comm'n*, Part 2, at 73, 95-96, UN doc. A/CN.4/SER.A/1976/Add.1 (Part. 2).

tional conventions[364] that proscribe certain activities of international concern without creating international tribunals to try the violators characteristically obligate States to prohibit those activities and to punish the natural and legal persons under their jurisdiction for violations according to national law.

The fact that international rules are normally enforced by national institutions and national courts applying municipal law does not in any way diminish the status of the violations as international crimes. Conversely, the evolution of individual criminal responsibility must not erode the vital concepts of State responsibility for the violation of international norms.

The penal element of international humanitarian law is still rudimentary. Its development has been nourished by such broad ideas as the Martens Clause[365], general principles of law recognized by civilized nations, and general principles of penal law[366]. When treaties fail to define clearly the criminality of prohibited acts, the underlying assumption has been that customary law and internal penal law would supply the missing links.

The development of penal aspects of international humanitarian law has shifted back and forth between a preference for more or less comprehensive lists of crimes and brief references to the laws and customs of war. The first approach was attempted in the report of the commission established by the Preliminary Peace Conference in 1919, which adopted a formal list of thirty-two crimes[367]. This approach was also taken in the lists of grave breaches in the 1949 Geneva Conventions, and in the expanded list of grave breaches in

364. E.g., Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993, Art. VII, 32 *ILM* 800, 810 (1993).

365. See Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes", 21 *Brit. YB Int'l L.* 58, 65 (1944); see also Lord Wright, "War Crimes under International Law", 62 *LQ Rev.* 40, 42 (1946). See also Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", 94 *AJIL* 78 (2000). The Martens Clause reads as follows:

> "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them [and annexed to the Convention], the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." Hague Convention No. IV, *supra* footnote 358, Preamble.

366. Draper, *supra* footnote 352, at 18.

367. United Nations War Crimes Commission, *supra* footnote 321, at 34-35.

Additional Protocol I to the Geneva Conventions. In Article 228 of the Treaty of Versailles itself, however, the German Government recognized the right of the Allied and Associated Powers to bring persons before military tribunals who were accused of having committed acts simply in violation of the laws and customs of war[368]. The view that lists of crimes should be detailed and comprehensive is in greater harmony with the principle of *nullen crimen*. It is clearly ascendant in contemporary practice.

The fourth Hague Convention, which contains a normative statement in its "[r]egulations respecting the laws and customs of war on land", was silent regarding penal responsibility. The early Geneva Conventions contain no penal provisions whatsoever. Nor does the 1929 POW Convention[369] (except with respect to penal and disciplinary measures against POWs), which figured so prominently in the Nuremberg trials as a basis for the prosecution and conviction of offenders. The other Geneva Convention of the same year, the Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, contained a weak provision requiring Governments to

> "propose to their legislatures should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention" (Art. 29)[370].

In contrast to the Statute prepared by the International Law Commission (1994), the Rome Statute lists and defines crimes and enumerates those that it deems applicable to non-international armed conflicts. Listing crimes has, of course, the advantage of preventing *ex post facto* challenges. As much as possible, the Rome Conference sought to reflect in treaty language the customary international law. Where it has gone beyond customary law may pose particular difficulties where nationals of non-State parties are prosecuted.

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368. Treaty of Peace with Germany, 28 June 1919, 2 *Bevan*s 43, 11 *Martens nouveau recueil* (Ser. 3) 323. See also Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, reprinted in 14 *AJIL* 95, 112-115 (1920) and Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, *Violation of the Laws and Customs of War* 16-19 (1919). The Commission recommended prosecuting all those guilty of offences "against the laws and customs of war or the laws of humanity". 14 *AJIL*, at 117.

369. *Supra* footnote 359.

370. 118 *LNTS* 303.

The Nuremberg Tribunals appear to have taken it for granted that violations of the substantive provisions of The Hague and Geneva Conventions were criminal. These Tribunals considered those provisions of the two treaties that were declaratory of customary law as having created an adequate basis for individual criminal responsibility. Establishing the customary law character of these provisions was necessary because the Hague Convention was not formally applicable as a result of the *si omnes* clause (some belligerents were not parties), and because the Soviet Union was not a party to the Geneva POW Convention[371]. Thus, although neither the Geneva Conventions that preceded those of 1949 nor the fourth Hague Convention contained explicit penal provisions, they were accepted as a basis for prosecutions and convictions in the post-World War II Tribunals.

The grave breaches system was introduced by the Geneva Conventions of 12 August 1949. The penal system of the Conventions requires the States parties to criminalize certain acts, and to prosecute or extradite the perpetrators. The advantage of this approach is its clarity and transparency, which is so important for criminal law. The disadvantage is the creation of the category of "other" breaches, which involves the violation of all the remaining provisions of the Conventions, some of which are arguably less categorically penal. Of course, the introduction of the system of grave breaches cannot alter the possibility that the other breaches may be considered war crimes under the customary law of war. Some national statutes provide that violations other than grave breaches may also give rise to criminal responsibility, without being subject to universal jurisdiction. Moreover, the list of grave breaches may be expanded through treaty interpretation, and various types of conduct may be treated as war crimes[372].

371. See Meron, *supra* footnote 315, at 37-41.

372. As happened in the case of rape, see Meron, *supra* footnote 282, at 426-447 (concerning the readiness of the International Committee of the Red Cross and the US Government to regard rape as a grave breach or war crime). It may be noted that the indictments presented by the Prosecutor against Meakic and others (Indictment No. 2, paras. 22.8-22.10 (13 February 1995)), and against Tadić and others (Indictment No. 3, paras. 4.2-4.4 (13 February 1995)) to the International Criminal Tribunal for the Former Yugoslavia treat "forcible sexual intercourse" as "cruel treatment" in violation of the laws or customs of war recognized by Article 3 of its Statute and common Article 3 (1) *(a)* of the Geneva Conventions, and also as a grave breach of the Conventions of causing "great suffering" under Article 2 *(c)* of its Statute. "Rape" is treated as a crime against humanity recognized by Article 5 *(g)* of the Statute of the Tribunal. See particularly *Prosecutor* v. *Kunarac,* Case No. IT-96-23&23/1-A, Judgment of 12 June 2002, at paras. 125-33, 179-85.

The creation of the penal system of the Geneva Conventions led some commentators to conclude that jurisdiction was limited to the courts of the detaining power and that international courts, such as the Nuremberg and Tokyo Tribunals, would have no competence in respect of grave breaches of the Conventions and Protocol I[373]. I disagree. Although international trials were not contemplated by the Conventions, which envisaged co-operative system of penal enforcement based on national courts, neither did they exclude the possibility of establishing international criminal tribunals and granting them jurisdiction over breaches of the Geneva Conventions as among States parties[374], or of the Protocols, or under Chapter VII, as the Security Council did in the Statutes of the *ad hoc* Tribunals for Yugoslavia and Rwanda. Surely, States can do jointly what they may do severally, especially when such joint action is undertaken through the Security Council.

Although the Geneva Conventions system of grave breaches contemplates national enforcement through national law, I see no difficulty in having these offences applied directly to individuals belonging to State parties by either a treaty-based tribunal or a Chapter VII tribunal. The fact that grave breaches are considered crimes under customary law strengthens the case for the competence of a treaty-based international tribunal.

E. Universality of Jurisdiction

Universal jurisdiction is a principle permitting States to exercise criminal jurisdiction over persons who have committed offences against international law that are recognized by the community of nations as of universal concern and as subject to universal condemnation and who are present in their territory, even in the absence of any other basis for jurisdiction. International law thus allows any

373. G. I. A. D. Draper, "The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1977", 164 *Recueil des cours* 1, 38 (1979).

374. Meron, "Prisoners of War, Civilians and Diplomats in the Gulf Crisis", 85 *AJIL* 104, 106 (1991).

The *Commentary on the Geneva Conventions of 12 August 1949: [No.] IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 593 (Oscar M. Uhler and Henri Coursier, eds., 1958) observes that Article 146 (2) of the Fourth Geneva Convention "does not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties."

State to apply its laws to certain offences even in the absence of territorial, nationality (active or passive), or protective bases of jurisdiction or other accepted contacts with the offender or the victim. Universal jurisdiction may be created by multilateral conventions, usually of a universal or almost universal character, or by customary international law.

Not all things prohibited by international law constitute offences involving the individual criminal responsibility of individuals and not all offences involving such individual responsibility are subject to universality of jurisdiction. As Rosalyn Higgins has observed, few are the offences subject to universal jurisdiction, these are acts commonly treated as criminal by most States in their own laws, and they are perceived as an attack upon international order[375]. She notes that the right to exercise such jurisdiction stems from universally or quasi-universally accepted treaties, or from acceptance under general international law. As a practical proposition, a State must have in place legislation enabling it to exercise such jurisdiction.

The United States Court of Appeals for the Sixth Circuit has agreed that when a State exercises jurisdiction under the universality principle, neither the nationality of the accused or the victims nor the location of the crime is significant: "The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations."[376] The Court of Appeals built on the previous *Eichmann* jurisprudence[377] and on Section 404 of the American Law Institute's Restatement of Foreign Relations Law of the United States[378].

In a more recent case, *United States* v. *Ramzi Ahmed Yousef*[379], the Second Circuit followed and elaborated upon *Demjanjuk*. The Court established the requirement of universal condemnation for a crime for which universal jurisdiction can be exercised:

> "universal jurisdiction arises under customary law only where crimes (1) are universally condemned by the community of

375. Rosalyn Higgins, *Problems and Process* 58 (1994).
376. *Demjanjuk* v. *Petrovsky*, 776 F. 6th 571, 583 (6th Cir. 1985), cert. denied, 457 US 1016 (1986).
377. *Attorney General of Israel* v. *Adolf Eichmann*, 36 *Int'l L. Rep.* 5 (Isr. Dist. Ct. 1961), aff'd, 36 *Int'l L. Rep.* 277 (Isr. Sup. Ct. 1962).
378. Restatement (Third) of the Foreign Relations Law of the United States § 404 (1987) (hereinafter Restatement).
379. 327 F. 3d 56 (2nd Cir. 2003).

> nations, and (2) by their nature occur outside of a State or where there is no State capable of punishing, or competent to punish, the crime" [380].

The universality principle permits a State, without contacts to the State in which the crime occurred [381] to prosecute a few offences recognized as offences against the law of nations, which include piracy, war crimes and crimes against humanity, but do not, in the Court's view, include "terrorism" which is not universally condemned, nor uniformly defined. It is thus not subject to universal jurisdiction [382].

In recent years, treaties creating universal jurisdiction have been increasingly concluded in matters such as the safety of civil aviation and maritime navigation, the safety of internationally protected persons and of UN personnel, suppression of terrorism, and such egregious violations of human rights as torture. Such treaties recognize the right of the State of custody to prosecute or to extradite to other States nationals of non-State parties. Customary principles of universality of jurisdiction may emerge from such treaties and pertinent practice and *opinio juris*. Whether such customary law has already matured for a specific crime will be tested by litigation and practice.

Despite limited practice, there has also been increasing readiness to recognize that crimes against humanity, the crime of genocide [383], and war crimes are subject, under customary law, to the universal jurisdiction of all States. Several States have adopted legislation enabling them to prosecute genocide committed outside of their territories either as a crime under the Genocide Convention or under customary law [384]. Other States might be able to use their general legislation in the criminal field for such purpose.

Investigations and prosecutions have taken place in a number of States for acts committed in the former Yugoslavia, and in Denmark for acts committed in Rwanda. Mandatory prosecution (or extradi-

380. *Id.*, at 105.
381. *Id.*, at 103.
382. *Id.*, at 104-106.
383. The provision of the genocide convention which mentions only the jurisdiction of the territorial State or of an international tribunal to be established has been largely ignored in the doctrine.
384. See Lori Fisler Damrosch, "Enforcing International Law through Non-Forcible Measures", 269 *Recueil des cours* 9, 216 (1997). An important recent example of legislation conferring universal jurisdiction over the crime of genocide is the Belgian Act concerning the Punishment of Grave Breaches of International Humanitarian Law (10 February 1999), Arts. 1 (1) and 7, reprinted in 38 *ILM* 918 (1999).

tion) of perpetrators of grave breaches of the Geneva Conventions and discretionary prosecution for non-grave breaches are left to the penal courts of the detaining power, as are, subject to certain broad principles stated in the Conventions, the law of evidence, procedural rules and the system of penalties.

In Belgium, on the basis of the 1993 law which grants Belgium jurisdiction over a broad range of violations of international humanitarian law committed abroad without requiring any nexus with Belgium (Spanish law also provides for broad universal jurisdiction)[385], complaints and preliminary investigations have been initiated against the ex-Chilean president Pinochet requesting his extradition from the United Kingdom, against members of the Government of the Democratic Republic of Congo, ex-leaders of the Cambodian Khmer Rouge, an ex-minister of Morocco, an ex-president of Iran and against the Israeli Prime Minister Ariel Sharon. On 27 June 2000, the indictment chamber *(chambre de mise en accusation)* of the Court of Appeal of Brussels ordered the trial of four suspects (Rwandan nuns) before the Brussels regional court of assizes on the basis of the 1993 law. On 8 June 2001, the jury found the suspects guilty of grave breaches (homicide) of the Geneva Conventions and of the Additional Protocols, and sentenced them to 12 to 20 years' imprisonment. An appeal of the decisions of the indictment chamber and the court of assizes was rejected by the Court of Cassation on 9 January 2002.

The wide reach of the Belgian law has been controversial. In April 2000 a Belgian judge issued an international arrest warrant against the Congolese Minister of Foreign Affairs alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols and crimes against humanity. The Minister was outside Belgium both at the time of the alleged violations and at the time when the arrest warrant was issued. These Belgian warrants prompted the Congo to institute proceedings before the ICJ, complaining of a violation of Congo's sovereignty and of the Minister's

385. Loi de 16 juin 1993 à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux protocoles I et II du 8 juin 1977, Moniteur belge, 5 August 1993. For the Spanish law, see Antonio Cassese, "When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo* v. *Belgium* Case", 13 *EJIL* 854, 860 (2002). See also *supra* footnote 384. The Belgian law, as amended in 1999, covered violations of the Geneva Conventions and their Additional Protocols, the Crime of Genocide, and Crimes against Humanity.

immunity. The case concerned two main questions: the extent of immunities of Foreign Ministers while in office, and the reach of the principle of universal jurisdiction. The Court decided not to address universal jurisdiction and confined itself to the question of immunity. It concluded that "the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability"[386]. The ICJ decision suggests that provisions in Statutes of the ICTY, ICTR and the ICC which override sovereign immunity privilege do not affect international law outside international criminal tribunals. From the separate opinions, it is apparent that judges had widely differing views of the scope of application of the principle of universal jurisdiction.

The question as to whether universal jurisdiction can be exercised in the absence of any connection with the State has been the object of controversy. In many national cases, the defendants had some connection with the territory of the forum State, for instance by residence. In Belgium, a recent court decision, triggered by the *Yerodia* case before the ICJ, has reintroduced the requirement of the suspect's presence in the territory in the forum State's territory. In this case, the indictment chamber of a Belgian court on 17 April 2002 in effect narrowed the scope of the 1993 law by holding that "les poursuites ne peuvent avoir lieu que si l'inculpé est trouvé en Belgique". In June 2002 a Belgian Appeals Court dismissed the case against Prime Minister Sharon arising from the massacres in the Sabra and Chatila refugee camps, insisting that for investigations or trials, suspects had to be physically present on Belgian soil[387]. However, the highest court, the Cour de Cassation, decided on 12 February 2003 that Sharon could not be prosecuted only as long as he enjoyed his

386. The Court also decided that the issuance of the arrest warrant against the Foreign Minister and its international circulation constituted violations of respect for the Minister's immunity from criminal process and his inviolability. The case for Belgium suffered from a lack of international practice supporting to the 1993 law. Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium)*, International Court of Justice, Judgment of 14 February 2002, para. 54. As regards a former Minister for Foreign Affairs, the Court held that he or she can be tried for acts committed prior or subsequent to his or her period of office, as well as for acts committed during that period of office in a private capacity. *Id*., at para. 61. For a criticism of this Judgment, see Steffen Wirth, "Immunity for Core Crimes? The ICJ's Judgment in the *Congo* v. *Belgium* Case", 13 *EJIL* 877 (2002); Antonio Cassese, *supra* footnote 385.

387. "Belgian Court Rejects Suit against Sharon", *International Herald Tribune*, 27 June 2002.

Prime Ministerial immunity. The court did not block the prosecution of a co-defendant, a former Israeli Army chief-of-staff[388].

A new law adopted on 1 August 2003[389] provides that while Belgium remains competent to exercise jurisdiction over serious violations of international humanitarian law regardless of the place of the crime's commission and whether or not the alleged perpetrator is present in Belgium, no prosecution shall take place if: (1) the suspect is not a Belgian national or does not have Belgium as his/her main domicile; or (2) the victim is not a Belgian national or has not habitually and regularly been living in Belgium for at least three years. In the second case, the proceedings can only be instituted at the request of the Federal Prosecutor, who will have final authority over the matter. The Federal Prosecutor may decide to institute proceedings only when it is in the interests of good administration of justice, and in accordance with the international obligations of Belgium, including treaties with the state of the suspect. Thus, the law requires a clear personal or territorial connection to Belgium and strict control by the Prosecutor. It is therefore likely to eliminate the diplomatic and legal difficulties for Belgium which have been triggered by the previous law.

The Princeton Principles on Universal Jurisdiction suggest that no connection with the prosecuting State is required:

> "universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction"[390].

In contrast, the ILA study of universality of jurisdiction takes the position that the physical presence of the accused on the prosecuting State's territory is required. The ILA study appears closer to the traditional understanding of universality of jurisdiction. Such a narrower view may avoid excessive prosecutorial zeal, whether motivated by political or other considerations. M. T. Kamminga, the

388. Cour de Cassation, section française, 2e Chambre; *NYT*, 13 February 2003.

389. Loi relative aux infractions graves du droit international humanitaire du 5 août 2003 modifiant la loi du 17 avril 1878 contenant le titre préliminaire du Code de procédure pénale, C-2003/21182, *Moniteur belge*, 7 août 2003, Ed. 2, p. 40511.

390. Princeton Principles on Universal Jurisdiction, Principle 1.

rapporteur on universal jurisdiction for the ILA, thus wrote that "the only connection between the crime and the prosecuting State that may be required is the physical presence of the alleged offender within the jurisdiction of that State"[391].

F. Non-Grave Breaches and Universal Jurisdiction

Do third States — i.e., States that have no territorial or nationality (active or passive) or "protective principle" links with the offender or the victim — have the right to prosecute those who commit violations in internal armed conflicts? Does the principle of universal jurisdiction apply to violations of international humanitarian law committed in internal armed conflicts? It is worth recalling that following World War II, it was neither the various international tribunals nor the courts of the occupying powers in Germany, but primarily the national courts of various Allied States, that tried the greater number of persons for war crimes and crimes against humanity[392] — although such trials were not required by international law, and (outside of the Nuremberg Charter) the offences were not even characterized as crimes by any general international treaty in force at the time. Such trials gained legitimacy from the situation of war and the traditional right of captors to try enemies accused of war crimes.

The right of States to punish perpetrators of violations committed outside their territory, while admittedly broad, is not unlimited and must conform to accepted jurisdictional principles recognized in international law, as well as to national constitutions and other laws[393]. Even States committed in principle to territorial criminal jurisdiction may and do provide by statute for prosecutions regarding particular categories of offences committed outside their territories. Often the acts concerned are recognized as criminal by interna-

391. Menno T. Kamminga, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, International Law Association, London Conference, 2000, p. 2.

392. See 11 *Reports of Trials of War Criminals*, *supra* footnote 323, at 28-48 (1949).

393. See Restatement, *supra* footnote 378, § 402. See also Richard R. Baxter, "The Municipal and International Law Basis of Jurisdiction over War Crimes", 28 *Brit. YB Int'l L.* 382, 391 (1951). The US Constitution grants Congress the power to define and punish offences against the law of nations and permits it to make acts committed abroad crimes under US law, Andreas F. Lowenfeld, "U.S. Law Enforcement Abroad: The Constitution and International Law", 83 *AJIL* 880, 881-882 (1989).

tional treaties, and less frequently by customary law, and sometimes by both. Obviously, universal jurisdiction over international offences can be exercised only in those States that have the necessary national laws. The Princeton Principles on Universal Jurisdiction provide, however, that "national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it"[394]. It is unlikely that this suggestion will be followed in State practice, and certainly not in the absence of enabling domestic legislation in States following a dualist model.

Many commentators agree that crimes against humanity are subject to universal jurisdiction[395]. And it is increasingly recognized that the crime of genocide[396] (despite the absence of a provision on universal jurisdiction in the Genocide Convention) may also be prosecuted by any State[397]. Is this also true, however, of violations of common Article 3 and Additional Protocol II to the Geneva Con-

394. Princeton Principles on Universal Jurisdiction, Principle 3.

395. Dinstein, *supra* footnote 353, at 211-212; Baxter, *supra* footnote 393; 1 *Oppenheim's International Law* 998 (Robert Jennings and Arthur Watts, eds., 9th ed., 1992); Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", 100 *Yale LJ* 2537, 2555, 2593-2594 and n. 91 (1991); M. Cherif Bassiouni, *Crimes against Humanity in International Law* 510-527 (1992). See also Judgment of 6 October 1983 (*In re* Barbie), Cass. crim., 1983 *Gazette du Palais*, Jur. 710. In its comments on the establishment of an international criminal court, the United States emphasized that States have a continuing responsibility to prosecute those who commit crimes against humanity. UN doc. A/AC.244/1/Add.2, para. 23 (1995) (hereinafter US Comments).

396. Restatement, *supra* footnote 378, § 404. Reporters' Note 1 states that "[u]niversal jurisdiction to punish genocide is widely accepted as a principle of customary law". See also A. R. Carnegie, "Jurisdiction over Violations of the Laws and Customs of War", 39 *Brit. YB Int'l L.* 402, 424 (1963); Jordan J. Paust, "Congress and Genocide: They're Not Going to Get Away with it", 11 *Mich. J. Int'l L.* 90, 92 and n. 2 (1989). In his separate opinion in the *Genocide* case before the International Court of Justice, Judge *ad hoc* Lauterpacht stated that the description of genocide as a crime under international law in Article 1 of the Convention was intended

> "to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime of genocide — that is to say, even when the acts have been committed outside their respective territories by persons who are not their nationals". *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *Provisional Measures*, *ICJ Reports 1993,* 325, 443, para. 110 (Order of 13 September).

397. The ILC's Statute for an International Criminal Court allows any State party to the Genocide Convention to lodge a complaint with the Prosecutor alleging that a crime of genocide has been committed (Art. 25 (1)). The court would have an inherent, or compulsory, jurisdiction over the crime of genocide (Art. 21 (1) *(a)*). Although addressing international, not national, jurisdiction, these provisions appear to reflect the principle of universal concern for the punishment of the crime of genocide.

ventions (Article 4 of the Rwanda Statute), which fall outside the grave breaches provisions of the Geneva Conventions ?

Just because the Geneva Conventions created the obligation of *aut dedere aut judicare* only with regard to grave breaches does not mean that other breaches of the Geneva Conventions may not be punished by any State party to the Conventions. Indeed, Article 129 (3) of the Third Geneva Convention provides that each State party "shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches". Identical provisions are contained in the other 1949 Geneva Conventions. As the Commentary to the Third Convention states, "The Contracting Parties . . . should at least insert in their legislation a general clause providing for the punishment of other breaches."[398] Even if there is no clear obligation to punish or extradite authors of violations of the Geneva Conventions that are not encompassed by the grave breaches provisions, such as common Article 3, all States have the right to punish those guilty of such breaches. In this sense, non-grave breaches may fall within universal jurisdiction, i.e., the concurrent criminal jurisdiction of all States. Moreover, in the *Nicaragua* case[399], the International Court of Justice recognized the applicability of common Article 1 of the Conventions to non-international armed conflicts addressed by common Article 3[400]. The command of Article 1 that all the contracting parties must respect and ensure respect[401] for the Geneva Conventions may entail resort to penal measures to suppress violations.

One finds some apparent confusion in the literature with regard to the relationship of the Geneva Conventions to universal jurisdiction. In denying the applicability of universal jurisdiction to non-grave

398. *Commentary on the Geneva Conventions of 12 August 1949 : [No.] III Geneva Convention Relative to the Treatment of Prisoners of War* 624 (Jean de Preux, ed., 1960).

399. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), Merits*, *ICJ Reports 1986,* 14 (27 June).

400. *Id.*, at 114.

401. On Article 1, see Luigi Condorelli and Laurence Boisson de Chazournes, "Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances' ", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* 17 (Christophe Swinarski, ed., 1984). See also Protocol I, *supra* footnote 279, Arts. 1 (1) and 89. Article 89 refers to the broader category of "serious violations" rather than to grave breaches, and appears to leave to each State the choice of means for complying with its obligations to act in situations of serious violations of the Conventions and the Protocol.

breaches of the Geneva Conventions, some commentators assume that universal jurisdiction requires recognition not only of the right, but also of the duty, to prosecute perpetrators of international offences. I dissent. There is no reason why universal jurisdiction should not also be recognized in cases where the duty to prosecute or to extradite is unclear, but the right to prosecute when offences are committed by aliens in foreign countries is recognized. Indeed, the true meaning of universal jurisdiction is that international law permits any State to apply its laws to certain offences when the suspect is present in its territory even in the absence of territorial, nationality or other accepted contacts with the offender or the victim. These are the offences that are recognized by the community of nations as of universal concern, and as subject to universal condemnation[402]. Although Judge Röling was critical of the concept of universal jurisdiction, he agreed that "the distinction between 'grave' and 'other' violations might find its perfect explanation in the obligation to prosecute grave violators and the right to prosecute those who have committed other breaches"[403]. Röling argued, however, that the Geneva Conventions apply only between belligerents[404], a view that was debatable at the time it was expressed and is unacceptable today.

As regards the national State of the perpetrators of non-grave breaches, its obligations go further. Given the purposes and objects of the Geneva Conventions and the normative content of their provisions, every State should have the necessary laws in place, and be willing to prosecute and punish violators of clauses other than the grave breaches provisions that are significant and have a clear penal character.

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402. See, e.g., Restatement, *supra* footnote 378, § 404.

403. B. V. A. Röling, *supra* footnote 323, at 342. Accord Howard S. Levie, *Terrorism in War: The Law of War Crimes* 192-193 (1993). Solf and Cummings observe that breaches of the Geneva Conventions are distinguishable from grave breaches by not being made subject to extradition, but they remain crimes under customary law and the perpetrators may be punished. Waldemar A. Solf and Edward R. Cummings, "A Survey of Penal Sanctions under Protocol I to the Geneva Conventions of August 12, 1949", 9 *Case W. Res. J. Int'l L.* 205, 217 (1977). Draper points out that

> "[t]he Conventions' system of repression of breaches seems to assume that non-grave breaches are to be treated as war crimes for whose suppression States have a duty to take all measures necessary. Beyond that obligation, it is left to individual States to decide the mode of suppression. This might be by way of penal proceedings, judicial or disciplinary, or of administrative action." Draper, *supra* footnote 352, at 45.

404. See Röling, *supra* footnote 323, at 359.

I would not like to suggest that all violations of the Geneva Conventions must thus be treated as offences. Some provisions may address administrative matters without any penal significance. The Conventions state many different kinds of obligations that bear on core humanitarian values in quite different degrees. Some of these are technical or administrative and would not seem an appropriate predicate for criminal proceedings. Of course, third States will have no interest in such breaches and usually no evidence to prosecute the offenders. These technical breaches are not recognized by the community of nations as of universal concern and as subject to general condemnation.

Suppose, however, that a third State prosecuted a violator of the prohibition of torture under common Article 3 or the prohibition of rape under Article 27 (of the Fourth Geneva Convention), neither of which is listed as a grave breach. No one can doubt the categorical character of the proscriptions stated in these articles. The identical prohibition of torture, which is widely regarded as a *jus cogens* norm of general international law, is defined as a grave breach for international armed conflicts. Even as regards the "peacetime" commission of torture, third States, such as the United States under the Alien Tort Claims Act (in the case of suits by aliens), or under the Torture Victims Act, have occasionally exercised civil jurisdiction over the alleged torturer without any protest by the defendant's national State.

Possibly, some Governments will protest foreign prosecutions based on activity that may reflect their State policy. And probably, legal advisers of some foreign ministries will discourage the justice ministries of their countries from prosecuting foreign officers for their conduct during a civil war in their own country. If the activity at the core of the prosecution is a significant international offence clearly giving rise to international concern, such as murder in violation of common Article 3, the prosecution probably would be legitimate, provided the accused is present in the territory of the prosecuting third State. There has been some support for applying the universality of jurisdiction doctrine not only to criminal prosecutions but also to civil claims[405].

In situations not clearly regulated by treaties, difficulties could

405. Beth Stephens, "Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 43-44 (2002).

arise between the custodial State and the State of nationality of the offender when the latter, in good faith, asserts its readiness to prosecute and requests the former to desist from prosecution and to deliver the person to it. The possibility that both States would exercise jurisdiction must be subject to the *non bis in idem* principle. Given States' traditional lack of interest in prosecuting those who have committed international offences in internal conflicts, the likelihood that two States will compete bona fide for the exercise of criminal jurisdiction is quite remote[406]. It may be noted that the grave breaches provisions of the Geneva Conventions do not address priority of jurisdiction. In any event, the Conventions do not require the State ready to prosecute (the custodial State) to extradite the offender to a State party requesting extradition as an alternative to proceeding with the prosecution.

Geneva Additional Protocol I did not contribute to clarifying the criminal system of repression of violations of international humanitarian law. The Protocol uses such terms as "grave breaches", "breaches", "violations" and even "serious violations" of the "Conventions or of this Protocol"[407]. Violations of the Protocol that are not defined as grave breaches have consequences similar to those resulting from violations other than grave breaches of the Geneva Conventions and may, in some cases, be prosecuted as war crimes by third States[408].

406. On the traditional scope of universal jurisdiction, see Kenneth Randall, "Universal Jurisdiction under International Law", 66 *The Tex. L. Rev.* 785, 788 (1988).

407. Protocol I, *supra* footnote 279, Art. 90 (2) *(c)* (i).

408. International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 1033 (Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, eds., 1987). States parties may, of course, "suppress any act or omission contrary to the provisions of these instruments [the Geneva Conventions and Protocol I]; furthermore they must impose penal sanctions on conduct defined by these same instruments as 'grave breaches' ". *Id.* See also *id.*, at 1012. The Commentary recognizes that, although the punishment of other than grave breaches is the responsibility of the power to which the perpetrators belong, "this does not detract from the right of States under customary law, as reaffirmed in the writings of a number of publicists, to punish serious violations of the laws of war under the principle of universal jurisdiction". *Id.* at 1011. But see Erich Kussbach, "The International Humanitarian Fact-Finding Commission", 43 *Int'l & Comp. LQ* 174, 177 (1994) (who believes that only grave breaches of Protocol I involve individual criminal responsibility and that serious violations implicate State responsibility only). Mr. DiBernardi (Italy) stated that national legislation which went beyond the grave breaches provisions could not be applied to armed forces of other States. See 6 Diplomatic Conference on the Reaffirmation and

G. War Crimes and Universal Jurisdiction

Those concerned about the recognition of the violations of common Article 3 and Protocol II as international offences should remember that, until fairly recently, questions were raised even about universal jurisdiction over war crimes, which is now largely taken for granted[409]. As important a scholar as Draper wrote in 1976 of the customary law right of a belligerent to try those charged with war crimes who fall into its hands; he therefore raised the question whether such jurisdiction is genuinely universal, on an analogy with jurisdiction over piracy[410]. From that perspective, which considers trial of captured war criminals as a manifestation of the principle of self-help, the Nuremberg process represented an expanded protection of the interests of co-belligerents[411]. Hersch Lauterpacht opened the door to a truly universal jurisdiction over war crimes by arguing that, in trying enemy soldiers for war crimes, the State is enforcing not only its national law but also the law of nations:

> "War criminals are punished, fundamentally, for breaches of international law. They become criminals according to the municipal law of the belligerent only if their action . . . is contrary to international law."[412]

Richard Baxter suggested that

> "one of the intermediate stages on the way to a true international penal jurisdiction may be the recognition that any State, including a neutral, has jurisdiction to try war crimes. By what State prosecution of a particular offence will actually be under-

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Development of International Humanitarian Law Applicable in Armed Conflict, Geneva (1974-1977), *Official Records*, doc. CDDH/SR.44 (30 May 1977), para. 76. A more persuasive view was expressed by Mr. Ullrich (German Democratic Republic), who stated that

> "the definition of grave breaches within the system of the Conventions and Protocol was a specific form of international co-operation in the prosecution of war crimes, but that it did not determine or limit the scope of war crimes. There were many other war crimes which were extremely grave violations of international law". *Id.*, para. 90.

409. See Restatement, *supra* footnote 378, § 404; *Oppenheim's International Law*, *supra* footnote 395, at 470.

410. See Draper, *supra* footnote 352, at 21. Compare G. Brand, "The War Crimes Trials and the Laws of War", 26 *Brit. YB Int'l L.* 414, 416 (1949).

411. See Röling, *supra* footnote 323, at 359-360. See also *United Nations War Crimes Commission*, *supra* footnote 324, at 30.

412. Lauterpacht, *supra* footnote 365, at 64.

> taken would then be determined, as it is now between allied or associated belligerents, by the convenience of the forum"[413].

The laws and usages of war are, of course, universal, and war crimes are crimes against the *jus gentium*[414]. The British Report of the War Crimes Inquiry states that it is a generally recognized principle of international law that belligerent and neutral States have a right to exercise jurisdiction in respect of war crimes since they are crimes *ex jure gentium*[415]. The British War Crimes Act 1991 allows proceedings to be brought against any British citizen or resident of the United Kingdom, irrespective of his or her nationality at the time of its commission, for an alleged World War II offence (murder, manslaughter or culpable homicide) that constituted a violation of the laws and customs of war[416]. Clearly, the object of the British legislation was to deal with suspected war criminals who had settled in the United Kingdom. The 1945 Regulations, which were the basis of the prosecutions immediately following the World War II, only foresaw the setting up of military tribunals outside the United Kingdom. The British legislation appears based on the right of all States to prosecute serious violations of the law of nations[417].

Contemporary international law would allow the United Kingdom to go further and prosecute even those simply present in the country, as was done by Canada in 1987, without encountering any objections from other States. The Canadian legislation provides for jurisdiction over acts that constitute war crimes and crimes against humanity under either customary or conventional international law in force at the time of their commission when the alleged offender is present in Canada, and Canada, in conformity with international law, can exercise jurisdiction[418]. The Austrian Military Manual clearly recognizes the principle of universality of jurisdiction over war crimes:

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413. Baxter, *supra* footnote 393, at 392 (footnotes omitted). Frits Kalshoven agrees that, in "customary international law, jurisdiction over war criminals is universal", but points out that, in practice, it is limited to the belligerent parties. Frits Kalshoven, *The Law of Warfare* 119 (1973).

414. 14 *Trials*, *supra* footnote 323, at 15.

415. Thomas Hetherington and William Chalmers, *War Crimes: Report of the War Crimes Inquiry*, 1989, Cmnd 744, at 45.

416. For other States' war crimes legislation, see *id.*, at 65-74.

417. *Id.*, at 60.

418. *Id.*, at 72-73. See also L. C. Green, "The German Federal Republic and the Exercise of Criminal Jurisdiction", 43 *U. Toronto LJ* 207, 208 (1993).

> "If a soldier breaches the laws of war, although he can recognize the illegality of his own action, his own State, the enemy State and also a neutral State can punish him for that action."[419]

Universal jurisdiction over war crimes means that all States have the right under international law to exercise criminal jurisdiction over offenders present in their territory. Most States do not have the necessary resources or interest to prosecute offenders when the State itself was not involved in the situation in question. Many States also do not have national laws in place that allow them to prosecute offenders. The United States appears to be among these States[420]. Universal jurisdiction over military personnel can be exercised under the Code of Military Justice[421]. The United States does have, however, ample authority under both the US Constitution and international law to adopt the necessary legislation.

H. War Crimes and Internal Conflicts

The Rwanda Statute contains no provisions paralleling Article 3 of the Yugoslavia Statute, which grants the ICTY jurisdiction over violations of the fourth Hague Convention and its annexed Regulations and has been applied also to the non-international aspects of the armed conflicts in the former Yugoslavia. This omission reflects the previous understanding which had denied war crimes a place in internal conflicts. However, war crimes under the "Hague law", i.e., those perpetrated in the conduct of hostilities, should also be punishable when committed in non-international armed conflicts. This is particularly important with regard to non-discriminating weapons

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419. Bundesministerium fur Landesverteidigung, Truppenfuhrung, para. 52 (1965) (translation by author).

420. See US Dept. of the Army, *supra* footnote 354, paras. 506-507. Under the War Crimes Act, 18 USC § 2441 (2000) US courts have jurisdiction over whoever inside or outside the United States commits a crime as defined in the Statute provided that he is a member of the armed forces or a national of the United States. The crimes defined include grave breaches and common Article 3 of the Geneva Convention and certain violations of Hague Convention No. IV. On US anti-terrorism legislation having effect in the United States, see 18 § 2332 *b*; on the killing of US nationals outside the United States, see 18 § 2332 *a*.

421. See Douglass Cassell, "Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court", 35 *New England L. Rev.* 420, 428-434 (2001).

and the violation of the basic principles of international humanitarian law. Despite all the obstacles, international law prohibitions that apply to international wars are gradually being extended to non-international armed conflicts. Through common Article 3 and Additional Protocol II, some war crimes were made enforceable in the ICTR and routinely applied in the ICTY.

In the ICTY, the application of war crimes to the non-international aspects of the armed conflicts in the former Yugoslavia has been a constant feature of the Tribunal's jurisprudence since the seminal *Tadić* decision of 1995[422]. However, the ICTR, while confirming that war crimes were applicable, has until recently refrained from convicting for war crimes for lack of proof of an adequate nexus between the acts of the accused and the armed conflict in Rwanda. It was only in May 2003, in the *Rutaganda* case that the Appeals Chamber, reversing the Trial Chamber for factual errors, entered a conviction for war crimes in Rwanda under Article 4 *(a)* of the Statute[423], thus correcting course in the ICTR's jurisprudence.

The Appeals Chamber of the ICTR had not previously endorsed a particular definition of the nexus requirement[424]. The Appeals

422. See Meron, "Cassese's Tadić and the Law of Non-International Armed Conflicts", in *Man's Humanity to Man: Essays on International Law in Honour of Antonio Cassese* 532 (L. C. Vohrah *et al.*, eds., 2003).

423. ICTR, Appeals Chamber, Judgment of 26 May 2003, Case ICTR-96-3-A (9987/A-9714/A), paras. 556-585.

424. In the *Akayesu* case, the ICTR Appeals Chamber observed that "common Article 3 requires a close nexus between violations and the armed conflict". *Akayesu* Appeals Chamber Judgment, para. 444. It then said:

> "This nexus between violations and the armed conflict implies that, in most cases, the perpetrator will probably have a special relationship with one party to the conflict. However, such a special relationship is not a condition precedent to the application of common Article 3 and hence of Article 4 of the Statute." *Id.*

The Appeals Chamber expressly noted that the definition of the nexus requirement had not been raised on appeal. *Id.* at n. 807. Trial Chambers of this Tribunal have four times considered charges under Article 4 of the Statute in their judgments. The definitions of the nexus requirement used in the four cases were similar but not identical to each other. In the *Akayesu* case, the Trial Chamber Judgment stated that the nexus requirement means that the acts of the accused have to be committed "in conjunction with the armed conflict". *The Prosecutor* v. *Jean-Paul Akayesu*, ICTR-96-4-T, 2 September 1998, para. 643. In *Kayishema-Ruzindana*, the Trial Chamber used four different formulations to characterize the nexus requirement, apparently considering them synonymous. It sometimes stated that there must be "a direct link" or "a direct connection' between the offences and the armed conflict. *The Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, 21 May 1999, paras. 185, 602, 603, 623 ("direct link"); 188, 623 ("direct connection"). It also stated that the

Chamber of the ICTY had done so twice. The first time, in the *Tadić* Jurisdiction Decision, the Appeals Chamber said in dictum that the offences had to be "closely related" to the armed conflict, but it did not spell out the nature of the required relation[425]. In the *Kunarac* Appeals Chamber Judgment, it endorsed the same standard and gave the following elaboration:

> "58. What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment — the armed conflict — in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. . . .
>
> 59. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties."[426]

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offences have to be committed "in direct conjunction with" the armed conflict. *Id.* at para. 623. Finally, it stated that the offences had to be committed "as a result of" the armed conflict. *Id.* In the *Musema* case, the Trial Chamber took the view that the offences must be "closely related" to the armed conflict. *The Prosecutor* v. *Alfred Musema*, ICTR-96-13-T, 27 January 2000, para. 260. In *Ntakirutimana*, the Trial Chamber acquitted the accused of the count under Article 4 *(a)* of the Statute based, among other things, on the Prosecution's failure to establish a nexus between the offence and the armed conflict, but it offered no definition of the nexus requirement. *The Prosecutor* v. *Elizaphan and Gérard Ntakirutimana*, ICTR-96-10 & 96-17-T, 21 February 2003, para. 861. See, however, Rutaganda Appeals Chamber Judgment, in French, ICTR-96-3-A, 26 May 2003, paras. 556-585.

425. *The Prosecutor* v. *Duško Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70 ("*Tadić* Jurisdiction Decision").

426. *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovać and Zoran Vuković*, IT-96-23 & IT-96-23/1-A, 12 June 2002, paras. 58-59. Just before and after these paragraphs, the Appeals Chamber said:

> "57. There is no necessary correlation between the area where the actual

The Appeals Chamber agreed with the explanation of the nexus requirement given by the ICTY Appeals Chamber in *Kunarac.* It added first that the expression "under the guise of the armed conflict" does not mean simply at the same time as an armed conflict and in any circumstances created in part by the armed conflict. Second as the *Kunarac* Appeals Chamber Judgment indicated, the determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one. Particular care, the *Rutaganda* Appeals Chamber Judgment noted, is needed when the accused is a non-combatant.

Given the Trial Chamber's conclusion that Rutaganda participated directly in those killings, that he exercised a position of authority over the *Interahamwe*, and that soldiers of the Presidential Guard participated in the ETO massacre alongside the *Interahamwe*, the Appeals Chamber concludes that no reasonable trier of fact could have failed to find a nexus between the armed conflict and Rutaganda's participation in the particular killings charged[427].

Since the Trial Chamber's erroneous conclusion concerning the required nexus supplied the only basis for its acquittal of Rutaganda

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fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring States or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.

. . . . . .

60. The Appellants' proposition that the laws of war only prohibit those acts which are specific to an actual wartime situation is not right. The laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it. The laws of war can apply to both types of acts. The Appeals Chamber understands the Appellants' argument to be that if an act can be prosecuted in peacetime, it cannot be prosecuted in wartime. This betrays a misconception about the relationship between the laws of war and the laws regulating a peacetime situation. The laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation."

427. Rutaganda Appeals Chamber Judgment, paras., 579-581.

on the war crimes counts, correction of the error by the Appeals Chamber required entry of convictions on both counts, and the error was thus one "which has occasioned a miscarriage of justice"[428].

Experience has shown that cultural property can be extensively destroyed in non-international armed conflicts. The applicability of parts of the (Hague) Convention for the Protection of Cultural Property in the Event of Armed Conflict[429], which is primarily addressed to international wars, to non-international armed conflicts is therefore useful[430]. The Convention also contains a penal clause obligating States parties, within their ordinary criminal jurisdiction, to prosecute and impose penal or disciplinary sanctions on persons of whatever nationality who commit breaches of the Convention[431]; logically, this clause must cover breaches of obligations pertaining to non-international armed conflicts. The 1999 Protocol to this Convention, which has very important criminal provisions, states (Art. 22) that it will apply to non-international armed conflicts occurring within the territory of one of the parties, though not to situations of internal disturbances and tensions. Other provisions establish jurisdiction based on territoriality, active nationality or the universality principle. This is another recognition of offences committed in non-international armed conflicts that are subject, under the treaty, to the universal jurisdiction of the contracting parties.

In the regulations regarding weapons and methods of war, limitations or prohibitions are increasingly applied to internal armed conflicts governed by common Article 3. A very important recent development has been to extend the prohibitions on the particularly abhorrent use of gas to domestic conflicts through international treaties. Although the 1925 (Geneva) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare[432] was arguably addressed to international wars only, this limitation has been overridden by customary

428. Article 24 of the Statute.
429. 14 May 1954, 249 *UNTS* 240.
430. See *id.*, Art. 19 (1) ("In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.").
431. See *id.*, Art. 28.
432. 17 June 1925, 26 *UST* 571, 94 *LNTS* 65.

law. Later treaties on the subject have not followed the 1925 paradigm. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction — a 1972 arms control treaty — obligates the parties "in any circumstances"[433]. Similarly, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, of 13 January 1993 (which concerns both arms control and use), provides that the obligations of States under the Convention shall apply "under any circumstances", including non-international armed conflicts and even civil strife[434]. Article VII of the Convention contains provisions requiring each State party to prohibit natural and legal persons anywhere in its territory or subject to its jurisdiction from undertaking any activity prohibited to a State party under the Convention and to penalize violators[435].

The revised Protocol II to the 1980 Convention on Certain Conventional Weapons on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices (1996) also applies in internal armed conflicts. The Review Conference of the United Nations Convention on Certain Conventional Weapons (CCW), which took place in December 2001, adopted without opposition an amendment extending the scope of application of the CCW to non-international armed conflicts. It was agreed to make the existing CCW Protocols applicable to non-international armed conflicts. Thus, in addition to

433. 10 April 1972, Art. 1, 26 *UST* 583, 1015 *UNTS* 163.

434. Art. 1 (1), 32 *ILM* 800 (1993). The Department of State's article-by-article analysis of the Convention, annexed to the President's Letter of Transmittal to the Senate, points out that

> "the prohibition on the use of chemical weapons extends beyond solely their use in international armed conflicts, i.e. chemical weapons may not be used in any type of situation, including purely domestic conflicts, civil wars or State-sponsored terrorism. As such, this article closes a loophole in the Geneva Protocol of 1925, which covered only uses in war, i.e. international armed conflicts. Note that the phrase 'never under any circumstances' reflects a similar phrase in Article I of the Biological Weapons Convention." S. Treaty doc. No. 21, 103d Cong., 1st Sess. 4 (1993).

A recent commentary notes that the words "undertakes never under any circumstances" have a universal dimension, extend to all activities of State parties everywhere, and are independent of the character of the conflict, whether it is international armed conflict, non-international armed conflict, or civil strife. See Walter Krutzsch and Ralf Trapp, *A Commentary on the Chemical Weapons Convention* 12-13 (1994).

435. See Krutzsch and Trapp, *supra* footnote 434, at 109-115; S. Treaty doc. No. 21, *supra* footnote 434, at 40-41.

amended Protocol II on the use of mines, booby-traps and similar devices, Protocol I (which prohibits weapons injuring by means of fragments not detectable by X-rays), Protocol III (which restricts the use of incendiary weapons), and Protocol IV (which prohibits the use and transfer of blinding laser weapons), will also be applicable in non-international conflicts. Furthermore, the amendment of the CCW reverses the presumption that new protocols should apply to international armed conflicts only. The limitations or prohibitions in the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997), for example, apply in all circumstances. Future protocols (for instance, on remnants of war, if adopted) may contain more limiting language, but negotiation will start from the assumption that they are applicable in all armed conflicts.

These developments hold great humanitarian promise because of the catastrophic dimensions of the use of mines in internal conflicts. They represent an extremely important step toward remedying an unacceptable *lacuna*: that the use of land mines causing incalculable damage to the population of countries involved in non-international armed conflicts was not prohibited by law of war treaties.

Once internal atrocities are recognized as international crimes and thus as matters of major international concern, the right of third States to prosecute violators must be accepted. Typically, these would be offences of such significance that the international community would have an important interest in prosecuting the violators, especially when the criminal justice systems of the State where the offences were committed and/or the State of nationality have failed to act. Many serious violations of common Article 3 and Geneva Protocol II, as well as other significant norms of the Geneva Conventions, though not explicitly listed as grave breaches, are of universal concern and subject to universal condemnation. These are crimes *jure gentium* and therefore all States should have the right to try the perpetrators. This right can be seen as an analogue, *mutatis mutandis*, of the prerogative of all States to invoke obligations *erga omnes* against States that violate the basic rights of the human person [436].

The *ad hoc* Tribunals for Yugoslavia and Rwanda have concurrent

436. *Barcelona Traction, Light & Power Co., Ltd. (Belgium* v. *Spain) (New Application), ICJ Reports 1970* 3, 32 (5 February).

jurisdiction with national courts, and primacy over them. These international tribunals may request that national courts defer to their competence, subject to the principle of *non bis in idem*, and in the case of questionable national court proceedings. Otherwise, the establishment of the *ad hoc* Tribunals for Yugoslavia and Rwanda does not affect the right or duty of States, as the case may be, to prosecute those who violate international humanitarian law[437].

The extension of the concept of international criminality to violations of common Article 3 and Protocol II should not lead to the conclusion that the distinction between crimes under municipal law and offences under international law would be eliminated. It simply means that certain egregious crimes, such as murder, committed in certain circumstances will now be treated as international offences in situations of non-international armed conflict as well. The ICTY Appeals Chamber has clarified this question in the recent *Kunarac* decisions which I have already cited[438]. Thus, in situations of non-international armed conflict, the question of whether or not an offence constitutes a war crime is usually framed in terms of the nexus between the situation and the specific acts of the perpetrator.

The normative contributions made by the ICTY and the ICTR Statutes have substantially influenced the shaping of international law. These developments have already been followed by the provi-

437. See Yugoslavia Statute, Arts. 9-10; Rwanda Statute, Arts. 8-9; Yugoslavia Tribunal, Application [by the Prosecutor] for Deferral by the Federal Republic of Germany in the Matter of Duško Tadić, Case No. 1 of 1994 (8 November 1994); Decision of the Trial Chamber in Case No. 1 of 1994, IT-94-1-D (8 November 1994); Yugoslavia Tribunal, Application by the Prosecutor for a Formal Request for Deferral by the Government of Bosnia and Herzegovina of Its Investigations and Criminal Proceedings in Respect of Radovan Karadzić, Ratko Mladić and Mico Stanisić (21 April 1995), Decision by the Trial Chamber in Case No. IT-95-5-D (16 May 1995); and, concerning the Lasva River Valley Investigation, Decision by the Trial Chamber in Case No. IT-95-6-D (11 May 1995).

Regarding the relations between national courts and the international criminal court, see Report of the International Law Commission on the work of its forty-sixth session, UN, *GAOR*, 49th session (Supp. 10), UN doc. A/49/10 (1994) at 129-138, Arts. 51-58.

The United States expressed the concern that the statute adopted by the ILC does not adequately reflect the principle that the jurisdiction of the proposed international tribunal should be complementary to the national criminal justice systems. See US Comments, *supra* footnote 395, paras. 6-14. The United States proposed that the State of nationality, or any other State actively exercising jurisdiction, should have preemptive rights of jurisdiction in relation to the proposed international tribunal. See *id.*, para. 68.

438. Case No. IT-96-23&23/1-A, Judgment of 12 June 2002, para. 58.

sions of the Treaty of Rome criminalizing violations of common Article 3 and some violations of Additional Protocol II[439].

It is not surprising that, on a subject of such great humanitarian importance, the practice of States lags behind *opinio juris*, and general principles of law play an important role. Nevertheless, slowly but unmistakably, the practice of States is evolving, as exemplified by the already discussed Belgian law relative to *"crimes de droit international"* which provided for the criminal jurisdiction of Belgian courts over certain breaches not only of the Geneva Conventions and Protocol I, but also of Protocol II, regardless of the nationality of the victim or perpetrator or of where the offence was committed[440]. This rare example of a law providing for comprehensive universal jurisdiction over perpetrators of atrocities[441] committed in internal conflicts in foreign countries has, as pointed out, been reassessed and narrowed down. Thus in the aftermath of the *Yerodia* case, that law might be applied only to the cases where the accused is present on the investigating/prosecuting State's territory.

I. The International Criminal Court

Two events with enormous institutional and normative implications for international humanitarian law are the UN Diplomatic Con-

439. Rome Statute of the International Criminal Court, Arts. 8 (2) *(c)*-8 (2) *(e)*.

440. Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions, *Moniteur belge*, 5 August 1993; see also Eric David, *Principes de droit des conflits armés* 556 (1994). For the revision of the Belgian law, which incorporates the language of the ICC Statute on most of the crimes against humanity, see Act concerning the Punishment of Grave Breaches on International Humanitarian Law (10 February 1999), reprinted in 38 *ILM* 918 (1999). The Act provides for the definition of the crime of genocide, crimes against humanity, and grave breaches of the Geneva Conventions and of the two Additional Protocols, and for the jurisdiction of Belgian courts, irrespective of where the crimes have been committed. The Act makes no distinction between international and non-international conflicts and both criminalizes and establishes Belgian jurisdiction (universality of jurisdiction) with regard to breaches committed in non-international conflicts as well. See also Thomas Graditzky, "Individual Criminal Responsibility for Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts", *Int'l Rev. Red Cross* 29, No. 322 (March 1998). The Security Council has, however, taken a more reserved attitude to universal jurisdiction in its resolution 1291 (2000) on the Democratic Republic of Congo. In this resolution (para. 15) it called only "on all parties" to bring to justice those responsible for violations of the crime of genocide, crimes against humanity and war crimes.

441. Other warrants involved the killing of Belgian peacekeepers, among others. Parquet de Bruxelles, *Crimes de guerre au Rwanda*, Press Communiqué No. 30.99.3959/94 (30 May 1995) (on file with author).

ference of plenipotentiaries in Rome (15 June-17 July 1998) on the establishment of an international criminal court and the resulting Rome Statute's entry into force in 2002. The Diplomatic Conference followed four years of intensive preparatory work by the United Nations, first by an *ad hoc* committee (1995) and then by the Preparatory Committee on the Establishment of an International Criminal Court (1996-1998). The starting point and an important focus for the *ad hoc* and preparatory committees was the draft statute drawn up by the International Law Commission in a remarkably short time and completed in 1994, under the leadership of Professor James Crawford as chairman of the commission's working group.

The adoption of the Rome Statute of the International Criminal Court on 17 July 1998 was an event of historic importance. Although it is too early to assess the prospects of the effectiveness of the Court and many aspects of its Statute, such caution is not required with regard to the statement of the crimes contained in Articles 6-8. These articles, now part of treaty law, contain definitions of crimes adopted only for the purposes of the Statute and the jurisdiction of the ICC. These crimes constitute the principal offences that the ICC will try. Nonetheless, they will take on a life of their own as an authoritative and largely customary statement of international humanitarian and criminal law, and may thus become a model for national laws as well as for laws implementing the principle of universality of jurisdiction. The process by which States have started adopting the same offences as a part of their criminal laws has already begun. By conforming their legislation to the ICC Statute, States are better positioned to take advantage of the principle of complementarity, whereby bona fide national investigations or prosecutions pre-empt ICC prosecutions. In contrast to the ICTY and the ICTR, which have primacy of jurisdiction over national courts, the ICC is subordinate in jurisdiction to national courts. Many States parties are revising, or have already revised, their penal legislation to allow the prosecution of ICC offences. In terms of substantive humanitarian law, Articles 6-8 are the most important part of the Statute. They will influence practice and doctrine. And though, by their own terms, the ICC offences are treaty law, they may be applied to non-party State nationals in circumstances specified in Article 12 of the Statute, including by the Security Council, acting under Chapter VII of the UN Charter. Furthermore, the adoption of an international criminal code, which

the Statute in effect constitutes, helps to counter one of the objections to international criminal jurisdiction, that is, the lack of uniform international substantive criminal law[442].

Regarding the crime of genocide, Article 6 repeats verbatim Article 2 of the Convention on Prevention and Punishment of the Crime of Genocide as adopted by the UN General Assembly on 9 December 1948. Incitement to commit genocide is now dealt with in Article 25 (3) *(e)* in Part 3 of the Statute (General Principles of Law).

As a contribution to international law, Article 7, on crimes against humanity, is more important. Leaving aside the brief provision contained in Article 6 *(c)* of the Nuremberg Charter and the statements of crimes against humanity in the Statutes of the criminal tribunals for the former Yugoslavia and for Rwanda, it is the first comprehensive multilateral treaty definition of crimes against humanity. It is accompanied by definitions of the principal offences. The articles on crimes against humanity and on war crimes are, on the whole, enlightened, credible and up to date.

The chapeau of crimes against humanity mentions no nexus to armed conflicts, either international or internal in character. The Statute thus confirms that crimes against humanity are as applicable in peacetime as they are in wartime. Crimes against humanity under the Rome Statute, as well as some of the offences listed for non-international armed conflicts, overlap with some violations of fundamental human rights (such torture, rape or enslavement), which thus become criminalized under a multilateral treaty.

The crimes against humanity chapeau also does not require proof of discrimination against the targeted civilian population. Following the Nuremberg model, and ICTY jurisprudence, Article 7 makes discriminatory intent pertinent only to the offence of persecution (Art. 7 (1) *(h)*). The chapeau adheres to the disjunctive approach ("widespread or systematic attack") already followed by the two *ad hoc* tribunals. The disjunctiveness of the Statute is, however, balanced by a definition of "attack directed against any civilian population" (para. 2 *(a)*) as a course of conduct involving the commission of multiple acts (referred to in paragraph 1). This definition of attack should not be regarded as raising the threshold for crimes against humanity. It has always been unlikely that acts not involving com-

442. See generally, Leila Nadya Sadat, "Redefining Universal Jurisdiction", 35 *New England L. Rev.* 241, 249 (2000).

mission of multiple attacks would be tried by the ICC as crimes against humanity in the first place. The definition of attack further recognizes that crimes against humanity can be committed not only by States but also by various organizations ("pursuant to or in furtherance of a State or organizational policy to commit such attack"). This provision may be an important addition to the arsenal of criminal law norms to be applied to individuals acting for non-State entities, and especially terrorist organizations. For crimes against humanity to be established the element of intention that must be shown is knowledge of the attack.

The chapeau is then followed by the enumeration of 11 offences, building on but significantly adding to the Nuremberg list. These offences or some of their terms are then specifically defined. These definitions in themselves make a considerable contribution to international law.

The additions to Nuremberg are forcible transfer of population (not only deportations), imprisonment and other severe deprivations of personal liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any form of sexual violence of comparable gravity, enforced disappearance of persons and apartheid[443]. Most important and as already mentioned, the crime of persecution expands the protected categories well beyond those in the Genocide Convention.

The definition of extermination includes "the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population"[444]. The definition of enslavement includes the exercise of power attaching to ownership over persons in the course of trafficking in persons, in particular women and children. This provision further demonstrates the importance attributed by the Statute to the criminalization of offences against women[445].

Deportation is usefully defined as forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law[446].

443. Rome Statute of the International Criminal Court, Art. 7 (1).
444. *Id.*, Art. 7 (2) *(b)*.
445. *Id.*, Art. 7 (2) *(c)*.
446. *Id.*, Art. 7 (2) *(d)*.

The definition of torture is not limited to acts committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, as was the case in the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[447]. The offence is thus not limited to governmental actors. This is a positive and important development.

Forced pregnancy is defined as the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

The definition of enforced disappearances of persons elaborates on earlier definitions adopted in the United Nations. It describes such disappearances as the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Article 8 on war crimes contains, first, a section tracking grave breaches of the Geneva Conventions, i.e., acts against persons or property protected by those Conventions; a second section then addresses other serious violations of the laws and customs applicable in international armed conflict; finally, several sections define offences in non-international armed conflicts.

The second section, paragraph 8 *(b)*, is a very important and rather comprehensive statement of offences that draws on the Hague Law and Additional Protocol I to the Geneva Conventions, and thus goes beyond the grave breaches provisions of the Geneva Conventions. The innovations include criminalization of various acts against UN peace-keepers and members of humanitarian organizations, their flags, emblems and assets; criminalization of transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies (which, except for the addition of the words "directly or indirectly", is a grave breach of Protocol I, but not of the Fourth Geneva Convention); criminalization of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting

447. *Id.*, Art. 7 (2) *(e)*.

a grave breach of the Geneva Conventions; criminalization of conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in the hostilities, and intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable for their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions. One provision (para. 2 *(b)* (iv)) concerns collateral damage or proportionality. It requires, for the criminalization of an attack launched in the knowledge that such attack will cause an excessive damage to civilians or to the natural environment, that the attack be "*clearly* excessive in relation to the concrete and direct overall military advantage anticipated". The emphasized words indicate a departure from Protocol I's language and constitute a certain clarification of the Protocol's principle of proportionality.

The list of prohibited weapons is limited to poison or poisonous weapons (Article 23 *(a)* of the Regulations annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land), asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices (1925 Geneva Protocol), and bullets which expand or flatten easily in the human body (1899 Hague Declaration (IV, 3) concerning expanding bullets)[448]. Additional weapons can be included in an annex to the Statute by a future amendment[449]. Specific references to bacteriological (biological) agents or toxins for hostile purposes or in armed conflict and to chemical weapons as defined and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction regrettably have been omitted. It remains to be seen whether the ICC will interpret the offences concerning poison, gases, and analogous materials so as to include some of the deleted elements.

Article 8 *(c)* repeats verbatim and declares criminal serious violations of common Article 3. Drawing on Article 1 (2) of Additional Protocol II, Section *(d)* states that Section *(c)* applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

448. Geneva Protocol 17 June 1925; Hague Declaration IV, 3, 29 July 1899.
449. Art. 8 (2) *(b)* (xx).

Section *(e)* of Article 8 contains an important and significant list (but far shorter than the list of war crimes drafted for international armed conflicts) of other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law. The recognition that war crimes under customary law are pertinent to non-international armed conflicts represents a significant advance. The list draws on the Hague law and the additional Protocols. It includes the crimes of intentional attacks against civilians, buildings dedicated to religion, education, art, etc., and hospitals, refusal of quarter, and destruction or seizure of property of an adversary that is not imperatively required by the necessity of the conflict. In addition to the inclusion of some fundamental Hague law rules as offences for non-international armed conflicts, Section *(e)* — drawing on additional Protocol II —criminalizes the displacement of the civilian population for reasons related to the conflict, but this is qualified by a reference to the security of the civilians or imperative military reasons. Unfortunate omissions include provisions addressing the war crimes of not abiding by the principles of proportionality and of discrimination between civilians and combatants, principles the violation of which is regarded as a war crime for international armed conflicts (Art. 8 (2) (iv), 8 (2) (xx)). The war in Chechnya has demonstrated, once again, how important these principles are for non-international armed conflicts.

Sexual offences — rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of common Article 3 — are recognized as criminal for non-international armed conflicts as well as for international ones. Conscription or enlistment of children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities is criminalized (note that there is no mention of national armed forces for non-international armed conflicts, as in Section *(b)*). Non-inclusion of any weapon, even poison gas, in the sections addressing non-international armed conflicts is unfortunate. The possibility remains, however, of considering the use of gas against any civilian population in any internal conflict — or even absent an armed conflict — as a crime against humanity.

Despite considerable pressure from some States, the Rome conference resisted attempts to raise the threshold for non-international

armed conflicts to that contained in Article 1 (1) of additional Protocol II. Accepting such changes would have made the sections addressing non-international armed conflict virtually ineffectual. Instead, Section *(f)* repeats the already mentioned language of Article I (2) of Additional Protocol II and adds the statement that paragraph *(e)* applies to armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organized armed groups, or — reflecting recent developments of the law — between such groups. The reference to protracted armed conflict was designed to give some satisfaction to those delegations that insisted on the incorporation of the higher threshold of applicability of Article 1 (1) of Additional Protocol II. Attempts to consider protracted armed conflict as recognizing an additional high threshold of applicability should be resisted. The statement that nothing in the sections on non-international armed conflicts "shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State by all legitimate means" must not be understood as allowing any Government to commit the offences enumerated in these sections of the Statute.

The offences stated in the Statute have been amplified by "elements of crimes" to be adopted by a two-thirds majority of the Assembly of States Parties[450] (Art. 9). Such elements shall assist the Court in the interpretation and application of Articles 6, 7 and 8. They must be consistent with the Statute. Their adoption reflects the recognition of the need for very specific guidelines for judges and prosecutors alike, as befits criminal law.

The definitions of crimes are now in place. It is up to the States to make them effective, punish violators and deter future crimes through both national prosecutions and prosecutions before the ICC.

Apart from the definition of crimes, the Statute (Part 3) makes another great contribution to international law: the elaboration of general principles of criminal law. The Statute contains the first comprehensive statement of such principles for offences against

450. For the text as adopted by the Preparatory Commission, see PCNICC/2000/Add.2 (2 November 2002). The Preparatory Commission also adopted a draft of rules of procedure (PCNICC/2000/1/Add.1, 2 November 2002), which has been approved by the Assembly of States Parties. In contrast, adoption of rules of procedure and evidence in the ICTY and the ICTR is the responsibility of judges.

international humanitarian law. Of course, many such principles have already emerged from the jurisprudence of the ICTY and the ICTR. It is to be hoped that the interpretation and the application of general principles of criminal law by the ICC would be consistent with the work of the *ad hoc* tribunals.

It thus defines matters such as mental element, grounds for excluding criminal responsibility, mistake of fact and mistake of law, superior orders, and refines the concept of responsibility of commanders and other superiors by introducing a distinction between military and civilian superiors. Under Article 124, States parties have seven years after the entry into force of the Statute for the State concerned to exercise the opt-out option for war crimes (they may declare that they do not accept the jurisdiction under Article 8), but not for genocide or crimes against humanity.

Article 5 of the Statute, listing crimes within the jurisdiction of the Court, mentions the crime of aggression in addition to the crimes of genocide, crimes against humanity, and war crimes. However, the Court may not exercise jurisdiction over the crime of aggression until the Statute has been amended, in accordance with Articles 121 and 122, to incorporate a definition of aggression. Such a definition must be consistent with the Charter of the United Nations.

The provision on aggression (Art. 5 *(d)*) is difficult to evaluate. Its inclusion in the jurisdiction of the ICC was made tentative by the need to adopt a definition grounded in customary law, to set out the conditions under which the Court shall exercise jurisdiction, and to adopt an appropriate amendment to the Statute. The provision on aggression represents a compromise between those who insisted on the inclusion of the crime of aggression in the Statute on the same operational basis as the crime of genocide, crimes against humanity and war crimes, and those who argued for complete exclusion of the crime of aggression on the ground that it has not been sufficiently defined and that it is a crime of States more than a crime of individuals. This controversy has been compounded by different visions of the role of the UN Security Council, i.e., whether a prior determination by the Security Council that aggression has been committed is a condition precedent for the exercise of the Court's jurisdiction over individuals accused of the crime of aggression, as well as of a potential role for the ICJ. Given the strong convictions of the permanent members of the Security Council, and some other States, about the peremptory nature of the UN Charter's provisions pertaining to the

Security Council's authority to determine that aggression has occurred, as well as the insistence of the Permanent Members on their right to the veto, an agreement on a text that would not reflect the requirement for such a determination prior to the Court's consideration of the individual responsibility for the crime has proven elusive[451].

Insofar as personal jurisdiction is concerned, the most important, and controversial, provision of the Statute is Article 12. Unless the matter has been referred to the Court by the UN Security Council acting under Chapter VII, in which case State consent is not required, Article 12 (2) states that the Court shall have jurisdiction if one or more of the following States are parties to the Statute or, being non-parties, have declared acceptance of the Court's jurisdiction: the State of territoriality or the State of the nationality of the accused. Thus, the Court would have jurisdiction over nationals of a non-State party whose nationals are accused of crimes within the jurisdiction of the Court, provided that the State where the crimes have been committed is a party or has accepted the jurisdiction of the Court by a special declaration. The latter possibility might enable a State to impose ICC jurisdiction on nationals of a State occupying its territory, without subjecting itself to the jurisdiction in respect of crimes committed in its own territory which is not under foreign occupation. This provision has been challenged by the United States as a violation of the principle that treaties cannot create obligations for third States without their consent. The answer that the jurisdiction would catch individuals and not States, while correct, presents problems where important consequences from their prosecution can arise for the accountability of their Government.

States of nationality may indeed have a special interest in cases in which the individual accused of crimes under the Statute has acted in the line of duty. In such cases, a prosecution against an individual can mask a dispute over facts and over the law which implicates State accountability. The Security Council, acting under Chapter VII of the Charter, may request the Court to defer any investigation or prosecution for renewable periods of 12 months.

There is a certain lack of balance in Article 12. By providing that the ICC is to have jurisdiction only when it is accepted by the State

451. See Meron, "Defining Aggression for the International Criminal Court", 25 *Suffolk Transnat'l L. Rev.* 1 (2001).

where the crimes have been committed or by the national State of the accused, the treaty effectively lets off tyrants, who kill their own people on their own territory. This provision might make the court largely ineffective in dealing with rogue regimes that choose not to become parties to the Statute, except when the Security Council exercises its Chapter VII authority to extend jurisdiction to them.

Given the intense opposition of the United States to the ICC, it is unclear whether the United States would permit referral of cases to the ICC under Chapter VII of the Charter (Art. 13 *(b)* of the Statute). The advantage of such a form of referral is that it does not require consent of the State or States involved and that it would permit a quick response to atrocities. Such a response would also benefit from the power and authority of the Security Council.

At the insistence of the United States, the Security Council adopted under Chapter VII, on 12 July 2002, resolution 1422 (2002) exempting from investigation or prosecution by the ICC for a renewable 12-month period nationals of States not parties to the ICC Statute and participating in UN established or authorized operations. Such deferral is allowed under Article 16 of the Statute, provided that the invocation of Chapter VII is justified. The resolution has generated controversy, the opponents arguing that the Security Council has abused its Chapter VII powers.

Attempts by the United States to conclude bilateral agreements under Article 98 of the ICC Statute excluding surrender to the ICC of its nationals, may, if successful, further limit the reach of the ICC, while formally conforming to the provisions of its Statute. However, the US policy of persuading States to pursue such agreements has involved inappropriate pressure.

Inevitably perhaps, there are possibilities for abuse. For example, a State where alleged atrocities are committed could accept jurisdiction to complain against another State that resorted, even with Security Council authorization, to a humanitarian intervention to save lives. Given the indeterminacy of some war crimes or crimes against humanity, controversies may arise. The Statute extends the court's sway over nationals of non-parties where jurisdiction has been accepted by the State of territoriality.

Even in situations not involving international tribunals, there may be some rare treaty limitations on the exercise of jurisdiction over nationals of non-State parties with regard to war crimes. An interesting recent example is the Second Protocol (1999) to the 1954 Hague

Convention for the Protection of Cultural Property in the Event of Armed Conflict. Article 15 defines certain acts as serious violations of the Protocol. Article 16 creates obligations for each party to establish its jurisdiction under the principle of territoriality, active nationality, or universality (presence of the accused/suspect in the territory), and Article 17 establishes obligations of *aut dedere aut judicare*. Article 16 *(b)* carves out, however, an important exception:

> "members of the armed forces and nationals of a State which is not a party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them".

This limitation leaves open, however, the possibility of prosecution of a national of a non-State party for those violations committed against cultural property which can be regarded as arising from general or customary law.

The ICC may eliminate the need for the establishment of additional *ad hoc* tribunals and the type of selectivity implicated in them. Its power will depend largely on the breadth of ratification outside Europe. The ICC is inevitably weakened without the participation of three permanent members of the Security Council (the United States, China and Russia), and such major countries as India, Pakistan and Japan.

J. Due Process of Law

International humanitarian law instruments contain considerable due process protections. Additional protections are contained in human rights instruments. How do international criminal courts applying international humanitarian law comply with the latter?

The International Military Tribunals in Nuremberg and Tokyo were established in very special circumstances, following a total victory of the Allies and the unconditional capitulation of Germany and Japan. They were "multinational" occupational courts, rather than genuinely "international" ones[452]. They had only rudimentary pro-

452. *Prosecutor* v. *Duško Tadić,* International Tribunal for the Former Yugoslavia, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 19.

cedural rules. Certain minimum rights, however, were guaranteed: the right of the defendant to be served with the indictment in a language which he understands; the right to a translation of the proceedings in a language which the defendant understands; the right to assistance of counsel; and the right to present evidence and to cross-examine witnesses called by the prosecution[453].

Despite these safeguards, Nuremberg had notable due process problems: there was no specific recognition in the Nuremberg Charter of the presumption of innocence and no discussion of the burden of proof; defendants were not allowed to make opening statements; trials *in absentia* were permitted; defendants could not challenge the Tribunal's competence. There was a certain lack of equality between prosecution and defence. However, the Charter and the procedure reflected a compromise with civil law traditions[454], which allow, for example, *in absentia* trials, in certain circumstances.

Although a victors' court, Nuremberg was neither arbitrary nor unjust. The Tribunal tempered the Charter's harsh rules to protect the accused, it assessed evidence according to accepted and fair legal standards, and it acquitted some defendants outright. Although *tu quoque* arguments were not addressed directly, they were important as the underpinnings of the proceedings. Because of *tu quoque* some offences were not prosecuted (e.g., the bombing of Coventry), and some charges were rejected on the ground that similar practices of the Allies demonstrated that certain norms did not harden into clear prohibitory norms.

In his 1993 report on the Statute of the ICTY (1993), the first international criminal tribunal established by the United Nations, the Secretary-General noted that "[i]t is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings". He added that "[i]n the view of the Secretary-General, such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights"[455], which inspired Article 21 of the ICTY Statute[456].

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453. *Id.*, para. 20.

454. Meron, "From Nuremberg to The Hague", in Meron, *War Crimes Law Comes of Age*, Chap. X (1998).

455. Report of the Secretary-General, *supra* footnote 286, at para. 106.

456. Rwanda Statute has a similar provision. See also Anne-Marie La Rosa, *Institutions pénales internationales* (2003); Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (2003).

The influence of human rights law can be seen in the ICTY's and the ICTR's treatment of such norms as due process and judicial guarantees, including *ne bis in idem*, independence and impartiality of the tribunals, the right to be presumed innocent until proven guilty according to law and the right to a fair and public trial.

The due process standards are further reflected in the Statutes and the Rules of the Tribunals in the absolute respect for the principle of "equality of arms" of the prosecution and the defence. These standards inspired provisions for the full respect of the rights of the defence, the right of the accused to be present at his trial, the fact that the Tribunals were not empowered to impose the death penalty, and the right to appeal against a decision[457].

Nevertheless, it is not easy to establish the correct balance between maximum guarantee of due process rights and the interests of efficient vindication of justice against war criminals. A major difficulty has been the length of the trials and of pre-trial detentions, combined with the policy not to release on bail persons awaiting trial. In human rights instruments, it is generally recognized that

> "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement"[458].

Under the ICTY Rules of Procedure and Evidence, in contrast, the general rule was the detention of the accused; provisional release was the exception[459].

The ICTY has explained this approach by pointing out that

> "both the shifting of the burden to the accused and the requirement that he show exceptional circumstances to qualify for provisional release are justified by the extreme gravity of the offences with which persons accused before the International

457. Report of the Secretary-General, *supra* footnote 286, paras. 23-26.
458. International Covenant on Civil and Political Rights, 19 December 1966, GA res. 2200 (XXI), 21 UN, *GAOR*, (Supp. No. 16), at 52, UN doc. A/6316, Art. 9 (2).
459. (ICTY) Rules of Procedure and Evidence, doc. IT/32/REV 26, Rule 65 (30 December 2002).

> Tribunal are charged and the unique circumstances under which the International Tribunal operates" [460].

While major war criminals may have the means to escape, the virtual impossibility to obtain a provisional release, meshed with some difficulty with normal human rights requirements. The prospect of the accused spending years behind bars while awaiting trial is troubling. This is an area in which human rights considerations should have played a greater role, perhaps by helping devise alternative means of detention. Rule 65 of the ICTY was, however, amended in 2001 to eliminate the reference to the exceptional nature of provisional release. The parallel provision in the ICTR Statute has so far not been similarly amended. Following the revision of the ICTY rule, provisional release has become more common in the practice of the Tribunal, in cases where the Tribunal has been satisfied that the accused will return for trial. Nevertheless, provisional release continues to be rather rare, also because the Netherlands, as the host country, insists that a person granted provisional release must returned to his home country, which makes the accused's return for trial more uncertain.

The Statute of the ICC contains important human rights protections for persons investigated or accused, including Article 20 *(ne bis in idem)*, Article 55 (rights of persons during an investigation), Article 58, Article 60, Article 63 (trial in the presence of the accused), Article 66 (presumption of innocence), and Article 67 (rights of the accused).

K. War Crimes Law Comes of Age

The rapid developments of the last few years in the establishment of criminal responsibility for serious violations of international humanitarian law have been such as to require an assessment of their principal treatment.

On the institutional plane, the establishment of the *ad hoc* tribunals and of the ICC are of cardinal importance. Once in danger of running out of defendants in custody, both the ICTY and the ICTR

460. *Prosecutor* v. *Zejnil Delalić et al.*, International Criminal Tribunal for the Former Yugoslavia, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, 25 September 1996, para. 19. See also Patricia Wald and Jenny Martinez, "Provisional Release at the ICTY : A Work in Progress", *Essays on ICTY Procedure and Evidence,* in *Honor of Gabrielle Kirk McDonald* 231 (Richard May *et al.*, eds., 2001).

now struggle to provide the many detainees with speedy trials. Under international pressure Croatia has improved its co-operation with the ICTY, as have the FRY and Serbia. An increasing number of indictees have surrendered or been delivered to the ICTY. NATO and SFOR have actively sought out indictees in Bosnia-Herzegovina. Some have been captured *manu militari* and brought to The Hague. Several, including senior leaders, have surrendered under pressure. The change of regime in Belgrade permitted the arrest of Slobodan Milošević. The trial of Milošević, a former head of State, is an historic event. Some of the principal leaders responsible for the atrocities, however, and especially Radovan Karadić and Radko Mladić, remain free but are forced to hide from international justice.

The Security Council has considered establishing yet another Chapter VII *ad hoc* tribunal, one that would have the power to prosecute senior members of the Khmer Rouge leadership who planned or directed the commission of serious violations of international humanitarian law in Cambodia during the period 1975-1979. This proposal failed because of constant obstacles and procrastination by the regime of Cambodia. One of the issues before the Security Council regarding this proposal was whether its powers under Chapter VII encompass punishing members of a defunct regime for crimes committed more than two decades ago. Finally an agreement between the United Nations and Cambodia on the establishment of a Cambodian Tribunal was reached in 2003[461]. This court will be comprised of Cambodian and international judges, the former being in the majority. Its subject matter jurisdiction will include genocide, crimes against humanity, and grave breaches of the Geneva Conventions. An agreement was also concluded between the UN Secretary-General and the Government of Sierra Leone for the establishment of a special court in January 2002 to try those principally responsible for serious violations of international humanitarian law, and crimes committed under Sierra Leone law, in that country. The court, on which national and international judges sit, will apply both national (Sierra Leone) and international law[462].

461. UN doc A/57/806, 6 May 2003.

462. Sierra Leone, the Special Court Agreement, 2002 (Ratification) Act, 2002, CXXX *Sierra Leone Gazette*, No. II (7 March 2002); Agreement of 16 January 2002 between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone; Statute of the Special Court for Sierra Leone pursuant to Security Council resolution 1315 (2000).

Mixed tribunals have also been established in territories under UN administration, such as Kosovo. In East Timor, a special Indonesian human rights court has shown uneven results[463]. The diversity of accountability mechanisms reveal the "challenge to give effect to [international law] principles taking into account the unique needs and complexities of any given situations"[464]. The ICTY has issued several important decisions that clarify and give a judicial imprimatur to rules of international humanitarian law. The ICTR is overcoming the difficulties that have plagued it during its first few years, but the co-operation of the Government of Rwanda has been problematic and difficulties have arisen with regard to the travel of witnesses from Rwanda to the ICTR in Arusha. Many of the principal indicted persons involved in the Rwandan genocide have been arrested and are in the Tribunal's custody. Like the Hague Tribunal[465], the Arusha Tribunal has rendered important decisions concerning its jurisdiction, the Security Council's competence under Chapter VII of the UN Charter to establish the tribunal[466], and questions of international humanitarian law. The Tribunal has issued some important judgments on genocide, including genocidal rape, and on crimes against humanity. Its contribution to the elaboration of war crimes law has, however, been limited.

The growing maturity of these tribunals has enhanced the importance of decisions interpreting and applying rules of procedure and evidence and of general principles of criminal law. The tribunals' meticulous concern for due process and the requirement of proving guilt beyond a reasonable doubt have led to lengthy trials, with trials at the ICTY for example typically exceeding one year. Often, the accused spend years in a detention unit awaiting trials and during trials. Some observers ask whether the ICTY and the ICTR will be

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463. Finding a civilian ex-governor guilty of crimes against humanity, *NYT* 14 August 2002, but acquitting military and police officials of such crimes, *NYT* 15 August 2002.

464. Address by David J. Scheffer, Ambassador-at-Large for War Crimes Issues, "The Global Challenge of Establishing Accountability for Crimes against Humanity", University of Pretoria, Centre for Human Rights, 22 August 2000, at 6.

465. See e.g. *Prosecutor* v. *Tadić*, No. IT-94-1-AR72, Appeal on Jurisdiction, paras. 28-40 (2 October 1995), 35 *ILM* 32 (1996) (hereinafter Interlocutory Appeal).

466. See e.g. *Prosecutor* v. *Kanyabashi*, No. ICTR-96-15-T, Decision on Jurisdiction (18 June 1997), summarized by Virginia Morris, in 92 *AJIL* 66 (1998).

able to complete the trials of those awaiting trials before the international community's interest and willingness to fund them run out. The possibility of referring cases, especially of lower-level perpetrators, to courts in the former Yugoslavia would be appropriate and is being planned ("exit" or "completion strategy") provided, however, that the alternative forum is able to comply fully with due process and international human rights.

Creating a positive environment for the establishment of a standing international criminal court, the achievements of the *ad hoc* tribunals have contributed to the ending of impunity, injected new vigour into the concept of universal jurisdiction and sparked the readiness of States to prosecute persons accused of serious violations of international humanitarian law. It is less certain that the *ad hoc* tribunals have had a deterrent impact, but deterrence is only one of the pertinent considerations. Vindication of justice and ending the cycle of impunity are critically important. The more often war criminals are arrested and brought to justice before national or international tribunals, the better the prospects for deterrence. The *Pinochet* case is likely to have some effect, hopefully in deterring violations, or at least in creating the sanction of making it dangerous for war criminals to travel to foreign countries. Much will depend on the effectiveness of the ICC, and even more, on the readiness of third States to assert jurisdiction.

As groundbreaking as these institutional developments are, the rapid growth of the normative principles of international humanitarian law equals them in significance. International humanitarian law has developed faster since the beginning of the atrocities in the former Yugoslavia than in the prior four and a half decades since the Nuremberg Tribunals and the adoption of the Geneva Conventions for the Protection of Victims of War of 12 August 1949.

Wolfgang Friedmann's important book, *The Changing Structures of International Law*, noted in 1964 that international criminal law recognized as crimes only piracy *jure gentium* and war crimes[467]. Despite the potential for a more expansive vision even in 1964[468], the criminal aspects of international humanitarian law remained limited and the prospects for its international enforcement poor, right

467. Wolfgang Friedmann, *The Changing Structure of International Law* 168 (1964).

468. See generally Meron, "Is International Law Moving towards Criminalization?", 9 *Eur. J. Int'l L.* 18 (1998).

up to the eve of the atrocities committed in Yugoslavia. How different the law is today!

There is, of course, a synergistic relationship among the Statutes of the international criminal tribunals, the jurisprudence of the ICTY and the ICTR, the growth of customary law, its acceptance by States, their readiness to prosecute offenders under the principle of universality of jurisdiction, and the establishment of the ICC. For example, the 1995 *Tadić* appeals decision of the Hague Tribunal, which confirmed the applicability of some principles of the Hague law to non-international armed conflicts and the international criminalization of violations of common Article 3 of the Geneva Conventions in such conflicts, clearly helped create the environment for some of the developments in the ICC. Perhaps the single most important contribution by the ICTY has been to recognize that some violations of the Geneva law and of the Hague law can be committed in non-international armed conflicts and thus, in short, to help extend the notion of war crimes to such conflicts.

The *ad hoc* Tribunals have also contributed to a robust reading of customary humanitarian law[469]. Even though the ICTY's early jurisprudence on grave breaches of the Geneva Conventions and on the classification of conflicts have erred on the side of legal formalism[470], the ICTY's recent decisions have brought about a correction of the course. One of the most significant contributions has been the jurisprudence on the international criminalization of rape as a crime against humanity, as a recognized war crime under customary international law punishable under Article 3 of the ICTY Statute, and through the vehicle of Article 3 of that Statute, as an outrage upon personal dignity and as torture, under common Article 3 to the Geneva Conventions[471].

This robust normative development can best be illustrated by the crimes defined in the ICC Statute. One is struck by three aspects of the scope of crimes under international humanitarian law in the Rome Statute. First, many participating Governments appeared ready to accept an expansive concept of customary international law without much supporting practice. Second, there is an increasing readi-

469. See e.g., *Tadić* Interlocutory Appeal, *supra* footnote 296.

470. See Meron, "Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua*'s Fallout", 92 *AJIL* 236 (1998).

471. See the Judgment of the ICTY Appeals Chamber in *Prosecutor* v. *Kunarac and Others* (12 June 2002), Case No. IT-96-23 and IT-96-23/1-A.

ness to recognize that some rules of international humanitarian law once considered to involve only the responsibility of States are also a basis for individual criminal responsibility. There are lessons to be learned here about the impact of public opinion on the formation of *opinio juris* and customary law.

Third, the inclusion in the ICC Statute of common Article 3 and crimes against humanity, the latter divorced from a war nexus, connotes a certain blurring of international humanitarian law with human rights law and thus an incremental criminalization of serious violations of human rights. Significantly, Article 36 of the ICC Statute on the qualifications of judges requires competence not only in international criminal law and international humanitarian law, but also in human rights law. Although important human rights conventions, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, have established a system both of universal jurisdiction over certain crimes and of international co-operation and judicial assistance between States parties, a process has begun whereby some serious violations of human rights are being subjected, additionally, to the jurisdiction of international criminal courts.

Another important development is the growing recognition that the elevation of many principles of international humanitarian law from the rhetorical to the normative, and from State responsibility to individual criminal accountability, creates a real need for the crimes within the ICC's jurisdiction to be defined and applied with the clarity, precision and specificity required for criminal law, in accordance with the principle of legality *(nullum crimen sine lege).* The adoption of the ICC elements of crimes is an important step in that direction.

These developments could not have taken place without a powerful new coalition driving further criminalization of international humanitarian law. Much like the earlier coalition that stimulated the development of both a corpus of international human rights law and the mechanisms involved in its enforcement, this new coalition includes scholars who promote and develop legal concepts and give them theoretical credibility, NGOs that provide public and political support and means of pressure, and various Governments that spearhead lawmaking efforts in the United Nations and in other multinational fora.

These institutional and normative developments will generate

further growth of universal jurisdiction. Of course, the offences subject to the jurisdiction of international criminal tribunals should not be conflated with those subject to the universality of jurisdiction principle, but there is some synergy between the two. The list of crimes included in the ICC Statute will inevitably influence national laws on crimes subject to universal jurisdiction. The broader significance of the ICC Statute thus exceeds its immediate goals. Although the ICC will not be able to try more than a small number of defendants, its importance lies in the principle of denying impunity to those responsible for serious violations of international humanitarian law, in fostering deterrence, and in providing an international criminal jurisdiction when State prosecutorial or judicial systems fail to investigate and prosecute serious violations of international humanitarian law. It is in the stimulation of national prosecutions that a standing international criminal court may make its most important contribution.

CHAPTER III

THE LAW OF TREATIES

A. Normative and Multilateral Treaties

Human rights and humanitarian law treaties are among the most important normative treaties of our time. Other general multilateral conventions, especially in public law matters such as the environment, arms control and international organizations, are also normative, performing important codificatory functions for the international community. They enact "uniform rules" for the State parties[472] and advance broad community values. As such, they aspire to at least some recognition or deference even by non-parties as an expression of customary law or general principles of law.

In this respect, international organizations, themselves typically created by multilateral treaties, generate additional normative agreements and treaty regimes with new centres of authority. Bruno Simma has noted the "particularly intensive role of international organizations in the law-making process" in the field of human rights[473]. All multilateral human rights treaties have been negotiated in the framework of universal organizations — the United Nations and its specialized agencies — or regional organizations, such as the Council of Europe, the Organization of American States, or the Organization of African Unity. An important feature of multilateral treaties, especially those concerning human rights, labour rights, environmental protection, humanitarian law, international criminal law and tribunals, and especially the Rome Statute of the International Criminal Court, is that non-governmental organizations, indigenous peoples' organizations, representatives of employers and workers exercise increasing influence on the treaty-making process.

While human rights and humanitarian law treaties present the

472. Second Report on Reservations to Treaties by Alain Pellet, Special Rapporteur, International Law Commission, 48th Sess., 6 May-26 July 1996, para. 87, UN doc. A/CN.4/477/Add.1 (1996) (hereinafter Second Report on Reservations to Treaties).

473. Bruno Simma, "International Human Rights and General International Law: A Comparative Analysis", in IV (2) *Collected Courses of the Academy of European Law* 155, 174 (1993).

most striking examples of norms in which reciprocity is absent or limited and where broad community interests and values are of critical importance, other general normative provisions may present many of the same characteristics, albeit in a different measure and mix. G. G. Fitzmaurice thus wrote of normative treaties:

> "[T]hey operate in, so to speak, the absolute, and not relatively to the other parties — i.e., they operate *for* each party *per se*, and *not* between the parties *inter se* — coupled with the further peculiarity that they involve mainly the assumption of duties and obligations, and do not confer direct rights or benefits on the parties *qua* States, that gives these Conventions their special juridical character[.]"[474]

To the extent that human rights may influence the law of treaties, that influence is potentially important, *mutatis mutandis*, for other general normative treaties as well.

Oscar Schachter has written that

> "[t]he fact that increasingly treaties in the economic and social fields as well as in the area of the law of war recognize the well-being of individuals as their raison d'être is further evidence that international law is moving away from its State-centered orientation"[475].

The Vienna Convention on the Law of Treaties[476] mentions both human rights and humanitarian law. The preamble states that the parties have "in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of . . . universal respect for, and observance of, human rights and fundamental freedoms for all"[477], while Article 60 (5) refers to "provisions relat-

474. G. G. Fitzmaurice, "Reservations to Multilateral Conventions", 2 *Int'l & Comp. LQ* 1, 15 (1953).

475. Oscar Schachter, *International Law in Theory and Practice* 81 (1991).

476. Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, UN doc. A/CONF.39/27 and Corr.1 (1969), 1155 *UNTS* 331, reprinted in 63 *AJIL* 875 (1969), 8 *ILM* 679 (1969) (hereinafter Vienna Convention).

477. *Id.*, preamble. Similar wording appears in the preambles of the Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978, not yet in force, UN doc. A/CONF.80/31 and Corr.2 (1978), reprinted in 72 *AJIL* 971 (1978), 17 *ILM* 1480 (1978), and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, A/CONF.129/15 (1986), reprinted in 25 *ILM* 543 (1986).

ing to the protection of the human person contained in treaties of a humanitarian character"[478]. Nevertheless, the Vienna Convention gives little substantive acknowledgment to the development of major multilateral conventions in the human rights field. Shabtai Rosenne has observed that this omission ran "counter to the expansive evolution of the law of human rights and its companion international humanitarian law".

> "The plain fact is that there is a growing body of international treaty law which does accord rights to individuals and which can also impose obligations on individuals, including juristic persons and groups of individuals; and alongside this there is an increasing number of competent international intergovernmental organs in which those rights and obligations can be assayed. The old law of diplomatic protection with its technicalities and intricacies such as the nationality of claims rule is not showing itself adequate as a framework in which to categorize all such treaties. . . ."[479]

In conclusion, he observed,

> "Looking back at what was completed twenty years ago, and observing that the twentieth century is inexorably and rapidly moving into the twenty-first, one cannot fail to be struck by the fact that the codification of the law of treaties . . . is still cast in a nineteenth century mold. . . ."[480]

The root of this problem is, of course, the International Law Commission's (ILC) decision not to deal in its draft articles on the law of treaties with the question of the application of treaties to individuals in terms of rights and obligations, on the ground that this would take the Commission beyond the subject of the law of treaties[481].

The phenomenon of multilateral treaties is central to contemporary international law. It involves not simply a replacement for form or convenience of a set of bilateral treaties by a single multilateral treaty, but the establishment of instruments for "the defense of the common interests of mankind" and a reflection of "growing global

478. Vienna Convention, *supra* footnote 476, Art. 60 (5).
479. Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986* 73 (1989).
480. *Id.*, at 83-84.
481. Ian Sinclair, *The Vienna Convention on the Law of Treaties* 242-244 (2nd ed., 1984); Rosenne, *supra* footnote 479, at 72-73.

solidarity"[482]. Although legal doctrine attempted "to capture the real feeling of solidarity which, in varying degrees depending on the case, prevents multilateral treaties from being viewed as merely the sum of independent bilateral agreements"[483], the distinction between normative and contractual treaties did not find expression in the codification of the law of treaties[484], perhaps because "it is very difficult to distinguish between treaties in terms of substantive criteria"[485]. The definition and nature of "multilateral treaties" thus remains a neglected issue in the codified law of treaties[486].

As Reuter has noted, a fundamental change in the way conventional instruments were concluded occurred with the emergence of multilateral treaties[487]. Earlier treaties could and did involve several States, but these were made up of several bilateral treaties between pairs of parties. At first, the signing of a single instrument by several parties was regarded as a mere simplification of form. But soon,

> "[i]n fields such as public health, communications, maritime security, protection of maritime resources, literary, artistic and scientific property, metrological unification, and protection of certain basic human rights, multilateral treaties were called upon to serve an entirely new purpose: the defence of the common interests of mankind. The parties to such treaties are not so much setting up a compromise on diverging interests as symmetrically pooling their efforts to achieve an identical goal."[488]

This development led to the distinction suggested in doctrinal writings between the *traité-loi* and the *traité-contrat*, or the normative treaty and the contractual treaty[489]. But the doctrine failed to influence the codification of the law of treaties in this respect. In practice, the negotiating States would often disagree on the characterization of a treaty or its component parts as normative or contractual. To develop general yardsticks that could inform such a distinction would be equally difficult.

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482. Paul Reuter, *Introduction to the Law of Treaties* 2-3 (2nd ed., 1995).
483. *Id*., at 3.
484. Rosenne, *supra* footnote 479, at 80-81.
485. Reuter, *supra* footnote 482, at 27.
486. Rosenne, *supra* footnote 479, at 80-81.
487. Reuter, *supra* footnote 482, at 2.
488. *Id.*, at 2-3.
489. *Id*., at 3; Rosenne, *supra* footnote 479, at 80-81.

Of course, normative treaties are usually not woven from the same uniform codificatory fabric[490]. Typically, they contain contractual, technical or administrative provisions of little general significance. Alain Pellet has noted that a single treaty generally contains both normative clauses and contractual clauses[491]. This may be one of the reasons why international law has not created, so far, codified rules governing normative treaties only. The exception, of course, is Article 60 (5) of the Vienna Convention on the Law of Treaties, where the distinction between the normative treaty and the contractual treaty finds a limited expression[492].

If no special rules for normative treaties have been developed, multilateral treaties have not fared much better. The Vienna Convention does not even contain a definition of a "multilateral treaty". The ILC had introduced in its 1962 draft a provision defining a "multilateral treaty" as "a treaty which . . . [concerns] general norms of international law or . . . deals . . . with matters of general concern to other States as well as to parties to the treaty"[493]. That provision was subsequently deleted, and the entire issue dropped because it had been linked to the political controversies arising from the existence of the divided States (Germany, Korea, China), which led in turn to the question of the right of all States to participate in UN treaty-making conferences and the right to become parties to those treaties[494]. This question came up again in the Vienna Conference, but was only finally resolved by a resolution of the General Assembly which invited "all States" to join the Convention[495]. A similar practice was followed for other UN multilateral treaties. The result, as Rosenne observes, is that

> "[n]one of the Vienna Conventions touch upon the nature of the obligations arising from the multilateral treaty-instrument, in the more precise sense of between whom and how those obligations run. Alongside this, the treatment of the instrument itself may be seen as emphasizing, perhaps excessively, the

490. Reuter, *supra* footnote 482, at 27.
491. Second Report on Reservations to Treaties, *supra* footnote 472, paras. 82-83.
492. Vienna Convention, *supra* footnote 476, Art. 60 (5).
493. First Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, Art. 1 *(d)*, UN doc. A/CN.4/144 (1962), in "Law of Treaties", 2 *YB Int'l L. Comm'n* 31 (1962).
494. Rosenne, *supra* footnote 479, at 81-82.
495. GA res. 3233 (XXIV), UN, *GAOR*, 29th Sess., 2280th plen. mtg. (1974).

bilateral element in the relations created by the performance of the treaty."[496]

In contrast to the Vienna Convention and the process of codification, international tribunals have been less reluctant to consider human rights and humanitarian treaties as treaties of a special character and to derive legal consequences from that special character. It was on the basis of such treaties that the International Court of Justice enunciated the *erga omnes* doctrine in the *Barcelona Traction* case[497]. In the *Reservations to the Genocide Convention* Advisory Opinion[498] in the *Nicaragua* case[499], and in the *Nuclear Weapons* Advisory Opinion[500], the Court assumed, without much enquiry, that the Genocide Convention[501], the Geneva Conventions of 1949[502], and the Hague Convention on Laws and Customs of War on Land (1907)[503] declare customary law. In the *Reparations for Injuries Suffered in the Service of the United Nations* case[504], the Court considered the Charter of the United Nations as a living constitution, capable of conferring on the United Nations Organization status and rights not expressly granted in the Charter. When referring to such treaties, Governments and non-governmental organizations com-

496. Rosenne, *supra* footnote 479, at 83.

497. *Barcelona Traction, Light and Power Co., Ltd. (Belgium* v. *Spain) (New Application)*, *ICJ Reports 1970* 3, 32 (5 February) (hereinafter *Barcelona Traction* case).

498. Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of Crimes of Genocide*, *ICJ Reports 1951* 15 (28 May) (hereinafter *Reservations to the Genocide Convention* Advisory Opinion).

499. Case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, *ICJ Reports 1986* (27 June).

500. Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996*, declaration of J. Bedjaoui, para. 13 (hereinafter *Nuclear Weapons* Advisory Opinion).

501. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 *UNTS* 277.

502. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 12 August 1949, 6 *UST* 3114, *TIAS*, No. 3362, 75 *UNTS* 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II), 12 August 1949, 6 *UST* 3217, *TIAS*, No. 3363, 75 *UNTS* 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), 12 August 1949, 6 *UST* 3316, *TIAS*, No. 3364, 75 *UNTS* 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 12 August 1949, 6 *UST* 3516, *TIAS*, No. 3365, 75 *UNTS* 287.

503. Hague Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277, *TS*, No. 539.

504. Advisory Opinion on *Reparations for Injuries Suffered in the Service of the United Nations*, *ICJ Reports 1949* (11 April).

monly express the presumption that those treaties distill and declare customary law.

Not surprisingly, human rights tribunals and other organs of supervision established under human rights treaties have emphasized the distinctive character of human rights treaties. The Inter-American Court of Human Rights, for example, has noted that

> "modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction." [505]

The Court then quoted the oft-cited statement of the European Commission of Human Rights on the objective character of the European Convention:

> "the obligations undertaken by the High Contracting Parties in the [European] Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves" [506].

Similarly, in its famous and controversial General Comment No. 24, the Human Rights Committee stated:

> "Such treaties [human rights treaties], and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with

505. The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82 of 24 September 1982, *Inter-Am. Ct. HR* (Ser. A), No. 2, para. 29 (1982).

506. *Austria* v. *Italy*, App. No. 788/60, 4 *YB Eur. Conv. on HR* 116, at 140 (1961) (Eur. Comm'n on HR).

> rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41." [507]

Although it disagreed with the Human Rights Committee's categorical claim that human rights treaties are "not a web of inter-State exchanges of mutual obligations", the United Kingdom cited a statement of the European Court of Human Rights which held that the European Convention

> "comprises *more than* mere reciprocal engagements between Contracting States. It creates *over and above a network of mutual bilateral understandings*, objective obligations which in the words of the preamble benefit from 'collective enforcement' " [508].

Thus, although the codification of the law of treaties fails to provide rules relating to multilateral, normative treaties, international tribunals regularly recognize the special characteristics of such treaties. This is particularly true in the fields of human rights and humanitarian law.

B. Interpretation of Treaties

The primary rule of treaty interpretation, as stated in Article 31 (1) of the Vienna Convention, is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In interpreting human rights treaties, human rights courts have tended to attribute primary importance to a teleological interpretation focused on the object and purpose of the treaty, even if that meant that the ordinary meaning would sometimes be overridden and the legislative history or preparatory work addressed in Article 32 of the Convention ignored. Sinclair thus has noted:

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507. General Comment No. 24 (1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc. HRI/GEN/1/Rev.5 (2001), p. 150, at para. 17. Thomas Buergenthal describes the general comments of the Committee as "distinct juridical instrument[s], enabling the Committee to announce its interpretations of different provisions of the Covenant . . .", "The U.N. Human Rights Committee", 5 *Max Planck UNYB* 341 (2001).

508. Report of the Human Rights Committee, Vol. I, UN, *GAOR*, 50th Sess. (Supp. No. 40), at (vii), UN doc A/50/40 (1995) (emphasis added by the Human Rights Committee).

> "There are *indicia* . . . that the Strasbourg organs . . . have adopted a very specific and decided view of the 'object and purpose' of the European Convention of Human Rights and seek deliberately to interpret particular provisions of the Convention so as to give effect to that overriding 'object and purpose' — and notwithstanding that the interpretation may do violence to the ordinary meaning of the provision in its context and may ignore such evidence of the intentions of the parties as are to be found in the *travaux préparatoires*." [509]

In the *Golder* case, for example, the European Court of Human Rights read into Article 6 of the European Convention on Human Rights not only procedural safeguards in legal proceedings, but also a right of access to courts [510]. Sinclair has observed that

> "[t]he European Court of Human Rights did not specifically rely on the 'object and purpose' of the Convention to justify their *[sic]* conclusion that a right of access to the courts could be read into Article 6 (1). Nevertheless, the line of reasoning employed by the majority clearly led to an interpretation incompatible with the 'ordinary meaning' of Article 6 (1) read in its context." [511]

Judges following more traditional schools of interpretation have censured this approach. Thus, Judge Fitzmaurice wrote in a dissenting opinion:

> "(i) The objects and purposes of a treaty are not something that exist *in abstracto*: they follow from and are closely bound up with the intentions of the parties, as expressed in the text of the treaty, or as properly to be inferred from it, these intentions being the sole sources of those objects and purposes. Moreover, the Vienna Convention — even if with certain qualifications — indicates, as the primary rule, interpretation 'in accordance with the ordinary meaning to be given to the terms of the treaty' . . . the real *raison d'être* of the hallowed rule of the textual interpretation of a treaty lies precisely in the fact that the intentions of the parties are supposed to be expressed or

509. Sinclair, *supra* footnote 481, at 133.
510. *Golder* v. *United Kingdom*, 18 *Eur. Ct. HR* (Ser. A) (1975).
511. Sinclair, *supra* footnote 481, at 133.

> embodied in — or derivable from — the text which they finally draw up. . . . From these considerations it is therefore clear that the Vienna Convention implicitly recognizes the element of intentions though it does not in terms mention it.
>
> (ii) I have no quarrel with the view that the European Convention — like virtually all so-called 'law-making' treaties — has a constitutional aspect. . . . But what I find it impossible to accept is the implied suggestion that because the Convention has a constitutional aspect, the ordinary rules of treaty interpretation can be ignored or brushed aside in the interests of promoting objects or purposes not originally intended by the parties."[512]

In his important work on international tribunals, Charney defended the interpretative approach of human rights tribunals, arguing that

> "[t]o the extent that these Courts may have adopted a teleological approach, it seems more consistent with the role of the treaty's purpose as intended in the Vienna Convention. It has rarely, if ever, been used to sacrifice the text in order to carry out judicially created purposes."[513]

In the interpretation of the Vienna Convention itself by specialized tribunals, including human rights courts, Charney concludes:

> "It is clear that all of the tribunals rely upon the Vienna Convention on the Law of Treaties as endorsed by the ICJ. By doing so they have applied that treaty to a variety of circumstances not yet addressed by the ICJ and, thus, they have added to the body of international law in the area. The tribunals have certainly not diverged from the mainstream of international treaty law. Rather they have built upon that law and, generally, have added greater sophistication, coherence, and legitimacy to it."[514]

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512. *National Union of Belgian Police* v. *Belgium*, 19 *Eur. Ct. HR* (Ser. A) (1975) (separate opinion of J. Fitzmaurice, para. 9). See also separate opinion in *Golder* v. *United Kingdom*, 18 *Eur. Ct. HR* (Ser. A) (1975).

513. Jonathan I. Charney, "Is International Law Threatened by Multiple International Tribunals?", in 271 *Recueil des cours* 101, 188 (1998); also Thomas Buergenthal, "The Advisory Practice of the Inter-American Human Rights Court", 79 *AJIL* 1, 18-20 (1985).

514. Charney, *supra* footnote 513, at 92.

He recognized, however, that the interpretation of a treaty by a human rights body according to its "object and purpose" can result in apparent contradiction with the generally recognized rules[515]. An example would be the holding of the European Court of Human Rights in the *Loizidou* case[516] that territorial restrictions on the acceptance of its jurisdiction other that those expressly provided in the Convention were invalid[517]. This is contrary to the ICJ's validation of similar limitations attached to declarations accepting its compulsory jurisdiction under Article 36 (2) of its Statute. However, Charney justifies the difference in interpretation on the basis of the different purposes and objects of the pertinent treaties: the Court's Statute seeks to encourage the widest possible accession by States; the European Convention on Human Rights's goal is to maximize human rights protections.

The European Court of Justice, which applies the law of the European Union, also resorts to broad goal-related principles interpreting and applying that law. The Court has incorporated a significant number of fundamental human rights into its jurisprudence. It did so by recourse to general principles, relying upon the European Convention on Human Rights, the constitutions of member States, and the treaties to which member States are parties. The Court has recognized the need to take into account the protection afforded to human rights in order to interpret the European Union's non-human rights instruments it is called upon to construe. It thus has held that fundamental rights are among the general principles of law which it applies. The *Nold* case demonstrates this approach. In that case the applicant challenged a Commission decision, arguing that it deprived him of the fundamental right to the free pursuit of business. The Court noted that "fundamental rights form an integral part of the general principles of law, the observance of which [the ECJ] ensures"[518]. After referring to the "constitutional traditions common to the Member States", it added that

> "international treaties for the protection of human rights on which the Member States have collaborated or of which they

515. *Id*., at 70-71.
516. *Loizidou* v. *Turkey*, 310 *Eur. Ct. HR* (Ser. A) (1995).
517. Charney, *supra* footnote 513, at 70.
518. Case 4/73, *Nold, Kohlen-und Baustoffgroßhandlung* v. *Commission*, 1974 *ECR* 491, at 507, para. 13.

> are signatories, can supply guidelines which should be followed within the framework of Community Law"[519].

Thus, in the *Marshall* case, the Court found a State pension law that set different age requirements for men and women to be discriminatory in violation of a community directive[520]. Charney has observed that in addition to the "right of the free pursuit of business", the Court has recognized the right to be heard, freedom of association, freedom of religion, the right of property, the right to pursue one's trade or profession, the inviolability of the home, freedom of expression, and the right to participate in selecting one's government as fundamental rights to be taken into account[521]. He adds that

> "[t]o the extent that [those recognized principles] are not already general international law, the ECJ's endorsement of these doctrines may contribute to the evolution of general international law. . . . [T]he doctrine of sources used by the ECJ, if not identical to international law, is closely analogous to it or specifically derived from the requirements of the EEC/EU Treaty."[522]

Even some bilateral treaties, which have no claim to a particular normative status, such as extradition, have been interpreted in light of human rights concerns. In 1983, the Institute of International Law adopted a resolution proposed by Professor Doehring that the invocation of the duty to protect human rights may justify non-extradition[523]. The text as amended by Judge Schwebel read as follows:

> "In cases where there is a well-founded fear of the violation of the fundamental human rights of an accused in the territory of the requesting State, extradition may be refused . . ."[524]

Thus, the Institute supported the proposition that human rights must be taken into consideration in the interpretation of extradition agreements, and that, moreover, fundamental human rights have a

519. *Id.*
520. Case No. 152/84, *Marshall* v. *Southampton and South-West Hampshire Area Health Authority*, 1986 *ECR* 723-750.
521. Charney, *supra* footnote 513, at 135.
522. *Id.*, at 136.
523. New Problems of the International Legal System of Extradition with Special Reference to Multilateral Treaties, Rapporteur M. Karl Doehring, 60 *YB Institute Int'l L.* 214 [1983-II] (1984). *Id.*, at 136.
524. *Id.*, at 306.

claim to a higher hierarchical status, or *jus cogens*, and should, in case of conflict, prevail over those agreements[525].

In his discussion of the impact of human rights on the law of aliens, Cassese notes that "certain long-standing rules must now be interpreted or applied in the light of human rights"[526]. As an example of "re-interpretation" of a treaty, he mentions a judgment of the Swiss Federal Court (1982) in which the court declined to apply the extradition treaty between Switzerland and Argentina:

> "[E]ven long-standing treaties on extradition must now be interpreted and applied in the light of two fundamental principles of human rights, which have now acquired the weight of *jus cogens*, that is peremptory law: one was the principle that no individual should be extradited to a country to undergo a trial in which considerations of race, religion or political opinion might play a role; the other was the principle prohibiting torture or any form of inhuman or degrading treatment."[527]

I have already mentioned the *Loizidou* case, but a more detailed discussion of interpretation of jurisdictional clauses is necessary. In contrast to the narrow, even minimalist, sovereignty-based, approach to interpreting treaty commitments, human rights courts have begun to construe consent to jurisdiction more broadly in application of human rights treaties. The courts' assessment of the significance and weight given to States' consent to be bound and to the interpretation of that consent directly affects their conclusions regarding the construction of jurisdictional clauses and the validity of restrictions and reservations generated by States. In order to extend their jurisdiction, human rights bodies have claimed considerable latitude in construing State consent. In the *Loizidou* case, the European Court of Human Rights paid little attention to the intent of Turkey at the time it made the declarations. The Court simply excluded Turkey's statements after the filing of the declarations and considered that Turkey had willingly run the risk that the reservation would be held invalid by the Convention's institutions without affecting the validity of the declarations themselves[528]. In other words, the Court concluded that

525. Meron, *Human Rights Law-Making in the United Nations* 194-216 (1986).
526. Antonio Cassese, *Human Rights in a Changing World* 166 (1990).
527. *Id*.
528. *Loizidou* v. *Turkey,* 310 *Eur. Ct. HR* (Ser. A) para. 95 (1995). See also *Belilos* v. *Switzerland*, 132 *Eur. Ct. HR* (Ser. A) paras. 60-97 (1988).

the Turkish reservation was severable from its acceptance of jurisdiction.

In General Comment No. 24, the Human Rights Committee adopted the approach followed shortly thereafter by Loizidou. The comment has attracted considerable criticism from leading international lawyers, including Judge Robert Jennings[529], but has found support among many human rights lawyers. An influential critic, Alain Pellet, wrote that

> "[i]rrespective of its object, a treaty remains a juridical act based on the will of States, whose meaning cannot be presumed or invented. Human rights treaties do not escape the general law: their object and purpose do not effect any 'transubstantiation' and do not transform them into international 'legislation' which would bind States against their will. This is the risk monitoring bodies take if they venture to determine what was the *intention* of a State when it bound itself by a treaty, while it was, *at the same time*, formulating a reservation."[530]

Before the Inter-American Court of Human Rights, Guatemala argued that the Court was incompetent to hear a case involving forced disappearance since the events had taken place before the date on which Guatemala had deposited its acceptance of the compulsory competence of the Court (9 March 1987). But the victim's detention and death occurred earlier in March 1985. The Court found Guatemala's objection well founded and held that it lacked competence to rule on the Government's liability for the detention and death of the victim. However, since the case concerned disappearance and the victim's relatives had not been informed of the whereabouts of the victim until June 1992, the Court decided that it had jurisdiction for the consequences of those acts, i.e., the concealment of the victim's arrest and murder by governmental authorities or agents[531]. While joining in the decision of the Court, Judge Antônio A. Cançado Trindade pointed to the limitations in the law of treaties

529. Robert Y. Jennings, "Proliferation of Adjudicatory Bodies: Dangers and Possible Answers", in *Implications of Proliferation of International Adjudicatory Bodies for Dispute Resolution, ASIL Bulletin*, No. 9, p. 2, at 5-6 (November 1995).

530. Second Report on Reservations to Treaties, *supra* footnote 472, paras. 229-230.

531. *Blake* v. *Guatemala, Preliminary Objections*, 1996 *Inter-Am. Ct. HR*, paras. 33-34 (July 2).

that hinder effective protection of human rights. He spoke of the "insufficient evolution of the precepts of the law of treaties to fulfill the basic purpose of effective protection of human rights", and complained of continuing "State voluntarism and an undue weight attributed to the forms and manifestations of consent"[532].

Judge Hersch Lauterpacht's dissent in the *Norwegian Loans* case is the *locus classicus* for the traditional approach. This case interpreted the acceptance of the International Court of Justice's compulsory jurisdiction. Judge Hersch Lauterpacht declared invalid both the pertinent part of the reservation and the entire acceptance of jurisdiction tainted with invalidity[533], concluding that the Court did not have jurisdiction in the case. He thus clearly promoted the notion of the integrity of the treaty, rejecting the alternative approach of divisibility or separability. The majority of the court, however, viewed the reservation concerned as valid and grounded the lack of jurisdiction over the dispute in the right of Norway, to invoke by virtue of reciprocity, the French reservation. Schabas, commenting on the *Chrysostomos et al.* case before the European Commission on Human Rights thus distinguished between the Strasbourg and the traditional approach:

> "It may be useful . . . to distinguish the Strasbourg jurisprudence from the approach of Judge Lauterpacht, in that the latter was not dealing with human rights instruments. Where human rights obligations are concerned, and where the protection of individual and not that of sovereign States is at issue, there are compelling policy reasons why 'the thing may rather have effect than be destroyed'. The same approach may be less decisive in areas of international litigation where human rights are not involved."[534]

Not only human rights bodies, but also the ICJ has recently regarded the "object and purpose" as central to the interpretation of human rights treaties' jurisdictional clauses. In the case concerning the *Application of the Genocide Convention* between Bosnia-Herzegovina and Yugoslavia, Bosnia contended that it had become a party

532. *Id.*, separate opinion of J. Cançado Trindade, paras. 11-15.
533. *Norwegian Loans (France* v. *Norway)*, *ICJ Reports 1957* 9, at 55-56 (6 July) (separate opinion of Judge Sir Hersch Lauterpacht).
534. William A. Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform", 32 *Can. YB Int'l L.* 39, 74 (1994).

to the Genocide Convention by "automatic succession" at the date of its accession to independence (rather than the date of its notice of succession) because the Genocide Convention fell in the category of human rights treaties, a category of treaties for which the rule of "automatic succession" applied. Since Bosnia was a party to the Genocide Convention at the date of the introduction of the request[535], the Court, citing its statement in the *Genocide Convention* Advisory Opinion, found it unnecessary to decide whether the principle of automatic succession applied. The Court referred, however, to the Convention's object in its treatment of its *ratione temporis* jurisdiction:

> "Yugoslavia, basing its contention on the principle of the non-retroactivity of legal acts, has indeed asserted as a subsidiary argument that, even though the Court might have jurisdiction on the basis of the Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applicable as between the Parties. In this regard, the Court will confine itself to the observation that the Genocide Convention — and in particular Article IX — does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia-Herzegovina. This finding is, moreover, in accordance with the object and purpose of the Convention as defined by the Court in 1951 and referred to above."[536]

In the *LaGrand* case *(Germany* v. *United States of America)*, the ICJ interpreted Article 36 of the Vienna Convention on Consular Relations, which requires the detaining State to inform detained aliens of their right to have their country's consulate notified of their arrest, and grants the rights of access and communication to consular

535. Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, *Preliminary Objections*, *ICJ Reports 1996* 595, paras. 22-23 (11 July).

536. *Id.*, at para. 34.

officials and their nationals. Reflecting increasing sensitivity to human rights concerns, the ICJ held that Article 36 creates rights not only for the sending State (Germany), but also for the detained persons, rights which may be invoked in the Court by the sending State's exercise of the right of diplomatic protection[537]. But the Court refrained from pronouncing on the additional argument of Germany that these rights of the detained persons constituted human rights.

Finally, a brief comment about one particular aspect of interpretation reflecting human rights concerns: the intertemporal or evolving interpretation. Simma has written that "dynamic interpretation on the part of international courts has been applied in cases of treaty obligations on human rights"[538]. Indeed, the ICJ has resorted to just such an interpretation of the obligation to care for the "well-being and development" of indigenous peoples under the mandate of South Africa[539]. The European Court of Human Rights has emphasized on several occasions that the European Convention must be interpreted in "in the light of present-day conditions"[540]. Simma suggests that dynamic interpretation is prevalent for human rights treaties in part because human rights obligations must be implemented within national legal systems[541]. But the principle of inter-temporal interpretation goes well beyond human rights treaties.

C. Jus Cogens *and Invalidity of Treaties*

The relationship between human rights and the concept of *jus cogens* needs special discussion.

Article 53 of the Vienna Convention defines a peremptory norm of general international law *(jus cogens)* as

> "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a sub-

537. *LaGrand (Germany* v. *United States)*, International Court of Justice, Judgment of 27 June 2001, para. 89.

538. Simma, *supra* footnote 473, at 187.

539. Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *ICJ Reports 1971* 16, 31-32 (21 June).

540. Simma, *supra* footnote 473, at 185, citing *Tyrer* v. *United Kingdom*, 26 *Eur. Ct. HR* (Ser. A) at 15-16 (1978).

541. *Id.*, at 187-188.

> sequent norm of general international law having the same character"[542].

Article 64 provides that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". Under Article 44 (5), a treaty clause contrary to a peremptory norm is not separable and voids the entire treaty. Although this was a controversial decision, the majority of the ILC insisted that the *jus cogens* principle was so fundamental that a treaty containing a clause in conflict with an existing rule of *jus cogens* must be considered totally invalid. Sinclair has suggested that this latter provision "is designed to operate as a sanction"[543] for conclusion of agreements containing such clauses. Clearly it can also act as a deterrent. He considered that the concept of invalidity of a treaty contrary to *jus cogens* "must be regarded as the most significant instance of progressive development in the Convention as a whole"[544]. During the Vienna Conference on the Law of Treaties, Germany thus stated that the ILC's views on the validity of treaties were in advance of developments in State practice[545]. But as early as 1966, Roberto Ago argued that "when the Commission affirmed the existence of mandatory rules of *jus cogens,* it was only defining a principle which already existed and had been recognized by the conscience of States"[546]. The conscience of States may, however, be ahead of *lex lata*. Others considered *jus cogens* as a part of progressive development of international law. Thus Nahlik wrote that the Vienna Convention's provisions on *jus cogens* were not

> "an invention of either the International Law Commission or the Vienna Conference. . . . [T]he freedom of States in concluding treaties had *already* been restricted by the progressive development of international law."[547]

Of course, one of the difficulties with a hierarchy of norms in

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542. Vienna Convention, *supra* footnote 476, Art. 53. See generally Antonio Cassese, *International Law* 142-148 (2001).
543. Sinclair, *supra* footnote 481, at 167.
544. *Id*., at 17.
545. Cited in Rosenne, *supra* footnote 479, at 283.
546. *Id*., at 282.
547. Stanislaw E. Nahlik, "The Grounds of Invalidity and Termination of Treaties", 65 *AJIL* 745 (1971), quoted in Sinclair, *supra* footnote 481, at 17-18.

international law is that there is no superior authority to decide conclusively which rules constitute *jus cogens* and thus impose general legal obligations of a superior character[548]. The Vienna Convention left in some doubt how exactly *jus cogens* norms are created. Paul Reuter has noted that the ILC purposely refrained from being too specific on the question of how a peremptory norm comes into existence. The Vienna Convention would seem to "hint that it is born out of custom since it provided that the rule is accepted and recognized by the international community as a whole", but a "custom with a particular kind of *opinio juris* expressing the conviction that the rule is of an absolute nature"[549]. He has suggested that peremptory norms might "have gone beyond the customary stage and reached the firmer status of general principles of public international law"[550].

Whatever exactly the status of these provisions may have been in 1969 when the Vienna Convention was adopted, there is no doubt that the concept of *jus cogens* has entered the mainstream of international law and is now accepted as *lex lata*, despite the very limited practice of States and the many unresolved questions which the concept has generated.

The ILC's commentary on *jus cogens* gave three examples: a treaty contemplating an unlawful use of force contrary to the Charter of the United Nations; a treaty contemplating the performance of any other act criminal under international law, or a treaty contemplating or conniving at the commission of such acts as slave-trade, piracy or genocide, which all States are expected to suppress[551]. Human rights and humanitarian norms were thus only some of the inalienable principles contemplated by the ILC and later by the Vienna Conference. There is no question, however, that the discussion of *jus cogens* since Vienna has focused far more on human rights and humanitarian law than on other central themes of international law, such as aggression or use of force contrary to the Charter. In contrast to the discussion in Vienna, with its emphasis on invalidity of agreements contrary to *jus cogens*, the *current usage* typically concerns claims that various human rights or humanitarian treaties are endowed with a sort of super-customary character and, therefore,

548. Meron, "On a Hierarchy of International Human Rights", 80 *AJIL* 1, 3 (1986).
549. Reuter, *supra* footnote 482, at 143.
550. *Id.*, at 145.
551. Sinclair, *supra* footnote 481, at 215.

impose obligations on non-parties, or that certain unilateral acts of State are in violation of *jus cogens*. *Jus cogens* has been invoked to question the validity of derogations and reservations. The impact of human rights law on the establishment of *jus cogens* as a fundamental principle of international public order has been significant.

For many delegations at the Vienna Conference, the provisions of the Convention on invalidity and termination of treaties were closely linked to those on settlement of disputes [552]. There was concern that *jus cogens*, abusively invoked, may destabilize the security of international agreements. Hence the perceived need to develop mechanisms for settlement of disputes. Japan thus argued:

> "[Q]uestions of *jus cogens* involved the interests of the entire community of nations, and the question whether a provision of a treaty was in conflict with a rule of general international law, and whether that rule was to be regarded as a peremptory norms could be settled only by the International Court of Justice." [553]

Article 66 *(a)* of the Vienna Convention provides for a unilateral reference to the ICJ for disputes relative to Articles 53 and 64, unless the parties to the dispute agreed to a binding arbitration. The latter provisions are the only ones subject to a compulsory, binding third-party dispute settlement procedure; other provisions relating to invalidity and termination of treaties contemplate a special procedure of compulsory conciliation. Paradoxically, Article 66 *(a)* might give rise to questions of consistency with *jus cogens*. In the course of the ILC's work on the law of treaties of international organizations, the question arose whether a decision of the ICJ invalidating a multilateral treaty on the ground of a conflict with *jus cogens* would invalidate the treaty for all its parties or only for the parties before the Court. Rosenne points out that, technically, such a decision would only apply to the parties before the Court according to Article 59 of the ICJ Statute [554], but

> "there is something incongruous in saying that a treaty is void as between States A and B since it violates a peremptory norm of international law while at the same time implying that

552. *Id.*, at Rosenne, *supra* footnote 479, at 282-283.
553. Rosenne, *supra* footnote 479, at 286.
554. Statute of the International Court of Justice, Art. 59.

> it remains valid and in force as between States A and C, D, E, Z"[555].

At times, attempts have been made to relate *jus cogens* to other major developments of international law and relations. Thus in the *Nuclear Weapons* Advisory Opinion, Judge Bedjaoui identified the development of the concept of *jus cogens* — along with those of obligations *erga omnes* and the common heritage of mankind — as testimony to "the progress made in terms of the institutionalization, not to say integration and 'globalization', of [the] international society", illustrated by

> "the proliferation of international organizations, the gradual substitution of an international law of co-operation for the traditional international law of co-existence, the emergence of the concept of 'international community' and its sometimes successful attempts at subjectivization."

He concluded that

> "[t]he resolutely positivist, voluntarist approach of international law which still held sway at the beginning of the century has been replaced by an objective conception of international law, a law more readily seen as the reflection of a collective juridical conscience and as a response to the social necessities of States organized as a community"[556].

While Sinclair concedes that there are some fundamental rules that clearly cannot be derogated from by treaty — such as the rule of *pacta sunt servanda* — the main difficulty is how to identify other rules that qualify as peremptory norms[557]. Most sources refer to the prohibitions on the use of force, genocide[558], slavery, and racial dis-

555. Rosenne, *supra* footnote 479, at 311.

556. Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Reports 1996* (8 July) (declaration of Judge Bedjaoui, para. 13).

557. Sinclair, *supra* footnote 481, at 215; also Meron, *supra* footnote 548, at 4.

558. Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Further Provisional Measures*, *ICJ Reports 1993* (13 September) (separate opinion of Judge Lauterpacht, at 440); case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, *Preliminary Objections*, *ICJ Reports 1996* 595 (11 July) (dissenting opinion of Judge Krećа, para. 101).

crimination[559]. Those were the examples of obligations *erga omnes* given by the ICJ in the *Barcelona Traction* case[560]. The Human Rights Committee offered as examples the prohibitions of torture and of arbitrary deprivation of life[561]. Other rules have been characterized as rules of *jus cogens*, such as the principle of self-determination[562]. In the *Nuclear Weapons* Advisory Opinion, Judges Bedjaoui, Weeramantry and Koroma were of the view that the fundamental principles of international humanitarian law were of a *jus cogens* nature[563]. The Court itself did not find it necessary to discuss the issue of the *jus cogens* nature of certain rules of humanitarian law, but it expressed the view that certain fundamental rules of humanitarian law constituted "intransgressible principles of international customary law"[564].

In his discussion of the most likely candidates for *jus cogens* norms, Sinclair notes that multilateral conventions which prohibit slavery, piracy, and genocide contain denunciation clauses. If a State can be released through denunciation from such conventional obligations, how can these conventions State norms from which States cannot derogate by treaty[565]? Although the presence of such clauses is not decisive, they introduce some uncertainty as to the status of those rules[566]. Of course, every treaty contains a mix of provisions. Even a highly normative treaty, which contains some *jus cogens* provisions, creates also jurisdictional, technical or administrative obligations, as well as obligations reflecting customary law, which though legally binding, clearly do not rise to *jus cogens* status. Such treaties may be denounced without necessarily questioning the *jus cogens* norms stated in the same instruments. A case in point is the denunciation clauses of the Geneva Conventions of 12 August 1949.

559. Ian Brownlie, *Principles of Public International Law* 512-515 (4th ed., 1990); Reuter, *supra* footnote 482, at 143.

560. *Barcelona Traction, Light and Power Co., Ltd. (Belgium* v. *Spain) (New Application)*, *ICJ Reports 1970* 3, 32 (5 February).

561. General Comment No. 24, *supra* footnote 507, para. 8.

562. Héctor Gros Espiell, "Self-Determination and *Jus Cogens*", in *UN Law/Fundamental Rights: Two Topics in International Law* 167, 171 (Antonio Cassese, ed., 1979).

563. Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Reports 1996* 16 (21 June) (declaration of Judge Bedjaoui, para. 21; dissenting opinion of Judge Weeramantry, para. 10; dissenting opinion of Judge Koroma, at 286-287).

564. *Id.*, para. 79.

565. Sinclair, *supra* footnote 481, at 217.

566. *Id.*, at 223.

These clauses, which reflect a version of the Martens Clause, make it clear that denunciation will not affect the obligations of the denouncing States under the principles of the law of nations[567].

The concept of *jus cogens* has only a limited immediate practical importance for the validity of treaties[568]. It is very unlikely that States would publicly conclude a treaty that is in violation of *jus cogens*[569]. So far, despite the support of the concept in doctrine and statements, it has found little application in State practice[570]. As a matter of fact, States do not conclude agreements to commit torture or genocide or enslave peoples. Moreover, States are not inclined to contest the absolute illegality of acts prohibited by *jus cogens*. When such acts take place, States deny the factual allegations or justify violations on other grounds.

But even in treaties, the significance of *jus cogens* cannot be denied. For example, when it comes to balancing one human right against another, the right that has gained the exalted status of *jus cogens* would be preferred. *Jus cogens* may also be invoked to challenge the application of agreements, such as in the field of extradition or criminal assistance. While unimpeachable in the abstract, the pertinent treaties may, in their actual application, clash with *jus cogens*.

The notion of *jus cogens* is close to Judge Mosler's concept of public order of the international community[571]. Because of the decisive importance of certain norms and values to the international community, they merit absolute protection, and should be protected from derogations and reservations by States, whether jointly by treaty or severally by unilateral legislative or executive action. *Jus cogens* is thus relevant to unilateral acts, including those taken to implement treaties, statutes or regulations.

With regard to the nullity of unilateral acts, somewhat different issues, however, arise. In the case of a conflict between a treaty and *jus cogens*, the latter nullifies the former. A treaty, however, is a creature of international law, while a unilateral State act is rooted in a national legal system. It cannot be taken for granted, therefore, that

567. See e.g. Article 158 of Geneva Convention IV.
568. Meron, *supra* footnote 548, at 14.
569. E. Jiménez de Aréchaga, 52 *Annuaire IDI*, t. 1, 378 (1967), quoted in Rosenne, *supra* footnote 479, at 287-288.
570. Sinclair, *supra* footnote 481, at 209 and 215.
571. Meron, *supra* footnote 525, at 197-198.

the unilateral act would have no internal legal force. But, at the very least, the violating State would incur international responsibility, and the persons responsible might also incur individual criminal liability under international law. Moreover, the actor State should not be allowed to invoke an act contrary to *jus cogens* on the international plane.

The ethical significance of *jus cogens* goes further. Reuter considered that the Vienna Convention's formal recognition of the existence of peremptory norms constituted "a reminder . . . of the moral basis of law"[572].

Cassese has observed that:

> "Many legal rules produce effects far beyond their immediate objective. They possess an ethico-political halo that is destined to glow in unthought-of areas. Above all, they are influential in the moral and psychological spheres, creating a new ethos in the international community, and new expectations not only among States but among individuals and peoples — the new twin poles of interest and action — not to mention public opinion."[573]

The notion of *jus cogens* had an important influence on the work of the ILC on State responsibility, in particular former draft Article 19 on international crimes. The definition of an "international crime" followed closely the definition of *jus cogens* in the Vienna Convention: a violation "of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime against that community as a whole"[574]. It has also influenced the development of international criminal law, regulation of weapons, and international environmental protection. Even such a sceptical observer as Sinclair was led to conclude that "[t]he notion of *jus cogens* has accordingly begun to have a pervasive influence on branches of international law other than the law of treaties"[575].

Application of *jus cogens* in particular cases continues to prove

572. Reuter, *supra* footnote 482, at 146.
573. Cassese, *supra* footnote 526, at 169.
574. Draft Articles on State Responsibility, Art. 19, in Report of the International Law Commission on the Work of its Forty-eighth Session, 6 May-26 July 1996, UN, *GAOR*, 51st Sess., Supp. No. 10, UN doc. A/51/10 (1996).
575. Sinclair, *supra* footnote 481, at 215.

difficult. The continuing doctrinal controversy appears to be diminishing in its intensity as the acceptance of *jus cogens* is becoming broader, but the lack of consensus about the identity of peremptory norms, beyond the more fundamental human rights and humanitarian norms remains. Selection of rights for higher status is fraught with personal, cultural, and political bias and has not been addressed by the international community as a whole. The prevailing differences in the social, cultural, political, and economic values of States have made it easier to arrive at agreements on sets of rights than on their order of priority. Few criteria exist for distinguishing between ordinary rights and higher rights. Some commentators have resorted to superior rights, to *jus cogens*, to provide the foundation for the binding normative status of rights whose customary law underpinnings are still weak. Too liberal an invocation of superior rights, fundamental rights, basic rights, or *jus cogens*, may, however, weaken the credibility of all rights.

But the positive outweighs the negative. The use of such hierarchical terms as *jus cogens* promotes a normative order in which higher norms can be invoked as a moral and legal barrier against violations and derogations. Such terms discourage violations and strengthen the case for responsibility and accountability. Hierarchical terms have helped to establish the foundations for *erga omnes* obligations. In the constant clash between claims by the civil society and repressive Governments, the language of *jus cogens* has played a significant role, as, for example, in protecting the right to life.

D. Termination of Treaties

I. Withdrawal and denunciation

In its Advisory Opinion on Namibia (1971)[576], the ICJ recognized the customary law nature of the Vienna Convention's provisions on termination of treaties[577]. A recent case demonstrates the trend in the international community to refuse to admit the possibility of denunciation of or withdrawal from multilateral conventions in the field of

576. Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *ICJ Reports 1971* 16, at 55, para. 122 (21 June).

577. *Id.*, at 47.

human rights. The case concerned the Democratic People's Republic of Korea's notification to the Secretary-General in August 1997 of its withdrawal from the Political Covenant. North Korea justified its withdrawal by reference to "extremely dangerous and hostile acts which encroach upon [its] sovereignty and dignity"[578]. It asserted that, in so doing, the North Korean Government had

> "exercised its legitimate and just self-defense right in connection with the misuse of the 'International Covenant on Civil and Political Rights' by hostile elements . . . for their dishonest political objective"[579].

The UN Secretariat then drafted an aide-mémoire explaining its legal position, which it forwarded to North Korean authorities. It stated that the Political Covenant does not contain any provision on denunciation or withdrawal. In assessing the legal position regarding withdrawal from the Covenant, the Secretariat based itself on Article 56 of the Vienna Convention, to which North Korea was not a party, as declaratory of customary law. It concluded that a Party to the Political Covenant could only withdraw from it in accordance with Article 54 of the Vienna Convention, i.e., with the consent of the parties. After an examination of denunciation clauses in other human rights instruments negotiated during the same period, the Secretariat found that the "negotiating parties deliberately did not intend to provide for withdrawal or denunciation"[580]. It considered the Political Covenant an instrument for which a right of denunciation could not be implied:

> "In considering whether human rights treaties are by their nature subject to a right of denunciation or withdrawal, it should be noted that human rights treaties express universal values from which no retreat should be allowed. This is also consistent with the United Nations approach to human rights."[581]

Although many human rights instruments provide for a right of

578. Notification by the Democratic People's Republic of Korea, 23 August 1997, UN doc. C.N.467.1997.Treaties-10 (1997).
579. *Id.*
580. Aide-Mémoire: Denunciation of the ICCPR by the Democratic People's Republic of Korea, 23 September 1997, Annex, para. 4, UN doc. C.N.467.1997.Treaties-10 (1997).
581. *Id.*, para. 7.

denunciation, the Secretariat observed that "such treaties in general do not imply an inherent right of denunciation or withdrawal" and that since the Political Covenant "is among the relative minority of human rights treaties not explicitly subject to denunciation or withdrawal, it is incorrect to assume that its nature somehow implies such a right"[582]. Its earlier withdrawal notwithstanding, in March 2000, North Korea submitted its second report to the Human Rights Committee under Article 40 of the Covenant[583].

The Human Rights Committee adopted the same position as the Secretariat in a General Comment. Discussing Article 56 (1) of the Vienna Convention, it concluded that the drafters of the Political Covenant "deliberately intended to exclude the possibility of denunciation"[584]. The nature of the instrument did not imply a right of denunciation. As part of the "International Bill of Human Rights", the Political Covenant was not of a temporary character typical of treaties for which a right of denunciation would be admitted despite the absence of a specific provision to that effect. The Committee went even further. It mentioned its long-standing position that

> "once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in Government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant"[585].

II. Material breach

The Vienna Convention does not address directly the question of State responsibility for the breach of a conventional obligation. Article 73 provides only that "[t]he provisions of the present Con-

582. *Id.*, para. 8.

583. Status of withdrawals and reservations with respect to the International Covenants on Human Rights: Report of the Secretary-General, UN doc. E/CN.4/Sub.2/2000/7, Part III, para. 12.

584. General Comment No. 26 (1997), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc. HRI/GEN/1/Rev.5 (2001), p. 162, at para. 3-5.

585. *Id.*, at para. 4. See discussion in Buergenthal, *supra* footnote 507, at 360-362. The Committee took the view that the former Yugoslav States and the former Soviet Republics were bound by their obligations under the Covenant as from the date of their independence. *Id.*, at 360, and footnote 529.

vention shall not prejudge any question that may arise . . . from the international responsibility of a State . . .". On a more general plane, however, the Convention shows some recognition of enhanced responsibility for violations of normative, multilateral conventions. Reuter thus notes that the Vienna Convention

> "whenever it touches upon questions of responsibility [it] takes into account the object and character of the obligation breached. Whether implicitly (invalidity for coercion against a party or its representative . . .), or in more general if unspecified terms (invalidity for breach of a peremptory rule . . .), or again in more restrictive though still uncertain terms (special régime for provisions of a humanitarian character . . .), an emerging distinction is noticeable between international rules according to their *importance* and their *value*"[586].

Under Article 60 of the Vienna Convention, a party is allowed to terminate or suspend a treaty on the ground of a material breach by another contracting party. Material breach, a term understood in the past only by cognoscenti, gained recent currency with the adoption by the Security Council of resolution 1441 (2002) on weapons inspections in Iraq, which used this term prominently. Article 60 (5) of the Vienna Convention, however, precludes a State from invoking a material breach as a justification for suspending or terminating "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". This last paragraph, which did not appear in the ILC draft articles, was proposed by Switzerland and "inspired by the International Committee of the Red Cross"[587]. Simma wrote that the initial proposal was designed to cover humanitarian law treaties, but "in the intention of the proponents of paragraph 5, the operation of the principle in Article 60 was also to be excluded in the case of treaties for the protection of human rights in peacetime"[588]. He emphasized that Article 60 takes into account the special features of human rights treaties, i.e., that they contain obligations which are

> "integral in the sense that they run inseparably between all the

586. Reuter, *supra* footnote 482, at 197-198 (emphasis in original).
587. *Id.*, at 200.
588. Simma, *supra* footnote 473, at 209-210.

> States Parties, with the effect that any bilateral measure of reciprocal non-application would necessarily infringe upon the rights of all other States Parties to continued performance".

Therefore, the principle of law embodied in Article 60 (5) clearly applies to both humanitarian and human rights treaties. It leaves intact the right of a State to suspend those provisions which do not relate to the protection of human rights and humanitarian norms and do not constitute *jus cogens* in response to a material breach of a humanitarian or human rights treaty. Nevertheless, such provisions are often neither separable from the remainder of the treaty, nor of any significant weight in the balance of reciprocity between the States concerned[589]. Whether Article 60 (5) will be applied to treaties other than humanitarian and human rights treaties is unclear. To the extent that some normative treaties reflect broad community values and are not designed to ensure reciprocity, there may well be a tendency to take into account the principle stated in Article 60 (5). Indeed, Reuter notes that "a great many . . . controversial extensions can be thought of, depending on whether the legal basis of this provision is seen as conventional or as founded on a peremptory rule"[590].

In its Advisory Opinion on Namibia, the ICJ enunciated an important position, also reflected in Article 60 (5) of the Vienna Convention (which was not mentioned in the opinion), on the non-reciprocal character of humanitarian treaties. The Court considered the legal consequences of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970). The resolution had declared invalid and illegal all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate. The Court recalled that member States were under an obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purported to act on behalf of or concerning Namibia and added:

> "With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provi-

589. Meron, *Human Rights and Humanitarian Norms as Customary Law* 241-242 (1991). On breach of treaty, see generally Shabtai Rosenne, *Breach of Treaty* (1985).

590. Reuter, *supra* footnote 482, at 201.

> sions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental cooperation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia."[591]

Thus the international community has strengthened the binding nature of rules protecting fundamental human and humanitarian rights by refusing to recognize either an implicit right of denunciation or the invocation of material breach as a defence for non-performance.

E. Succession to Treaties

The Vienna Convention on the Law of Treaties does not address succession of States. It states in Article 34 that a treaty creates neither obligations nor rights for a third State without that State's consent. Article 38 confirms, however, that the Convention does not preclude a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law.

The Vienna Convention on Succession of States in Respect to Treaties (1978)[592] — which is not yet in force — rests on two distinctions. The first is the distinction between "personal" and "dispositive" obligations. Such a distinction is recognized in Articles 11 and 12, according to which boundary and other territorial regimes continue in force and are not affected by State succession. Although at the time of the drafting of the Convention in the ILC, it had been suggested that obligations contained in law-making treaties would continue to bind successors States, that view did not prevail[593]. Article 12 recognizes treaties creating objective regimes, which may, as Sinclair observes, have certain effects *erga omnes*[594]. These would

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591. Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *ICJ Reports 1971* 16, at 55 (21 June).

592. Vienna Convention on Succession of States in Respect to Treaties, opened for signature 23 August 1978, not in force, UN doc. A/CONF.80/31 and Corr.2 (1978), 17 *ILM* 1480 (1978) (hereinafter Vienna Convention on State Succession).

593. Menno Kamminga, "State Succession in Respect of Human Rights Treaties", 7 *Eur. J. Int'l L.* 469, 473 (1996).

594. Sinclair, *supra* footnote 481, at 104.

be treaties pertaining to permanent rights of a territorial character and treaties establishing areas of demilitarization or neutralization, perhaps global commons, and perhaps such territorially based rights as navigation of waterways, or transit of national territory[595]. With respect to treaties intended to create an objective regime, the ILC stated that the successor State is not to be regarded simply as a third State in relation to the treaty but that international law rules pertaining to succession also come into play and may create obligations for the successor State[596].

The second distinction, one that applies to multilateral treaties, turns on the type of successor State. The Vienna Convention on Succession of States in Respect of Treaties provides for a presumption of continuity, i.e. treaties of the predecessor State continue in force in respect of each successor State, "when a part or parts of the territory of a State separate to form one or more States"[597]. It, however, recognizes a "clean slate" rule for "newly independent States", i.e., ex-colonial territories[598]: a State is not bound to maintain in force, or to become a party to, any treaty concluded by the predecessor State.

The policy underlying this distinction has been criticized. According to some commentators, it has introduced a measure of imbalance and removed reciprocity by allowing newly emergent States to adopt old treaties while permitting them to disregard promises to continue treaty relations contained in devolution agreements with the former colonial State[599]. In contrast, States which have not been colonies are bound by their predecessors' treaties. The failure of States to ratify the Convention is not surprising. Legal advisers of countries of the Council of Europe considered that it did not represent existing public international law and that the distinction between continuation and dissolution of States was unhelpful for determining the obligations of successor States with regard to treaties of the predecessor State. They recommended that to avoid a legal vacuum, a new State

595. Detlev F. Vagts, "State Succession: The Codifiers' View", 33 *Va. J. Int'l L.* 275, 289 (1993).

596. Succession of States in Respect of Treaties, Report of the International Law Commission on the Work of Its Twenty-sixth Session, 6 May-26 July 1974, 2 *YB Int'l L. Comm'n* 204 (1974).

597. Vienna Convention on State Succession (1978), *supra* footnote 592, Art. 34.

598. *Id.*, Art. 19.

599. Vagts, *supra* footnote 595, at 283.

should make a declaration of succession to multilateral treaties, but considered that States parties should be able to oppose such a declaration [600].

Others have regarded the distinction between colonies and non-colonies as a reasonable compromise, assuring both continuity and equity [601]. The Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") goes so far as to claim that all newly independent States benefit from the "clean slate" principle [602].

Neither the Vienna Convention on the Law of Treaties nor the Vienna Convention on Succession of States in respect of Treaties recognizes a rule or a presumption of continuity based on the character of a treaty. It is important, of course, that international law and policy should be guided by such fundamental values as stability of international treaties, especially general normative treaties. I agree with Schachter that "an especially strong case for continuity can be made in respect of multilateral treaties of a so-called 'universal' character that are open to all States" [603]. Schachter has predicted that "most such treaties of a general 'legislative' character will be treated in the future as automatically binding on new States on the basis of adherence by their respective predecessor States" [604]. This category of treaties would include codification conventions (e.g. law of treaties, diplomatic relations) and law-making treaties, such as human rights conventions [605].

The chairmen of the human rights treaty bodies expressed a similar view in 1994:

> "[T]hey were of the view that successor States were automatically bound by obligations under international human rights instruments from the respective date of independence and that observance of the obligations should not depend on a

600. Paul R. Williams, "The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do they Continue in Force?", 23 *Denv. J. Int'l L. & Pol.* 1, 9-10 (1994).

601. Edwin D. Williamson and John E. Osborn, "A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia", 33 *Va J. Int'l L.* 261, 263 (1993).

602. 1 Restatement (Third) of the Foreign Relations Law of the United States, § 210 (1987).

603. Oscar Schachter, "State Succession: The Once and Future Law", 33 *Va. J. Int'l L.* 253, 259 (1993).

604. *Id.*, at 259.

605. Vagts, *supra* footnote 595, at 289-290.

declaration of confirmation made by the Government of the successor State."[606]

The ICTY Appeals Chamber agreed in the *Čelebići* case. Relying both on the customary nature of the obligations contained in the Geneva Conventions and on a customary rule according to which there is "automatic State succession to multilateral humanitarian treaties in the broad sense, i.e., treaties of universal character which express fundamental human rights", the Tribunal held that Bosnia and Herzegovina was bound by the Geneva Conventions from the date of that State's creation. Article 23 (2) of the Vienna Convention, which provides that the operation of a treaty is suspended pending succession, was held to be inapplicable[607]. Detlev Vagts makes a powerful argument in favour of succession to treaties which codify or develop principles of international law. Such treaties state norms widely regarded as customary law and are thus binding on all States. There seems to be little equity in allowing new States to escape their obligations[608]. The problem, however, is that the core of the human rights treaties resides in their mechanisms for supervision, mechanisms which cannot be regarded as customary law and thus subject to succession.

In the field of arms control agreements, Vagts regards the Nuclear Test Ban Treaty as similar to codifying agreements[609]. With regard to such issues, although the law is unsettled, the United States prefers to presume continuity in the treaty relations[610]. From the perspective of the United States, it is advantageous for all the ex-Soviet republics, for example, to continue as parties to multilateral conventions of general application to all States, except the Non-Proliferation Treaty, where any attempt to allocate rights or obligations under the Treaty (which designated the Soviet Union as a nuclear power) to all the republics would be inconsistent with the purpose and object of the treaty[611].

606. Status of International Covenants on Human Rights: Succession of States in Respect of International Human Rights Treaties: Report of the Secretary-General, UN, *ESCOR*, Commission on Human Rights, 51st Sess., UN doc. E/CN.4/1995/80, para. 10 (1994).
607. *Prosecutor* v. *Delalić and Others*, Case IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, para. 111.
608. Vagts, *supra* footnote 595, at 290.
609. *Id.*, at 292-293.
610. Williamson and Osborn, *supra* footnote 601, at 263 (1993).
611. *Id.*, at 265-266.

Unfortunately, despite some movement here and there, it is far from clear that the practice of States follows the principle of succession to general normative conventions, even in the field of human rights. In the case of the dismemberment of both the USSR and Yugoslavia, neither the continuity nor the clean-slate principle has been fully applied to bilateral and multilateral treaties with limited participation, but rather a procedure of negotiated and agreed readjustment of the international obligations of predecessor States[612] has been followed. As regards universal treaties, the practice of the successor States has been inconclusive[613]. As a general rule, successor States of the Soviet Union (except the Russian Federation) have acceded — not succeeded — to general multilateral conventions such as conventions on diplomatic and consular relations and human rights treaties. In the case of the Geneva Conventions and their protocols, four of the successor States considered themselves as successors while the others acceded to the Conventions, showing that they did not consider themselves automatically bound by such treaties as successor States. Conversely, successor States of Czechoslovakia and of the Socialist Republic of Yugoslavia considered themselves as successors to most universal treaties that their predecessor State had ratified[614].

Arguments in favour of automatic succession to human rights treaties have been advanced on several theories. The first has been to suggest that individual human rights be treated as acquired rights[615]. The Human Rights Committee has adopted a related concept by considering that human rights devolve with the territory, as already mentioned in our discussion of withdrawal and denunciation. A case in point is the resumption of Chinese sovereignty over Hong Kong. Under the Vienna Convention on State Succession, in such circumstances treaties of the predecessor State cease to be in force in the territory subject to the succession and treaties of the successor State come into force in that territory[616]. At the time of the succession, the United Kingdom, but not China, was a party to the two Covenants.

612. Rein Mullerson, "New Developments in the Former USSR and Yugoslavia", 33 *Va. J. Int'l L.* 299, 317 (1993).
613. *Id.*, at 318.
614. Kamminga, *supra* footnote 593, at 475-480.
615. Mullerson, *supra* footnote 612, at 319; Kamminga, *supra* footnote 593, at 472-473; *contra* Craven, "The *Genocide* Case, the Law of Treaties and State Succession", 68 *Brit. YB Int'l L.* 127, 157-158 (1997).
616. Vienna Convention on State Succession, *supra* footnote 592, Art. 15.

However, the Joint Declaration signed by the two States in 1984 stipulated *inter alia* that "[t]he provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force"[617]. In considering the report made by the United Kingdom for Hong Kong, the Human Rights Committee mentioned its position that the protection of the rights under the Political Covenant "cannot be denied to [the inhabitants] merely by virtue of dismemberment of that territory or its coming under the sovereignty of another State or of more than one State". However, taking into account the Joint Declaration, the Committee considered that it was "unnecessary to rely solely on [its] jurisprudence as far as Hong Kong was concerned"[618]. It declared itself ready to give effect to the intention of the parties. Menno Kamminga considered this agreement as support by the States concerned for the propositions that human rights entitlements are inalienable, that they constitute acquired rights, and that they are not affected by transfers of sovereignty[619]. The Chinese Government did not, at first, agree that its obligations extended to submitting periodic reports to the Human Rights Committee, a question which depends on the interpretation of the Joint Declaration[620]. China, however, notified the Secretary-General in December 1997 of the continued application of the Covenants in Hong Kong and on the arrangements for the Hong Kong Special Administrative Region to report to the UN Committees "in the light of the relevant provisions of the two Covenants"[621]. China submitted a report prepared by Hong Kong's authorities to the Human Rights Committee in 1999, and the Committee in its concluding observations reaffirmed "its earlier pronouncements on the continuity of the reporting obligation in relation to Hong Kong"[622].

617. Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, 26 September 1984, reprinted in 23 *ILM* 1366 (1984). Relevant provisions are quoted in Nihal Jayawickrama, "Human Rights in Hong Kong: The Continued Applicability of the International Covenants", 25 *Hong Kong LJ* 171 (1995).

618. Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland-Hong Kong, UN doc. CCPR/C/79/Add.69, para. 4 (1996).

619. Kamminga, *supra* footnote 593, at 481.

620. *Id*., at 482.

621. UN doc. CCPR/C/HKSAR/99/1, para. 2 (1999).

622. See also the Concluding Observations of the Human Rights Committee, China (Hong Kong), UN doc. CCPR/C/79/Add. 17 (4 November 1999).

However, Hong Kong constitutes a rather special case. Under the "one country, two systems" Chinese policy, Hong Kong retains substantial autonomy in matters of international relations[623]. In particular, its Basic Law provides that "[i]nternational agreements to which China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong SAR"[624].

A second theory may be described as one of inherent rights derived from the specific characteristics of human rights treaties. In his separate opinion in the case concerning the *Application of the Genocide Convention,* Judge Weeramantry contended that, although

> "some human rights treaties may involve economic burdens, such as treaties at the economic end of the spectrum of human rights, . . . human rights and humanitarian treaties in general attract the principle of automatic succession"[625].

He argued that the Genocide Convention represents a commitment to certain norms and values recognized by the international community, transcends concepts of State sovereignty and embodies rules of customary international law:

> ". . . [A] State, in becoming party to the Convention, does not give away any of its rights to its subjects. It does not burden itself with any new liability. It merely confirms its subjects in the enjoyment of those rights which are theirs by virtue of their humanity. . . . Human rights treaties are no more than a formal recognition by the sovereign of rights which already belong to each of that sovereign's subjects. Far from being largesse extended to them by their sovereign, they represent the entitlement to which they were born."[626]

Similar arguments have been advanced by members of the Human Rights Committee for the continued application of the Political Covenant.

A third theory suggests a presumption of continuity based on the

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623. Jayawickrama, *supra* footnote 617, at 176-177.
624. *Id.*, at 177.
625. Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, ICJ Reports 1996* 595 (11 July) (separate opinion of Judge Weeramantry).
626. *Id.*

object and purpose of the treaty at issue. Judge Shahabuddeen thus observed that:

> "To effectuate its object and purpose, the Convention would fall to be construed as implying the expression of a unilateral undertaking by each party to the Convention to treat successor States as continuing as from independence any status which the predecessor State had as a party to the Convention. The necessary consensual bond is completed when the successor State decides to avail itself of the undertaking by regarding itself as a party to the treaty."[627]

It is to be hoped that such theories will be supported not only by human rights bodies and scholars but by the practice of States. The task of extending these rationales for automatic succession of human rights treaties to other types of multilateral treaties faces considerable hurdles, however. The several theories discussed above are based on the special nature of human rights treaties, in particular on the fact that they state undertakings of Governments in favour of individuals. A specific rule has thus been carved out for those instruments. Nonetheless, parallel arguments have been suggested for other types of treaties, in particular arms control and disarmament treaties. Such arguments often emphasize the common interest of the international community:

> "[T]he dissolution of the USSR and Yugoslavia also shows that the world community of States was seriously concerned with the stability of international legal relations and, by pushing the newly-born States, achieved acceptance by most of them of the most important obligations of their predecessors. This was the case with the START and the CFE treaties."[628]

It has been suggested that arms control agreements could be regarded as dispositive treaties[629]. Neutralization and demilitarization agreements are a traditional category of obligations considered to devolve with territory. But only a few modern arms control agree-

627. *Id.*, separate opinion of Judge Shahabuddeen.

628. Mullerson, *supra* footnote 612, at 317; also George Bunn and John B. Rhinelander, "The Arms Control Obligations of the Former Soviet Union", 33 *Va. J. Int'l L.* 323, 349 (1993).

629. Love, "International Agreement Obligations after the Soviet Union's Break-up: Current United States Practice and Its Consistency with International Law", 26 *Vand. J. Transnat'l L.* 373, 411 (1993).

ments, such as those that establish complete ban on certain weapons systems, could be regarded as devolving with the territory. It has seldom been argued that there was "automatic succession" regarding such treaties. For most types of arms control agreements, some adjustments have had to be made to take into account the breaking up of the predecessor State into several units. For instance, the continuing status of the Soviet Union as a nuclear power under the Non-Proliferation Treaty[630] and arrangements for quantitative limitations on certain types of armaments became subjects of negotiation[631].

F. Reservations to Multilateral Treaties

Much has been written about reservations to human rights treaties. I would like, therefore, to discuss only a limited number of issues of potential importance for the entire law of treaties, especially to normative treaties.

I. From the unanimity rule to the "object and purpose" test

Up to the World War I, State practice on reservations was based on the so-called unanimity rule: "any reservation, in order to be admitted, must be accepted by all contracting parties to the treaty in question"[632]. The rule of unanimity was closely linked to contemporary practices in the negotiation of multilateral treaties and was founded on the concept of the treaty's integrity. Texts of multilateral treaties had to be adopted unanimously, so that every participating State in the negotiations could be assured that no unacceptable provisions would bind it without its consent[633]. A Report of the Committee of Experts for the Progressive Codification of International Law of the League of Nations concluded in 1927 that

> "[i]n order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all contracting parties, as would have been the case if it had been put forward in the course of

630. Treaty on the Non-Proliferation of Nuclear Weapons, 1st July 1968, 21 *UST* 483, 729 *UNTS* 161, revised.
631. Bunn and Rhinelander, *supra* footnote 628, at 348.
632. Sinclair, *supra* footnote 481, at 54-55.
633. *Id.*, at 56.

the negotiations. If not, the reservation, like the signature to which it is attached, is null and void."[634]

Cracks in the unanimity rule began to appear between the two world wars, especially in Latin America. A number of countries from that area supported the Pan-American system, defined by the Governing Board of the Pan-American Union in 1932 as follows:

"*(a)* as between States which ratify a treaty without reservations, the treaty applies in the terms in which it was originally drafted and signed;

(b) as between States which ratify a treaty with reservations and States which accept those reservations, the treaty applies in the form in which it may be modified by the reservations; and

(c) as between States which ratify a treaty with reservations and States which, having already ratified, do not accept those reservations, the treaty will not be in force"[635].

Similarly, the Havana Convention on Treaties adopted by the International Conference of American States (1928) also followed a system departing from unanimity[636].

In the post-World War II period, the Latin American departure from unanimity in the Pan-American system continued, and many Eastern European States asserted the "sovereign right to make reservations unilaterally and at will"[637]. But it was the practice of adopting conventional texts by a two-thirds majority that finally shattered the unanimity rule. Since a minority of States could no longer be accommodated, the need arose to allow a greater flexibility in the reservations regime[638]. As noted by James Brierly, the first ILC Rap-

634. Report of the Committee of Experts for the Progressive Codification of International Law, 8 *League of Nations OJ* 69 (1927).

635. Sinclair, *supra* footnote 481, at 57; also Rosenne, *supra* footnote 479, at 426-427.

636. Havana Convention on Treaties, Art. 6, adopted at the Sixth International Conference of American States (1928), reprinted in "Conventions on Public International Law Adopted by the Sixth International American Conference", 22 *AJIL* 124 (1928), which read:

"In case the ratifying state make reservations to the treaty it shall become effective when the other contracting party informed of the reservations expressly accepts them, or having failed to reject them formally, should perform actions implying its acceptance."

637. Sinclair, *supra* footnote 481, at 56.

638. Reuter, *supra* footnote 482, at 78-79.

porteur on the Law of Treaties, two main principles were to inform the law of reservations. First, "the desirability of maintaining the integrity of international multilateral conventions"[639]. Second, "the desirability of the widest possible application of multilateral conventions"[640].

These tensions came to a climax when some States sought to make reservations to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, which allowed one party to submit a dispute to the ICJ unilaterally. Other States insisted that such a reservation was inadmissible and would invalidate the ratifications concerned. As the Convention did not contain any specific rules on reservations, the General Assembly requested the ICJ to give an advisory opinion on the validity of the reservations to the Convention. The Court decided that classic rules could not easily be applied in the multilateral treaty context. According to the Court, the contracting parties wanted to encourage widespread ratification, and did not intend that an objection to a minor reservation should frustrate that goal. Reservations should not, however, be incompatible with the "object and purpose" of the Convention[641].

The Court did not consider reservations to Article IX of the Genocide Convention incompatible with the "object and purpose" of the Convention. It made it clear that the humanitarian object of the Convention was central to its decision; the General Assembly, together with the States that adopted the Convention, intended to obtain the widest possible participation of States without sacrificing its object. While the Genocide Convention is, of course, a human rights treaty, the Court, as Rosalyn Higgins has observed, was "concerned with the broad distinction between 'contract treaties' and 'normative treaties'"[642].

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639. Reservations to Multilateral Conventions, Report by Mr. J. L. Brierly, Special Rapporteur, para. 11, UN doc. A/CN.4/41, in 2 *YB Int'l L. Comm'n* 3-4 (1951); quoted in First Report on the Law and Practice Relating to Reservations to Treaties: Preliminary Report by Alain Pellet, Special Rapporteur, International Law Commission, 47th Sess., 2 May- 21 July 1995, para. 16, UN doc. A/CN.4/470 (1995).

640. *Id.*, para. 12.

641. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice, Advisory Opinion of 28 May 1951, *ICJ Reports 1951* 15, at 24 (1951).

642. Rosalyn Higgins, "Introduction", in *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* xv, xix (J. P. Gardner, ed., 1997).

The Court stated that the crime of genocide shocked the conscience of mankind and was contrary to moral law and to the spirit and aims of the United Nations. It explained that the principles underlying the Convention were recognized by civilized nations as binding on States even without any conventional obligations. Although the Court did not explicitly address the question of reservations to customary law, it recognized two points. First, the principles underlying the Convention are declaratory of customary law. Second, States have the right to make reservations to the treaty rules stated in the Convention if those reservations are not incompatible with the purpose and object of the Convention. The contracting States did not intend to sacrifice the object and purpose of the Convention in order to secure as many participants as possible. Nor did they intend to exclude from participation in the Convention States making other reservations.

The Court's opinion is silent on whether reservations to conventional rules which are identical to customary rules are generally possible. But in the specific case of the Genocide Convention, the Court appeared to suggest that because the principles of the Convention that correspond to customary law determine its humanitarian and civilizing objects, such reservations would be contrary to those objects and thus inadmissible[643].

Although the Court did not embrace the view of those States that argued for an unrestricted right to make reservations, its decision was criticized for favouring a minority view, that of the Eastern bloc countries[644]. At first, the ILC considered the Court's opinion unsuitable for multilateral conventions:

> "[T]he criterion of the compatibility of a reservation with the object and purpose of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide, is not suitable for application to multilateral conventions in general. It involves a classification of the provisions of a Convention into two categories, those which do and those which do not form part of its object and purpose. It seems reasonable to assume that, ordinarily at least, the parties regard the provisions of a convention as an integral whole, and that a reservation to

643. Meron, *supra* footnote 589, at 11-12.
644. Reuter, *supra* footnote 482, at 79; Sinclair, *supra* footnote 481, at 58.

> any of them may be deemed to impair its objects and purpose."[645]

Despite the criticism it attracted, the opinion of the Court transformed international law on reservations. As Catherine Logan Piper has noted,

> "[a]lthough, the Court's opinion met with varying criticism and interpretation, it has been viewed as the catalytic event initiating the subsequent development in the law of reservations. Adoption of the compatibility rule in place of the unanimity rule exemplified a movement towards the objective of universality."[646]

The Opinion thus marked the starting point of the evolution of the general regime of reservations. Imbert has observed:

> "depuis l'avis de la Cour, un processus irréversible s'est produit et nul ne pense plus aujourd'hui à exiger pour l'ensemble des conventions multilatérales l'application du principe du consentement unanime"[647].

Following the opinion of the Court (1951) and the ILC Report (1951), the General Assembly adopted a resolution in the nature of a compromise[648] "between the somewhat contradictory opinions of these two organs", which requested the Secretary-General, *inter alia*,

> "In respect of future conventions concluded under the auspices of the United Nations of which he is the depositary:
>
> . . . . . .
>
> (ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications."[649]

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645. "Reservations to Multilateral Conventions", in Report of the International Law Commission covering the Work of Its Third Session, 16 May-27 July 1951, para. 24, UN doc. A/1858, in 2 *YB Int'l L. Comm'n* 125, 128 (1951).

646. Catherine Logan Piper, "Reservations to Multilateral Treaties: The Goal of Universality", 71 *Iowa L. Rev.* 295, 313 (1985) (internal citations omitted).

647. Pierre-Henri Imbert, *Les réserves aux traités multilatéraux: Evolution du droit et de la pratique depuis l'avis consultatif donné par la Cour international de Justice le 28 mai 1951* 75 (1978).

648. Rosenne, *supra* footnote 479, at 430.

649. GA res. 598 (VI), UN, *GAOR*, Sixth Committee, 360th mtg., items 49 *(a)*-50 (1952).

The resolution decided on departure, in UN practice, from the unanimity principle, for conventions concluded under the auspices of the United Nations for which the Secretary-General was the depositary. Pellet has noted that this

> "constituted the guidance followed by the Secretary-General in his practice as depositary until 1959, when the problem resurfaced in connection with the declaration made by India on the occasion of the deposit of an instrument of acceptance of the Convention on the Intergovernmental Maritime Consultative Organization"[650],

a declaration to which the Secretary-General of that organization wanted to apply the unanimity rule. This led to an ILC study of reservations. Commenting in 1959 on the Indian episode, Oscar Schachter expressed the hope that reservations should not be employed by a State to evade the essential minimum of binding obligations laid down by the treaty to which it becomes a party[651]. Unfortunately, States have not hesitated to make crippling reservations, especially to human rights treaties.

In 1953, two years after the Court's advisory opinion, the ILC's second rapporteur on the law of treaties, Hersch Lauterpacht, thus described the rule of existing law on reservations to multilateral treaties: "[A] signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty."[652] The Special Rapporteur was of the opinion, however, that

> "although nothing decisive has occurred to dislodge the principle of unanimous consent as a rule of existing international law, the Commission . . . is not of the view that it constitutes a satisfactory rule and that it can — or ought to — be maintained"[653].

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650. First Report on the Law and Practice Relating to Reservations to Treaties, *supra* footnote 639, para. 22; also Rosenne, *supra* footnote 479, at 431.

651. Oscar Schachter, "The Question of Treaty Reservations at the 1959 General Assembly", 54 *Am. J. Int'l L.* 372, 379 (1960).

652. Law of Treaties, Report by Mr. H. Lauterpacht, Special Rapporteur, Draft Art. 9, UN doc. A/CN.4/63 (1953), in *YB Int'l L. Comm'n* 90, 91 (1953); quoted in First Report on the Law and Practice Relating to Reservations to Treaties, *supra* footnote 639, para. 25.

653. *Id.*, at 124.

His considerations for a modification of the rule were:

> "A. It is desirable to recognize the right of States to append reservations to a treaty and become at the same time parties to it, provided these reservations are not of such a nature to meet with disapproval on the part of a substantial number of the States which finally accept the obligations of the treaty;
>
> B. It is not feasible or consistent with principle to recognize an unlimited right of any State to become a party to a treaty while appending reservations, however sweeping, arbitrary, or destructive of the reasonably conceived purpose of the treaty and of the legitimate interests and expectations of the other parties;
>
> C. The requirement of unanimous consent of all parties to the treaty as a condition of participation in the treaty of a State appending reservations is contrary to the necessities and flexibility of international intercourse."[654]

Although his proposals for the development of the law were not discussed by the ILC, it was clear that the general attitude of States towards reservations was evolving towards more flexibility, permitting more universal accession, and moving away from the unanimity rule.

The turning point in international codification came after the first report presented by Humphrey Waldock, the fourth ILC Rapporteur on the Law of Treaties[655]. The Rapporteur, following the distinction drawn by the third Rapporteur (Sir G. Fitzmaurice) between bilateral treaties and treaties of limited membership (plurilateral) on one hand, and multilateral treaties on the other, proposed a flexible system for the last category. (The Commission eventually abandoned the distinction between treaties of limited membership and multilateral treaties, and the draft articles did not cover reservations to a bilateral treaty[656].) The system proposed by Waldock was substantially modified by the Commission in its details but the underlying general principle was adopted:

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654. *Id.*, at 125; quoted in First Report on the Law and Practice Relating to Reservations to Treaties, *supra* footnote 639, para. 26.

655. First Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, Arts. 1 *(f)*, 17, and 19, UN doc. A/CN.4/144, in 2 *YB Int'l L. Comm'n* 27, 60-68 (1962); Sinclair, *supra* footnote 481, at 59.

656. First Report on the Law and Practice Relating to Reservations to Treaties, *supra* footnote 639, para. 43.

> "[I]n the case of general multilateral treaties, the considerations in favour of a flexible system, under which it is for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States, outweigh the arguments advanced in favour of retaining a 'collegiate' system under which the reserving State would only become a party if the reservation were accepted by a given proportion of the other States concerned."[657]

II. Appropriateness of the Vienna regime on reservations for human rights treaties

The evolution of the reservations regime culminated in Articles 19 to 23 of the Vienna Convention on the Law of Treaties (1969), which embody the "flexible" system based on the "object and purpose test"[658]. Those articles permit the States parties to apply the system in their reciprocal relations. The two other instruments that relate to reservations, the Convention on Succession of States in Respect of Treaties (1978) and the Convention on the Law of Treaties between States and International Organizations (1986) were modelled on the Vienna Convention (1969)[659]. At the time of the adoption of the Vienna Convention on the Law of Treaties, these provisions on reservations may have represented "at least in some measure, progressive development rather than codification"[660]. But, as Pellet notes, this question has become moot given their acceptance through the practice of States.

The general regime of reservations and objections established in Article 20 of the Vienna Convention leaves the assessment of the acceptability of reservations to contracting Parties[661]. Special rules are provided for treaties between a limited number of participants and treaties establishing international organizations[662]. The dynam-

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657. Report of the International Law Commission covering the Work of Its Fourteenth Session, 24 April-29 June 1962, UN doc. A/5209, in 2 *YB Int'l L. Comm'n* 157, 180 (1962).
658. Second Report on Reservations to Treaties, *supra* footnote 472, para. 166.
659. First Report on the Law and Practice Relating to Reservations to Treaties, *supra* footnote 639, para. 61.
660. Sinclair, *supra* footnote 481, at 13-14.
661. Reuter, *supra* footnote 482, at 82-83.
662. Vienna Convention, *supra* footnote 476, Art. 20 (2) and (3).

ics of reservations, on the one hand, and of acceptances or objections of various kinds on the other hand, triggers the application of the principle of reciprocity and determines the legal effects of objections. Under Article 21 (3) of the Vienna Convention,

> "[w]hen a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation"[663].

However, in the case of normative provisions where inter-State reciprocity plays no role, such a rule leads to "absurd results". "The Convention regime is predicated on reciprocity built within a treaty. In our case of human rights conventions, however, there is no contractual *quid pro quo* to withhold."[664]

The appropriateness of the Vienna Convention's provisions on reservations to human rights treaties is controversial. Pellet addressed the issue whether the rules applicable to reservations, whether conventional or customary, were applicable to all treaties, whatever their objects. His discussion focused on whether reservations to "normative treaties," in particular human rights treaties, were subject to the general rules, as codified in the Vienna Convention, and on whether the flexibility of the Vienna regime in that regard is appropriate for human rights treaties, i.e., where should the line be drawn between the integrity of the treaty and universality of participation. Pellet pointed out that drafters can always devise rules different from the Vienna Convention in a particular treaty[665] and that clauses prohibiting reservations are relatively rare in human rights and disarmament treaties, although they are more common in environmental treaties[666]. Imbert has noted the great diversity in reservation clauses in human rights treaties, even in treaties having related objects[667]. For Pellet, treaty practice indicates that the appropriateness of reservations to normative treaties is not necessarily

663. *Id*., Art. 21.
664. Simma, *supra* footnote 473, at 181. Also Schabas, *supra* footnote 534, at 65, and Second Report on Reservations to Treaties, *supra* footnote 472, para. 154.
665. Second Report on Reservations to Treaties, *supra* footnote 472, para. 123.
666. *Id*., para. 124 and accompanying footnotes.
667. Imbert, *supra* footnote 647, 193-196.

excluded, and that "the question cannot be objective and depends far more on political . . . preferences than on legal technicalities"[668].

He insisted on the consensual nature of treaty law:

> "these instruments [human rights treaties], even though they are designed to protect individuals, are still treaties: it is true that they benefit individuals directly, but only because — and after — States have expressed their willingness to be bound by them. The rights of the individual derive from the State's consent to be bound by such instruments. Reservations are inseparable from such consent. . . ."[669]

A diametrically opposite view was expressed by Judge De Meyer in the *Belilos* case before the European Court of Human Rights:

> "The object and purpose of the European Convention on Human Rights is not to create, but to recognise, rights which must be respected and protected even in the absence of any instrument of positive law."[670]

Supporters of the applicability of the Vienna regime to human rights and humanitarian treaties, including the United Kingdom[671], France[672], and of course Pellet[673], have emphasized that its regime was modelled on the 1951 ICJ Advisory Opinion concerning the *Genocide Convention*, a normative and humanitarian treaty par excellence. Pellet's conclusion that the object and purpose test also governs human rights treaties and more generally normative treaties[674] was endorsed by the ILC:

> "because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;

668. Second Report on Reservations to Treaties, *supra* footnote 472, para. 113.
669. *Id*., para. 142.
670. *Belilos* v. *Switzerland*, 132 *Eur. Ct. HR* (Ser. A) (1988) (concurring opinion of Judge De Meyer, para. 2).
671. Report of the Human Rights Committee (1995), *supra* footnote 508, at (vi).
672. Report of the Human Rights Committee, Vol. I, UN, *GAOR*, 51st Sess., Supp. No. 40, Annex VI, para. 11, UN doc. A/51/40 (1997).
673. Second Report on Reservations to Treaties, *supra* footnote 472, para. 166.
674. *Id.*, para. 176.

> . . . these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and consequently . . . the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments"[675].

While recognizing the ambiguity of the provisions of the 1969 and 1986 Vienna Conventions on validity of reservations[676], Pellet suggested that there was a presumption in favour of permissibility of reservations[677]. This presumption was challenged by the Human Rights Committee's General Comment No. 24, in which the Committee insisted on the unsuitability of the Vienna Convention's regime of reservations to human rights treaties[678].

Supporting the Human Rights Committee[679], Simma quoted Rosalyn Higgins's statement that "one might almost say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged"[680]. He considers the preliminary conclusion of the ILC according to which the Vienna rules on reservations are suited for all treaties, whatever their object or nature, as "correct only from a very formalistic viewpoint"[681]. I agree with the view that the Vienna Convention's provisions on reservations are not fitting the needs of human rights treaties or of other normative conventions to which reciprocity is irrelevant. It is difficult however to suggest a solution which both meets the needs of human rights and is generally acceptable.

III. Admissibility of reservations to normative treaties

For treaties which do not provide different guidelines for reservations by prohibiting or permitting specific reservations, the test of

675. Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties including Human Rights Treaties, in Report of the International Law Commission on the Work of Its Forty-ninth Session, 12 May-18 July 1997, UN, *GAOR*, 52nd Sess., Supp. No. 10, at 126, paras. 2-3, UN doc. A/52/10 (1997).

676. First Report on the Law and Practice Relating to Reservations to Treaties, *supra* footnote 639, para. 103.

677. *Id.*, para. 106.

678. General Comment No. 24, *supra* footnote 507, para. 17.

679. Simma, *supra* footnote 473, at 182.

680. Rosalyn Higgins, "The United Nations: Still a Force for Peace", 52 *Modern LR* 12 (1989), quoted in Simma, *supra* footnote 473, at 182.

681. Bruno Simma, "Reservations to Human Rights Treaties — Some Recent Developments", in *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in Honor of his 80th Birthday* 659, at 678 (G. Hafner *et al.*, eds., 1998).

permissibility is codified in Article 19 of the Vienna Convention, which requires that a reservation be compatible with the object and purpose of the treaty. That Article is directly derived from the principle established in the *Genocide Convention* case. Article 19 provides:

> "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> *(a)* the reservation is prohibited by the treaty;
> *(b)* the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
> *(c)* in cases not falling under sub-paragraphs *(a)* and *(b)*, the reservation is incompatible with the object and purpose of the treaty."[682]

The Human Rights Committee noted in its General Comment No. 24 that "Article 19 *(c)* of the Vienna Convention on the Law of Treaties provides relevant guidance" and that "its terms reflect the general international law on this matter as had already been affirmed by the International Court of Justice in *The Reservations to the Genocide Convention* case of 1951"[683]. Pellet has observed, correctly, that the system of the Vienna Convention seeks a balance between integrity and universality of the treaty. As such, it cannot guarantee the complete integrity of the treaty[684].

The Vienna Convention does not provide any rule on the legal effects of invalid reservations. As Pellet puts it when referring to the doctrinal dispute as to what constitutes an "impermissible" reservation, "can the question of the permissibility or impermissibility of a reservation be decided 'objectively' and in the abstract or does it depend in the end on the subjective determination by the contracting States"[685]? Consequently, is a reservation which undermines the object and purpose of a treaty but which is accepted by the other contracting parties impermissible?

Two doctrinal schools have gained prominence. The first, the "permissibility school", argues that a reservation is "impermissible"

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682. Vienna Convention, *supra* footnote 476, Art. 19.
683. General Comment No. 24, *supra* footnote 507, para. 6 and note 2.
684. Second Report on Reservations to Treaties, *supra* footnote 472, para. 138.
685. First Report on the Law and Practice Relating to Reservations to Treaties, *supra* footnote 639, para. 100.

if it is contrary to the object and purpose of a treaty or prohibited by it. As Bowett observes in his seminal article:

> "The issue of 'permissibility' is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether, as a matter of policy, other Parties find the reservation acceptable or not."[686]

In its observations on the Human Rights Committee's General Comment No. 24, the United Kingdom appeared to support the "permissibility school"[687]. (The other school, the "opposability school", argues that "the validity of a reservation depends solely on the acceptance of the reservation by another contracting State"[688].)

(a) *Reservations to customary law*

The concept of compatibility is related to the treaty itself, not to customary law. Thus, every reservation which is not specifically permitted or prohibited must be assessed in light of its compatibility with the object and purpose of the treaty to which it is addressed. Whether the concordance of a reservation with customary law is a relevant consideration depends on the treaty itself. The yardstick for assessing the admissibility of reservations is thus always to be found in the first instance within the treaty (by reference to the treaty's object and purpose) and not outside the treaty, by reference to customary law. However, because even within the treaty itself it is difficult to find an objective standard for assessing the compatibility of a reservation with the treaty's object and purpose, every State may normally judge for itself whether a reservation is compatible or not.

Ideally, a reservation to a substantive provision of a clearly codifying treaty should be considered by the parties to that treaty as incompatible with the object and purpose of the treaty. In reality, even reservations to treaty provisions declaratory of customary law have been accepted without raising questions of compatibility. The

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686. Derek W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", 48 *Brit. YB Int'l L.* 67, 88 (1976-1977); quoted in First Report on the Law and Practice Relating to Reservations, *supra* footnote 639, para. 101.

687. Report of the Human Rights Committee (1995), *supra* footnote 508, at (ix).

688. First Report on the Law and Practice Relating to Reservations to Treaties, *supra* footnote 639, para. 102, also para. 115.

connection between compatibility and customary law status has thus not been established by State practice as central to the admissibility of reservations.

In the *North Sea Continental Shelf* case[689], however, the ICJ appeared to depart from its earlier opinion on the Genocide Convention. In the *North Sea Continental Shelf* case, the Court stated that treaty clauses permitting reservations to specified provisions of the treaty normally imply that such provisions are not declaratory of existing or emergent rules of customary law:

> "speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any rights of unilateral exclusion exercisable at will by any one of them in its own favour"[690].

The Court acknowledged that the Convention's reservations clause did not exclude reservations to certain other provisions of the Convention which related to matters "that lie within the field of received customary law"[691]. However, the Court explained that

> "[t]hese matters . . . all relate to or are consequential upon principles or rules of general maritime law, very considerably ante-dating the Convention, and only incidental to continental shelf rights as such"[692].

This gives rise to the question whether the effect of such reservations (except those concerning *jus cogens* rules) upon the relationship between the reserving State and the State accepting the reservation is not similar to that produced by a treaty establishing a conventional rule which displaces *inter partes* a rule of customary law. Of course, leaving aside the rights of a persistent objector, a single State is not permitted to derogate from any rule of customary

689. *North Sea Continental Shelf* cases *(Federal Republic of Germany* v. *Denmark*; *Federal Republic of Germany* v. *Netherlands)*, *ICJ Reports 1969* 3 (20 February).
690. *Id.*, at 38-39.
691. *Id.*, at 39.
692. *Id.*

international law unless it can establish a justification precluding wrongfulness, such as *force majeure*, state of necessity or self-defence. But as regards customary rules which are *jus dispositivum*, several States acting strictly *inter se* may substitute a rule of conventional law for a rule of customary law. Reservations to those customary norms, including humanitarian and human rights norms which are not *jus cogens*, are made effective by their acceptance under the provisions of the Vienna Convention which govern the acceptance of such reservations.

The difference between the *Genocide Convention* case and the *North Sea Continental Shelf* case, may, however, be more apparent than real. Focusing on reservations to codifying conventions, the Court perhaps intended to enunciate the principle that some reservations could be inadmissible because of incompatibility with the codifying object and purpose of the convention. Indeed, such reservations may even give rise to questions pertaining to the good faith of the reserving State. But reservations merely seeking to adapt a codifying convention to a particular situation, or reservations to conventional provisions that are themselves only partly declaratory of customary law, would not necessarily be excluded as incompatible with the object and purpose of the treaty. Most reservations, however, would not present compatibility questions in such clear-cut terms and would, in practice, be regulated through acceptance of and objection to reservations in accordance with the Vienna Convention.

Unquestionably, reservations may weaken the claims to customary law status of the norms that they address[693]. In assessing this effect, the number and the depth of the reservations made must be considered. In practice, those provisions of human rights treaties that clash with national laws and prevailing religious, social, economic, and cultural values are particularly likely to be the subject of reservations. To be sure, under the *Genocide* test, every State must be guided by the principle of compatibility when deciding whether to make a reservation or whether to object to another State's reservation. Because different considerations motivate States in making such assessments, there is an obvious danger that reservations will result in encroachments upon customary law. The reluctance of most States to object even to far-reaching reservations to human rights

693. Richard Baxter, "Treaties and Custom", in 129 *Recueil des cours* 51 (1970).

treaties heightens this danger. A laissez-faire system typifies the Vienna Convention's provisions on reservations, characterized by the frequent absence of a third-party organ authorized to rule on the compatibility of reservations. This leaves the reserving States, and other parties to human rights treaties acting *ut singuli*, as the final arbiters of compatibility. Excessive reservations and concerns about the integrity of human rights treaties have understandably triggered proposals to empower supervisory organs established under human rights treaties to determine the compatibility of reservations.

Apart from treaties closely connected to international public order and international regimes such as the UN Convention on the Law of the Sea and the Rome Statute of the International Criminal Court, States find it difficult to agree on provisions prohibiting all reservations. Normative treaties often contain both customary and non-customary provisions but States frequently disagree as to whether certain provisions belong to the first or the second category. The obvious solution is to include a reservation clause that provides clear guidance to States. Such clauses advance the twin goals of promoting universality and protecting the fundamental values stated in the treaties.

In reacting to the US reservations to the Political Covenant, the Human Rights Committee insisted in its observations on the United States' first report that it was "particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant"[694]. In its General Comment No. 24, it also attempted to advance a theory of impermissibility of reservations to customary law provisions contained in human rights treaties:

> "Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations."[695]

694. Report of the Human Rights Committee (1995), *supra* footnote 508, para. 279.
695. General Comment No. 24, *supra* footnote 507, para. 8.

The position of the Committee encountered strong opposition from major States. The United States disagreed with the Committee regarding its views on both customary law and incompatibility. It also challenged the Committee's assessment of the customary law character of several provisions of the Covenant, provisions which had been the object of US reservations [696]. The United States argued that:

> "The proposition that any reservation which contravenes a norm of customary international law is per se incompatible with the object and purpose of this or any other convention, however, is a much more significant and sweeping premise. It is, moreover, wholly unsupported by and is in fact contrary to international law. As recognized in the paragraph 10 analysis of non-derogable rights, an 'object and purpose' analysis by its nature requires consideration of the particular treaty, right and reservation in question.
>
> . . . . . .
>
> Such a position would, of course, wholly mistake the question of the object and purpose of the Covenant insofar as it bears on the permissibility of reservations. In fact, a primary object and purpose of the Covenant was to secure the widest possible adherence, with the clear understanding that a relatively liberal regime on the permissibility of reservations should therefore be required." [697]

The United Kingdom also disputed the Committee's view that reservations to customary law are excluded because the Covenants object is to benefit individuals [698].

France, too, contested the Committee's approach. It distinguished between the duty to observe a general customary principle and the decision to consent to be bound by a treaty that expresses that principle [699].

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696. Reservations, Declarations, Notifications, and Objections Relating to the International Covenant on Civil and Political Rights: United States, at Multilateral Treaties Deposited with the Secretary-General, United Nations, New York (ST/LEG/SER.E).

697. Report of the Human Rights Committee (1995), *supra* footnote 508, at (iii).

698. *Id.*, at (vii)-(viii).

699. Report of the Human Rights Committee (1997), *supra* footnote 672, at (i).

In its work on reservations, the International Law Commission agreed with Special Rapporteur Pellet that reservations could be made to customary rules in principle, provided that they were not contrary to the object and purpose of the treaty[700]. Of course, a reservation to a conventional rule corresponding to a customary rule would have no effect on the substantive obligations of the reserving State under general international law.

(b) *Reservations to peremptory norms and to non-derogable provisions*

In contrast to the controversy over reservations to customary norms which are *jus dispositivum*, there is a general agreement on the impermissibility of reservations to peremptory norms. The Human Rights Committee, for example, has stated that "[r]eservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant"[701]. Pellet agreed with the principle that "peremptory provisions in treaties cannot be the subject of reservations"[702]. Other writers have asserted that a reservation to a norm of *jus cogens* would be illegal[703]. The overlap between peremptory norms and those deemed to be non-derogable may provide a prima facie test of compatibility, as suggested by the Human Rights Committee[704].

In its Advisory Opinion on *Restrictions to the Death Penalty*, the Inter-American Court of Human Rights took the view that a reservation to a non-derogable right — the right to life — should be deemed to be incompatible with the object and purpose of the American Convention, unless the reservation "sought merely to restrict certain aspects of a nonderogable right without depriving the right as a whole of its basic purpose"[705]. Guatemala had formulated a reservation to Article 4 (4) of the American Convention, a provision that prohibits the infliction of capital punishment for political offences or

700. Report of the International Law Commission on the Work of its Forty-ninth Session, *supra* footnote 675, para. 106.
701. General Comment No. 24, *supra* footnote 507, para. 8.
702. Second Report on Reservations to Treaties, *supra* footnote 472, para. 142.
703. Schabas, *supra* footnote 534, at 50.
704. General Comment No. 24, *supra* footnote 507, para. 10.
705. Advisory Opinion on *Restrictions to the Death Penalty* (Arts. 4 (2) and 4 (4) of the American Convention of Human Rights), *Inter-Am. Ct. HR* (Ser. A) No. 3, para. 61, OC-3/83 (1983).

related common crimes. The Court concluded that the reservation was not incompatible with the object and purpose of the Convention, since it did "not appear to be of a type that is designed to deny the right to life as such"[706]. Buergenthal has commented that the opinion constituted

> "the first unambiguous international judicial articulation of a principle basic to the application of human rights treaties, that non-derogability and incompatibility are linked. The nexus between non-derogability and incompatibility derives from and adds force to the conceptual relationship which exists between certain fundamental human rights and emerging *jus cogens* norms"[707].

In objecting to certain reservations to human rights provisions, some States have suggested that reservations to non-derogable provisions be deemed incompatible with the object and purpose of the treaty prima facie. Belgium objected to a reservation to Article 11 of the Political Covenant (imprisonment for debt) by Congo/Zaire. It did not object to the Congolese legislation as such. Instead, it sought to avoid setting a precedent of toleration of reservations to non-derogable provisions. Other States have objected to the US reservations to Article 6 (5)[708], and Article 7, of the Political Covenant[709]. Most of the objectors referred to Article 4 (2), which lists Article 6 as describing non-derogable rights. Germany stated, for example, that

> "[t]he reservation referring to this provision [Article 6 (5)] is incompatible with the text as well as the object and purpose of article 6, which, as made clear by paragraph 2 of article 4, lays down the minimum standard for the protection of the right to life"[710].

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706. *Id.*

707. Thomas Buergenthal, "The Advisory Practice of the Inter-American Human Rights Court", 79 *Am. J. Int'l L.* 22, 25 (1985) (internal citations omitted).

708. Reservations, Declarations, Notifications, and Objections Relating to the International Covenant on Civil and Political Rights: Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, *supra* footnote 696.

709. *Id.*, at Denmark, Finland, Germany, Italy, the Netherlands, Norway, Portugal, Spain, Sweden.

710. *Id.*, at Germany.

(c) *Severability*

Judge Hersch Lauterpacht discussed the question of severability in his separate opinions in the *Norwegian Loans*[711] and *Interhandel*[712] cases. In the former case, he concluded that the solution rested on intent. If the State having known that the reservation would be considered invalid, would not have ratified the treaty, then it should not be bound by the treaty. If, on the other hand, the reservation subsequently considered invalid was merely incidental to the State's ratification, the State remained bound by the treaty, including the reserved provision[713]. In the *Interhandel* case, Lauterpacht concluded that the US reservation to its declaration accepting the Court's jurisdiction under Article 36 (2) of the Court's Statute was an essential condition of its acceptance:

> "If that reservation is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the Declaration."[714]

There has been considerable discussion of severability versus integrity in the context of the Genocide Convention. Implicit in the objection to reservations to Article IX of the Genocide Convention, according to Schabas, is that an illegal reservation invalidates the instrument's ratification[715].

For instance, the Netherlands' objection to the reservations to Article IX of the Genocide Convention exemplifies a case where the objecting State considers that the reservation invalidates the treaty's ratification[716].

Another approach deems "the illegal reservation to be ineffec-

711. *Norwegian Loans* case *(France* v. *Norway)*, *ICJ Reports 1957* 9 (6 July).
712. *Interhandel* case *(Switzerland* v. *United States)*, *ICJ Reports 1959* 6 (21 March).
713. *Norwegian Loans* case, *ICJ Reports 1957*, at 55-59.
714. *Interhandel* case, *ICJ Reports 1959*, at 117.
715. Schabas, *supra* footnote 534, at 71.
716. Reservations, Declarations, Notifications and Objections Relating to the Convention on the Prevention and Punishment of the Crime of Genocide: Netherlands, at Multilateral Treaties Deposited with the Secretary-General, United Nations, New York (ST/LEG/SER.E).

tive", but considers the reserving State "bound by the instrument as a whole, including the reserved provision"[717]. Thus, the objecting States often declare that their reservations are not meant to prevent the entry into force of the Convention between themselves and the reserving State, despite the incompatibility of the reservations, in their eyes, with the object and purpose of the convention[718]. In some cases, however, objections do not make it clear whether the reserved provision is considered to be in force.

In the *Belilos* case, the European Court of Human Rights held for the first time that a reservation to the European Convention was invalid. The Court stated that

> "it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration. Moreover, the Swiss Government recognized the Court's competence to determine the latter issue, which they argued before it"[719].

Belilos was followed by *Chrysostomos et al.* v. *Turkey*[720]. Greek Cypriots petitioned the European Commission of Human Rights alleging violations of their rights in Northern Cyprus and in the buffer zone. The Turkish declaration recognizing the competence of the Commission to receive individual petitions included a statement that it only applied in territory subject to the Constitution of Turkey. Turkey intended to exclude petitions concerning Northern Cyprus. Greece objected to the reservation and several other States reserved their right to do so[721]. The Commission considered the relevant provisions of the Convention and its "object and purpose" and then

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717. Schabas, *supra* footnote 534, at 71.

718. See, for example, Reservations to the Convention on the Elimination of All Forms of Discrimination against Women, Report of the Secretariat, Committee on the Elimination of Discrimination against Women, 16th Sess., para. 15, UN doc. CEDAW/C/1997/4 (1996).

719. *Belilos* v. *Switzerland*, 132 *Eur. Ct. HR* (Ser. A), para. 60 (1988). In *Fischer* v. *Austria*, Judge Matscher criticized the policy of the Court "to restrict the scope of reservations and interpretative declarations, and even to eliminate them as far as possible". From the point of view of international law, this practice strikes him as "highly questionable, given that Article 64 expressly authorizes States to make reservations, even if the Convention makes them subject to certain conditions". 312 *Eur. Ct. HR* (Ser. A.), Concurring Opinion of Judge Matscher, para. 60 (1995).

720. *Chrysostomos, Papachrysostomos and Loizidou* v. *Turkey*, App. Nos. 15299/89, 15300/89 and 15318/89 (joined), Decision of 4 March 1991 on the admissibility of the application, 68 *Eur. Comm'n Dec. & Rep.* 216 (1991).

721. *Id.*, at 233-236, and 243.

referred to some of its earlier statements on "the collective enforcement of the rights and freedoms" and the "objective character" of the obligations of the parties under the Convention [722]. It found

> "that the character of the Convention, as a constitutional instrument of European public order in the field of human rights, excludes application by analogy . . . of the State practice under Article 36, para. 3, of the Statute of the International Court of Justice [since] [d]eclarations under this clause create mere reciprocal agreements between Contracting States" [723].

The Commission held that territorial reservations were not permitted under the Convention, and that Turkey remained bound by its declaration. To assess the effect of the illegal reservation, the Commission referred both to subjective (the State's intent) and objective criteria (the object and purpose of the Convention), stating that

> "where a State has clearly expressed the intention to be bound under Article 25, but has added restrictions to its declaration which are incompatible with the Convention, the main intention of the State must prevail" [724].

When it considered the case commonly called *Loizidou,* the European Court of Human Rights similarly concluded that the reservation was invalid because of the "character of the Convention, the ordinary meaning of Articles 25 and 46 in their context and in the light of their object and purpose" [725]. The Court also maintained the validity of the Turkish declarations under Articles 25 and 46. The approach taken by the Commission and the Court shifted the traditional presumption that express consent is required for a State to be bound [726]. In effect, the Commission and the Court required Turkey to demonstrate that it did not intend to be bound by its declaration without the benefit of its reservation, a burden that it did not discharge.

Considerations similar to those in the *Loizidou case* were raised by the Inter-American Court to deny effect to Peru's purported with-

722. *Id.*, at 241-242.
723. *Id.*, at 242.
724. *Id.*, at 249.
725. *Loizidou* v. *Turkey*, 310 *Eur. Ct. HR* (Ser A.), para. 89 (1995).
726. Elena A. Baylis, "General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties", 17 *Berkeley J. Int'l L.* 277, 304 (1999).

drawal of its recognition of the Court's jurisdiction. Emphasizing the integrity of the American Convention and the fundamental importance of the judicial protection of human rights, the Court ruled that a State could not withdraw its recognition of the Court's jurisdiction without denouncing the Convention as a whole. On 24 September 1999 the Court issued two judgments: one in the *Ivcher-Bronstein* case[727], and the other in the *Constitutional Tribunal* case[728]. Both raised similar issues of jurisdiction. In both cases, the Court emphasized that, as a court of law, it had the inherent right to determine its own competence (*compétence de la compétence/Kompetenz-Kompetenz*). Acceptance of compulsory jurisdiction presupposes the recognition by States of the Court's competence to determine its own jurisdiction[729].

The Court said, in effect, that in interpreting the Convention in conformity with its object and purpose, the Court must preserve the integrity of the mechanism provided in Article 62 of the Convention. It would be inadmissible to subordinate that mechanism to restrictions attached by States with regard to on-going proceedings. Such restrictions would not only affect the efficacy of the mechanism but also impede its future development. Article 62 did not permit limitations other than those for which it explicitly provided. The compulsory jurisdiction clause was fundamental to the operation of the Convention's system of protection; therefore, it could not be left at the mercy of limitations not provided for in the Convention. The Court reasoned that neither the Convention nor the Peruvian acceptance of jurisdiction contemplated such a withdrawal of the acceptance of compulsory jurisdiction[730].

The interpretation of the American Convention "in good faith, in conformity with the ordinary meaning that must be attributed to the terms of the treaty in its context, and taking into account its object and purpose"[731] led the Court to conclude that a State party to the American Convention could only release itself from its treaty obligations in accordance with the provisions of the treaty itself. Therefore, the only way that a State could free itself of the compulsory

727. Case of *Ivcher-Bronstein (Competence)*, Inter-American Court of Human Rights, Judgment of 24 September 1999, paras. 40-41.
728. Constitutional Tribunal Case, Inter-American Court of Human Rights, Judgment of 24 September 1999.
729. Case of *Ivcher-Bronstein (Competence)*, paras. 32-34.
730. *Id.*, para. 35-39.
731. *Id.*, para. 40.

jurisdiction of the Court was to denounce the treaty as a whole. The denunciation would enter into effect, in conformity with Article 78, after one year. Article 29 of the Convention supports this interpretation [732].

The Court went on to reiterate the specific characteristics of human rights treaties: they are inspired by superior values; they include specific mechanisms of supervision; they are applied in conformity with the notion of a collective guarantee; their obligations are objective and are of a special nature and, hence, are different from the obligations in treaties based on reciprocity. Drawing on the *Loizidou* case before the European Court of Human Rights, the Court ruled out any analogy with the optional clause (Art. 36 (2)) of the ICJ Statute [733]. It refused to distinguish substantive from procedural rights within the human rights protection system and ruled that Article 62 of the American Convention was an integral part of the Convention and as such was governed by the rules on denunciation of the Convention, thus disallowing a partial denunciation of the Convention [734].

In its General Comment No. 24, the Human Rights Committee enunciated the doctrine of severability of unacceptable reservations to human rights treaties:

> "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation." [735]

The United States objected asserting that "this conclusion is . . . completely at odds with established legal practice and principles" [736].

France [737] and the United Kingdom [738] also opposed the Committee's severability doctrine. Simma has observed that although the

732. *Id.*, paras. 40-42.
733. *Id.*, paras. 47-49.
734. Karen C. Sokol, "Case note: Ivcher Bronstein and Constitutional Tribunal", 95 *AJIL* 178, 182-184 (2001).
735. General Comment No. 24, *supra* footnote 507, para. 18.
736. Report of the Human Rights Committee (1995), *supra* footnote 508, at (v).
737. Report of the Human Rights Committee (1997), *supra* footnote 672, at (iii).
738. Report of the Human Rights Committee (1995), *supra* footnote 508, at (x).

United Kingdom and France disapproved of the position taken by the Human Rights Committee on the severability of invalid reservations, they seem to have accepted in the European Court of Human Rights an approach similar to that of the Committee[739]. Yet, the European system of human rights protection, based on a binding adjudicatory system, encroaches more significantly on States' sovereignty[740]. Other European States — Belgium, Denmark, Finland, Ireland, Portugal and Sweden — have adopted the "severability doctrine" in relation to universal human rights treaties, albeit not consistently[741].

Pellet has joined in the criticism of the European jurisprudence and of the Human Rights Committee's position on the severability of the reservation from the consent to be bound. He has noted that the Vienna Convention does not contemplate such a solution. Only two possibilities were considered: non-application of the reserved provision objected to (Art. 20 (1) *(a)*) or of the treaty as a whole (Art. 20 (4) *(b)*). He maintained that "consensuality . . . is the very essence of any treaty commitment"[742], but recognized that the question of severability goes beyond the subject of reservations to treaties and concerns also the specific powers and competence of the organ assessing the reservations and deciding on severability. He defined that competence as follows:

> "1. The human treaty-monitoring bodies may determine the permissibility of reservations formulated by States in the light of the applicable reservations regime;
>
> 2. If they consider the reservation to be impermissible, they can only conclude that the reserving State is not currently bound;
>
> 3. But they cannot take the place of the reserving State in order to determine whether the latter wishes or does not wish to be bound by the treaty despite the impermissibility of the reservation accompanying the expression of its consent to be bound by the treaty."[743]

Thus, "[the State] alone must determine whether the impermissible reservation that it attached to the expression of its consent to

739. Simma, *supra* footnote 681, at 671.
740. Baylis, *supra* footnote 726, at 303.
741. Simma, *supra* footnote 681, at 666-668.
742. Second Report on Reservations to Treaties, *supra* footnote 472, para. 228.
743. *Id.*, para. 231.

be bound constituted an essential element of that consent"[744]. Following a monitoring body's finding that a reservation is invalid, the State would then have two options: to withdraw from the treaty or to terminate the reservation[745]. Pellet, however, favours a third solution: permitting the State to modify its reservation to make it compatible with the object and purpose of the treaty[746].

Under the Vienna Convention, States may make a reservation "when signing, ratifying, accepting, approving or acceding to a treaty"[747]. Some construe that provision to exclude any possibility of subsequent modification[748]. Pellet has argued, however, that to permit a State to modify its reservation so as to make it compatible with the treaty "[would] not [be] incompatible [with] the Vienna rules", and would have "the advantage of reconciling the requirements of integrity and universality that are inherent in any reservations regime"[749]. Judge Valticos advocated this solution in his partly dissenting opinion in the *Chorherr* case before the European Court[750].

There is some State practice supporting this approach. Following the *Belilos* Judgment, for example, Switzerland, for example, has made two modifications to its declaration without "apparent objection from the other parties"[751]. Giorgio Gaja has listed several instances in which reservations have been made after the deposit of the instrument of ratification or accession, sometimes even years after the entry into force of the treaty concerned, without objections from the other parties. With this in mind, he concludes that there is

> "a rule that allows States to make reservations even after they have expressed their consent to be bound by a treaty, provided that the other Contracting Parties acquiesce to the making of reservations at that stage"[752].

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744. *Id*., para. 243.
745. *Id*., para. 244.
746. *Id.*, paras. 247-251.
747. Vienna Convention, *supra* footnote 476, Art. 19.
748. Schabas, *supra* footnote 534, at 76.
749. Second Report on Reservations to Treaties, *supra* footnote 472, para. 249.
750. *Chorherr* v. *Austria*, 266 *B. Eur. Ct. HR* (Ser. A), at 42 (1993) (partly dissenting opinion of Judge Valticos).
751. Schabas, *supra* footnote 534, at 77. See Reservations and Declarations to the Convention for the Protection of Human Rights and Fundamental Freedoms: Switzerland (accessed on 1 August 1999).
752. Giorgio Gaja, "Unruly Treaty Reservations", *International Law at the Time of Its Codification: Essays in Honour of Roberto Ago* 307, 312 (1987).

State practice allows the withdrawal of reservations. It would therefore be reasonable to allow States to amend their reservations on the condition that they would be made less extensive and thus broaden the States' acceptance of normative commitments[753]. But whether a reservation enlarges or limits the obligations of a contracting party is not necessarily obvious. There is a clear risk of abuse. Granting competence to a judicial or quasi-judicial body to scrutinize such a revised reservation could thus be desirable.

A variant of this situation occurs when a State formally respects the Vienna Convention's rules but circumvents them by denouncing a treaty and re-acceding to it with a new reservation introducing new limitations on rights or on competences of the bodies concerned. Trinidad and Tobago, in May 1998, and Guyana, in January 1999, notified their denunciations of the Optional Protocol to the Political Covenant and then re-acceded to the Optional Protocol subject to a reservation. The reservation concerned the death penalty, and neither Trinidad and Tobago nor Guyana had made any reservation in regard of Article 6 when acceding to the Political Covenant[754].

The Human Rights Committee noted that a

> "reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case"[755].

Such a reservation, in its view, would be contrary to the object and purpose of the first Optional Protocol, if not of the Covenant.

The Committee followed the same approach in a subsequent case concerning the death penalty. In *Kennedy* v. *Trinidad and Tobago*, Trinidad and Tobago argued that the communication was not admissible because of the reservation entered following its re-accession[756]. The Committee rejected that contention and considered the com-

753. For a discussion of modification of reservations to some Council of Europe conventions, see Sia Spiliopoulou Åkermark, "Reservation Clauses in Treaties Concluded within the Council of Europe", 48 *Int'l & Comp. LQ* 479, 487 (1999).

754. Reservations, Declarations, Notifications and Objections Relating to the Optional Protocol to the International Covenant on Civil and Political Rights: Trinidad and Tobago, Guyana, *supra* footnote 696.

755. General Comment No. 24, *supra* footnote 507, para. 13.

756. *Rawle Kennedy* v. *Trinidad and Tobago*, Communication No. 845/1999, UN doc. CCPR/C/67/D/845/1999, reprinted in 21 *HRLJ* 18 (2000).

munication receivable on the basis of General Comment No. 24. It reaffirmed its competence to interpret and determine the validity of reservations, and undertook to examine the compatibility of the reservation with the object and purpose of the Optional Protocol. It recalled its statement in the General Comment that since

> "the object and purpose of the first Optional Protocol is to allow the rights obligatory for the State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant" [757].

The Committee considered the reservation discriminatory since it singled out a particular group of individuals — prisoners under a sentence of death — and as such contrary to the object and purpose of the Optional Protocol. It thus seems to have endorsed a view similar to the one the American Court of Human Rights enunciated in the cases against Peru, that the right of petition once granted is linked with the substantive right protected under the main instrument. In considering the communication admissible and the reservation invalid, the Committee applied the "severability theory" as stated in its General Comment No. 24. Re-accession was regarded as valid, without the benefit of the reservation [758].

757. General Comment No. 24, *supra* footnote 507, para. 13.
758. *Rawle Kennedy* v. *Trinidad and Tobago*, *supra* footnote 756, para. 6.7.

CHAPTER IV

HUMANIZATION OF STATE RESPONSIBILITY: FROM BILATERALISM TO COMMUNITY CONCERNS

The object of this chapter is to explore the influence of human rights on the law of State responsibility and to examine the law's evolution from bilateralism to multilateralism.

A. Origin of State Responsibility

The shift in emphasis from bilateralism to community interests is evident in the current understanding of conduct giving rise to State responsibility. This understanding paved the way for the concept of obligations *erga omnes* and State claims for the vindication of human rights. Article 1 of ILC's draft Articles on State responsibility provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State"[759]. Article 2, in turn, defines "internationally wrongful acts" in terms of the acting State's conduct vis-à-vis its international obligations:

> "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."[760]

This formulation departs from classical notions of State responsibility by relying almost exclusively on the consistency of the State's conduct with its international obligations without regard to damage to other States or to fault. In the classical tradition, as Prosper Weil observes, the notions of wrongful act, fault and damage were "trois concepts-clés de la problématique de la responsabilité interna-

759. Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 1, reprinted in Report of the International Law Commission on the Work of its Fifty-third Session, 56 UN, *GAOR*, Supp. No. 10, pp. 41 *et seq.*, UN doc. A/56/10 (1998) (hereinafter "Draft Articles (2001)").
760. *Id.*, Art. 2.

tionale"[761]. In the law of diplomatic protection, the Vatellian theory that "[whoever] uses a citizen ill, indirectly offends the State"[762] was usually construed to encompass actual material injuries suffered by the citizens of the claimant State and elements of direct injury (e.g., breach of a treaty) caused by the wrongdoing State to the claimant State.

Even in the absence of material damage, international law has always recognized that States have standing to sue for non-material or moral damage in cases involving, *inter alia*, offences to representatives, the flag, dignity, sovereignty, or territorial integrity of the State. Such breaches have resulted in appropriate reparations, such as "satisfaction" in the form of apologies, punishment of responsible officials, declaratory judgments, injunctive relief, monetary compensation, or a combination of these remedies.

Classical international law assumed that every obligation had a corresponding subjective right, a view suited to the bilateral nature of most legal relationships[763]. But this view is strained when applied to contemporary human rights and humanitarian norms and a number of other areas with a strong *erga omnes* component. In the *Barcelona Traction* case, the ICJ did not try to fit its statement that all States have a legal interest in the protection of obligations *erga omnes* into the Vatellian paradigm[764]. Up to a point, the ILC tried to do so, arguing that obligations *erga omnes* involve a correlation between the obligation of one State and the subjective right of another — any other — State[765]. It is more persuasive, however, to justify the actions of a State seeking enforcement of an obligation

761. Prosper Weil, "Le droit international en quête de son identité", 237 *Recueil des cours* 9, 339 (1992).

762. Emerich de Vattel, *The Law of Nations*, Bk. 2, Sec. 71, 161 (J. Chitty, ed., 1852).

763. Crawford observed that it is partly because of this view that a notion of "public interest standing" has not been developed in international law. James Crawford, "The Standing of States: A Critique of Article 40 of the ILC's Draft Articles on State Responsibility", in *Liber Amicorum in Honour of Lord Slynn of Hadley: Judicial Review in International Perspective* 23, 24 (Mads Andenas, ed., 2000).

764. *Barcelona Traction Light and Power Company, Ltd. (Belgium* v. *Spain) (Second Phase)*, International Court of Justice, Judgment of 5 February 1970, *ICJ Reports 1970* 3, at paras. 33-34. The Court made the distinction "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".

765. See Crawford (2000), *supra* footnote 763, at 33-34, commenting on the view of Ago on the correlation between rights and obligations that underlain Part I of the former draft Articles and former Article 40.

erga omnes as a vindication of basic community values than to resort to the rather artificial concept of a subjective right in such cases.

If only the State that suffered material damage were allowed to present a claim, the obligation would be seen solely as arising from a bilateral relationship between the most immediately injured State and the wrongdoing State. And in the absence of specific damage suffered by State A, as is the case typically with violations of human rights by State B, State responsibility for conduct inconsistent with international obligations could not be triggered at all.

Established jurisprudence under both the European and the American conventions on human rights reflects the concept of conventional human rights as involving objective obligations, the breaches of which constitute violations of international public order, as opposed to bilateral obligations, the breaches of which constitute violations of the subjective rights of specific States. The same principle should apply to customary norms, but the doctrine has moved ahead of practice.

Where the claim arises from injury suffered by a single individual, or several individuals, the moral or material injury suffered by the individual(s) involved serves as a yardstick for reparation. Where an inter-State claim based on the principle of *erga omnes* alleges a whole pattern of violations, damage is more difficult to measure. A declaratory judgment, preferably coupled with injunctive relief, flows naturally from the objective character of human rights obligations.

The elimination of damage to a particular State as a precondition for establishing State responsibility presents the question whether *any* State is entitled to seek enforcement of a general international obligation regardless of whether or not it is specifically affected by the violation [766]. It is clear that by eliminating the damage element of State responsibility, the ILC has made *erga omnes* claims more viable. If by violating the human rights of its nationals a State offends the general international legal order, and thereby also equally offends every other State, then every State should have the necessary standing — subject to satisfying the requirements of jurisdiction and competence of the relevant tribunal — to bring an action against those that perpetrate violations of human rights and humani-

766. See generally, André de Hoogh, *Obligations* Erga Omnes *and International Crimes* 27-37 (1996). See also Brigitte Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité* 50-90 (1973).

tarian norms. Without the damage requirement, a State may promote observance of human rights norms through actions brought before international tribunals to vindicate the rights of persons who are not its nationals. Here, again, practice lags behind legal principle.

Significantly, the ILC based its conclusion that damage is not an essential condition for State responsibility on conventions involving human rights and labour rights. The ILC commentary on the former Draft Article 3 explains:

> "International law today lays more and more obligations on the State with regard to the treatment of its own subjects. For examples we need only turn to the conventions on human rights or the majority of the international labor conventions. If one of these international obligations is violated, the breach thus committed does not normally cause any economic injury to the other States parties to the convention, or even any slight to their honour or dignity. Yet it manifestly constitutes an internationally wrongful act, so that if we maintain at all costs that 'damage' is an element in any internationally wrongful act, we are forced to the conclusion that any breach of an international obligation towards another State involves some kind of 'injury' to that other State."[767]

The elimination of the element of damage as a condition for State responsibility does not mean that damage is never relevant to State responsibility. Indeed, it may have obvious implications for remedies[768]. Damage may also be an integral component of some primary norms. But the elimination of damage as a precondition for State responsibility reflects a shift of emphasis from the bilateral view of State responsibility to a concept of inherent legal injury. Brigitte Stern has noted:

> "Faire disparaître le dommage de la définition de la responsabilité internationale, c'est ... ouvrir la porte, et ce n'est paradoxal qu'en apparence, à la prise en compte de la violation du droit elle-même.
>
> Si la violation du droit entraîne automatiquement la respon-

767. Report of the International Law Commission to the General Assembly, Commentary on Article 3 of the Draft Articles on State Responsibility, at para. 12, reprinted in [1973] 2 *Yb. Int'l L. Comm'n* 179.

768. See Karl Zemanek, "The Legal Foundations of the International System", 266 *Recueil des cours* 11, 255 (1997).

> sabilité, cela peut signifier que la violation du droit elle-même est un préjudice permettant à celui qui l'a subi de réclamer le rétablissement de l'ordre juridique."[769]

Some members of the ILC have emphasized its decision to endorse a concept of "objective responsibility" as "truly the revolutionary step of detaching State responsibility from the traditional bilateralist approach that had been conditioned upon damage"[770]. Some have described

> "[t]he notion of objective responsibility . . . as an acknowledgment in resounding terms that there was such a thing as international lawfulness, and that States must respect international law even if they did not, in failing to respect it, harm the specific interests of another State, and even if a breach did not inflict a direct injury on another subject of international law. In short, an international society founded on law existed."[771]

Graefrath noted that "it is the violation of the obligation and not the damage that entails the State's responsibility"[772]. Treating conduct rather than resulting damage as the "decisive criterion" for determining responsibility promotes "the preventive function of international responsibility"[773]:

> "The matter, after all, is not allocation of damages but a regulation of obligations meeting the different interests, coordinating the activities of sovereign States, preventing damage from occurring as much as possible."[774]

B. Circumstances Precluding Wrongfulness

I. Distress, necessity, consent

The ILC draft Articles on State Responsibility list circumstances precluding wrongfulness for conduct inconsistent with international

769. Brigitte Stern, "La responsabilité dans le système international: Conclusions générales", in *La responsabilité dans le système international (Colloque du Mans)* 319, 331 (1991).
770. Report of the International Law Commission on the Work of its Fiftieth Session, 53 UN, *GAOR*, Supp. No. 10, para. 283, UN doc. A/53/10 and Corr.1 (1998).
771. *Id.*
772. Bernhard Graefrath, "Responsibility and Damages Caused: Relationship between Responsibility and Damages", 185 *Recueil des cours* 9, 37 (1984).
773. *Id.*, at 37.
774. *Id.*, at 38.

obligations. These include the consent of the affected States to the conduct (draft Article 20), the resort to otherwise wrongful conduct as countermeasures (draft Article 22) or in self-defence (draft Article 21), and circumstances of *force majeure* (draft Article 23), distress (draft Article 24), and necessity (draft Article 25). Each of these implicates human rights concerns, but only some of them will be considered here.

The definition of distress, for example, reflects concern for the well-being of individuals and populations, as opposed to the State's interests *stricto sensu*: Article 24 (1) provides that the wrongfulness of an act is precluded when the author of the act had no other reasonable way "of saving [his] life or the lives of other persons entrusted to [his] care"[775].

As a circumstance precluding wrongfulness, distress has been invoked primarily in cases involving violations of frontiers to avoid endangering human life. Recorded cases include entry into foreign ports or landing of aircraft without prior authorization[776]. Several international agreements recognize the exception of distress. Article 18 of the Convention on the Law of the Sea, for example, which concerns the right of innocent passage, provides that

> "[P]assage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."[777]

Also the Convention for the Protection of the Marine Environment of the North-East Atlantic provides in an annex (referring both to *force majeure* and distress) that

> "The provisions of this Annex concerning dumping shall not apply in case of force majeure, due to stress of weather or any

775. Draft Article 24 (2001), *supra* footnote 759.
776. Report of the International Law Commission on the Work of its Fifty-third Session (2001), *supra* footnote 759, at 189-192.
777. United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, Art. 18, reprinted in 21 *ILM* 1261 (1982).

> other cause, when the safety of human life or of a vessel or aircraft is threatened. . . ."[778]

The principle of proportionality calls for balancing humanitarian concerns against other interests such as the integrity of borders and airspace or the prevention of maritime pollution. The ILC thus observed in its former commentary on the draft Articles that

> "it seems beyond doubt that the wrongfulness of an act or omission not in conformity with an international obligation cannot be precluded unless there is some common degree of value between the interest protected by that action or omission and the interest ostensibly protected by the obligation; what is more, the interest sacrificed must in fact be less important than that of protecting the life of the organ or organs in distress"[779].

In the *Rainbow Warrior case,* the plea of distress was accepted by the UN arbitral tribunal with respect to one of the officers held on the island of Hao (French Polynesia) because of her health situation[780]. However, the ILC commentary explains that the plea of distress should be limited to cases of life-threatening situations, and mildly criticizes the view of the *Rainbow Warrior* tribunal as too broad, pointing out the difficulty of determining a lower limit if distress is extended to less than life-threatening situations[781].

Necessity is another circumstance in which humanitarian concerns may preclude wrongfulness. The ILC defines necessity as

> "[t]hose exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other interna-

778. Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992, Annex II, Art. 7, in force 25 March 1998, reprinted in P. Sands *et al.*, *Documents in International Environmental Law*, Vol. IIA, at 472 (1994). The International Convention for the Prevention of Pollution of the Sea by Oil, 12 May 1954, Art. IV, and the Convention on the Prevention of Marine Pollution by Dumping of Wastes, 29 December 1972, Art. V, contain similar provisions.

779. Report of the International Law Commission on the Work of its Thirty-first Session, Commentary on Article 32, para. (11), at 135, UN doc. A/33/10, reprinted in [1979] 2 (2) *Yb. Int'l L. Comm'n* 133.

780. *Rainbow Warrior (New Zealand* v. *France)*, 20 *UNRIAA* 217, 254-255 (1990).

781. Report of the International Law Commission on the Work of its Fifty-third Session (2001), *supra* footnote 759, at 192.

> tional obligation of lesser weight or urgency to another State"[782].

To trigger the exception of necessity, the protection of the interests of individuals and populations, not just of the State apparatus, is central[783]. The ILC explained that necessity has been invoked

> "to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population"[784].

Although some members of the ILC were reluctant to accept the exception of necessity because of its potential for abuse as a pretext for wrongful conduct, they were "willing to accept a State of necessity in cases where the possibilities of abuse are less frequent and less serious, and particularly where it is necessary to protect a humanitarian interest of the population"[785].

State practice involving claims of necessity has chiefly concerned non-performance of financial obligations and the treatment of aliens and foreign-owned property. In recent years, necessity has also been understood to justify otherwise wrongful conduct in other contexts, including measures taken "to ensure the survival of the fauna or vegetation of certain areas on land or at sea, to maintain the normal use of those areas or, more generally, to ensure the ecological balance of a region"[786]. Thus, in the famous *Torrey Canyon* incident in 1967, the British Government decided to bomb and burn a Liberian tanker shipwrecked off the British coast, but outside United Kingdom's territorial waters in order to avert further spillage. The ILC observed that "[t]his was the first time that so serious an incident had occurred, and no one knew how to avert the threatened disastrous effect on the English coast and its population"[787]. The Commission

782. *Id*., at 194.
783. See Marina Spinedi, personal communication on file with author.
784. Report of the International Law Commission on the Work of its Fifty-third Session (2001), *supra* footnote 759, at 202. See also Report of the International Law Commission on the Work of its Thirty-second Session, Commentary of Article 33, para. 1, UN doc. A/35/10, reprinted in 2 (2) *Yb. Int'l L. Comm'n* 34, at 35.
785. Report of the International Law Commission on the Work of its Thirty-second Session, *id*., Commentary of Article 33, para. 29, at 48.
786. *Id.*, para. 14, at 39.
787. *Id.*, para. 15, at 39.

took the view that even if the ship owner "had tried to oppose its destruction, the action taken by the British Government would have had to be recognized as internationally lawful because of necessity"[788].

This incident and the need to recognize the exception of necessity in such cases led to important codifications. The first was the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969)[789]. The second was Article 221 of the UN Convention on the Law of the Sea, which reads:

> "1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences."[790]

Just as the principle of necessity precludes wrongfulness for certain acts to safeguard concerns of individuals and of the community, humanitarian and human rights concerns may circumscribe the principle of necessity. Draft Article 25 (2) provides that "[i]n any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness if the international obligation in question excludes the possibility of invoking necessity"[791]. The Commission's commentary suggests that pleas of necessity for violating humanitarian law conventions may not be entertained[792]. Such conventions had been adopted specifically to apply in such dire emergencies as armed conflicts; derogations from these conventions clearly could not be justified by the very circumstances for which they were designed. Referring to the balance between "military necessity" and humanitarian concerns, the Commission had noted in its former commentary:

> "It would be absurd to invoke the idea of military necessity

788. *Id.*
789. See 1969 *UN Juridical Yearbook* 166 (1971).
790. UN Convention on the Law of the Sea, *supra* footnote 777, Art. 221.
791. Draft Article 25 (2001), *supra* footnote 759.
792. See Report of the International Law Commission on the Work of its Fifty-third Session (2001), *supra* footnote 759, at 205-206.

> or necessity of war in order to evade the duty to comply with obligations designed, precisely to prevent the necessities of war from causing suffering which it was desired to prescribe once and for all."[793]

By precluding the plea of circumstances excusing wrongfulness for the breach of a peremptory norm, draft Article 26 goes beyond the notion of *jus cogens* recognized for the law of treaties in Article 53 of the Vienna Convention: it makes the concept applicable to unilateral acts discussed also in my Chapter on the Law of Treaties. With regard to necessity, the Commission's former commentary focused on the prohibition of the use of armed force, observing that States have abusively invoked necessity to justify breaches of this prohibition[794]: "One obligation whose peremptory character is beyond doubt in all events is the obligation of a State to refrain from any forcible violation of the territorial integrity or political independence of another State."[795] The Commission extended this analysis to humanitarian matters: "[t]he rule outlawing genocide and the rule categorically condemning the killing of prisoners of war [are] . . . further examples of rules whose breach is in no event to be justified on any ground of necessity"[796].

A third circumstance precluding wrongfulness for the breach of an international obligation is the consent of the State to which the obligation is owed[797]. But, like necessity, consent cannot be invoked to justify a breach of a peremptory norm. Crawford thus notes that one State may not by consent relieve another from respecting the prohibitions of genocide or of torture, for example[798]. The former ILC commentary states that

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793. Report of the International Law Commission on the Work of its Thirty-second Session, *supra* footnote 784, Commentary of Article 33, para. 28, at 46.
794. *Id.*, para. 37, at 50.
795. *Id.*
796. *Id.* Also Report of the International Law Commission on the Work of its Fifty-third Session (2001), *supra* footnote 759, at 207-208.
797. Draft Article 20 (2001), *supra* footnote 759. It provides:

> "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."

Special Rapporteur Crawford has proposed the deletion of the provision on consent. He argued that, for many international obligations, lack of consent was an element of the wrongfulness. Consequently, if consent was given before the commission of the wrongful act, State responsibility simply did not arise. See Second Report on State Responsibility, *id.*, para. 241.
798. *Id.*, para. 240.

> "If one accepts the existence in international law of rules of *jus cogens* . . . one must also accept the fact that conduct of a State which is not in conformity with an obligation imposed by one of these rules must remain an internationally wrongful act even if the injured State has given its consent to the conduct in question. The rules of *jus cogens* are rules whose applicability to some States cannot be avoided by means of special agreements."[799]

As observed in the ILC's commentary with regard to the validity of a claim's waiver by an injured State, since the breach of a peremptory norm

> "engages the interest of the international community as a whole, even the consent or the acquiescence of the injured State does not preclude that interest from being expressed in order to insure a settlement in conformity with international law"[800].

C. Differentiation of Norms

I. Erga omnes *obligations*

Under the influence of the concepts of human rights, of obligations *erga omnes* as recognized by the ICJ in the *Barcelona Traction* case, and of peremptory norms as reflected in the Vienna Convention on the Law of Treaties, international law has embarked on a limited transition from bilateral legal relations to a system based on community interests and objective normative relationships. Of course, traditional bilateral patterns remain the rule in most areas of international law. But there has been a growing recognition of certain substantive rights and of legal standing for States *not directly injured* by violations of certain norms. Such norms are typically the fundamental norms of the international community involving aspects of interna-

799. Report of the International Law Commission on the Work of its Thirty-first Session, *supra* footnote 779, Commentary on Article 29, para. 21, at 114. See also Eighth Report on State Responsibility, by Roberto Ago, Special Rapporteur, UN doc. A/CN.4/318 and Add.1-4, reprinted in [1979] 2 (1) *Yb. Int'l L. Comm'n* 38, para. 75. For a discussion of *jus cogens*, see Meron, *Human Rights Law-Making in the United Nations* 173-202 (1986).

800. Report of the International Law Commission on the Work of its Fifty-third Session (2001), *supra* footnote 759, at 308.

tional order and community values — including basic human rights. The International Law Commission's work in the field of State responsibility has built on these developments, furthering the transformation of international law from bilateralism towards multilateralism.

Traditionally, international law consisted chiefly of bilateral relationships between States. Vindication of international rules relied on these bilateral, "subjective" relationships rather than on a system of law through which States would in the future act in defence of community interests. As Simma puts it, "international law does not oblige States to adopt certain conduct in the absolute, *urbi et orbi*, so to speak, but only in relation to the particular State or States to which a treaty or customary law obligation is owed"[801].

Bilateral relationships are not limited to those arising under bilateral treaties. Many multilateral conventions reinforce this bilateral tradition, reflecting the coupling or standardization of bilateral relationships. Obligations arising under the Vienna Conventions on Diplomatic Relations and on Consular Relations and from numerous provisions of the Conventions on the Law of the Sea and the Law of Treaties exemplify the traditional bilateralism of international law[802]. They can be seen as clusters of uniform obligations between pairs of States parties. Nevertheless, even conventions which establish primarily bilateral and sinalagmatic legal relationships can give rise to violations so grave as to trigger community concerns[803]. Members of the international community prefer that States comply with international law in bilateral relationships, but it is doubtful that every State has a protected legal interest in the relations between third States *inter se* in the context of State responsibility[804].

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801. Bruno Simma, "International Crimes: Injury and Countermeasures, Comments on Part 2 of the ILC Work on State Responsibility", in *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* 283 (Joseph H. H. Weiler, Antonio Cassese and Marina Spinedi, eds., 1989).

802. See generally Vienna Convention on Diplomatic Relations, 18 April 1961, 23 *UST* 3227, 500 *UNTS* 95; Vienna Convention on Consular Relations, 24 April 1963, 21 *UST* 77, 596 *UNTS* 261; United Nations Convention on the Law of the Sea, *supra* footnote 777; Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, UN doc. A/CONF.39/27 and Corr.1 (1969), 1155 *UNTS* 331, reprinted in 63 *AJIL* 875 (1969), 8 *ILM* 679 (1969).

803. See *United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)*, International Court of Justice, Order of 15 December 1979, *ICJ Reports 1979* 7, 20, para. 40.

804. Third Report on State Responsibility, by James Crawford, Special Rapporteur, UN doc. A/CN.4/507, at 46 (2000).

Other treaties, however, cannot be adequately analysed through the prism of bilateral relationships. Some multilateral conventions represent broad statements of community values in which every State party has a legal interest in the integrity of the treaty and its observance by all the parties [805]. The notion of such integral obligations, first developed by Fitzmaurice, has been further elaborated by Crawford as rapporteur on State responsibility for the ILC [806]. Treaties such as disarmament agreements and the Nuclear Test Ban Treaty [807] create rights and obligations which are integral and indivisible. In such cases all parties have an interest in other parties' performance of their obligations under the treaty, and a violation by any party has consequences for all other parties [808].

Some treaties create obligations that run in parallel between all States parties and persons within their jurisdiction rather than running solely through bilateral relations. Examples include human rights treaties, private international law conventions, and many environmental treaties [809]. In a well-known statement, the European Commission of Human Rights described the "parallel" structure of the European Convention on Human Rights.

> "The purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to . . . establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law[.]" [810]
>
> "[T]he obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High

805. See Simma, *supra* footnote 801, at 285-286. See also Kamen Sachariew, "State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and its Legal Status", 35 *Neth. Int'l LR* 273, 276 (1988).

806. Third Report on State Responsibility, by James Crawford, *supra* footnote 804, at 40 and nn. 175-178.

807. See generally Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, 5 August 1963, 14 *UST* 1313, 480 *UNTS* 43.

808. See de Hoogh, *supra* footnote 766, at 40-41.

809. See Sachariew, *supra* footnote 805, at 277.

810. *Austria* v. *Italy*, App. No.788/60, European Commission of Human Rights, Decision on admissibility of 11 January 1961, 4 *Yb. Eur. Conv. HR* 116, at 138 and 140 (1961).

> Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves."[811]

Such obligations of an "objective character" are obligations running to all States (obligations *erga omnes* in general international law) or to all the parties to a general normative convention (obligations *erga omnes contractantes*). Perhaps the most important illustration of the *erga omnes* principle in the multilateral context is common Article 1 of the Geneva Conventions for the protection of victims of war[812], which provides that the parties have the duty to "respect and ensure respect" for each Convention[813]. The ICRC Commentary on the Fourth Geneva Convention notes that:

> "[Article 1] is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations 'vis-à-vis' itself and at the same time 'vis-à-vis' the others."[814]

Article 1 has been interpreted as providing standing for all State parties to the Conventions to challenge the violations of any State party[815]. This provision precedes by some two decades the enuncia-

811. *Id.*, at 140.

812. See Zemanek, *supra* footnote 768, at 256 note 876 (1997).

813. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), Art. 1, 12 August 1949, 6 *UST* 3114, *TIAS*, No. 3362, 75 *UNTS* 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), Art. 1, 12 August 1949, 6 *UST* 3217, *TIAS*, No. 3363, 75 *UNTS* 85; Convention relative to the Treatment of Prisoners of War, Art. 1, 12 August 1949, 6 *UST* 3316, *TIAS*, No. 3364, 75 *UNTS* 135; Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), Art. 1, 12 August 1949, 6 *UST* 3516, *TIAS*, No. 3365, 75 *UNTS* 287.

814. Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 25 (Jean S. Pictet, ed., 1952). See Meron, "The Humanization of International Law", 94 *AJIL* 239, 248-249 (2000).

815. See Commentary on the Geneva Convention (I), *id.*, at 26; see also Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 16 (Oscar M. Uhler and Henri Coursier, eds., 1958). Common Article 1 was invoked as authority to convene a conference of the States parties on measures to enforce the Fourth Geneva Convention in the Occupied Palestinian Territory. See GA res. ES-10/3 (30 July 1997). It was also invoked to recommend that State parties "take measures, on a national or regional level" to encourage respect by Israel for the Fourth Geneva Conven-

tion of a similar principle by the ICJ in the *Barcelona Traction* case. However, the ICJ had already anticipated the principle of obligations *erga omnes* in its earlier 1951 Advisory Opinion on *Reservations to the Genocide Convention*, where it concluded that under the Genocide Convention, States did not have "any interests of their own; they merely have, one and all, a common interest"[816]. The Court further observed that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation"[817]. These principles, the Court added, were intended to be universal in scope[818].

With the 1971 *Barcelona Traction* case, the ICJ explicitly recognized the existence of obligations *erga omnes*. In a famous passage, the ICJ made the "essential distinction"

> "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, States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules governing 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; others are conferred by international instruments of a universal or quasi-universal character."[819]

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tion. See GA res. ES-10/2 (5 May 1997). See also GA res. ES-10/4 (19 November 1997), Security Council resolution 681 (1990) (20 December 1990). A Conference of High Contracting Parties to the Fourth Geneva Convention was held in Geneva in December 2001. See ICRC Statement (5 December 2001). See also Frits Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", 2 *Ybk. Int'l Hum. L.* 3 (1999); Laurence Boisson de Chazournes and Luigi Condorelli, "Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests", *Int'l Rev. Red Cross*, No. 837, pp. 67-87 (2000).

816. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice, Advisory Opinion of 28 May 1951, *ICJ Reports 1951* 15, at 23.

817. *Id.*

818. *Id.*

819. *Barcelona Traction, Light and Power Company, Ltd.*, *supra* footnote 764, paras. 33-34.

Some international obligations are thus so basic that they run equally to all other States, and every State has the right to demand respect for those obligations. When a State breaches an obligation *erga omnes*, it injures every State, including those not specially affected. In this sense, every State is a victim of a violation of an obligation *erga omnes*; every State suffers an inherent or community type of injury.

This passage of the *Barcelona Traction* opinion has been criticized as either an unnecessary dictum or as an effort to temper angry reactions to the Court's earlier decision in the *South West Africa* cases[820]. In those cases, the ICJ held that although States may have a general interest in the observance of international law, that interest is not "specifically juridical in character"[821]. Hence the Court refused to consider the "trust of civilization" as an interest legally protected under international law:

> "The sacred trust, it is said, is a sacred trust of civilization. Hence all civilized nations have an interest in seeing that it is carried out. An interest, no doubt; — but in order that this interest may take on a specifically legal character, the sacred trust itself must be or become something more than a moral or humanitarian ideal. In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form."[822]

The *Barcelona Traction* dictum, of course, took quite a different approach to these questions. Defending the *Barcelona Traction* approach, Ragazzi argued that

> "[t]he concept of obligations *erga omnes* is not outlandish, as the questions of rights and obligations valid for all States had been around for some quite time before the International Court's dictum"[823].

820. See F. A. Mann, "The Doctrine of Jus Cogens in International Law", in *Festschrift für Ulrich Scheuner zum 70 Geburtstag* 418 (Ehmke, Kaiser, Meesen and Rüfner, eds., 1973), quoted in Maurizio Ragazzi, *The Concept of International Obligations* Erga Omnes 5 (1997).

821. *South West Africa (Ethiopia and Liberia* v. *South Africa)*, *Second Phase*, International Court of Justice, Judgment of 18 July 1966, *ICJ Reports 1966* 6, para. 50.

822. *Id*., para. 51.

823. Ragazzi, *supra* footnote 820, at 42.

Indeed, the concept of obligations *erga omnes* dates back at least to Hugo Grotius' discussion in 1625 of humanitarian intervention[824], and gained currency during the nineteenth century in the context of protecting minorities[825]. Judge Jessup, in his separate opinion in the *South West Africa* cases, surveyed established practice under which certain treaties recognized the legal interests of States in general humanitarian causes and sometimes provided procedures to secure respect for those interests[826]. Such interests included protection of minorities, labour rights and mandates over non-sovereign territories. Jessup emphasized that in none of those cases was it necessary for a State invoking the jurisdiction of the Court to claim that it had a direct material interest for itself or for its nationals. In such treaties, and under most contemporary human rights treaties, a State's standing is not limited to cases where its own nationals are injured. Obligations *erga omnes* thus have long-established foundations in human rights and humanitarian treaties.

In the case concerning the *United States Diplomatic and Consular Staff in Tehran*, which involved bilateral relations under custom and treaty and gross violations of diplomatic and consular privileges, the ICJ emphasized that the violations had implications for the entire international community and considered it is "more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected"[827].

Without mentioning peremptory norms explicitly, the Court, especially in mentioning imperative rules, seems to have considered certain fundamental rules of the law of diplomatic relations as *jus cogens*[828] or at least as *erga omnes*[829]. Discussing the case, Rosenne stresses the inability of legal method to deal with the enforcement of

824. Hugo Grotius, *De Jure Belli ac Pacis*, Bk. II, Chap. XXV, §§ 1, 2, Whewell's trans. Vol. ii, 438-440 cited in Meron, *Human Rights and Humanitarian Norms as Customary Law* 188 (1989) (hereinafter Meron, *Customary Law*).

825. Meron, *id.*, at 188-189.

826. *South West Africa* cases *(Ethiopia* v. *South Africa; Liberia* v. *South Africa)*, *Preliminary Objections*, Judgment of 21 December 1962, 319, at 424-428, *ICJ Reports 1962* (separate opinion of Judge Jessup).

827. International Court of Justice, Judgment of 24 May 1980, *ICJ Reports 1980* 3, para. 92.

828. See *United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)*, *supra* footnote 803, at 20, para. 40.

829. See Simma, *supra* footnote 801, at 287, note 15.

obligations whose violation was intended to destabilize the international legal order, since these violations "are not *per se* amenable to *unilateral* legal reactions or remedies . . ."[830].

Despite some initial scepticism, the *erga omnes* principle has been widely accepted in the doctrine of international law, though more rarely in practice, in international organizations, and in the case law of international tribunals[831]. Welcoming this development, Simma has written:

> "It is to be seen in the growing recognition — be it explicit or implied — of the need to re-think some of the basic tenets of international law in order to enable it to meet the new challenges for which the old bilateralist paradigm is so terribly ill-equipped."[832]

This recognition of the concept of *erga omnes* has been largely doctrinal and rhetorical. It has not spawned, so far, significant practice. Although it has not explicitly defined obligations *erga omnes*, the ICJ has identified two key characteristics. It has referred, first, to the universality or quasi-universality of the obligation and, second, to the "solidarity" of States in the interest protected, suggesting that every State is deemed to have a legal interest in other States' compliance with the obligation[833]. These two characteristics might serve to distinguish *erga omnes* obligations from treaty obligations *simpliciter*[834]. Simma has suggested that *erga omnes* obligations can be distinguished by the existence of "a particular value judgment according to which the international community as a whole considers observance of certain obligations as imperative"[835]. This is of course true of *jus cogens* as well.

The *erga omnes* principle underlies States' assertions of the right, rooted in the general interest of the international community, to demand the observance of human rights by other States. *Barcelona Traction* ushered in growing acceptance in contemporary interna-

830. Shabtai Rosenne, *Breach of Treaty* 110 (1985).
831. Ragazzi, *supra* footnote 820, at 5 [A-6]; see also Bruno Simma, "Does the UN Charter Provide for an Adequate Legal Basis for Individual and Collective Responses to Violations of Obligations Erga Omnes?", in *The Future of International Law Enforcement New Scenarios — New Law?* 125, 127 (Jost Delbrück, ed., 1992).
832. Simma, *id.*, at 128-129.
833. Ragazzi, *supra* footnote 820, at 17.
834. *Id.*, at 200-203.
835. Simma, *supra* footnote 831, at 133.

tional law of the principle that all States have a legitimate interest in, and the right to protest against, significant violations of customary human rights, regardless of the nationality of the victims (customary *erga omnes*). I shall return to the question of the additional remedies that may be available to various categories of injured States. Additionally, an increasing number of human rights treaties grant each State party standing to challenge violations by other State parties, regardless of the nationality of the victims (conventional *erga omnes* or *erga omnes contractantes*).

The crystallization of the *erga omnes* character of human rights, grounded in Articles 55 and 56 of the UN Charter, is progressing despite the uncertainty voiced by some commentators. Some have questioned, for example, whether a State not directly involved in a matter by the need to protect its nationals may *ut singulus* bring an action before an international tribunal for reparation against the violating State. While questions persist concerning the remedies available to States acting only to vindicate the general international legal order, the *locus standi* of a State not specially affected has not been questioned in principle where a human rights court, such as the European Court of Human Rights, has the necessary jurisdiction explicitly conferred. Nevertheless, the discussions on the status and the implications of obligations *erga omnes* take place largely in the abstract, given that State practice lags behind scholarly opinion.

Many human rights conventions confer standing to pursue inter-State complaints of human rights violations without requiring proof of material damage to the claimant State. Standing to ensure respect for customary human rights *(erga omnes* in *lex generalis)* is conceptually different from standing under such treaties (*erga omnes contractantes*). *Ratione personae*, the latter is limited to the parties, and *ratione materiae*, is limited primarily to the norms stated in the treaty in question. However, the practical differences between the two may decrease as the number of parties to treaties covering a wide spectrum of human rights increases.

Through its work on the topic of State responsibility and on the draft Articles on State Responsibility in particular, the ILC has attempted to clarify the Court's *Barcelona Traction* pronouncement. Although in international law a correlation between the obligation of one State and the "subjective right" of another always exists, the ILC has determined that

> "this relationship may extend in various forms to States other than the State directly injured if the international obligation breached is one of those linking the State, not to a particular State, but to a group of States or to all States members of the international community" [836].

When an obligation *erga omnes*, in whose fulfilment all States have a "legal interest", is breached, the breaching State's responsibility is engaged vis-à-vis all the other members of the international community. Therefore, "every State must be considered justified in invoking the responsibility of the State committing the internationally wrongful act" [837].

Still, some questions persist. Are "basic rights of the human person" [838], which give rise to obligations *erga omnes*, synonymous with human rights *tout court*, or are they limited to those rights which are intimately associated with the human person and human dignity and are generally accepted as customary norms? The distinction between "basic" rights and "ordinary" rights is not self-evident. In the *Barcelona Traction* case, the Court may have intended to bestow *erga omnes* character on rights which have matured into customary law or been incorporated into universal or quasi-universal instruments. While "basic" rights could be protected by States regardless of the victim's nationality, would protecting "ordinary" rights depend on either employment of treaty mechanisms or diplomatic protection by the victim's State of nationality? Scholars have increasingly recognized the *erga omnes* character of all human rights, at least those under customary law. Do obligations *erga omnes* justify judicial recourse or only political protests and diplomatic action?

Of course, the concept of the diplomatic protection of citizens is largely foreign to human rights treaties. Such treaties often emphasize the rather different right of State parties to bring complaints against perpetrators of human rights violations irrespective of the nationality of the individual claimants and of whether or not the violation resulted in material injury. There has been a growing accep-

836. [1976] 2 *YB Int'l L. Comm'n* (Pt. 2) at 76, UN doc. A/CN.4/SER.A/1976/Add.1 (Part 2) (1977).
837. See *id.* at 99.
838. *Barcelona Traction, Light and Power Co., Ltd.*, *supra* footnote 764, para. 34.

tance of the *erga omnes* character of human rights recognized by customary law, whether or not they are regarded as "basic rights of the human person". Such is the position taken, for example, by Section 703 (2) of the Restatement (Third) of the Foreign Relations Law of the United States (1987). As a practical proposition it is, however, unlikely that any third State will take up trivial cases on the basis of an obligation *erga omnes*.

The ICJ relied on the concept of obligations *erga omnes* in considering the scope of consent to the Court's jurisdiction in the *East Timor* case [839], to which I shall return, and the *Genocide Convention (Bosnia* v. *Yugoslavia)* case. In the *Genocide Convention (Preliminary Objections)* decision, the Court held that "the rights and obligations enshrined in the Convention are rights and obligations *erga omnes*" [840]. This was one of the grounds advanced to conclude that the Court's temporal jurisdiction was not limited to the time after which Bosnia and the FRY became bound by the Convention [841].

In the ILC, the concept of *erga omnes* has triggered an ambitious research and codification agenda centred on the draft Articles on State Responsibility. Special Rapporteurs Ago, Riphagen, Arangio-Ruiz and Crawford have all made important contributions in this regard. Reporting to the General Assembly, the ILC suggested that it was important

> "to distinguish among the various degrees of wrongful acts that a State could commit in violation of various international obligations and, above all, to determine the legal consequences arising from the various categories of wrongful acts . . . While in the context of relations between subjects of law it was for the injured State to take action and the damage and causal relationship were constituent elements of the regime of responsibility, as were the compensation or indemnification required, in the case of the violation of an essential norm or one of superior degree, it was for the community to take action, direct harm

839. See *East Timor (Portugal* v. *Australia)*, International Court of Justice, Judgment of 30 June 1995, *ICJ Reports 1995* 90, at 102, para. 29.

840. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, *Preliminary Objections*, International Court of Justice, Judgment of 11 July 1996, *ICJ Reports 1996* 616, para. 31.

841. *Id.*

> was not indispensable and the penalty was the consequence of the violation."[842]

In the context of State responsibility, discussions of *erga omnes* obligations have focused on the legal interests or *rights* of third States to demand the respect for such obligations. *Duties* of third States bound under *erga omnes* norms with regard to situations where violations occur have attracted less attention. Commenting on a draft resolution of the Institute of International Law on obligations *erga omnes*, René-Jean Dupuy referred to such duties:

> "il s'agit non pas d'une faculté, mais d'un devoir qui pèse sur les membres de la communauté des nations. Cela entraîne également des devoirs en matière d'aide humanitaire, un domaine où des progrès récents ont été enregistrés, y compris au sein de l'Assemblée générale des Nations Unies en ce qui concerne les secours en cas de catastrophes naturelles."[843]

That resolution, on "The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States", adopted by the Institute of International Law in 1989, characterizes the obligation of States to ensure observance of human rights as *erga omnes*, "[implying] a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world"[844].

The concept of *erga omnes* rights is also relevant to such other fields of community interest as environmental protection and control of weapons of mass destruction. In these areas, the human rights paradigm of *erga omnes* is likely to exercise considerable influence.

II. International crimes

The tremendous advances in the criminal responsibility of individuals for violations of international, especially humanitarian, law,

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842. Report of the International Law Commission on the Work of its Fiftieth Session, *supra* footnote 770, para. 305, UN doc. A/53/10 and Corr.1 (1998).

843. The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States, Institute of International Law Declaration, Record of Deliberations, in 63 (2) *Yearbook of the Institute of International Law* 230 (1989).

844. The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States, Institute of International Law Declaration, Art. 1, *id.* at 338.

have not rendered moot the question of criminal responsibility of States. This is especially true in cases where responsibility for egregious breaches is not limited to a narrow group of leaders but is widely shared among the population. Many national legal systems are increasingly departing from the maxim *impossibile est quod societas delinquat,* a doctrine frequently invoked against the concept of criminal responsibility of States. The erosion of this maxim in national jurisdictions may suggest that the controversy surrounding crimes of States has more to do with State sovereignty — with the difficulty in defining appropriate remedies, and with the establishment of necessary institutional procedures and safeguards — than with the character of the State as a legal person[845].

In considering the potential for the criminal responsibility of States, the ILC adopted on first reading a controversial approach to the criminal responsibility of States, as proposed by Special Rapporteur Roberto Ago[846]. Article 19 (3) provided that

> "an international crime may result, *inter alia*, from
>
> *(a)* a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
>
> *(b)* a serious breach of an international obligation of essential importance for safeguarding the right to self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
>
> *(c)* a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;
>
> *(d)* a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."

Obviously, human rights are central to Article 19. In that article, the ILC introduced a twofold test for identifying international crimes based on both the magnitude of the violation (a "serious breach on a

845. Meron, "Is International Law Moving towards Criminalization?", 9 *Eur. J. Int'l L.* 18 (1998).

846. [1976] 2 *YB Int'l L. Comm'n* (Part. 2) 73, UN doc. E/CN.4/1976/Add.1 (Part 2) (1977).

widespread scale") and the importance of the norm itself (an "international obligation of essential importance"). Under this approach, breaches of lesser proportions or of less-fundamental norms, while still constituting international delicts or international wrongs, would not qualify as "international crimes" giving rise to State criminal responsibility. Although Roberto Ago's ILC considered the examples of international crimes mentioned in Article 19 (3) as *lex lata* under multilateral treaties or custom[847], others have questioned both the evidence adduced by Ago and the practical utility of the concept of criminal responsibility of States[848].

Discussions in the ILC of measures authorizing States not specially affected by an international crime, individually or collectively, to compel the wrongdoing State to comply with its international obligations have been inconclusive. Some members of the ILC argued that crimes of States justified a collective intervention; others questioned the right of third States to resort even to non-military intervention.

The critical point here is the absence of appropriate international institutions and processes to enforce the prohibition of international crimes by States. Admittedly, the Security Council, acting under Chapter VII of the UN Charter, may authorize military action and other measures to maintain and restore peace and security. The Council has increasingly understood its mission under Chapter VII as encompassing responses to humanitarian atrocities. It is clear, however, that the Council has never considered the *criminal* responsibility of States as such as a factor in its decisions.

Difficulties with the idea of crimes of States are conceptual as well as institutional. Conceptual problems include the specification and choice of certain norms as "fundamental norms", the still inadequate rationales for distinguishing between the civil and criminal responsibility of States, and the continuing need to identify appropriate remedies for criminal responsibility. Institutional questions concern the availability of competent organs to determine whether or not a State is guilty of an international crime and the existence of credible enforcement procedures.

The concept of "international crime" has generated debates in

847. *Id.*, at 120.
848. See Ian Brownlie, *System of the Law of Nations: State Responsibility* (Part I) 33 (1983).

doctrinal works and in the ILC itself. Some members were of the view that "[i]n essence, it was nothing more than a system for *ex post* labeling of certain breaches as 'serious' "[849]. Others believed that there had been no significant practice supporting the concept of State crimes in international law[850]. The Commission remained divided over the issue and followed the suggestion of Special Rapporteur James Crawford to put aside Article 19[851]. Although the concept of criminal responsibility of States has important ethical and moral underpinnings, it is doubtful that it has taken root in contemporary international law[852].

An argument often raised against the concept of international crimes of States is that the very notions of "penal responsibility" and punishment make no sense when applied to States. Alain Pellet, for instance, has argued that "international responsibility is neither criminal nor civil" but *sui generis*[853]. Penal responsibility of States was rejected by the ICTY Appeals Chamber in the *Blaškić* case. The Tribunal held that, "under present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems"[854]. Reflecting similar concerns, the Inter-American Court of Human Rights also explicitly excluded awards of punitive or exemplary damages in the *Velásquez-Rodríguez* case despite the seriousness of the violations:

> "Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time."[855]

Georges Abi-Saab argues against abandoning crimes of States, which would result in a single regime of responsibility. He believes

849. Report of the International Law Commission on the Work of its Fiftieth Session, *supra* footnote 770, para. 243.
850. *Id.*
851. *Id.*, para. 331.
852. See generally Meron, *Customary Law*, *supra* footnote 824, at 208-215.
853. See First Report on State Responsibility, by James Crawford, Special Rapporteur, UN doc. A/CN.4/490/Add.1 (1998), para. 52.
854. See *Prosecutor* v. *Blaškić*, Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ICTY (Appeals Chamber), Judgment of 29 October 1997, para. 25.
855. See *Velásquez Rodríguez* v. *Honduras*, Compensation, Inter-American Commission on Human Rights, Judgment of 21 July 1989, 1989 *IACHR Report* (Ser. C), No. 7, 52, para. 38.

that a special regime is needed for the hierarchically higher peremptory norms, norms of public order, but agrees that the term "crimes of States" is not necessary [856].

However, there already is a distinct system of responsibility for obligations *erga omnes.* Even prior to its recent abandonment by the ILC, the concept of crimes of States had minimal consequences for international law. Crawford's recent report did not propose a unitary system for all breaches. The regime for *erga omnes* and *jus cogens*, with multiple injured States, is already different from that envisaged for bilateral breaches not involving broader community interests. With a special regime of responsibility for crimes of States, there would have been three regimes of responsibility. As it is, should a State commit some of the crimes mentioned in Article 19, Security Council action under Chapter VII of the UN Charter may be appropriate.

In the draft Articles, the ILC adopted two provisions on "serious breaches of obligations under peremptory norms of general international law" which omit any reference to a "criminal responsibility" [857]. The consequences of such breaches have not, however, been much clarified. Draft Article 41 rephrases the substance of former draft Article 53. At it had already been noted by Crawford, serious breaches of peremptory norms seem paradoxically to entail additional obligations for third States [858]. Special Rapporteur Crawford had suggested a reference to "punitive damages" or to "damages reflecting the gravity of the breach" [859]. This approach was finally rejected by the ILC for lack of agreement among its members, and the issue was left to "international law".

The ILC has been unable to elaborate further the concept and consequences of crimes of States. This proved to be fatal for the current prospects of transforming crimes of States into a concept with distinct legal sanctions for violations. It is, however, likely that this concept will continue to surface in discussions of ways to advance protection of human rights, humanitarian norms, and other values of the international community.

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856. Georges Abi-Saab, "The Uses of Article 19", 10 *Eur. J. Int'l L.*, 344-350 (1999).
857. Draft Articles 40 and 41, *supra* footnote 759.
858. Third Report on State Responsibility, Add.4, *supra* footnote 804, at 23, para. 410.
859. *Id.*, at 22-23.

D. Rights and Remedies

I. Departure from State-centric enforcement

The traditional approach to enforcement of international law has been State-centric. As Damrosch has written, "States are violators and States are victims of violations of international law."[860] The mechanisms for remedying such violations, as exemplified by UN Charter provisions for ensuring international peace and security, were similarly State-centric. Moreover, the Charter mechanisms are limited in scope and "[leave] obscure the problem of enforcement for all-too-common violations of international law in the absence of a recognizable threat to international peace and security"[861]. Contemporary international law shows, however, the trend towards the treatment of individuals as victims of violations of international norms (and as violators of those norms) and a recognition of a growing role for international organizations in the enforcement of those norms. The development of international criminal law and human rights law has fostered the idea that the individual has rights and responsibilities under international law:

> "The acceptance of the *individual* as a bearer of legal rights and responsibilities is of surpassing conceptual importance: this development was already well under way by mid-century. With the Charter of the International Military Tribunal, the Nuremberg and Tokyo trials, and the General Assembly's affirmation of the Nuremberg principles, the proposition was confirmed and applied that individuals as well as States could commit violations of international law and be held responsible for those violations."[862]

Until recently, enforcement of international norms, including those assigning responsibility to individuals, has been left to individual States. This system was ineffective, as evidenced by the very few cases of application of the principle of universal jurisdiction to prosecute violations of the grave breaches provisions of the Geneva

860. Lori F. Damrosch, "Enforcing International Law through Non-forcible Measures", 269 *Recueil des cours* 1, 27 (1997).
861. *Id.*; also Linos-Alexandre Sicilianos, *Les réactions décentralisées à l'illicite — Des contre-mesures à la légitime défense* 174 (1990).
862. Damrosch, *supra* footnote 860, at 27.

Conventions. The establishment of the international court contemplated by the Genocide Convention[863] is only now being realized with the recent adoption of the more general Rome Statute for an International Criminal Court[864]. The ICC Statute affirms the individual's legal personality as a bearer of rights and obligations under international law. The establishment of the ICC may be a manifestation of the trend towards a more centralized enforcement of international legal norms governing the conduct of individuals.

The establishment of the International Criminal Court may also reflect the increasing importance of international organizations in the enforcement of international law. Gray has observed that "[i]nternational organizations provide a partial substitute for the lack of any general action on behalf of the world community and also for the lack of compulsory judicial settlement"[865].

In the field of human rights, the principle that individuals have redress against their own States has been amply recognized. In the *Loizidou* case, the European Court of Human Rights has emphasized the collective enforcement aspect of the system established by the European Convention[866].

International environmental law has also been developing new practices to enforce obligations collectively[867]. For instance, Article 13 of the Bern Convention[868] establishes a Standing Committee comprising member States for the purpose of collective enforcement; Article 14 authorizes the Standing Committee to issue recommendations either of general application or targeting specific States[869].

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863. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 *UNTS* 277.

864. Rome Statute of the International Criminal Court, 17 July 1998, UN doc. A/CONF.183/9*, reprinted in 37 *ILM* 999 (1998).

865. Christine Gray, *Judicial Remedies in International Law* 215 (1987).

866. *Loizidou* v. *Turkey, Preliminary Objections*, European Court of Human Rights, Judgment of 23 March 1995, 310 *Eur. Ct. HR* (Ser. A), para. 70 (1995).

867. See Simma, *supra* footnote 831, at 134. Simma discusses *erga omnes* obligations "in the field of human rights or the environment that do not protect states but rather human beings or groups directly . . . or those rules that deal with the preservation of the world's commons".

868. Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, in force 1 June 1982, *Eur. TS*, No. 104, Art. 18.

869. Lyster writes that the Committee issued two recommendations addressed to the Italian Government "in circumstances where a breach of the terms of the Convention seemed likely". These matters concerned protection of wildlife and hunting in particular regions of Italy. Simon Lyster, *International Wildlife Law* 150 (1993).

II. Injured States

By dispensing with the traditional elements of fault and damage *and* concentrating on the "internationally wrongful" nature of conduct, the contemporary approach to State responsibility has given rise to an "enlarged vision of the scope of State responsibility" and a new focus on the relations between the wrongdoing State, the victim State and third parties[870]. An internationally wrongful act creates a new legal relationship between the perpetrating State and the injured State or States[871]. The elimination of damage as an element of State responsibility means that the infringement of a right alone suffices to establish State responsibility[872]. Former draft Article 40 consequently defined an "injured State" as "any State a right of which is infringed by the act of another State, if that act constitutes . . . an internationally wrongful act of that State"[873]. The infringement of

870. Pierre-Marie Dupuy, "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility", 10 *Eur. J. Int'l L.* 371, 373 (1999).

871. See Sixth Report on the Content, Forms and Degrees of International Responsibility by Willem Riphagen, Special Rapporteur, UN doc. A/CN.4/389, paras. 3-5; reprinted in [1985] 2 (1) *Yb. Int'l L. Comm'n* 3, 15, paras. 3-5.

872. See Attila Tanzi, "Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?", in *United Nations Codification of State Responsibility* 1, 8 (Marina Spinedi and Bruno Simma, eds., 1987). See also Graefrath, *supra* footnote 772, at 34-37.

873. Former draft Article 40 (2) and (3) defines the "injured State" as follows:

> ". . . . . .
>
> 2. In particular, 'injured State' means:
>
> *a.* if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;
>
> *b.* if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;
>
> *c.* if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;
>
> *d.* if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;
>
> *e.* if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:
>
> i. the right has been created or is established in its favour;
>
> ii. the infringement of the right by the act of a State necessarily affects

a State's right transforms it into an "injured State"[874]. As Graefrath observed:

> "[F]or the establishment of the injured party the first question is whose rights were infringed and not who suffered a damage. At this stage material damage becomes significant only if it was made expressly a condition for occurrence of a violation of international law."[875]

Identification of the "injured State", injured by a violation of *multilateral* obligations, obligations *erga omnes,* or *jus cogens*, has proven controversial. Acknowledging these difficulties, Special Rapporteur Riphagen distinguished "directly injured" from "indirectly injured" States. The first category includes those States which have suffered a specific injury; the second category includes States which have suffered an infringement of their rights without suffering a specific injury[876]. Pierre-Marie Dupuy preferred distinguishing between "subjectively injured" and "objectively injured" States. Focusing on the nature of the interest or right infringed, Dupuy considered the State which suffered a "personal" injury as subjectively injured, while the State that suffered an injury solely as a member of the international community as "objectively injured"[877]. Special Rapporteur Arangio-Ruiz however, was critical of such a distinction:

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the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

iii. the right has been created or is established for the protection of human rights and fundamental freedoms;

f. if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, 'injured State' means, if the internationally wrongful act constitutes an international crime, all other States."

874. Sachariew, *supra* footnote 805, at 274. But see de Hoogh, *supra* footnote 766, at 33-37 (comparing the Draft Articles and the Vienna Convention on the Law of Treaties with respect to the definition of an "injured State".)

875. Graefrath, *supra* footnote 772, at 47.

876. See Fourth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles), by Willem Riphagen, Special Rapporteur, UN doc. A/CN.4/366 and Add.1, para. 77, reprinted in [1983] 2 *Yb. Int'l L. Comm'n* 3, 14.

877. Pierre-Marie Dupuy, "Implications of the Institutionalization of the International Crimes of State", in *International Crimes of State* 170, 179-180 (Joseph H. H. Weiler, Antonio Cassese, Marina Spinedi, eds., 1989).

> "Each of the States participating in an *inter omnes* legal relationship is indeed entitled to the same kind of rights and *facultés* as those to which it would be entitled within the framework of any bilateral or international responsibility relationship."[878]

Former draft Articles 40 (2) *(e)-(f)* and (3)[879] identified the States injured by breaches of multilateral obligations but did not adequately address obligations *erga omnes*. Simma has suggested that former draft Article 40 (2) *(e)* (iii) "appears to recognize (or at least not to exclude) the existence of human rights obligations based on customary law"[880]. Former draft Article 40 (2) *(f)* recognizes all States parties to a multilateral treaty as "injured" by violations of rights under a treaty expressly adopted for the protection of collective interests. Charney suggests that such collective interests could also be protected by customary law[881]. But former draft Article 40 (2) *(f)* would not support the vindication by any State of collective interests secured through customary law. Under this approach, only when the wrongful act qualifies as an international crime are all States to be considered "injured States"[882]. Special Rapporteur Riphagen went as far as to argue that "beyond the case of international crimes, there are no internationally wrongful acts having an *erga omnes* character"[883].

Treating a State as an injured State as a result of human rights violations by another State, i.e. in the context of *erga omnes*, gives rise to the question of the precise scope of the injured State's capacity. Crawford distinguishes between States as representatives of the victims on the basis of their legal interest in the violating State's compliance with its human rights obligations, and the individuals

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878. Fourth Report on State Responsibility, by Gaetano Arangio-Ruiz, Special Rapporteur, UN doc. A/CN.4/444 and Add.1-3, para. 143, reprinted in [1992] 2 *Yb. Int'l L. Comm'n* 34, 46.

879. See *supra* footnote 873.

880. Simma, *supra* footnote 801, at 297-298 (commenting on the text of current Draft Article 40 *(e)* (iii) as it appeared in Article 5 (2) *(e)* of an earlier ILC draft).

881. See Jonathan Charney, "Third State Remedies in International Law", 10 *Mich. J. Int'l L.* 57, 81 (1989).

882. Giorgio Gaja, "Should All References to International Crimes Disappear from the ILC Draft Articles on State Responsibility?", 10 *Eur. J. Int'l L.* 365, 367 (1999).

883. Fourth Report on the Content, Forms and Degrees of International Responsibility, by Willem Riphagen, *supra* footnote 876, para. 73.

whose human rights have been violated, who remain the rights-holders. The effect of Article 40 (2) *(e)* (iii) would not transform human rights into States' rights[884]. Apart from the symbolic nature of this distinction, it may have some implications for the choice of suitable remedies. It might also be invoked to question the right of the injured State to waive its claims. Where a primary rule of international law protects extra-State interests and where a secondary rule allows other States to participate in enforcement[885], the need to consider appropriate remedies and the reconciliation of conflicts between remedies clearly arises.

The latest ILC draft articles depart from the earlier scheme by focusing on the obligation breached. Thus, the injured State is the State specifically affected. Other States may also invoke the responsibility of the defaulting State in certain circumstances, but have a more limited range of remedies under draft Articles 42 and 48[886].

III. Legal standing

The elimination of damage as a requisite element of State responsibility and the recognition of *erga omnes* obligations raise the question of a State's legal standing to bring an action before an international tribunal to vindicate a common or general interest without demonstrating a special interest in the case.

The ICJ initially answered this question in the negative, rejecting any possibility for an *actio popularis* in its *South West Africa* decision:

> "[A]lthough a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it

884. Third Report on State Responsibility, by James Crawford, *supra* footnote 804, at 38-39. Giorgio Gaja's proposal for Article 40*bis* reflects a similar approach:

> "Depending on the character of the international obligation that has been breached and on the circumstances of the breach, the obligations of the responsible State set out in this Part are owed to another State, several States, all the other States or the international community as a whole. However, the said obligations are not necessarily imposed for the benefit of the States to whom they are owed." ILC(LII)WG/SR/CRD.4 (17 May 2000).

885. Third Report on State Responsibility, *id.*, at 29.

886. Draft Articles (2001), *supra* footnote 759.

> as imported by the 'general principles of law' referred to in Article 38, paragraph 1 *(c)*, of its Statute."[887]

The extent to which the Court reversed this position in *Barcelona Traction* is still controversial[888]. The dictum recognizing the concept of obligations *erga omnes* is far from clear. The Court stated that "some of the corresponding rights of protection are conferred by international instruments of a universal or quasi-universal character", adding later in the judgment that "at the universal level, the instruments which embody human rights do not confer on States capacity to protect the victims of infringements of such rights irrespective of their nationality"[889]. These statements may suggest that some basis in conventional law is needed to vindicate such rights[890]. Crawford has suggested that the ICJ's treatment of human rights norms in *Barcelona Traction*

> "may imply that the scope of obligations *erga omnes* is not co-extensive with the whole field of human rights, or it may simply be an observation about the actual language of the general human rights treaties"[891].

In my view, the ICJ intended to depart from the *South West Africa* decision and to recognize the standing of third party States to vindicate breaches of obligations *erga omnes*. But the Court did not make clear what such standing effectively implicated. The Restatement of the Foreign Relations Law of the United States (Third), suggests that "general human rights agreements do not contemplate diplomatic protection by one State party on behalf of an individual victim of a violation by another State party"[892]. In any event, for purposes of obligations *erga omnes*, the doctrine appears to have dropped the

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887. *South West Africa (Ethiopia and Liberia* v. *South Africa)*, *Second Phase*, *supra* footnote 821, para. 88.

888. See Ragazzi, *supra* footnote 820, at 211. See also Gray, *supra* footnote 865, at 214; *Military and Paramilitary Activities in and against Nicaragua, Interim Measures*, Order of 10 May 1984, dissenting opinion of Judge Schwebel, *ICJ Reports 1984* 4, at 190.

889. See *Barcelona Traction, Light and Power Company Ltd (Belgium* v. *Spain)*, *supra* footnote 764, para. 35.

890. See Oscar Schachter, *International Law in Theory and Practice* 209 (1991).

891. First Report on State Responsibility, Add.2, *supra* footnote 853, para. 69; also de Hoogh, *supra* footnote 766, at 52-53.

892. See Restatement (Third) of the Foreign Relations Law of the United States, Sec. 703, Rep. Note 2 (1987).

distinction between basic and ordinary human rights, at least for rights recognized by customary law.

International agreements may expressly authorize State parties to initiate proceedings against other parties for violations irrespective of the nationality of the victims and without requiring that the complainant State have any specific interest in the matter[893]. In the European Union, any member State may bring actions before the European Court of Justice seeking a declaration that another member State has violated the law of the European Community, without having to establish that it suffered a specific injury[894]. Similarly, under some human rights conventions, State parties have standing to bring claims for violations of human rights regardless of the nationality of the victim[895]. The European Convention on Human Rights provides that "[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party"[896]. Some, though not many, such cases have been brought before the European Court of Human Rights by States parties to the European Convention against other States parties in situations where the complaining State did not have nationality or other special nexus with the victims of the violations.

In the environmental field, the Bern Wildlife Convention provides that:

> "Any dispute between Contracting Parties concerning the interpretation or application of this Convention which has not been settled . . . by negotiation between the parties concerned shall, unless the said parties agree otherwise, be submitted, at the request of one of them, to arbitration."[897]

Most obligations under that convention concern national measures for the conservation of wild flora, fauna and natural habitats. These obligations are, mainly, for the protection of species and habitats within parties' domestic jurisdictions, and it is not clear to what

893. See Christian Dominicé, "The International Responsibility of States for Breach of Multilateral Obligations", 10 *Eur. J. Int'l L.* 353, 355-356 (1999).
894. See Gray, *supra* footnote 865, at 211.
895. See Meron, *Customary Law*, *supra* footnote 825, at 193.
896. See Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, *Eur. TS*, No. 5, 213 *UNTS* 221, Art. 33. (As revised by Protocol 11.)
897. Convention on the Conservation of European Wildlife and Natural Habitats, *supra* footnote 868, Art. 18.

extent the Convention applies to areas beyond each State party's national jurisdiction [898]. There is no required element of extra-territorial effect, as would be the case if the convention applied only, for example, to migratory species. Disputes "relative to the interpretation or application of the Convention" (Art. 18) thus necessarily involve domestic policies conducted on national territory. Nor is a specific interest required to initiate a complaint before the Standing Committee. Thus, a State party need not suffer specific injury to challenge another party's compliance with the treaty. International environmental agreements present unique difficulties concerning the establishment of causation for environmental injury and the allocation of responsibility for pollution and other damaging conduct. These difficulties have prompted the development of "soft responsibility" procedures [899], such as the "non-compliance procedure" established under the Montreal Protocol : these procedures permit parties having "reservations regarding another Party's implementation of its obligations" or a party finding itself unable to meet its own obligations under the Protocol to submit the matter for consideration by an Implementation Committee [900]. No specific injury is required. Ultimate decisions are made by a Meeting of the Parties, which may issue warnings and suspend certain privileges under the Protocol.

As far back as 1923, the Permanent Court of Justice recognized the standing of a State party to a treaty to challenge violations — even though it did not suffer a specific injury — on the basis of a treaty provision expressly providing for such standing in the *Wimbledon* case [901]. The *Wimbledon* was a British vessel chartered by a French company. Great Britain, France, Italy and Japan instituted proceedings against Germany, arguing that Germany "was wrong in refusing free access to and passage through the Kiel Canal" [902]. Only France was seeking damages for the loss incurred. Italy and Japan did not have any specific interest in the matter, but only a general interest in the free access to the canal. Poland (the destination of the

898. See Lyster, *supra* footnote 869, at 145-149.

899. See Alexandre Kiss and Dinah Shelton, *International Environmental Law* 362 (1991).

900. See Report of the Fourth Meeting of the Parties to the Montreal Protocol in Substances that Deplete the Ozone Layer, Decision IV/5 : Non-compliance procedure and Annex IV, UN doc. UNEP/OzL.Pro.4/15 (1992).

901. See *S.S. Wimbledon (France et al.* v. *Germany)*, Permanent Court of International Justice, Judgment of 17 August 1923, 1923, *PCIJ (Ser. A), No. 1*, at 6 (17 August).

902. *Id.*, at 20.

ship) was also allowed to intervene. The Court held that States parties to a multilateral treaty — in this case the Treaty of Versailles (Art. 386) — had standing to bring an action against a State in breach of its obligations, even though they had not suffered a specific injury [903]. It stated that "[e]ach of the four Applicant Powers [had] a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possessed fleets and merchant vessels flying their respective flag" [904].

Although the Court recognized the standing of applicant States not specifically injured, its decision relied on the interpretation of a jurisdictional clause of the Treaty of Versailles. This clause provided that "'any interested Power' could bring an action for breach of any conditions provided in Articles 380 to 386 of the Peace treaty" [905]. Ragazzi has observed that the analogy between the notion of an "interested Power" in the quoted passage and the "concept of a State interested in the protection of obligations *erga omnes*" was more apparent than real since in fact

> "in the case of obligations *erga omnes*, a legal interest is deemed to be vested in all States by operation of general international law. On the contrary, in the *Wimbledon* case, the existence of a legal interest depended on the interpretation of a conventional rule, which alone was the ground for the institution of the legal proceedings." [906]

Another difference is that the "interested parties" in the *Wimbledon* case, though not victims, were nonetheless *potential* victims of the German policy. They thus had a material interest of their own, in contrast to obligations *erga omnes* in the field of human rights, where third States' interests are more of a legal and normative character.

In the preliminary phase of the *South West Africa* cases, the ICJ considered Ethiopia and Liberia each to have had a legal interest in the performance of the South African Mandate, even though they were not direct parties to the agreement between South Africa and the League of Nations and had not suffered any direct injury [907].

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903. Gray, *supra* footnote 865, at 211.
904. *S.S. Wimbledon*, *supra* footnote 901, at 20.
905. Ragazzi, *supra* footnote 820, at 24-25.
906. *Id.*, at 25.
907. *South West Africa* cases *(Ethiopia* v. *South Africa; Liberia* v. *South Africa)*, *Preliminary Objections*, International Court of Justice, Judgment of 21 December 1962, *ICJ Reports 1962* 319, at 343.

In the Second Phase, the Court recognized that

> "[I]t may be said that a legal right or interest need not necessarily relate to anything material or 'tangible', and can be infringed even though no prejudice of material nature has been suffered. . . . States may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material injury, or ask only for token damages."[908]

However, the Court ultimately based its judgment on a controversial distinction between the obligations of the Mandatory Power towards the League of Nations and those towards member States[909], concluding that the latter did not have a legal interest to demand performance of the Mandatory's obligations towards the League of Nations.

The standing of "unaffected" parties to challenge violations of multilateral agreements ultimately depends on the nature and terms of the underlying agreement. Schachter has addressed the question whether a State party to a multilateral treaty would have the right to seek redress for a violation of the treaty when it did not suffer any specific violation:

> "The question now presented is whether acceptance of the concept of *erga omnes* obligations implies that a right analogous to the *actio popularis* has emerged. Only a tentative answer can be given and, to do that, we have to divide the general problem into separate questions.
>
> [One] such question concerns the right of a State party to a multilateral treaty to seek redress for a treaty breach when that violation involves no material injury to that State and does not affect its nationals. An affirmative answer is reasonable on the premise that any breach of an international obligation owed to a State involves some kind of injury to that State. In a multilateral treaty the obligations as a rule run to all parties; consequently, in the absence of a contrary intent, every party would have a legal interest sufficient to sustain standing to redress."[910]

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908. *South West Africa (Ethiopia and Liberia* v. *South Africa)*, *Second Phase*, *supra* footnote 821, at 32, para. 44.
909. See Gray, *supra* footnote 865, at 213.
910. Schachter, *supra* footnote 890, at 209.

I agree. Although conceptually and materially different, the *erga omnes* principle under certain general conventions such as the Geneva Conventions for the Protection of Victims of War or under the Political Covenant *(erga omnes contractantes)* is, in practical terms, not greatly different from *erga omnes* in general international law.

Of course, vindication of rights based on *erga omnes* obligations before an international tribunal requires an independent basis for the tribunal's jurisdiction over the matter and over the offending State[911]. While recognizing that the right to self-determination constitutes an *erga omnes* principle, the ICJ concluded in the *East Timor* case and confirmed in *Congo* v. *Rwanda* that the *erga omnes* nature of the obligation at issue did not dispense with the requirement of consent to the Court's jurisdiction:

> "In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court [references omitted]; it is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things."[912]

While the holding of the Court clearly distinguishing between jurisdiction and substantive norms *(erga omnes)* is no doubt correct, it shows the limited effect of obligations *erga omnes* on the practice of international tribunals. It remains to be seen how the ICJ would deal with a claim based on human rights violations *(erga omnes)* in a case brought, for example, under Article 36 (2) (the compulsory jurisdiction clause) of the Statute. It is to be hoped that the Court would recognize the standing of the claimant State.

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911. See *Reparation for Injuries Suffered in the Service of the United Nations*, International Court of Justice, Advisory Opinion of 11 April 1949, *ICJ Reports 1949* 174, at 177.

912. *East Timor (Portugal* v. *Australia)*, *supra* footnote 839, at 102, para. 29. The Court took the same position in the more recent case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Order of 10 July 2002 on Request for the Indication of Provisional Measures, at para. 71.

IV. Choice of remedies

The ICJ in the *Barcelona Traction* case recognized that "[i]n view of the importance of the rights involved, States can be held to have a legal interest in their protection"[913]. This statement seems to assimilate obligations towards the international community as a whole with obligations towards each State within that community by conferring upon *each* State a discrete legal interest in the protection of the rights at issue[914]. Recognition of such legal interest could result in every State having a separate claim against the responsible State[915]. However, Special Rapporteur Roberto Ago stated that it was not clear whether the commission of an international crime resulted in new legal relationships with States *ut singuli* or as members of the international community[916]. Special Rapporteur Riphagen contended that the commission of an international crime gave rise primarily to collective rights[917]:

> "an individual State which is considered to be an injured State only by virtue of article 5 (e) [Article 40 (3)] [of the ILC draft Articles on State responsibility] enjoys this status as a member of the international community as a whole and should exercise its new rights and perform its new obligations within the framework of the organized community of States"[918].

Although I accept that, with regard to crimes of States, important considerations of stability and prevention of abuse support the preference for collective responses, ideally through the United Nations, a different principle could apply to *erga omnes* obligations. Despite many unresolved questions[919], the *Barcelona Traction* case can be

913. *Barcelona Traction, Light and Power Company Ltd. (Belgium* v. *Spain)*, *supra* footnote 764, at para. 33.

914. See Gaja, "Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts", in *International Crimes of State* 151, 152 (Joseph H. H. Weiler, Antonio Cassese and Manina Spinedi, 1989), at 152.

915. *Id.*

916. See Third Report on State Responsibility, by Roberto Ago, Special Rapporteur, UN doc. A/CN.4/246, para. 41, reprinted in [1971] 2 (1) *Yb. Int'l L. Comm'n* 199, 210.

917. See Sixth Report on the Content, Forms and Degrees of International Responsibility, by W. Riphagen, *supra* footnote 871, at 13, Commentary to Article 14.

918. *Id.*, Commentary to Article 14, para. 10.

919. See e.g. Max Gounelle, "Quelques remarques sur la notion de 'crime international' et sur l'évolution de la responsabilité internationale de l'Etat", *Le droit international: Unité et diversité. Mélanges offerts à Paul Reuter* 315, 322 (1981).

read as supporting unilateral responses to violations of *erga omnes* duties. Significant policy considerations support this approach. An alternative interpretation of *Barcelona Traction* requiring that all States act jointly to vindicate a legal interest vested in all States as a community (the French version of the judgment refers to "tous les Etats") would, in reality, deprive the *erga omnes* principle of much of its potential practical utility[920]. There is thus considerable merit to an approach recognizing the right of all injured States, but differentiating between the remedies available to them, based on whether they are especially affected or not. Recognizing that all injured States have rights *erga omnes* does not mean that all of them are entitled to the same remedies.

The idea that a State may intervene unilaterally when another State commits serious violations of international law has been advocated by writers since Grotius, who supported the right of kings to punish egregious violations of the law of nations. Grotius viewed such punishment as proper not only in response to injuries committed against the king himself or his subjects, "but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever . . ."[921]. Grotius was thus ready to accept as lawful the intervention by one State on behalf of gravely persecuted citizens of another[922].

The notion that third States may intervene in response to egregious breaches of human rights obligations is often based on the view that such violations constitute threats to peace and international security. As early as 1915, Elihu Root argued:

> "If the law of nations is to be binding, if the decisions of tribunals charged with the application of that law to international controversies are to be respected, there must be a change in theory, and violations of the law of such a character as to

920. See Gaja, *supra* footnote 914, at 152.

921. 2 Hugo Grotius, *De Jure Belli ac Pacis*, Libri Tres, Bk. II, Chap. XX, Part. XL (1) (Of Punishments) (Carnegie ed., F. Kelsey trans., 1925). Kelsey translated the 1646 edition rather than the first, 1625 edition of Grotius' work. For further discussion, see Meron, "Common Rights of Mankind in Gentili, Grotius and Suárez", 85 *AJIL* 110 (1991).

922. See *id.* Chap. XXV, at Part. VIII (2). Quoted in Third Report on the Content, Forms and Degrees of State Responsibility, by Willem Riphagen, Special Rapporteur, UN doc. A/CN.4/354 and Add.1 and 2, para. 99, reprinted in [1982] 2 *Yb. Int'l L. Comm'n* 22.

> threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained."[923]

In the past, the doctrine of humanitarian intervention through diplomatic and political channels was usually discussed outside the framework of State responsibility, and the two fields were perceived to involve distinctly different principles and concerns. The *erga omnes* principle, however, gave impetus to the idea of intervention by third States through legal channels and invoking legal remedies to promote community goals.

Even before *Barcelona Traction*, Tunkin advocated a broad notion of "injured State" as including States not directly injured by violations of norms concerning breaches of international peace[924], freedom of the seas and the protection of the natural resources of the seas. Several approaches to determining appropriate circumstances for third States' initiatives have been suggested. According to Charney, "third State remedies" are appropriate, first, when bilateral enforcement is inadequate — as with breaches of human rights obligations or the prohibition of genocide where no other State is directly injured — and, second, in situations where the State(s) or States directly injured cannot seek a remedy, either for reasons beyond their control (e.g. if the victim State is under the effective control of an aggressor State), or because of a disparity in power (e.g. "the injured States alone are not able to effectuate a remedy")[925]. The seriousness of the violation provides another pertinent yardstick. In reality, third States are unlikely to intervene in response to minor or sporadic violations. Christian Dominicé, drawing on draft Article 19, would thus reserve collective or third States reactions for "substantial breaches" of *erga omnes* obligations[926].

Georges Abi-Saab has classified the possible reactions by third parties to an internationally wrongful act into three categories: diplomatic reactions, passive legal reactions (e.g., non-recognition) and positive legal reactions. This last category includes acts of retortion, acts of reprisal, and submission of a claim to an international

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923. Elihu Root, "The Outlook for International Law", 10 *AJIL* 1, 8-9 (1916).
924. See Grigori I. Tunkin, *Droit international public: problèmes théoriques* 223 (1965).
925. See Charney, *supra* footnote 881, at 95-96.
926. See Dominicé, *supra* footnote 893, at 360-361 (emphasizing the "quantitative" connotation of the term "substantial breach").

tribunal[927]. In principle, any third party State would move into a new bilateral relationship with a State violating rules of international public order. However, a State invoking rights under multilateral treaties would be in a somewhat more privileged situation than a State invoking only customary *erga omnes*, since the former could, for example, resort to dispute settlement procedures under the treaty[928].

Diplomatic protests, public condemnation of illegal behaviour and, less frequently, measures of retortion, are among the remedies available for breaches of international law. The parameters and limits of many remedies are still in an indeterminate state[929]. Despite the narrowing of the contemporary scope of domestic jurisdiction, the principle of non-intervention in the internal affairs of sovereign States retains considerable vitality[930]. Nevertheless, the broad acceptance of the *droit de regard* and, at the least, of diplomatic intervention in support of the *erga omnes* principle is unmistakable. The Institute of International Law's 1989 resolution concerning human rights and non-intervention holds that "a State acting in breach of its obligations in the sphere of human rights cannot evade its international responsibility by claiming that such matters are essentially within its domestic jurisdiction", and that "[d]iplomatic representations as well as purely verbal expressions of concern or disapproval regarding any violations of human rights are lawful in all circumstances"[931]. As Georges Abi-Saab noted, the essential objective of the resolution was to reaffirm that, first, human rights are not a part of the reserved domain of States and, second, that human rights are *erga omnes* obligations. As a consequence, any State may resort to diplomatic remedies or act through the framework of international organizations in response to human rights violations[932].

The ILC's final draft Articles 34 to 37 list the remedies available to the injured States towards the State which has committed an internationally wrongful act: reparation, restitution, compensation and

927. See Abi-Saab, *supra* footnote 856, at 149.
928. See Sachariew, *supra* footnote 805, at 278.
929. See Lea Brilmayer, "International Remedies", 14 *Yale J. Int'l L.* 579, 588 (1989); see also Charney, *supra* footnote 881, at 60.
930. See generally, Charney, *id*.
931. See "The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States", Institute of International Law Declaration, Arts. 1 and 3, in 63 (2) *Yearbook of the Institute of International Law* 338 (1989).
932. See 63 (2) *Yearbook of the Institute of International Law* 243 (1989).

satisfaction. With respect to violations of obligations *erga omnes*, the choice of remedies that may be claimed by States sustaining no direct injury from such violations is controversial. Some argue that they can only be "injunctive", such as cessation of the wrongful conduct and guarantees of its non-repetition, rather than "compensatory", such as compensation and restitution in kind. Arangio-Ruiz argued that the injured State is merely entitled to the remedies that "are sufficient to restore the *droit subjectif* of the claimant State and of the others"[933]. He excludes compensation for a third State simply because the third State has not suffered any material damage. With regard to violations by a State of the human rights of its own nationals, a third State asserting obligations *erga omnes* could thus only claim cessation and adequate guarantees of non-repetition. This, however, would not be a consequence of any "indirectness" of the injury, but because the breach has not given rise to material damage.

A declaratory judgment, preferably coupled with injunctive relief, flows naturally from the objective character of human rights obligations and is thus particularly appropriate. In tandem, these remedies are particularly fitting for violations of *erga omnes* obligations, where the principal goal is to halt existing violations and to ensure the future observance of vital community values[934].

In commenting on the ILC's draft Articles, the United States accepted the general notion that there could be "a general community interest in relation to defined categories of treaty (e.g., human rights treaties)", but denied that, in the case of *erga omnes* obligations, an (indirectly) injured State would have a right to claim reparation, as distinct from a right to claim cessation[935].

What is the range of responses available to injured States? Draft Article 46 allows every injured State separately to invoke the responsibility of the State which has committed the internationally wrongful act. This might give rise to an apparent conflict *with* Article 60 (2) *(c)* of the Vienna Convention on the Law of Treaties: the Vienna Convention allows parties to multilateral treaties to suspend the operation of a treaty vis-à-vis a defaulting State only by unanimous agreement. Acting alone, the State especially affected may invoke the breach only to suspend, but not to terminate, the

933. Fourth Report on State Responsibility, by Gaetano Arangio-Ruiz, *supra* footnote 878, para. 144.
934. See Meron, *Customary Law, supra* footnote 825, at 205.
935. See First Report on State Responsibility, *supra* footnote 853, para. 24.

operation of the treaty in whole or in part only in the relations between itself and the defaulting State. The approach of the Vienna Convention is thus quite different both from the principle of *erga omnes*, which would allow every injured State to act on its own, and from ILC's draft Article 46[936]. Rosenne recognizes the tendency of the Vienna Convention

> "not to allow any breach of a treaty to justify a unilateral and arbitrary termination of the treaty by the State injured by the breach, although that solution is not excluded entirely, and even less to recognize the automatic termination of the treaty[.] [T]ermination of the treaty as a consequence of its breach would in many cases be the least desirable outcome; it might even go entirely against the wishes of the injured State."[937]

This applies to all multilateral conventions, not only those of a humanitarian character. Ironically, suspension of the operation of a treaty may in fact be convenient to the wrongdoing State. The conflict with the Vienna Convention is, however, attenuated by draft Articles 47, 48, 49 and 54, which introduce a differentiated scheme of responses by injured States, depending on the nature of their injury.

Reverting to the question whether the rights of States not specially affected may be exercised unilaterally and severally or only jointly by the members of the international community, Special Rapporteur Crawford warned about the abuses that may result from considering every State as an injured State and permitting unilateral responses:

> "Neither the Commission nor the Working Group had found a solution to the massive procedural difficulty that would exist if individual States were authorized severally to represent community interests without any form of control."[938]

In his third report, Crawford criticized former draft Article 40's treatment of all injured States in the same way[939]. (The Article

936. Crawford observed that "[t]here is no suggestion that obligations *erga omnes partes* give rise to any significant rights of reaction to breaches, in the framework of the law of treaties". Crawford (2000), *supra* footnote 763, at 31.
937. Rosenne, *supra* footnote 830, at 118.
938. Report of the International Law Commission on the Work of its Fiftieth Session, *supra* footnote 770, para. 324.
939. *Supra*, footnote 804.

allows each State injured by an internationally wrongful act to seek cessation and reparation and to resort to countermeasures absent cessation and reparation.) He argued that such remedies are appropriate only in cases where "subjective" or individual rights of States are implicated[940] and suggested that Article 40 (2) "fails to follow the logic of article 60 (2) of the Vienna Convention"[941]. He regards as an error the equation of all categories of injured States and the failure to distinguish between States "specially affected" and those not so affected by the breach of a multilateral obligations. And he recognizes that the implications of these questions extend beyond human rights. If human rights cannot be considered as affecting any particular State considered alone, this is also true of such other subjects as world heritage and environmental protection[942].

Despite the enlightened nature of the recognition that all States have a legal standing in breaches of international law of general interest, to claim that all of them have the same choice of remedies is impractical and counterintuitive. Difficulties arise when the same obligation is owed to several, many or all States who may invoke the responsibility of the violating State. Normative progress should work in tandem with the practicalities of international law. Involvement of several States severally claiming conflicting remedies could be potentially destabilizing, though the probability of such a situation occurring is small.

Crawford deserves praise for tackling the difficult problem of choice of remedies; his work, accepted by the ILC, has contributed to narrowing the gap between the doctrine of *erga omnes* and the practice of international law: a specially affected State or a State claiming on behalf of the victim is entitled to the entire range of remedies — cessation, restitution, compensation and satisfaction, and countermeasures. In the case of obligations *erga omnes*, all States are entitled to request cessation, but restitution, compensation and satisfaction may be demanded only on behalf of the victim/specially affected State or by agreement between States parties. This approach was endorsed by the ILC in the draft articles adopted on second reading. The ILC's draft Article 48 now provides that third States may claim

940. *Id.* para. 40.
941. *Id.* para. 93.
942. *Id.* para. 88.

"*(a)* cessation of the international wrongful act, [and assurances and guarantees of non-repetition] in accordance with article 30;

(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"[943].

E. Countermeasures

According to the ILC's commentary on former draft Article 30, countermeasures are "measures the object of which is, by definition, to inflict punishment or to secure performance — measures which, under certain conditions, would infringe a valid and subjective right of the subject against which the measures are applied"[944]. Such measures may be legitimate in certain circumstances. According to draft Article 22, resort to legitimate countermeasures is a circumstance that precludes wrongfulness:

> "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."[945]

I. The right to take countermeasures

Christian Dominicé has argued that the adoption of countermeasures for an objective other than "to bring a stop to conduct constituting a persistent breach of a multilateral obligation" would probably be unlawful[946]. There is no reason, however, why there could be no countermeasures by third States in response, for example, to crimes against humanity under customary law, even in the absence of a general treaty outlawing such crimes (unless one is to consider the Rome ICC Statute to be such a convention).

Two main schools have debated the modalities of the right to resort to countermeasures in case of violations of *erga omnes* obli-

943. Draft Articles (2001), *supra* footnote 759.
944. Report of the International Law Commission on the Work of its Thirty-first Session, *supra* footnote 779, Commentary on Article 30, para. 3, at 116.
945. Draft Articles (2001), *supra* footnote 759.
946. Dominicé, *supra* footnote 893, at 363.

gations. The first recognizes for every State *ut singuli* the right to resort to countermeasures. The second grants such a right only to the State specially injured, allowing other States to react only in the framework of the organized international community. Writers belonging to the second school emphasize the arbitrary and subjective nature of countermeasures or reprisals and the dangers of abuse [947]. Special Rapporteur Ago thus wrote:

> "It is understandable that . . . the international community, in seeking a more structured organization . . ., should have turned . . . towards a system vesting in international institutions other than States the exclusive responsibility, first for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and thereafter, for deciding what measures should be taken in response and how they should be implemented." [948]

Schachter has also expressed concern about the possibility of abuse: States, by and large, are not inclined to open a Pandora's box which would allow every member of the community of States to become a "prosecutor" on behalf of the community in judicial proceedings [949]. Fears that the recognition in international law of obligations *erga omnes* and of a right akin to *action popularis* might be abused by States to initiate politically motivated steps against other States have not been borne out by the post-*Barcelona Traction* experience [950].

As regards the question of countermeasures by third States for obligations *erga omnes*, the draft articles do not provide a clear solution. Under draft Article 54, the chapter on countermeasures

> "does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State,

947. See Bernhard Graefrath, "International Crimes — A Specific Regime of International Responsibility of States and its Legal Consequences", in *International Crimes of State* 161, 168 (Joseph H. H. Weiler, Antonio Cassese and Marina Spinedi, eds., 1989). See also Michael Akehurst, "Reprisals by Third States", [1970] 44 *Brit. YIL*, 1, 15; Charles Leben, "Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale", 28 *Annuaire français de droit international* 10, 20 ff. (1982).

948. Eighth Report on State Responsibility, by Roberto Ago, *supra* footnote 799, at Commentary on Draft Article 29, at 43, para. 91. See also Commentary on Draft Article 30, at para. 12.

949. Schachter, *supra* footnote 890, at 212.

950. See Meron, *Customary Law*, *supra* footnote 824, at 200.

> to take lawful measures against that State to ensure cessation of the breach and reparation in the interests of the beneficiaries of the obligation breached" [951].

It is unfortunate that the Commission did not include in its final articles a clearer statement suggesting that a State other than an injured or especially affected State may resort to countermeasures to ensure cessation of an internationally wrongful act or the performance of the obligation of reparation. Such a statement would have been more in line with the principle of obligations *erga omnes.* Third-party countermeasures are a robust means of promoting compliance with basic principles of international law and fundamental human rights. The ILC felt, however, that the practice of States on countermeasures was too sparse, the current State of the law too uncertain, and the possibility of abuse too great, to justify a positive provision on the right of third States to resort to countermeasures. At least Article 54, which is really only a saving clause, does not preclude a resort to lawful countermeasures.

After a review of State practice, Akehurst concluded that

> "The circumstances in which third States have claimed a power to take reprisals are virtually limited to three main categories:
>
> (i) [non] enforcement of judicial decisions;
> (ii) [under] Article 60 (2) *(a)* of the Vienna Convention, 1969;
> (iii) violation of rules prohibiting or regulating the use of force." [952]

Simma adds human rights to this list: because of a general recognition that at least

> "consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms . . . lead to admissibility of countermeasures by individual States even outside a treaty framework, if attempts to bring about collective action fail in the UN and other international bodies" [953].

The Institute of International Law in 1989 resolved that "States,

951. Draft Articles (2001), *supra* footnote 759. See also Edith Brown-Weiss, "Invoking State Responsibility in the Twenty-first Century", 96 *AJIL* 798, 804-805 (2002); David J. Bederman, Counterintuiting Countermeasures, 96 *AJIL* 798, at 817.

952. Akehurst, *supra* footnote 947, at 15.

953. Simma, *supra* footnote 801, at 312.

acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any other State which has violated the obligation to ensure observance of human rights"[954], adding that "[m]easures designed to ensure the collective protection of human rights are particularly justified when taken in response to especially grave violations of these rights"[955]. The Institute's language is broad enough to encompass countermeasures.

The ICJ suggested a more restrictive approach to third-State countermeasures. In the *Paramilitary Activities* case, the ICJ considered whether US activities in Nicaragua could be justified as reprisals for Nicaragua's assistance to armed opposition groups in El Salvador, Honduras and Costa Rica. The Court held that:

> "The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force."[956]

This statement may, however, have been influenced by the fact that US countermeasures were, for the most part, forcible countermeasures.

In the *Hostages* case, the Court explained that

> "Where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves, use of force could not be an appropriate method to monitor or ensure such respect."[957]

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954. "The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States", Institute of International Law Declaration, Art. 2, in 63 (2) *Yearbook of the Institute of International Law* 338 (1989).

955. *Id.* ILC's Special Rapporteur Crawford noted the distinction made in various contexts between individual violations of collective obligations and gross and systematic breaches. Third Report on State Responsibility, Add.4, by James Crawford, *supra* footnote 804, at 20.

956. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, *Merits*, Judgment of 27 June 1986, *ICJ Reports 1986* 14, para. 249.

957. *United States Diplomatic and Consular Staff in Tehran, supra* footnote 803, at 40, paras. 267-268.

The Court seems to suggest that the procedures and institutions set out in multilateral conventions present the most appropriate channel for enforcement. This view fails to reflect the sad reality that mechanisms for enforcement of international law are often either unavailable or ineffective under regimes governing human rights[958]. Simma has strongly criticized the self-contained regimes approach:

> "attempts at 'uncoupling' humanitarian treaties from the general régimes of international responsibility and conflict resolution serve the purpose of rendering impossible every effective *supra*- or inter-State enforcement of human rights"[959].

Henkin is another prominent critic of this approach[960].

Because procedures for the settlement of disputes and remedies recognized by human rights treaties are often weak and based on optional acts of acceptance, to endorse the exclusivity of treaty remedies would intensify the fragility and ineffectiveness of human rights. Whether a particular human rights treaty excludes remedies outside of the treaty depends not on abstract legal theory but on a good faith interpretation of the terms of the treaty in light of their context and the object and purpose of the treaty. Nothing in the character of general human rights agreements suggestsany inten-tion "to eliminate the ordinary legal consequences of international undertakings and the ordinary remedies for their violations"9[61.] Section 703 (1) of the Restatement of the Foreign Relations Law of the United States (Third) supports the thesis of the cumulative character of treaty remedioes and remedies outside the treaty[962].

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958. See de Hoogh, *supra* footnote 766, at 254-255.

959. Bruno Simma, "Consent: Strains in the Treaty System", in *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* 485, 501 (R. St. J. MacDonald and Douglas M. Johnston, eds., 1983). See also Bruno Simma, "Self-contained Regimes", 16 *Neth. Yb. Int'l L.* 110 (1985).

960. Louis Henkin, "Human Rights and 'Domestic Jurisdiction'", in *Human Rights, International Law and the Helsinki Accord* 30, 33 (Thomas Buergenthal, ed., 1977). *Contra* Jochen A. Frowein, "The Interrelationship between the Helsinki Act, the International Covenants on Human Rights, and the European Convention on Human Rights", *id.*, at 71, 79.

961. Henkin, *id.*, at 31.

962. Meron, *Customary Law*, *supra* footnote 824, at 231. Section 703 (1) of the Restatement (Third), *supra* footnote 892, provides, in part, that a

> "state party to an international human rights agreement has, as against any other state party violating the agreement, the remedies generally available for violation of an international agreement, as well as any special remedies provided by the particular agreement".

Some State practice, especially in the early 1980s, suggests that any State may resort to countermeasures where an *erga omnes* obligation has been breached[963]. Examples include international responses to the Soviet invasion of Afghanistan, the declaration of martial law in Poland, the taking of the American embassy in Tehran, and the Argentine invasion of the Falkland Islands[964].

The Soviet intervention in Afghanistan in 1979 was firmly condemned by the international community[965]. Some Western States, and in particular the United States, resorted to unilateral measures against the Soviet Union. Most of the measures taken involved retortion but some could be regarded as countermeasures[966]. The reactions of other Western States were weak[967]. Rousseau has suggested that this timid response was driven by economic considerations rather than by concern that countermeasures would violate international law[968].

Certain European, Japanese, Canadian and Australian reactions to the hostage taking at the US Embassy in Tehran have been regarded as countermeasures. Foreign ministers of the member States of the European Community declared that they had:

> "décidé de demander à leurs Parlements nationaux de prendre immédiatement, si elles sont nécessaires, les mesures pour imposer des sanctions à l'encontre de l'Iran, conformément à la résolution du Conseil de Sécurité sur l'Iran . . ."[969].

This declaration was made through the "political co-operation"

963. Sicilianos, *supra* footnote 861, at 156, also gives the example of the adoption by the US Congress of an import ban on all products manufactured in Uganda on the ground that Uganda's regime of Idi Amin engaged in genocide. According to him, this measures should be regarded as a countermeasure — as opposed to a measure of retortion — as it was in violation of GATT rules. The United States did not invoke any of the saving clauses of the GATT. No other State has followed the United States, but none protested against the measure.

964. The ILC Rapporteur also referred to US sanctions against Uganda in 1978 and US sanctions against South Africa in 1986 after a state of emergency was declared. More recent examples include initial measures taken against Iraq in 1990 and against Yugoslavia in 1998 (before they were legitimized by Security Council resolutions). Third Report on State Responsibility, Add. 4, by James Crawford, *supra* footnote 804, at 14-15.

965. See Charles Rousseau, "Chronique des faits internationaux", 84 *Revue générale de droit international public* 826, 840-846 (1980).

966. Sicilianos, *supra* footnote 861, at 158.

967. Rousseau, *supra* footnote 965, at 837.

968. Sicilianos, *supra* footnote 861, at 158.

969. Quoted in Rousseau, *supra* footnote 965, at 882.

process between member States, so that the sanctions were not compulsory. France and the United Kingdom suspended some contracts concluded after the hostage-taking[970].

Most of the measures taken by the United States against the USSR and Poland after the proclamation of martial law in Poland were measures of retortion. However, the suspension by the United States of landing rights of Polish and Soviet airlines amounted to countermeasures[971]. Most Western States approved the American measures against the USSR and Poland, but did not follow suit. The Prime Minister of France warned of economic consequences for France were it to resort to such countermeasures and expressed doubts concerning their efficacy[972]. In another instance, several Western States suspended the landing rights of the Soviet airline following the destruction of the Boeing 747 of the Korean Airlines over Soviet airspace by the Soviet military[973].

Western States resorted to economic countermeasures against Argentina during the conflict in the Falklands. The European Union, Canada, Australia and the United States imposed an embargo which was challenged by Argentina[974]. Several OAS members criticized the measures as breaching GATT obligations[975]. According to several resolutions adopted by the OAS Economic and Social Council, these measures were contrary to the OAS Charter[976]. Neither advocates nor opponents of these measures addressed their status as lawful countermeasures to violations of *erga omnes* obligations. Attempts to apply economic countermeasures in response to violations of labour or children rights, unilaterally or through the WTO, have encountered strong opposition, which emphasized the proposition that trade issues should not be used as leverage to force changes in the non-trade field.

Some authors conclude from this practice that States have the right to react unilaterally to violations of *erga omnes* obligations[977].

970. *Id.*, at 885-888.
971. Sicilianos, *supra* footnote 861, at 161-162.
972. P. Mauroy, French Prime Minister, quoted in Charles Rousseau, "Chronique des faits internationaux", 86 *Revue générale de droit international public* 601, 607 (1982).
973. Sicilianos, *supra* footnote 861, at 164.
974. Charles Rousseau, *supra* footnote 965, at 232, 748.
975. Sicilianos, *supra* footnote 861, at 163, note 341.
976. See Acedevo, "The U.S. Measures against Argentina Resulting from the Malvinas Conflict", 78 *AJIL* 323, 338 ff. (1984).
977. Sicilianos, *supra* footnote 861, at 167.

Others downplay the precedential significance of such practice by emphasizing the political context, the preponderant role of the United States, and the hesitations of some Western States. Pierre-Marie Dupuy has thus concluded that because of this strategic and political context, this body of practice did not generate a broader rule[978]. Although most of the measures taken were measures of retortion, States not willing to join these measures explained their non-participation by citing the binding nature of their international obligations. While it is true that the practice involved only the participation of a small group of Western States, other States did not protest against countermeasures, except in the case of the Falklands.

II. Limitations on countermeasures

The requirements for legitimate countermeasures were established already at the beginning of the twentieth century. The *Naulilaa* arbitration tribunal enunciated three main conditions: a prior violation of international law, a demand for redress, and proportionality[979]. These conditions were recently reaffirmed by the ICJ in the *Gabčíkovo-Nagymaros* case[980].

Resort to countermeasures may be motivated by three distinct rationales: reparation, coercion and punishment. The principal objective of countermeasures, and for many authors the only legitimate one, is to compel a wrongdoing State to abide by its obligations and cease the violations or to repair the consequences of wrongful acts. Special Rapporteur Arangio-Ruiz observed:

> "The study of international practice seems to indicate that in resorting to countermeasures injured States affirm that they are

978. Pierre-Marie Dupuy, "Observations sur la pratique récente des 'sanctions' de l'illicite", 87 *Revue générale de droit international public* 505, 542 (1983).

979. *Affaire de la responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique* (*Naulilaa* incident) *(Portugal* v. *Germany)*, Arbitral decision of 31 July 1928, 2 *RIAA* 1011; see also *Affaire de la responsabilité de l'Allemagne à raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre* (*Cysne* case) *(Portugal/Germany)*, Arbitral decision of 30 June 1930, 2 *RIAA* 1035; case concerning the *Air Service Agreement of 27 March 1946 between the United States of America and France (United States/France)*, Arbitral decision of 9 December 1978, 18 *RIAA* 443.

980. Case concerning the *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, International Court of Justice, Judgment of 25 September 1997, *ICJ Reports 1997*, paras. 82-88.

> seeking and, indeed appear to seek, cessation of the wrongful conduct and/or reparation in a broad sense and/or guarantees of non-repetition."[981]

Compensatory objectives are based on the principle of reciprocity and aim at restoring the equality between the parties or the *status quo ante*[982]. Measures of strict reciprocity, i.e. the non-performance of the reciprocal duty to the non-performed obligation, *inadimplenti non est adimplendum*[983], are usually not considered countermeasures. They are not necessarily unlawful *per se*[984].

Resort to "strict reciprocity", i.e., to the *exceptio inadimplenti non est adimplendum* countermeasures is excluded in the case of *erga omnes* obligations as it would constitute a breach towards other parties bound by the rule[985]. This applies of course to human rights and humanitarian law. In discussing the law of treaties, Special Rapporteur Fitzmaurice excludes from reciprocal non-performance "the class of [multilateral treaties of an 'integral' type . . . where the force of the obligation is self-existent, absolute and inherent for each party, irrespective and independently of performance by the others]"[986] that is, in effect, *erga omnes* obligations. In the *Genocide Convention (Bosnia* v. *Yugoslavia)* case, the Court said, with regard to *erga omnes* obligations:

> "Bosnia and Herzegovina was right to point to the *erga omnes* character of the obligations flowing from the Genocide Convention and the Parties rightly recognized that in no case could one breach of the Convention serve as an excuse for another."[987]

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981. Fourth Report on State Responsibility, by Gaetano Arangio-Ruiz, *supra* footnote 878, para. 3.

982. Sicilianos, *supra* footnote 861, at 65.

983. See the excellent discussion by James Crawford in his Second Report on State Responsibility, *supra* footnote 797, at 41-49.

984. See generally Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* 50 (1984).

985. Second Report on State Responsibility, Addendum, by James Crawford, *supra* footnote 797, para. 327.

986. Fourth Report on the Law of Treaties, by Sir Gerald Fitzmaurice, Special Rapporteur, [1959] 2 *Yb. Int'l L. Comm'n* 45-46, quoted in Second Report on State Responsibility, Addendum, by James Crawford, *supra* footnote 797, para. 320.

987. Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, *Counter-Claims*, International Court of Justice, Order of 17 December 1997, *ICJ Reports 1997* 243, at 258, para. 35.

The same concern underlies Article 60 (5) of the Convention on the Law of Treaties, which provides that the right of a party to terminate or suspend the operations of a treaty as a consequence of its breach does not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character[988].

The objectives of countermeasures may not go beyond coercion intended to compel the performance of an obligation[989]. Measures aimed at imposing a punishment on a State would be unlawful and could not be legitimated by a prior wrongful act of that State[990]. Penal measures are associated with the idea of *imperium*, and, according to Zoller, imply an inequality between the parties[991], and are contrary to the principle of the sovereign equality[992]. Nevertheless, in reality unilateral measures against a State, especially by a strong State against a weak one, may have some punitive effects[993]. Special Rapporteur Arangio-Ruiz noted that when countermeasures are taken to obtain satisfaction or guarantees of non-repetition, the intention to punish is hardly distinguishable from the intention to coerce[994]. He concluded, however, that:

> "Be that as it may, even if it were found that a punitive intent underlies the decision of injured States to resort to countermeasures, it would be very difficult to conceive of the presence of such an intent as more that a *factual characterization* of the function of countermeasures."[995]

Countermeasures to *erga omnes* violations are supposed to be on behalf of the collective interest of the international community.

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988. Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, UN doc. A/CONF.39/27 and Corr.1 (1969), 1155 *UNTS* 331, reprinted in 63 *AJIL* 875 (1969), 8 *ILM* 679 (1969).

989. See for example Omer Yousif Elagab, *The Legality of Non-forcible Counter-measures in International Law* 50 ff. (1988); see also Zoller, *supra* footnote 984, at 55 ff.

990. Fourth Report on State Responsibility, by Gaetano Arangio-Ruiz, *supra* footnote 878, paras. 3-4.

991. Zoller, *supra* footnote 984, at 59.

992. *Id.*

993. Gounelle, *supra* footnote 919, at 317-318.

994. Fourth Report on State Responsibility, by Gaetano Arangio-Ruiz, *supra* footnote 878, para. 4. In the surveyed State practice, the Rapporteur has identified several cases where a punitive element was present including, *inter alia*, Cuban expropriation of United States property (1960), expropriation of British assets by Libya, seizure of Dutch property by Indonesia (1958), French measures against Central Africa (1979), measures by the United States against China (1989), and by Belgium against Zaire (1990). See *id.*, at para. 4, note 765.

995. *Id.*

Some writers, therefore, have questioned whether a State could unilaterally determine what "the fundamental interests of the international community" justifying such countermeasures are and have argued for collective approval of unilateral measures[996]. States have sought to legitimize unilateral measures on the basis of the positions taken by the Security Council, the General Assembly or regional international organizations, for example. Of course, the need to respect the principle of proportionality between the initial wrongful act and the response provides an additional limitation on unilateral countermeasures[997].

There has been a general tendency to limit for humanitarian reasons the right of reprisals. Reprisals against prisoners of war, against civilians in occupied territory, against civilian populations and objects have been prohibited over time[998]. De Hoogh writes that "[t]he whole movement for the protection of human rights started more or less with the reprisal prohibitions in the field of the protection of the victims of war and prisoners of war"[999]. Special Rapporteur Arangio-Ruiz similarly noted that "the belief in the existence of inviolable ethical limits to the exercise of reprisals led to early recognition that the limits placed on reprisals in wartime should apply *a fortiori* in time of peace"[1000].

In the *Naulilaa* case, the arbitral tribunal held that to be lawful a reprisal had to be "limitée par les expériences de l'humanité et les règles de la bonne foi applicables dans les rapports d'Etat à Etat"[1001]. As early as 1934, a resolution of the International Law Institute declared that a State must "s'abstenir de toute mesure de rigueur qui serait contraire aux lois de l'humanité et aux exigences de la conscience publique"[1002].

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996. See Dupuy, *supra* footnote 978, at 515.

997. First Report on State Responsibility, Add.3, by James Crawford, *supra* footnote 853, para. 84, note 113.

998. See Geneva Convention I, *supra* footnote 813, Art. 46. See also Geneva Convention II, *supra* footnote 813, Art. 47; see also Geneva Convention III, *supra* footnote 55, Art. 13; see also Geneva Convention IV, *supra* footnote 813, Art. 33; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, Arts. 51-56, 1125 *UNTS* 3.

999. de Hoogh, *supra* footnote 766, at 260.

1000. Third Report on State Responsibility, submitted by Gaetano Arangio-Ruiz, Special Rapporteur, UN doc. A/CN.4/440 and Add.1, para. 103, reprinted in [1991] 2 *Yb. Int'l L. Comm'n* 1.

1001. *Affaire de la responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique*, *supra* footnote 979, at 1026.

1002. 38 *Annuaire de l'Institut de droit international* 708 (1934).

The development of human rights concerns has led to the extension of such limitations to the protection of human rights in general. Thus, the situation of the target State's population has become a part of the calculus. The ILC's draft Articles integrate similar humanitarian considerations in the regime of countermeasures that they envision. Countermeasures shall not affect:

> "*(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" [1003].

ILC's Article 50 (1) *(c)* thus appears to conform to Article 60 (5) of the Vienna Convention on the Law of Treaties.

Damrosch has suggested that

> "[e]ven in the case of serious violations as to which serious sanctions are presumptively justifiable, it may be necessary or desirable to constrain the application of countermeasures in the interests of avoiding undue harm to the population of the target State" [1004].

With regard to the (former) draft Articles on remedies and countermeasures, she added that "[t]o the extent that these formulations reflect a recognition of the human dimension of enforcement measures, they may well mark a commendable advance over traditional State-centered conceptions" [1005].

Special Rapporteur Arangio-Ruiz noted that

> "[t]he difficulty of establishing the threshold beyond which countermeasures are or should be condemned as infringing humanitarian obligations in a broad sense lies in the precise definition of the human rights and interests the violation of which would not be permitted even in reaction to a State's unlawful act. It is certain that not all human rights or individual interests could reasonably qualify." [1006]

1003. Art. 50, Draft Articles (2001), *supra* footnote 759.
1004. Damrosch, *supra* footnote 860, at 60.
1005. *Id.*, at 61.
1006. Third Report on State Responsibility, by Gaetano Arangio-Ruiz, Special Rapporteur, UN doc. A/CN.4/440 and Add.1, para. 110.

Some writers have taken a broad view of the limitations on countermeasures based on humanitarian concerns according to which "an injured State could not suspend, by way of countermeasure, forms of assistance aimed at improving the condition of the population of the wrongdoing State" [1007]. Special Rapporteur Arangio-Ruiz dissented, observing that "[s]uch a broad notion of a limitation based on humanitarian grounds is not . . . shared by a significant number of writers nor is it sufficiently supported by practice" [1008]. For him, the objective was to strike "an overall balance between the introduction of essential limitations to countermeasures, on the one hand, and the need not to deprive States of the possibility to react to breaches of international obligations, on the other" [1009]. Hence draft Article 50 refers to *fundamental* human rights, not all human rights. In his Third Report, the Special Rapporteur noted that

> "[w]hatever the seriousness of the violation involved, the injured State's measures could not be such as to tread upon fundamental principles of humanity to the detriment of the offending State's nationals in the injured State's territory: by violating for example, their right to life, their right not to be subjected to physical or moral violence, notably to torture, slavery or any other indignity" [1010].

An important, albeit inadequate, protective rule is contained in Article 23 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, which provides that even in time of war, any party must allow free passage of essential foodstuffs and clothing intended for pregnant women and children under fifteen [1011].

Resort to countermeasures has caused considerable tensions. The UN Commission on Human Rights has expressed concerns about the humanitarian effects of unilateral coercive measures. Calling on States "to refrain from adopting or implementing unilateral measures not in accordance with international law", the Commission rejected

> "the application of such measures as tools for political or

1007. Fourth Report on State Responsibility, by Gaetano Arangio-Ruiz, *supra* footnote 878, para. 82.
1008. *Id.*
1009. *Id.*
1010. Third Report on State Responsibility, by Gaetano Arangio-Ruiz, *supra* footnote 1006, para. 104.
1011. Geneva Convention IV, *supra* footnote 813.

> economic pressures against any country, particularly against developing countries, because of their negative effects on the realization of all human rights of vast sectors of their populations . . ." [1012].

The Commission reaffirmed that "essential goods such as food and medicines should not be used as tools for political coercion, and that in no case may a people be deprived of its own means of subsistence" [1013]. Referring to "unilateral measures not in accordance with international law", some States have expressed their rejection of unilateral measures, which they considered to be "violations of the principles of international law governing relations between States and resulting in serious violations of fundamental human rights" [1014].

The resolution of the Institute of International Law on the protection of human rights and the principle of non-intervention in internal affairs of States provides that "States having recourse to measures shall take into account the interests of individuals and of third States, as well as the effect of such measures on the standard of living of the population concerned" [1015]. During the discussions that led to the adoption of the resolution, De Visscher expressed the wish that the Institute declare

> "que les violations massives et grossières des droits fondamentaux de l'homme justifie de la part de *tout Etat* le recours aux procédures ordinaires de règlement des différends internationaux et, au cas où l'autre Etat refuse de s'y prêter, le recours aux mesures de rétorsion et de représailles non armées ne comportant, par elle-mêmes, aucune violation des droits fondamentaux, individuels ou collectifs, des personnes humaines placées sous la juridiction de l'Etat mis en cause" [1016].

Some State practice confirms that humanitarian concerns limit

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1012. Resolution 1998/11, Commission on Human Rights, Report of the Fifty-fourth Session, ECOSOC, *Official Records*, Supp. No. 3, at 62 (1998).

1013. *Id.*

1014. Human Rights and Unilateral Coercive Measures. Report of the Secretary General, UN doc E/CN.4/1999/44, at 2 (1998). Also Implications and Negative Effects of Unilateral Coercive Measure. Report of the Secretary General, UN doc. E/CN.4/1999/44/Add.1, paras. 1 and 3 (1999).

1015. "The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States", Institute of International Law Declaration, Art. 4, in 63 (2) *Yearbook of the Institute of International Law* 338 (1989).

1016. 63 (I) *Yearbook of the Institute of International Law* 362 (1989).

resorts to countermeasures. The total blockade of the United States on exportations to Libya excluded, for instance, "publications and donations of articles intended to relieve human suffering, such as food, clothing, medicine, and medical supplies intended strictly for medical purposes"[1017]. The current practice of the Security Council with regard to sanctions is far more generous than Article 23 of the Fourth Geneva Convention. It includes food and medical supplies for the entire civilian population, not only for vulnerable groups[1018]. I revert to this question in the chapter on international institutions.

III. Countermeasures and settlement of disputes

Because countermeasures by an injured State are subject to abuse, especially by strong States against weak ones, the ILC attempted to articulate some safeguards. Article 52 reads as follows:

> "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 international wrongful act has ceased, and
>
> *(b)* The dispute is pending before a court or tribunal which has 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."[1019]

There was disagreement in the ILC as to whether negotiations had

1017. Quoted in Fourth Report on State Responsibility, by Gaetano Arangio-Ruiz, *supra* footnote 878, para. 79. The freezing of Argentine assets in the United Kingdom during the Falklands War and the suspension of any Italian activities in Somalia following the murder of an Italian researcher also included humanitarian saving clauses. See *id.*

1018. Security Council resolution 687 (1991) of 3 April 1991, para. 20, excludes medicine, health supplies, foodstuffs, and materials and supplies for essential civilian needs from the scope of sanctions against Iraq.

1019. Draft Articles (2001), *supra* footnote 759.

to be pursued prior to the taking of countermeasures. Such negotiations or other forms of dispute settlement could be lengthy, and could deliberately be drawn out by a State seeking to avoid the consequences of its wrongful act. Moreover, some forms of countermeasures, including some of the most readily reversible forms (for example, the freezing of assets), are effective only if taken promptly. For these reasons, rather than requiring the exhaustion of all available procedures in accordance with Article 33 of the UN Charter as a precondition, draft Article 52 focuses on making available to the State which is the target of countermeasures an appropriate and effective procedure for resolving the dispute. Moreover, it allows the allegedly wrongdoing State to require a suspension of the countermeasures if it co-operates in good faith in a binding third-party dispute settlement mechanism. Such co-operation would not prejudice that State's right to continue to contest that its initial act was unlawful. The article does require that the injured State, before taking countermeasures, seek to resolve the problem through negotiations. This requirement is, however, without prejudice to the taking of urgent interim measures required to preserve the rights of the injured State [1020].

F. Diplomatic Protection

There has been considerable convergence between the guiding principles of diplomatic protection of nationals and of human rights law. The first report of the first Special Rapporteur on State Responsibility attempted to bridge the gap between the competing "national treatment" standard for treatment of aliens, which demands that domestic authorities treat aliens no less favourably than their own citizens (national treatment standard), and the "international minimum" standard, which requires that States treat aliens in a manner satisfying standards uniformly applicable to all States. To do so, the Special Rapporteur recommended the synthesis of human rights and alien protection [1021].

1020. For a critique of the former draft Article 48 (now redrafted as Article 52) as redrafted by the ILC's drafting Committee, see Gaetano Arangio-Ruiz, "Counter-measures and Amicable Dispute Settlement: Means in the Implementation of State Responsibility, A Crucial Issue before the International Law Commission", 5 *Eur. JIL* 20-53 (1994).

1021. See Richard B. Lillich, "The Current Status of the Law of State Responsibility for Injuries to Aliens", in *International Law of State Responsibility for Injuries to Aliens* 1, 18-19 (Richard B. Lillich, ed., 1983).

He observed that the two topics

> "hitherto considered as antagonistic and irreconcilable, can well be reformulated and integrated into a new legal rule incorporating the essential elements and serving the main purposes of both . . . The object of the 'internationalization' (to coin a term) of these rights and freedoms is to ensure the protection of the legitimate interests of the human person, irrespective of his nationality. Whether the person concerned is a citizen or an alien is then immaterial: human beings, as such, are under the direct protection of international law."[1022]

At the time, the ILC declined to pursue this approach to State responsibility. However, in 1996 the ILC returned to diplomatic protection as a topic appropriate for codification and progressive development, appointing a special rapporteur to consider it further. Discussions in the ILC reveal that States exercising diplomatic protection may prefer to ground their actions in basic human rights rather than in the international minimum standard[1023]. Because it was mostly the powerful Western States that have exercised diplomatic protection invoking the so-called international standard of civilization, diplomatic protection has come to be seen by the target States as a tool of intervention: it has become anathema to the developing States. Recently, however, Paraguay and Mexico (not only Germany) have used the Optional Protocol to the 1963 Convention on Consular Relations to bring to the ICJ their complaints against the United States arising from the breach of duty to provide consular notification and access to their nationals detained in the United States (capital punishment cases).

Diplomatic protection of citizens abroad continues to serve a useful purpose for the advancement of human rights. Were diplomatic protection not available for aliens suffering injuries constituting human rights violations (unfair imprisonment or inhumane treatment, for example), there might be no remedy for those aliens with no access to a human rights body[1024].

The first report on Diplomatic Protection by the ILC's present

1022. First Report on State Responsibility, by F. García-Amador, UN doc. A/CN.4/96 (1956), reprinted in [1956] 2 *Yb. Int'l L. Comm'n* 173, 203. Quoted in Lillich, *id.*, at 17-18.

1023. See Report of the International Law Commission on the Work of its Fiftieth Session, *supra* footnote 770, at 77, para. 84.

1024. *Id.*, at 77-79.

special rapporteur, John Dugard[1025], makes an important contribution to the clarification of the relationship between human rights and diplomatic protection. Dugard shows that diplomatic protection can be employed as a means to advance the protection of human rights[1026], but that there is no individual right to diplomatic protection[1027]. It is still regarded as a right of the State to be exercised at its discretion, unless otherwise provided by its national law. However, the classical view that through diplomatic protection the State is asserting its own right is more and more contested. Diplomatic protection is seen rather as a procedural right, while "the material right is vested in the individual"[1028]. In the *LaGrand* case, the ICJ thus recognized that the right to consular notification was an individual right "that may be invoked in this Court by the national State of the detained person"[1029].

Although aliens have rights as human beings, in the absence of human rights treaties — which normally protect citizens and aliens alike — or investment, trade, or commerce and navigation treaties, which grant them remedies, they would have no remedies under international law except through the intervention of their national State[1030]. Human rights have thus not superseded diplomatic protection[1031]. Moreover, for those who believe that a third State should not intervene in violations of human rights except where such violations are systematic and widespread, the possibility of intervention by the national State is not limited by such constraints[1032]. The national State may also extend diplomatic protection for rights as yet unrecognized by human rights treaties.

1025. First report on Diplomatic Protection by Special Rapporteur John Dugard, UN doc. A/CN.4/506 (2000).

1026. *Id.*, at para. 8.

1027. The Rapporteur notes, however, that "there are signs in recent State practice, constitutions and legal opinion of support for the view that States have not only a right but a legal obligation to protect their nationals abroad." *Id.*, para. 87.

1028. *Id.*, at para. 8.

1029. *LaGrand* case *(Germany* v. *United States)*, International Court of Justice, Judgment of 27 June 2001, para. 77.

1030. First Report on Diplomatic Protection by Special Rapporteur John Dugard, *supra* footnote 1025, para. 22.

1031. For instance, the International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (1991, not in force) which sets up a monitoring body and establishes an optional right of individual petition specifies that these mechanisms are not intended to replace the right of diplomatic protection. *Id.*, at para. 27.

1032. *Id.*, at para. 60.

An application presented by Denmark against Turkey for alleged violations of the European Convention of Human Rights "on behalf" of a Danish national is of special interest. Denmark's application combined both elements of diplomatic protection challenging infringements by a foreign State of the rights of a national of the complaining State and elements of enforcement of an obligation *erga omnes contractantes* — challenging domestic violations by a foreign State of its own nationals' human rights. Denmark requested the Commission of Human Rights to examine the treatment by Turkish authorities of a Danish citizen detained in Turkey [1033].

Turkey raised the objection of non-exhaustion of local remedies, but the Court rejected it at the admissibility stage on the ground that local remedies need not be exhausted when challenging administrative practices. The issue was thus joined to the merits and the application held admissible [1034].

What is particularly interesting here is that a case which traditionally would have been handled as a bilateral matter under the law of diplomatic protection was instead submitted as a human rights claim to an international court. The Court approved the Friendly Settlement of 5 April 2000, which addresses aspects of both diplomatic protection and human rights. The Government of Turkey agreed to pay the Danish Government *ex gratia* an amount of money, which includes legal expenses. Turkey acknowledged and expressed regret over the occurrence of occasional and individual cases of torture and ill-treatment in Turkey and committed to take steps to combat such practices. Both Governments agreed that the use of inappropriate police interrogation techniques constitutes a violation of Article 3 of the Convention and should be prevented in the future.

Where inter-State procedures under human rights treaties are available and efficient, as under the European Convention on Human Rights, States may prefer this avenue to bilateral protests and processes. Thus, for example, Germany was one of the parties (the United Kingdom and the European Commission on Human Rights were the other parties) that brought the *Soering* case to the European Court of Human Rights [1035]. Similarly, in the *Selmouni* case, both

1033. *Denmark* v. *Turkey*, European Court of Human Rights (First Section), Appl. 34382/97, Decision as to Admissibility of 8 June 1999, at 3 (mimeographed text).

1034. *Id.*, at 34-35.

1035. See *Soering* v. *United Kingdom*, *ECHR Reports* (Ser. A), Vol. 161.

the Netherlands and the Commission brought the case before the Court [1036].

This blending of human rights and diplomatic protection is apparent in the work of the UN Commission on Human Rights. The applicability of human rights instruments to aliens arose in 1972 in connection with the expulsion of persons of Asian origin from Uganda [1037]. A study on the applicability of human rights instruments to persons residing in a foreign country was entrusted to a rapporteur (Baroness Elles) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, who proposed the adoption of a declaration on the subject [1038]. The *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live* was finally adopted by the General Assembly in 1985 [1039]. The Declaration applies to "any individual who is not a national of the State in which he or she is present". Comparing the Declaration (at the time only a draft) and the human rights provisions found in universal conventions, Richard Lillich argued that:

> "[The approach] does not so much 'bridge the gap' between the international minimum standard and the national treatment doctrine, as it subsumes the newly emerging international human rights norms under a recast and revitalized international minimum standard which, it is hoped, will eventually be accepted by all States regardless of their past predilections or present ideologies." [1040]

Another illustration of the gradual overlap between human rights standards and standards applicable to aliens may be found in the Restatement (Third) of the Foreign Relations Law of the United States. The reporters stated that the

> "overriding organizing principle of Part VII [which concerns 'Protection of Persons'] is the conjunction of the international

1036. See *Selmouni* v. *France*, European Court of Human Rights, Judgment of 28 July 1999, 1999-V Eur. CHR, available at http://www.echr.coe.int/eng/Judgments.htm.

1037. See Lillich, *supra* footnote 1021, at 21-22.

1038. See International Provisions for Protecting the Human Rights of Non-Citizens, UN doc. E/CN.4/Sub.2/392/Rev.1 at 53 (1980).

1039. Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, General Assembly resolution 40/144 of 13 December 1985, UN doc. 40, *GAOR* (Supp. No. 53) at 252 (1986).

1040. Lillich, *supra* footnote 1021, at 23.

> law of human rights and the customary law concerning responsibility of States for injury to aliens" [1041].

On balance, the convergence of human rights and diplomatic protection standards appears to have raised thresholds of acceptable treatment for both aliens and nationals. As Chen has observed,

> "In short, the principal thrust of the contemporary human rights movement is to accord nationals the same protection formerly accorded only to aliens while at the same time raising the standard of protection for all human beings, nationals as well as aliens, far beyond the minimum international standard developed under earlier customary law." [1042]

At the same time, the increasing access of individuals to investment settlement mechanisms has tended to reduce the importance of diplomatic protection. A case in point is the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) established in 1965 under the auspices of the World Bank [1043]. Under the ICSID Convention, the Centre provides facilities for the conciliation and arbitration of disputes between member countries and investors of other member countries. Private investors may thus litigate cases against sovereign States on equal footing. Ratification of the Convention does not, however, give jurisdiction to the Centre *ipso facto*: consent to ICSID's jurisdiction must be stipulated in an investment treaty, a national law or in an investment contract. Many national investment laws, arbitration clauses in hundreds of bilateral investment treaties (BITs), and the dispute settlement provisions of numerous multilateral conventions [1044] require parties to submit disputes to ICSID for resolution. Once parties consent to an ICSID arbitration, their consent cannot be unilaterally withdrawn. All States parties to the Convention, whether

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1041. Lung-Chu Chen, "Reviews of the Restatement (Third) of the Foreign Relations Law of the United States: Protection of Persons (Natural and Juridical)", 14 *Yale J. Int'l L.* 542, 544 (1989).

1042. *Id.*, at 550.

1043. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force on 14 October 1966, 60 *AJIL* 892 (1966). As of 27 October 1998, 131 States were parties to the Convention.

1044. ICSID arbitration is thus specified among the dispute resolution provisions of the North American Free Trade Agreement, the Energy Charter Treaty, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur.

or not parties to the dispute, are required to recognize and enforce the arbitral awards issued by the Centre [1045].

The emergence of ICSID as a credible channel for foreign investors to settle disputes with States has reduced the importance of diplomatic protection for such commercial interests. Moreover, the ongoing erosion of sovereign immunity in our time allows alien individuals and corporations direct redress against States in their national courts, further diminishing the traditional dependence on the diplomatic protection of their Governments.

1045. *Id.*

CHAPTER V

SUBJECTS OF INTERNATIONAL LAW

In classical international law, States only were subjects of international law, individuals were considered mere objects. Is this paradigm still true ?

A. The State

I. Recognition of States

Under the traditional theory of international law, recognition of States was based on a set of conditions that had to be met by the entity aspiring to recognition : it had to have a defined territory, a permanent population, an effective government and capacity to enter into relations with other States [1046]. Effective control was not seen as requiring democratic consent [1047].

Since the early nineteenth century, however, there have been occasions when recognition has been influenced by the relationship between the Government and the governed and by human rights considerations. Historic examples include the non-recognition of the American Confederacy (because of slavery) by the United Kingdom, the recognition of Central and South American States and of Ethiopia (based on commitments to end the slave trade) [1048], and the recognition of States spawned by the Austro-Hungarian Empire after World War I (upon a guarantee of minority rights as a condition for admission to the League of Nations) [1049].

1046. Sean D. Murphy, "Democratic Legitimacy and the Recognition of States and Governments", 48 *Int'l & Comp. LQ* 545, 546 (1999). These criteria are derived from the 1933 Montevideo Convention on the Rights and Duties of States, 165 *LNTS* 19 (1936). See Thomas D. Grant, "Defining Statehood : The Montevideo Convention and Its Discontents", 37 *Colum. J. Transnat'l L.* 403 (1999). See generally, Thomas M. Franck, "The Emerging Right to Democratic Governance", 86 *Am. J. Int'l L.* 46 (1992). See also Jonathan I. Charney, "Self-Determination : Chechnya, Kosovo, and East Timor", 34 *Vand. J. Transnat'l L.* 455 (2001).

1047. See Murphy, *supra* footnote 1046, 48 *Int'l & Comp. LQ*, at 547.

1048. Christian Hillgruber, "The Admission of New States to the International Community", 9 *Eur. J. Int'l L.* 491, 507 (1998).

1049. Murphy, *supra* footnote 1046, at 549-551.

After World War II, while most human rights instruments did not address democratic legitimacy, they nonetheless provided important benchmarks for recognition of new States [1050]. The nearly universal non-recognition of Southern Rhodesia offers a case in point [1051]. Writers have nonetheless rightly observed that

> "It cannot . . . be argued that the principle of self-determination, or the human right to free elections, was fully incorporated into recognition practice during the Cold War era. Far too many States were formed and welcomed into the international community which were non-democratic in nature (e.g. virtually all African States)." [1052]

Following the break-up of the former Soviet Union, the United States and the Member States of the European Communities announced that they would recognize new States by taking into account not only the classic criteria of statehood, but also "adherence to democracy and the rule of law, including respect for the Helsinki Final Act and the Charter of Paris" [1053]. The EC's "Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" required

> "— respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
> — guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE" [1054].

These requirements were applied in a flexible manner. The declaration itself acknowledged that recognition based on these requirements was "subject to the normal standards of international practice and the political realities in each case" [1055]. For instance, Nagorno-

1050. *Id.*, at 552.
1051. Hillgruber, *supra* footnote 1048, at 494-495.
1052. Murphy, *supra* footnote 1046, at 553.
1053. *Id.*, at 558.
1054. Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union", Brussels, The Hague, 16 December 1991, reprinted in 31 *ILM* 1486-1487 (1992).
1055. *Id.*, at 547.

Karabakh in Azerbaijan, and Chechnya in the Russian Federation, were not recognized by any States, although the popular/separatist movements concerned exercised control over significant territory. Sean Murphy has thus noted:

> "The US statement and EC Declaration were quite significant; they expressly conditioned recognition on the basis of democratic rule. Yet, the EC declaration . . . provided ample opportunity to suppress the emergence of new States from regions within the Soviet republics." [1056]

Nevertheless, the EC Guidelines had a significant resonance, were frequently cited by diplomats, politicians and writers and, therefore, "might well have informed international practice" [1057].

In the case of the dissolution of Yugoslavia, the Badinter Arbitration Commission issued a number of rulings on whether the new Republics had met the EC recognition criteria. The reports, or "Opinions", refer to the requirements by the entities concerned to comply with fundamental human rights, the rights of peoples and minorities, the rule of law and free elections. Having found that Slovenia and Macedonia had met those criteria, it recommended their recognition [1058]. Although it found that Croatia had not satisfied the EC criteria, in particular as regards protection of minorities [1059], the EC recognized both Slovenia and Croatia in January 1992. The recognition of Macedonia was delayed because of Greek objections until the controversy associated with the name of the new State was resolved.

As regards Bosnia-Herzegovina, the Commission requested that a referendum be held to establish the popular will [1060]. This decision may have reflected

> "an additional criterion for recognition of statehood in cases of secession, based on the principle of self-determination and on

1056. Murphy, *supra* footnote 1046, at 559.
1057. Grant, *supra* footnote 1046, at 443.
1058. Conference on Yugoslavia, Arbitration Commission Opinion No. 7, 11 January 1992, reprinted in 31 *ILM* 1512 (1992), and Opinion No. 6, 11 January 1992, reprinted in 31 *ILM* 1507 (1992). See also Opinions 1-5, reprinted in *id*., at 1494-1507.
1059. Conference on Yugoslavia, Arbitration Commission Opinion No. 5, 11 January 1992, reprinted in 31 *ILM* 1503 (1992).
1060. Conference on Yugoslavia, Arbitration Commission Opinion No. 4, 11 January 1992, reprinted in 31 *ILM* 1501 (1992).

> considerations of general international law, including human rights law" [1061],

going beyond previous standards on minority protection [1062].

Obviously, this additional requirement was informed by the particular circumstances of the Bosnian situation: "a republic, on the verge of a civil war, containing three sizeable ethnic groups, any two of which outnumbered the third, and which had close links to neighboring republics" [1063]. Following a referendum (1 March 1992), Bosnia-Herzegovina was recognized by the EC (6 April 1992).

After an examination of State practice on recognition in the 1990s, Sean Murphy fairly concludes that:

> "In sum, notions of democratic legitimacy are certainly present in contemporary practice concerning recognition of States. However, the evidence of these notions is not uniform, and it derives exclusively from the practice of States that are themselves democratic. Further, there is no effort even by democratic States to apply these notions to existing States where governments lack legitimacy." [1064]

II. Admission to international organizations

While distinct from the recognition of statehood, admission to international organizations necessarily assumes recognition as a State. Few international organizations have established admission procedures based on an assessment of credentials derived from democratic principles or respect for human rights of the entity seeking recognition.

Five credentials must be fulfilled to satisfy the requirements for a State's admission to the United Nations: the applicant must be a State, must be peace-loving, must accept the obligations contained in the Charter, must be able to carry out those obligations, and must be willing to do so. Of course, in normal circumstances the peace-loving character of an applicant State was perfunctorily assumed. In

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1061. Marc Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", 86 *AJIL* 569, 593 (1992), quoted in Murphy, *supra* footnote 1046, at 563.
1062. Hillgruber, *supra* footnote 1048, at 501.
1063. Murphy, *supra* footnote 1046, at 563.
1064. *Id.*, at 566.

its Advisory Opinion on *Conditions of Admission of a State to Membership in the United Nations*, the ICJ rejected adding conditions to those referred to in Article 4 of the Charter[1065], whereby "peace-loving States . . . accept the obligations contained in the . . . Charter and, in the judgment of the Organization, are able and willing to carry out these obligations"[1066]. Although the Court did not exclude the possibility that factors reasonably connected with conditions stated in Article 4 would be considered, in practice the human rights record of the applicant State has not seriously been taken into account in considering applications for admission to the United Nations[1067].

In contrast to the United Nations, both the CSCE/OSCE and the Council of Europe have insisted on the acceptance of broadly gauged principles of democracy as a condition for the admission of new States. At the founding of the Helsinki process in 1972, membership was based essentially on geography. All European States were invited to join along with the United States, Canada and the Soviet Union. Albania was the only State to decline the invitation. For the next 15 years, there was no serious consideration of membership expansion. The majority of participating States considered that the Helsinki process should remain geographically limited. In 1990, Albania was admitted as an "observer". The subsequent decision of the CSCE Council of Ministers admitting Albania as a full participating State (June 1991) required Albania to adopt the Helsinki Final Act, the 1990 Charter of Paris for a New Europe and other basic documents of the CSCE. Under the Charter of Paris, the participating States undertook to protect human rights and fundamental freedoms, democracy and justice[1068].

To verify compliance, applicant States were required to receive a rapporteur mission organized by the CSCE Chair-in-Office.

By and large, this pattern of admission has been followed for countries admitted as independent States following the disintegration of the Soviet Union, Yugoslavia and Czechoslovakia: the country seeking admission would send a letter to the Chair-in-Office accepting all the CSCE requirements. A rapporteur mission would then be sent. There were, however, some deviations from this pattern. The

1065. *ICJ Reports 1948*, at 56 and 63 (28 May).
1066. Charter of the United Nations, Art. 4 (1).
1067. See generally Konrad Ginther, in *The Charter of the United Nations: A Commentary* 158 (Bruno Simma, ed., 1995).
1068. Charter of Paris for a New Europe (1990).

Baltic States were admitted without being required to accept rapporteur missions, largely in deference to their previous status of having been occupied. Estonia and Latvia eventually hosted a mission that examined issues related to their Russian-speaking inhabitants and the presence of Russian troops. Russia was treated as the successor State of the Soviet Union and inherited the Soviet Union's seat in the CSCE. By the time the States spawned by the break-up of Yugoslavia were admitted to the CSCE, conflicts erupted and the interest in sending *pro forma* rapporteur missions waned. Instead, a variety of *ad hoc* missions were established to examine specific problems. Macedonia's request for admission was delayed by Greek objections. Yugoslavia's (Serbia-Montenegro) participation was suspended in May 1992 to be renewed only after the election of Vojislav Kostunica as its President and Yugoslavia's admission as a new member to the United Nations (1 November 2000).

In addition to its focus on military and security issues, the CSCE, at least since the Copenhagen Conference on Human Dimension (1990), has emphasized democratic legitimacy and the rule of law, in addition to humanitarian and human rights questions [1069].

The process of admission of new States to the Council of Europe reflects these trends. Before the Parliamentary Assembly recommends that the Committee of Ministers invites an applicant State to become a member, the PA must satisfy itself that the applicant has met the conditions of Article 3 of the Statute of the Council of Europe: that it accepts the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and that it is willing to collaborate sincerely and effectively in the realization of the aims of the Council [1070].

Reports and resolutions of the Parliamentary Assembly pertaining to applicant States demonstrate that democracy and the rule of law are factors in the admission process [1071]. When recommending that the Committee of Ministers invite a non-member State to become a member, the Parliamentary Assembly requires that the applicant commits to (i) sign and ratify promptly after accession the European Convention on Human Rights; and (ii) consent to the individual

1069. Meron, "Democracy and the Rule of Law", 153 *World Affairs* 23 (1990).

1070. Statute of the Council of Europe, Art. 3.

1071. See Meron and Jeremy S. Sloan, "Democracy, Rule of Law and Admission to the Council of Europe", 26 *Israel YB Hum. Rts.* 137, 144-147 (1997).

right of petition to the European Commission (now the European Court) of Human Rights and to the compulsory jurisdiction of the European Court of Human Rights. Of course, the Convention as amended by Protocol 11 integrates the right of States and the right of any person, non-governmental organization or group of individuals to refer to the Court complaints of breaches or applications. In some cases, the Assembly has required, in addition, that the applicant State sign and ratify certain Protocols. In the cases of Latvia, Moldova, Albania, Ukraine and Macedonia, the Assembly required them, upon accession to the Council of Europe, to sign and ratify within a specified time not only the European Convention, but also Protocols 1, 2, 4, 6, 7 and 11. The Assembly also required that the applicant States commit themselves to sign and ratify within one year the Framework Convention for the Protection of National Minorities [1072].

The Parliamentary Assembly's procedure for Russia's admission was temporarily suspended in 1994 as a result of the events in Chechnya and a report of eminent jurists that concluded that Russia's legal order did not meet the Council of Europe standards. The admission procedure was resumed in the fall of 1995. Although the PA's Committee on Legal Affairs and Human Rights determined that the Russian Federation did not fulfil the conditions for membership laid down in Articles 3 and 4 of the Statute, it also presented arguments in favour of Russia's admission. Acting on the premise that Russia's admission will improve its chances for achieving such conditions, the Parliamentary Assembly finally recommended admission [1073].

Questions of expulsion or suspension of a State for reasons related to democracy and human rights have arisen in some intergovernmental organizations. Like the Council of Europe, the OAS emphasizes the value of democracy. Article 2 *(b)* of the OAS Charter states that one of the "essential purposes" of the OAS is to promote and consolidate representative democracy. The OAS has amended its Charter to permit suspension from participation in the sessions of the OAS of a member State whose "democratically constituted government has been overthrown by force" [1074]. The

1072. *Id.*, at 147-148.
1073. *Id.*, at 151-154.
1074. Charter of the Organization of American States, as amended, Art. 9; see generally, Henry J. Steiner, "Political Participation as a Human Right", 1 *Harv. YB Hum. Int'l L.* 77 (1988).

Declaration of Quebec City adopted by the Summit of the Americas on 22 April 2001 went further. Emphasizing the commitment of the OAS to the rule of law and democracy, the Summit agreed that

> "any unconstitutional alteration or interruption of the democratic order in a State of the Hemisphere constitutes an insurmountable obstacle to the participation of that State's government in the Summit of the Americas process" [1075].

Greece, under the repressive regime of the Colonels, faced with an inter-State complaint submitted to the European Court of Human Rights and with an adverse report from the European Commission on Human Rights, withdrew from the Council of Europe in 1967. Also in 1967, the EC/EU suspended (until 1974) its agreement with Greece [1076]. Greece rejoined the Council under the Karamanlis Government in 1974 [1077].

Because of "clear, gross and uncorrected violations of the CSCE commitments", the CSCE participating States agreed by an unprecedented consensus-minus-one decision to suspend Yugoslavia (Serbia-Montenegro) from decision-making regarding the on-going conflict in the former Yugoslavia. This decision preceded subsequent suspension of Yugoslavia.

Under the Treaty on the European Union as modified by the Treaty of Amsterdam, a Member State may be suspended from certain rights derived from the Treaty if found in breach of Article 6 (1) of the Treaty [1078], which provides that "[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".

The EU has been increasingly active in promoting minority rights in Eastern Europe, although the record of some of its members in treatment of their own minorities has been less than perfect [1079].

1075. Final Declarations-Declaration of Quebec City.
1076. Jack Donnelly, *International Human Rights* 71 (1998).
1077. Francis G. Jacobs and Robin C. A. White, *The European Convention on Human Rights* 51-52 (2nd ed., 1996).
1078. Treaty on European Union, as amended, Arts. 6 and 7 (*ex* Arts. F and F.1).
1079. Gaetano Pentassuglia, "The EU and the Protection of Minorities: The Case of Eastern Europe", 12 *Eur. J. Int'l L.* 3-5 (2001).

III. Recognition of Governments

As in the case of recognition of States, recent State practice indicates that democratic rule and human rights have become part of the calculus in the recognition of Governments. This is not an entirely new development. Already at the beginning of the twentieth century, President Wilson endorsed what was then known as the "Tobar doctrine" (named after the Foreign Minister of Ecuador), which urged Western hemisphere States to deny recognition to Governments that took power by non-constitutional means [1080]. During the Cold War, some Western States refused to recognize for a number of years the Governments of China, North Korea and North Vietnam. Experience shows, however, that even in cases of violent change of the Government which is not cured by the introduction of a democratic regime, recognition is in most cases delayed, rather than definitely denied.

Under the traditional international law theory, there is no need for a special recognition of new Governments that come to power through constitutional processes. Recognition is thus routinely granted when the new Government exercises effective control over the State. That does not mean that extraneous conditions, such as recognition of debt obligations, are not sometimes insisted upon, and have the effect of delaying recognition [1081]. "In determining whether to recognize another government, States do not find the democratic quality of the government as decisive; other factors are taken into consideration as well." [1082] To improve their prospects for speedy recognition, groups that overthrow an un-democratic Government often commit themselves to democracy and human rights [1083].

Haiti provides an example of effective action against the overthrow of a democratically elected Government. Although the Haitian military exercised effective control over the territory, their *coup* was condemned by the international community and normal diplomatic relations with the military Government were not established. The exiled Aristide Government continued to be recognized as the legitimate Government [1084] and, after the United States intervention on the ground, was restored to power. However, this case is more the

1080. Murphy, *supra* footnote 1046, at 569.
1081. *Id.*, at 566-567.
1082. *Id.*, at 572.
1083. *Id.*, at 573-574.
1084. *Id.*, at 545.

exception than the rule [1085]. In situations where democratic Governments have been overthrown, non-recognition has not always followed. Diplomatic relations are often established with a new Government with the justification that they may promote a return to democratic rule [1086], as in the case of Pakistan [1087].

B. Non-State Actors

I. The individual as subject of international law

In the 1990s, Sir Robert Jennings spoke of the rapid growth of a "new kind of international law which directly concerns individuals and entities other than States" [1088]. He attributed that phenomenon to the development of the law of human rights, which presented "a radical change from the traditional law which protected individuals only in the capacity of aliens, and only then in terms of the injury done not to the individual but to the State of his nationality" [1089]. "Today, the law of human rights has a primary judicial assumption that individuals can and do enjoy 'rights' directly from international law." [1090] Jennings highlighted additional developments. International law has been influenced by the recognition that the United Nations has the capacity to bring international claims directly against a State [1091], and thus has a measure of international personality, and by the increasing empowerment of non-State entities such as multinational corporations and NGOs. Another factor is the growing role of international law in domestic courts [1092]. The international legal personality of international organizations, first recognized in the Advisory Opinion of the ICJ on *Reparation for Injuries Suffered in the Service of the United Nations* [1093] is now universally accepted. The European Communities have acquired a legal personality that in some matters even

1085. *Id.*, at 578.
1086. *Id.*, at 574-575.
1087. See Ilias Bantekas and Zahid F. Ebrahim, "International Law Implications from the 1999 Pakistani Coup d'Etat", *ASIL Insight* (November 1999).
1088. Robert Y. Jennings, "The Role of the International Court of Justice", 68 *Brit. YB Int'l L.* 56, 58 (1997); "An International Lawyer Takes Stock", 39 *Int'l & Comp. LQ* 513, 522 (1990).
1089. Jennings, 39 *Int'l & Comp. LQ* 522.
1090. Jennings, *supra* footnote 1088, at 68 *Brit. YB Int'l L.* 58.
1091. Jennings, *supra* footnote 1088, at 39 *Int'l & Comp. LQ* 522 (citing *Reparation for Injuries* case), *ICJ Reports 1949* 174.
1092. Jennings, *supra* footnote 1088 at 68 *Brit. YB Int'l L.* 58.
1093. Jennings, *supra* footnote 1088, at 39 *Int'l & Comp. LQ* 522.

replaces that of its member States[1094]. The Palestine Liberation Organization has been given quasi-State status in the United Nations and has enjoyed the privilege of signing agreements with States as well as some diplomatic privileges and immunities.

A telling illustration of the changing conception of the role and status of non-State actors in international law may be found in the successive editions of *Oppenheim's International Law*. Both the 8th and the 9th editions are supportive of the recognition of individuals as subjects of international law, but regard individuals as subjects of international law only in limited circumstances. In the 8th edition, published in 1955, Hersch Lauterpacht observed that while international law requires States to grant certain privileges and rights to individuals, it is through municipal law that the rights are actually granted[1095]. He recognized, albeit with a caveat, the role of international law:

> "It is therefore quite correct to say that individuals have these rights in conformity with, or according to, International Law, provided it is remembered that, as a rule, these rights would not be enforceable before national courts had the several States not created them by their Municipal Law."[1096]

Although, in general, treaties impose obligations on States to grant certain rights to individuals through their municipal laws[1097], individual rights under international law are not always solely derivative. Lauterpacht recognized that States may, and occasionally do, confer directly on individuals international rights that can be enforced by individuals in their own names before certain international tribunals[1098]. International law may also impose direct duties on individuals (in particular under the laws of war), thus enhancing the trend to treat individuals as subjects of international law[1099].

In his seminal 1950 book, Hersch Lauterpacht explained that the problem was not so much with the acceptance of the concept of the individual as a subject of international law, as with the enforce-

1094. *Oppenheim's International Law* 20 (9th ed., R. Jennings and A. Watts, eds., 1992).
1095. *Oppenheim's International Law* 637 (8th ed., H. Lauterpacht, ed., 1955).
1096. *Id.*
1097. *Id.*, at 637-638.
1098. *Id.*, at 638.
1099. *Id.*, at 639, 20-21.

ability of the individual's rights, for which the interposition of the State was generally necessary:

> "The fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them. Thus, in relation to the current view that the rights of the alien within foreign territory are the rights of his State and not his own, the correct way of stating the legal position is not that the State asserts its own exclusive right but that it enforces, in substance, the right of the individual who, as the law now stands, is incapable of asserting it in the international sphere." [1100]

The 9th edition (edited by Robert Jennings and Arthur Watts in 1992) notes that "[m]any of [the] rules [of international law] are directly concerned with regulating the position and activities of individuals; and many more indirectly affect them". States may confer upon individuals international rights which do not need to be enacted by municipal legislation and which individuals may enforce directly before international tribunals [1101]. Non-State actors such as individuals and private companies may, in certain spheres — insurgency, international criminal responsibility, piracy, refugees, human rights — enter into direct international legal relationships with States [1102]. The 9th edition concludes that

> "[i]t is no longer possible, as a matter of positive law, to regard States as the only subjects of international law, and *there is* an increasing disposition to treat individuals, within a limited sphere, as subjects of international law" [1103].

Both editions recognize that individuals may be held directly responsible under international law not only for such classic offences as slave trading or piracy, but also for violations of the laws of war

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1100. Hersch Lauterpacht, *International Law and Human Rights* 27 (1950), quoted in Rosalyn Higgins, *Problems and Process: International Law and How We Use It* 53 (1994).

1101. *Oppenheim's International Law* (9th ed.), *supra* footnote 1094, at 846-847.

1102. *Id*., at 847-848.

1103. *Id*., at 848-849 (emphasis added).

and crimes against humanity [1104]. The 9th edition reflects the developments that have been taking place in the field of international criminal law since the early 1950s with regard to such international crimes as genocide, grave breaches of Geneva Conventions and apartheid, and recognizes the "increasing trend towards the expansion of individual responsibility directly established under international law" [1105]. These developments culminate with the Rome Statute of the International Criminal Court.

A striking difference between the 8th and 9th editions emerges in their treatment of human rights. The 8th edition maintained the traditional view that

> "apart from obligations undertaken by treaty, a State is entitled to treat both its own nationals and Stateless persons at [its] discretion and that the manner in which it treats them is not a matter with which International Law, as a rule, concerns itself" [1106].

The 9th edition recognizes the fundamental changes that have occurred in those previous rules of international law that did not address the basic rights of a human being [1107]. To the extent that international law acts on individuals *per se*, they become subjects of international law [1108]. The 9th edition also notes that other non-State actors such as NGOs and private corporations may have certain attributes of international personality [1109]. Significantly the 9th edition omits the 8th edition's reference to individuals as "objects of international law".

The dichotomy between "subject" and "object" of international law has been altogether rejected by some commentators. Rosalyn Higgins rightly complains that this dichotomy has "constrained" the terms of individuals' participation in international law [1110]. In her

1104. *Oppenheim's International Law* (8th ed.), *supra* footnote 1095, at 20-21, 341-342; *Oppenheim's International Law* (9th ed.), *supra* footnote 1094, at 505-508; Aldrich, "Individuals as Subjects of International Humanitarian Law", in *Theory and Practice of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* 851 (Jerzy Makarczyk, ed., 1996).

1105. *Oppenheim's International Law* (9th ed.), *supra* footnote 1094, at 506.

1106. *Oppenheim's International Law* (8th ed.), *supra* footnote 1095, at 641.

1107. *Oppenheim's International Law* (9th ed.), *supra* footnote 1094, at 850.

1108. *Id. Oppenheim's International Law* (8th ed.), *supra* footnote 1095, at 17.

1109. *Oppenheim's International Law* (9th ed.), *supra* note 1094, at 21-22.

1110. Higgins, *supra* footnote 1100, at 49-50.

model of international law as a "decision-making process", she argues that:

> "there are no 'subjects' and 'objects', but only *participants*. Individuals *are* participants, along with States, international organizations, . . . multinational corporations, and indeed private non-governmental groups" [1111].

Criticizing the nationality of claims rule, Higgins applies the distinction between the recognition of a right and its enforceability, a distinction made by Lauterpacht for rights derived from treaties, to general international law [1112]. Elsewhere, Higgins suggests that to the extent that individuals come into contact with matters regulated by international law, there is no reason of principle why they should be beyond the reach of that law [1113].

There has been a growing acceptance of both the rights and the status of the individual in international law. Tomuschat thus concludes that "the individual has acquired a status under international law" [1114]. Of course, despite the continuing controversy on whether the individual already is a subject of international law, there is no doubt that he has acquired a status in international law. Nevertheless, despite some progress, remedies available to the individual still lag behind rights and principles. Stephan Hobe has written that the growing recognition by the Security Council that grave violations of human rights may constitute a threat to international peace and security, the strengthening of the conventional means of enforcement of human rights, as, for example, by individual access to the European Court of Human Rights, and the recognition of individual criminal responsibility, as evidenced by the establishment of the two *ad hoc* international criminal tribunals, demonstrate the enhanced status of the individual under international law [1115]. In a report on diplomatic

1111. *Id*., at 50. The British official Training Directive (Army) (ITD(A)6) states that the law of armed conflict "is that part of international law which regulates the rights and duties of governments, States and individuals during an armed conflict to which the law applies, whatever the cause of that conflict".

1112. *Id*., at 52-54.

1113. Rosalyn Higgins, "The Reformation in International Law", in *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science* 207, 212-213 (Richard Rawlings, ed., 1997).

1114. Christian Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", 281 *Recueil des cours* 150 (1999).

1115. Stephan Hobe, "Individuals and Groups as Global Actors: The Denationalization of International Transactions", in *Non-State Actors as New Subjects of International Law* 115, 121-126 Veröffentlichungen des Walther-Schücking-

protection prepared for the International Law Commission, John Dugard agrees with Higgins that the debate over subject/object dichotomy is not helpful. He observes that, while individuals may exercise rights under human rights and investment protection treaties, their remedies are still limited. Individuals clearly have more rights than they used to have, but whether this makes them a subject of international law "is open to question" [1116].

II. Individual access to international organs and institutions

(a) *Trade organizations' dispute settlement mechanisms*

(i) *The World Trade Organization (WTO)*

The WTO [1117] dispute settlement mechanism is the successor to the dispute settlement mechanism embodied in Articles XXII and XXIII of the GATT (1947) [1118]. Article 3 (1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("Rules and Procedures") affirms that the principles for the management of disputes under Articles XXII and XXIII continue to apply to the WTO's system [1119]. As in GATT, access to the WTO's dispute settlement mechanism is limited to Member States [1120]. Private parties may not directly bring a claim, though they may have some input on the dispute settlement process. In their internal legislation, Members, including the United States and the European Community, have granted private parties the right to request initiation of WTO dispute

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Instituts für Internationales Recht an der Universität Kiel, Band 125, at 115-135 (Rainer Hofmann, ed., 1999). See also Anne-Marie Slaughter, "An International Constitutional Moment", 43 *Harv. Int'l LJ* 1, 13 (2002) (who speaks of the "individualization of international law").

1116. John Dugard, First Report on Diplomatic Protection, UN doc. A/CN.4/506, paras. 23-24 (2000).

1117. Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 15 April 1994 ("Uruguay Round Final Act"), Agreement Establishing the World Trade Organization, 33 *ILM* 1125, 1144.

1118. General Agreement on Tariffs and Trade, signed on 30 October 1947, 55 *UNTS* 187 (1950).

1119. Uruguay Round Final Act. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, 33 *ILM* 1125, 1227 (1994).

1120. Under the Rules and Procedures, Members begin with consultations, Art. 4, 33 *ILM* at 1228-1229. If the consultations fail, the complaining Member can request that a three-person arbitration panel be formed. Art. 4.7, *id.*, at 1229. The panel's report is submitted to the Dispute Settlement Body. Art. 16, *id.*, at 1235. A party to the dispute may appeal the decision of the panel to a standing Appellate Body, Art. 17, *id.*, at 1236-1237.

settlement procedures [1121]. Private parties may thus be the actual movers behind some of the cases [1122].

Often raised in the context of transparency of the Organization, NGOs' participation in the WTO dispute settlement proceedings has been a contentious issue [1123]. Article 13 of the Rules and Procedures grants the panels "the right to seek information and technical advice from any individual or body which it deems appropriate" [1124]. However, a panel must give notice to a Member before it seeks information from any individual or body within the Member's jurisdiction [1125]. Although Article 13 speaks of a panel's right to seek information, the Appellate Body accepted several unsolicited NGOs' *amicus* briefs, thus, at least potentially, enabling non-governmental bodies to have a greater voice in the WTO litigation process. In the case of *United States — Import Prohibitions of Certain Shrimp and Shrimp Products*, NGOs submitted two *amicus* briefs to the Panel. The United States urged the Panel to consider the information contained in those briefs, arguing that the Rules did not prohibit the panels from considering unsolicited information [1126]. The Panel refused to accept the briefs, insisting that "the initiative to seek information . . . rests with the Panel [and that] in any other situations, only parties and third parties are allowed to submit information directly to the Panel" [1127]. The Appellate Body overturned this finding, stating that "[a] panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether *requested by a panel or not*" [1128]. In a more recent decision, the Appellate Body went even further, holding that in the absence of any rules on the matter it had the right to accept and consider *amicus* briefs whenever it deemed it pertinent and useful to do so [1129].

1121. Ernst-Ulrich Petersmann, "Constitutionalism and International Organizations", 17 *Nw. J. Int'l L. & Bus.* 398, 468 (1996/97).

1122. Transcript of Discussion Following Presentation by Kenneth W. Abbott, 1992 *Colum. Bus. L. Rev.* 151, 161 (1992).

1123. Dukgeun Ahn, "Environmental Disputes in the GATT/WTO: Before and after US-Shrimp Case", 20 *Mich. J. Int'l L.* 819, 841 (1999).

1124. Rules and Procedures, Art. 13 (1), 33 *ILM* at 1234.

1125. *Id.*

1126. Ahn, *supra* footnote 1123, at 839.

1127. WTO, WT/DS58/R, para. 7.8, cited in Ahn, *supra* footnote 1123, at 840.

1128. WTO, WT/DS58/AB/R, paras. 106 and 108, cited in Ahn, *supra* footnote 1123, at 841 (emphasis added).

1129. WTO doc. WT/DS138/AB/R, para. 42 (10 May 2000), cited by Philippe Sands in "Turtles and Torturers: The Transformation of International

Such decisions demonstrate some "responsiveness of the WTO to global demands"[1130]. There has thus been some progress since the earlier adoption by the General Council of the WTO of "Guidelines for Arrangements on Relations with Non-Governmental Organizations" (1996), which stated that "there is a broadly held view [among Members] that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings"[1131].

Proposals to allow greater NGO participation in policy making (e.g., attending meetings of the General Council and working committees, and presence in multilateral trade negotiations) and in the dispute settlement process of the WTO (e.g., filing of right of *amicus* briefs or even initiating proceedings) have been advanced[1132]. Such proposals would ensure that interests and data of concern to civil society are presented to the WTO bodies, and would increase transparency and support for the WTO[1133]. Critics invoke the lack of accountability of NGOs and the danger that interest groups, including protectionist groups, might undermine international trade.

(ii) *North American Free Trade Agreement (NAFTA)*

The North American Free Trade Agreement[1134] provides, in addition to a general dispute settlement mechanism[1135], two specific mechanisms: one for disputes between a Party and an investor from another Party[1136], and one for disputes related to anti-dumping and countervailing duties between Parties[1137]. NAFTA's side agreements on environmental co-operation (NAAEC)[1138] and on labour co-opera-

Law", 33 *NYU J. Int'l L. & Pol.* 527, 545 (2001). See Duncan Hollis, "Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty", 25 *Boston Col. Int'l & Comp. L. Rev.* 235, 239-243 (2002). See generally Dinah Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings", 88 *AJIL* 611 (1994).

1130. Ahn, *supra* footnote 1123, at 843.

1131. WTO, WT/L/162 (23 July 1996), cited in Ahn, *supra* footnote 1123, at 842.

1132. John O. McGinnis and Mark L. Movsesian, "Commentary: The World Trade Constitution", 114 *Harv. L. Rev.* 511, at 569-570 (2000).

1133. *Id.*, at 570-571.

1134. North American Free Trade Agreement, done at Washington on 8 and 17 December, at Ottawa on 11 and 17 December and at Mexico City on 14 and 17 December 1992, reprinted in 32 *ILM* 605 (1993).

1135. NAFTA, Chap. 20, Sec. B.

1136. NAFTA, Chap. 11, Sec. B.

1137. NAFTA, Chap. 19.

1138. 32 *ILM* 1480 (1993).

tion (NAALC)[1139] also provide for specific dispute settlement procedures.

Non-governmental actors do not have access to the NAFTA general dispute resolution mechanism, which addresses controversies regarding NAFTA's scope, application or interpretation. Article 2022 of NAFTA simply requires State Parties to encourage the use of arbitration or other means of alternative dispute resolution in the free trade area[1140].

Under Articles 1116 and 1117 of NAFTA, an investor from one Party, or an investor from one Party on behalf of an enterprise from another Party, may submit a claim to arbitration, if attempts to settle the dispute through consultations or negotiations have failed[1141]. An investor may submit the claim to arbitration under:

> "*(a)* the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
> *(b)* the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
> *(c)* the UNCITRAL Arbitration Rules"[1142].

However, an ICSID arbitral tribunal has held that only a violation of an obligation provided in Chapter 11, Section A, of NAFTA can be invoked as a ground for arbitration (i.e. mainly obligations to provide non-discriminatory treatment and to compensate for expropriation). "NAFTA does not . . . allow investors to seek international arbitration for mere contractual breaches"[1143].

In contrast to the general dispute resolution mechanism, the countervailing and anti-dumping duties dispute resolution mechanism gives a greater role to non-State actors. Anti-dumping and counter-

1139. 32 *ILM* 1499 (1993).
1140. NAFTA, Art. 2022 (1).
1141. NAFTA, Arts. 1116 and 1117.
1142. NAFTA, Art. 1120.
1143. *Robert Azinian, Kenneth Davitian and Ellen Baca* v. *The United Mexican States*, ICSID (Additional Facility), Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement (Mr. J. Paulsson, Pres.), Case No. ARB(AF)/97/2, Award of 1 November 1999, para. 87. Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", in Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* 188, 198 (1995).

vailing duties have been highly controversial in international trade law and policy [1144]. Unable to agree on substantive rules, the parties to the Free Trade Agreement between the United States and Canada instead designed a specific procedural mechanism, empowering a binational panel to review a final determination of anti-dumping and countervailing duties taken by a national administrative agency. The panel reviews whether such a determination conforms to national law. It is, thus, essentially a mechanism "to avoid the potential bias in national courts to uphold decisions of the national administration" [1145]. A similar mechanism was established in NAFTA. Under its Article 1904, the Parties are required to "replace judicial review of final antidumping and countervailing duty determinations with a binational panel review" [1146]. The panel is convened at the request of an involved Party [1147]. The review of the determination is triggered by a State Party, although the complaint usually originates from private enterprises subject to the duties. Interested private parties are not parties to the dispute. They are, however, allowed to participate in the proceedings. The Parties to the dispute must allow persons who would have the right under the law of the importing Party to "appear and be represented in a domestic judicial review proceeding" concerning the imposition of the duty to appear and be represented by counsel before the panel [1148]. The proceedings are usually terminated if the private interested parties reach an agreement [1149].

Andreas Lowenfeld has observed that, at the time of the adoption of the United States-Canada FTA, the extent of private party participation allowed under Chapter 19 procedure was "unique in institutions of dispute settlement between nation-States" [1150]. After years of

1144. Andreas F. Lowenfeld, "Binational Dispute Settlement under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal", 24 *NYU J. Int'l L. & Pol.* 269, 270-271 (1991).

1145. Alexandra Maravel, "Constructing Democracy in the North American Free Trade Area" 16 *J. Int'l L & Bus.* 331, 345, n. 44 (1996).

1146. NAFTA, Art. 1904 (1). This section of NAFTA is largely similar to Chapter 19 of the Canada-United States Free Trade Agreement, done at Ottawa, 22 December 1987, and 2 January 1988, and at Washington, DC and Palm Springs, 23 December 1987, and 2 January 1988, reprinted in 27 *ILM* 281 (1988).

1147. NAFTA, Art. 1904 (2).

1148. NAFTA, Art. 1904 (7).

1149. See for instance David Lopez, "Dispute Resolution under NAFTA: Lessons from the Early Experience", 32 *Tex. Int'l LJ* 163, 176-178 (1997) (discussing cases which were terminated prior to a decision on the merits either by mutual consent or at the request of the complainant).

1150. Lowenfeld, *supra* footnote 1144, at 271.

several experience, he concluded that the FTA procedure had worked well and suggested that "the idea of private party participation in intergovernmental dispute settlement of economic issues deserves to be reconsidered" [1151].

The North American Agreement on Environmental Cooperation (NAAEC) provides for some non-governmental access to proceedings by ensuring that private parties with interests in the enforcement of environmental laws have recourse to national judicial and administrative proceedings. It creates a mechanism for presenting complaints to the Commission for Environmental Protection, established by the NAAEC for private persons and NGOs. The role of individuals and NGOs is, however, mainly limited to the triggering of the procedure.

Under Article 14, any "non-governmental organization" or "person" may submit a petition to the Secretariat "asserting that a Party is failing to effectively enforce its environmental law" [1152]. Submissions are screened by the Secretariat. To be admissible, a submission must "be aimed at promoting enforcement [of a Party's environmental law] rather than at harassing industry" [1153]. A submission must assert that a Party is failing to effectively enforce its environmental laws, but may not challenge the adequacy or the stringency of domestic environmental law [1154].

Another possible avenue open to citizens and NGOs is the imple-

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1151. *Id.*, at 335.

1152. NAAEC, 14 September 1993 (Canada, Mexico, United States), 32 *ILM* 1480 (1993), Art. 14 (1).

1153. NAAEC, *supra* footnote 1152, Art. 14 (1) *(d)*. In addition, the Secretariat must ascertain if the submission

> "*(a)* is in writing in a language designated by that Party in a notification to the Secretariat;
> *(b)* clearly identifies the person or organization making the submission;
> *(c)* provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
> *(d)* appears to be aimed at promoting enforcement rather than at harassing industry;
> *(e)* indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
> *(f)* is filed by a person or organization residing or established in the territory of a Party."

1154. *Department of the Planet Earth et al.* v. *United States*, Secretariat for the Commission for Environmental Cooperation, Submission ID: SEM-98-003, Determination pursuant to Article 14 (1) of the North American Agreement on Environmental Cooperation of 14 December 1998.

mentation of the NAAEC through the Article 13 procedure. Article 13 allows the Secretariat to research and prepare a report to the Council on "any matters within the scope of the annual program" as well as "any other environmental matter related to the cooperative functions" of the NAAEC [1155]. In preparing the report, the Commission may draw on a wide range of sources, including non-governmental ones [1156].

Under the North American Agreement on Labor Cooperation as well, private parties may trigger an enforcement mechanism of the agreement. The National Administration Offices [1157] (NAOs) may receive "public communications on labor law matters arising in the territory of another Party" [1158]. The NAO "review[s] such matters, as appropriate, in accordance with domestic procedures" [1159]. If the matter is not resolved, any consulting party may request that an Evaluation Committee of Experts be formed [1160]. The subject matter authority of the Committee of Experts is limited to "patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labor standards as they apply to the particular matter considered by the Parties" [1161]. In preparing its final report, the Committee of Experts may invite written submissions from the public [1162].

The NAALC procedure has a more limited scope than that under the NAAEC. In contrast to the latter, the NAALC procedure permits submissions concerning the actions of another Party; complaints against one's own Party are excluded. The role of individuals in both procedures is mostly limited to initiating the procedure.

(b) *Investment treaties and ICSID*

In the realm of international investment, private parties are increasingly protected through arbitration mechanisms established by investment treaties. Escobar has observed that

1155. NAAEC, *supra* footnote 1152, Art. 13 (1).
1156. *Id.*
1157. 14 September 1993 (Canada, Mexico, United States), 32 *ILM* 1499 (1993). Under Article 15 of NAALC, the Parties are required to establish a "National Administrative Office" which serves as a point of contact between the Parties, the Secretariat and other NAOs.
1158. S*upra* footnote 1157, Art. 16 (3).
1159. *Id.*
1160. NAALC, *supra* footnote 1157, Art. 23 (1).
1161. NAALC, *supra* footnote 1157, Art. 23 (2).
1162. NAALC, *supra* footnote 1157, Art. 24 (1) *(d)*.

> "[o]ne of the most prominent features of recent investment treaties is that, in addition to providing for State-to-State arbitration to settle questions concerning their interpretation or application, they allow the covered investors themselves to put in motion mechanisms for submitting disputes with the host State to binding arbitration, and in this way they ensure the enforcement of the treaties' substantive guarantees" [1163].

A majority of these investment treaties provide for arbitrations under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [1164]. The Convention on the Settlement of Investment Disputes created the International Centre for the Settlement of Investment Disputes (ICSID), a World Bank organization that provides facilities for the conciliation and arbitration of investment disputes [1165]. The Convention applies to investment disputes between a Contracting State and a private person who is a national of another Contracting State, or between a Contracting State and a juridical person with the nationality of the Contracting State if the parties agree that the juridical person should be treated as the national of another State Party because of foreign control [1166]. ICSID has no jurisdiction over a dispute between a Contracting State and a natural person who is a national of that State [1167]. The distinctive feature of the Convention is that it grants access to an international forum to private individuals and juridical persons involved in a dispute with a foreign State [1168]. As Broches has emphasized,

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1163. Alejandro Escobar, An Overview of the International Legal Framework Governing Investment, in "Toward an Effective International Investment Regime", 91 *ASIL Proc.* 485, 489 (1997); also Charles Leben, "Hans Kelsen and the Advancement of International Law", 9 *Eur. J. Int'l L.* 287, 302 (1998). (noting that bilateral investment treaties commonly include clauses allowing for cases of an alleged breach of obligations subscribed by the host State to be brought before an arbitration tribunal, even if there is no contractual tie between the State and the investor).

1164. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force 14 October 1966, 575 *UNTS* 159.

1165. CSID, Art. 2; see also Rudolf Dolzer, "Dispute Settlement Mechanisms in the IMF, the World Bank and MIGA", in 7 *Adjudication of International Trade Disputes in International and National Economic Law* 139, 143 (Ernst-Ulrich Petersmann and Günther Jaenicke, eds., 1992).

1166. CSID, Art. 25 (1) and (2); see also Broches, *supra* footnote 1143, at 202.

1167. CSID, Art. 25 (2) *(a)*.

1168. Dolzer, *supra* footnote 1165, at 144; Leben, *supra* footnote 1163, at 305.

> "From the legal point of view the most striking feature of the Convention is that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum, thus contributing to the growing recognition of the individual as a subject of international law." [1169]

ICSID's jurisdiction depends on the consent of the parties to the dispute. The mere ratification of the Convention is not sufficient. The parties to the dispute must consent to submit a particular dispute to the Centre [1170]. Consent is "not merely . . . a formal requirement . . . but an essential characteristic of the entire system of the Convention" [1171]. It can be given *ad hoc* for a particular case, in a compromissory clause in an investment agreement, by the host State in national legislation, or through a bilateral or multilateral treaty [1172]. Once both parties to the dispute have given consent (in writing) to ICSID arbitration, no party may unilaterally withdraw its consent [1173]. Broches has suggested that such

> "mutual consent has the effect of elevating the agreement between a private company and a State . . . to the level of an international legal obligation, and to that extent the Convention constitutes the private company a subject of international law" [1174].

An important limitation on the investor's options is that contracting States waive their right to diplomatic protection [1175]: no contracting State

> "shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention" [1176].

The host State is thus shielded from an international claim by the

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1169. Broches, *supra* footnote 1143, at 198.
1170. Dolzer, *supra* footnote 1165, at 145.
1171. Broches, *supra* footnote 1143, at 199; also Dolzer, *supra* footnote 1165, at 145.
1172. Broches, *supra* footnote 1143, at 200-201; Dolzer, *supra* footnote 1165, at 145.
1173. CSID, Art. 25 (1); Broches, *supra* footnote 1143, at 201.
1174. Broches, *supra* footnote 1143, at 200.
1175. Dolzer, *supra* footnote 1165, at 145.
1176. CSID, Art. 27 (1).

home State. The home State may, however, undertake informal exchanges for the sole purpose of facilitating a settlement [1177].

Under the Convention, the arbitration tribunals are to apply "such rules of law as may be agreed by the parties" [1178]. In the absence of an agreement as to the governing law, the arbitration tribunals are directed to apply "the law of the Contracting State party to the dispute . . . and such rules of international law as may be applicable" [1179]. Only in those instances "in which a particular action taken under national law, or a particular provision of national law, violated international law" would the tribunal, "in the application of international law, set aside that action or that law" [1180]. Charles Leben has discerned "a movement towards international law by several ICSID tribunals" [1181]. Some treaties refer to international law obligations as applicable law. NAFTA, for example, provides in its chapter on investment that "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law" [1182]. A European treaty, the Energy Charter Treaty, which also provides for arbitration between a contracting State and an investor (a natural person or a company) from another contracting party, includes a similar provision [1183].

A considerable controversy has been generated by the more general question of whether international contracts between States and private persons ("State contracts"), which refer to international law as their governing law, are grounded in public international law [1184]. Some commentators have denied that public international law, as a legal order, applies to such contracts [1185]. Others have maintained that such provisions removed "contracts between States and private law persons from domestic law and made [them] subject to international rules of law" [1186]. Charles Leben suggests that through international arbitration and modern investment law, private persons have acquired a limited international personality. He observes that

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1177. CSID, Art. 27 (2).
1178. CSID, Art. 42 (1).
1179. *Id.*
1180. Broches, *supra* footnote 1143, at 181.
1181. Leben, *supra* footnote 1163, at 303.
1182. NAFTA, Art. 1131 (1).
1183. Energy Charter Treaty, reprinted in 34 *ILM* 382 (1995), Art. 26 (6).
1184. See Leben, *supra* footnote 1163, at 300-301.
1185. See Leben, *id.*, at 301-302.
1186. Georges R. Delaume, "State Contracts and Transnational Arbitration", 75 *Am. J. Int'l L.* 784, 786 (1981). See also Leben, *supra* footnote 1163, at 305.

> "by means totally different from those used in the field of human rights, private persons have acquired in the legal institution of State contracts, and more generally in the field of investment law, (limited) international legal personality by dint of their capacity to act directly against the State for the defence of their rights and to do so in international courts" [1187].

(c) *World Bank Inspection Panel*

The World Bank Inspection Panel was established by resolutions of the World Bank and the International Development Association (IDA) [1188]. It consists of three experts appointed by the Bank's President in consultation with the Board of Directors. A group of individuals can complain to the panel that

> "its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank . . . provided in all cases that such failure has had, or threatens to have, a material adverse effect" [1189].

The Panel has the authority to make findings that are then proposed to the Board of Directors. The inspection procedure proceeds in two major steps. In the first stage, the Panel examines the "admissibility" of the complaint and recommends to the Executive Directors whether an investigation should be conducted. The second stage, the investigation, can only be triggered by a decision of the Executive Directors. At the end of the investigation, the Panel reports as to whether the Bank has complied with its own policies and procedures and the Executive Directors decide on the project's future [1190].

The Inspection Panel was envisioned as an addition to the already existing oversight and quality control mechanisms applied by the

1187. Leben, *supra* footnote 1163, at 305.

1188. IBRD Resolution No. 93-10 (1993), Resolution IDA 93-6 (1993), reprinted in 34 *ILM* 520 (1995). Both resolutions are identical. A similar body has been established by the Inter-American Development Bank in 1997. For a recent summary of the Panel's record and procedures, see *Accountability at the World Bank: The Inspection Panel 10 Years On* (2003).

1189. Resolution No. 93-10, *id.*, at para. 12.

1190. Resolution No. 93-10, *id*., at paras. 20-23.

World Bank to its projects [1191]. A World Bank management report offered three main justifications for the establishment of the Panel: increasing demands for transparency and accountability of development institutions; enhancement of the Bank's credibility; and the need for a more efficient and consistent method of dispute resolution. Through this Panel, members of the Board and those directly affected by Bank's projects "will have an additional, independent instrument to ensure that projects under preparation or implementation" meet the Bank rules and standards [1192]. The Panel reflects the trend to provide non-State actors access to international institutions as well as the growing recognition of the concepts of public participation and civic action [1193]. The Panel's establishment reflects the heightened sensitivity of the Bank to human rights concerns [1194].

The Inspection Panel is innovative and may set a precedent for other bodies [1195]. Under traditional international law, States, as representatives of the interests of individuals and groups within their jurisdiction, would have been regarded as the sole entities competent to protect these interests in their dealings with international organizations. In contrast, the Panel may deal directly with "specific categories of the general public" [1196].

There are limitations on who may bring a complaint to the Panel. Perhaps to forestall a flood of requests, single individuals and groups or organizations outside the borrowing countries cannot lodge a complaint [1197]. Commenting on the exclusion of complainants outside the borrowing countries, Shihata wrote that "the Panel is thus not a forum for an *actio popularis*" [1198].

Another important limitation is that the Panel only examines World Bank behaviour under the Bank's internal procedures. It does not go into the conformity of those procedures with general interna-

1191. Ibrahim F. I. Shihata, *The World Bank Inspection Panel* 14-21 (1994).
1192. *Id.*, at 38.
1193. *Id.*, at 118-122.
1194. Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* 218-219 (1999).
1195. Daniel D. Bradlow, "Letter to Mr. James Wolfensohn, President of the World Bank Group", December 1997. See also Daniel Bradlow, "Precedent-Setting NGO Campaign Saves the World Bank's Inspection Panel", *Human Rights Brief*, Vol. 6, Issue 3, at 7.
1196. Richard E. Bissell, "Current Developments: Recent Practice of the Inspection Panel of the World Bank", 91 *Am. J. Int'l. L.* 741 (1997) referring to Shihata, *supra* footnote 1191, at 120-121 (1994).
1197. Shihata, *supra* footnote 1191, at 93-94.
1198. *Id.*, at 95.

tional law. This limitation was inspired by the fear that a broader enquiry would entangle the Bank in areas clearly outside its mandate [1199].

The Panel's decisions are not binding, and are made public only after they have been finalized by the Executive Directors. The Bank's management decides on the appropriate remedy. "[T]he panel might have more effect on projects through indirect pressure than through its formal procedures set out by the executive directors." [1200] The procedure is non-adversarial. On-site visits are allowed only with the explicit consent of the State where the project is located. The Panel, in addition to being accessible to individuals, has agreed to receive memoranda from NGOs [1201]. Under the Panel's Operating Procedures, supplemental information from the general public may be submitted to the Panel [1202].

(d) *International tribunals*

The possibility of individual access to international tribunals had already been recognized early in the twentieth century. The Convention establishing the Central American Court in 1907 provided that the Court

> "shall . . . take cognizance of the questions which individuals of one Central American country may raise against any of the other Contracting Governments, because of the violations of Treaties or Conventions, and other cases of an international character; no matter whether their own Government supports [the] said claim or not . . ." [1203].

Among the cases heard by the Court, were several brought by individuals. (They were deemed inadmissible). The court ceased functioning in 1918.

(i) *International Tribunal for the Law of the Sea*

The International Tribunal for the Law of the Sea (ITLOS) is one of the four fora for the settlement of disputes under the United

1199. *Id.*, at 96.
1200. Bissell, *supra* footnote 1196, at 742.
1201. *Id.*, at 743.
1202. Operating Procedures of the Inspection Panel, Arts. 50 and 51.
1203. Convention for the Establishment of a Central American Court of Justice, signed at Washington 20 December 1907, reprinted in 206 *The Consolidated Treaties Series*, 1907-1908, at 90, Art. II (Clive Parry, ed., 1980).

Nations Convention on the Law of the Sea (UNCLOS)[1204]. Article 287 of UNCLOS provides that State Parties may choose one or more of the following bodies to settle disputes: the ITLOS, the International Court of Justice, an arbitral tribunal or, for certain types of disputes (concerning fisheries, protection of the marine environment, marine scientific research, or navigation, including pollution from vessels and by dumping), a special arbitral tribunal[1205]. A State Party may declare its preference for one or more of the fora "[w]hen signing, ratifying or acceding to th[e] Convention or at any time thereafter"[1206]. If no declaration is made, or if the parties to a dispute have not accepted the same forum, the dispute must be submitted to arbitration, unless the parties otherwise agree[1207]. Entities other than States may not access (for contentious cases) the International Court of Justice, which by its Statute is clearly limited to States[1208]. Access to the dispute settlement provided by the Convention is broader, perhaps because entities other than States may become parties to the Convention, i.e., self-governing associated States, territories which enjoy full internal self-government and international organizations such as the European Community[1209]. For the purposes of the Convention, references to "State Parties" include those entities[1210]. Thus, while Article 20 (1) of the Statute of the ITLOS provides that the Tribunal "shall be open to State Parties"[1211], non-State entities which are parties to the Convention have access to the Tribunal[1212].

Part XI of the Convention creates a special dispute settlement mechanism for disputes concerning the exploration and exploitation

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1204. United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, reprinted in United Nations, *Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, UN Sales No. E.83.V.5 (1983).

1205. UNCLOS, Art. 287 (1); see also *id.*, Annex VIII, Art. 1 (listing the categories of dispute for a special arbitral tribunal).

1206. UNCLOS, Art. 287 (1).

1207. UNCLOS, Art. 287 (3) and (5).

1208. Statute of the International Court of Justice, Art. 34 (1). See also Jonathan I. Charney, "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea", 90 *Am. J. Int'l L.* 69, 74 (1996) (noting that the ICJ's Statute would prevent it from considering many of the disputes that may arise under UNCLOS).

1209. UNCLOS, Arts. 305-307.

1210. UNCLOS, Art. 1 (2).

1211. UNCLOS, Annex VI, Art. 20 (1).

1212. 5 *United Nations Convention on the Law of the Sea 1982: A Commentary* 374-375 (Myron H. Nordquist, ed., 1989).

of the deep sea-bed. The Sea-Bed Disputes Chamber (SBDC) is a separate chamber within the ITLOS with its own jurisdiction[1213]. The jurisdiction of the SBDC extends to disputes between parties to a contract, i.e., State Parties, the Authority or the Enterprise, State enterprises and natural or juridical persons, as well as to certain disputes between the Authority and a prospective contractor sponsored by a State, and finally, to disputes between the Authority and a State Party, a State enterprise or a natural or juridical person sponsored by a State Party, where it is alleged that the Authority has incurred liability[1214]. Some of the disputes referred to in UNCLOS Part XI that come within the jurisdiction of the Sea-Bed Chamber may thus involve States, international institutions or private — natural or juridical — persons[1215]. Consequently, Article 20 (2) of the ITLOS Statute provides that the Tribunal is open to entities other than State Parties "in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case"[1216]. Thus, there is "no limit on such entities, provided they are specified in the agreement by which all the parties to a case have accepted the jurisdiction of the Tribunal"[1217]. As an alternative to the ITLOS, disputes concerning "the interpretation or application of a relevant contract or a plan of work" may be submitted to a binding commercial arbitration at the request of any party to a dispute[1218]. The 1994 Agreement Relating to the Implementation of Part XI does not affect the structure of the Part XI dispute settlement mechanisms[1219].

Unlike in the ICSID, the sponsoring State is not completely excluded from proceedings involving natural or juridical persons. In

1213. UN Convention on the Law of the Sea, Arts. 187-188; Statute of ITLOS, Arts. 14, 35-40; J. G. Merrills, *International Dispute Settlement* 173 (2nd ed., 1991).

1214. UNCLOS, Art. 187.

1215. John E. Noyes, "The Third-Party Dispute Settlement Provisions of the 1982 United Nations Convention on the Law of the Sea: Implications for State Parties and for Nonparties", in *Entry into Force of the Law of the Sea Convention* 213, 223 (Myron H. Nordquist and John Norton Moore, eds., 1995); see also Bernard H. Oxman, "Human Rights and the United Nations Convention on the Law of the Sea", 36 *Colum. J. Transnat'l L.* 399 (1997).

1216. UNCLOS, Annex VI, Art. 20 (2).

1217. 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, *supra* footnote 1212, at 374-375; see also Merrills, *supra* footnote 1213, at 172.

1218. UNCLOS, Art. 187 *(c)* (i), referred to in Article 188 (2).

1219. Noyes, *supra* footnote 1215, at 222.

the case of disputes involving such persons, the sponsoring State is to be notified and has the right to participate in the proceedings [1220]. Moreover, if the action is brought by a private person, the respondent State may request the sponsoring State to appear in the proceedings on behalf of that person. If such a request is not honoured, the respondent State may arrange to be represented by a juridical person of its own nationality [1221]. This procedure differs from diplomatic protection. As Adede observes, the sponsoring State appears on behalf of the private person and not to vindicate its own rights. This "constitutes a procedural device which emerged as part of a continued reluctance of States to be sued directly in an international forum by natural or juridical persons" [1222].

Under Article 292 of UNCLOS, an application to the ITLOS for the prompt release of a vessel may be made only "by or on behalf" of the flag State of the vessel [1223]. An earlier draft of this provision — which would have allowed individuals, namely, "the owner or operator of the vessel, or a member of the crew or a passenger of the vessel" [1224], to bring a complaint regarding the detention directly to the Tribunal — met with strong resistance from some coastal States and other States hostile to granting individuals access to international fora [1225]. Article 292 leaves to the State the authority to determine who may bring a case before the Tribunal on its behalf. Under the ITLOS Rules, an application for a prompt release on behalf of the flag State must be accompanied by authorization from the State unless the author has previously been identified by the State as competent to submit applications [1226]. The first application for prompt release [1227] was made on behalf of Saint Vincent and the Grenadines and was accompanied by the appropriate authorization [1228].

1220. UNCLOS, Art. 190 (1).
1221. UNCLOS, Art. 190 (2).
1222. A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea : A Drafting History and a Commentary* 275 (1987).
1223. UNCLOS, Art. 292 (2).
1224. 5 *United Nations Convention on the Law of the Sea 1982 : A Commentary*, *supra* footnote 1212, at 67.
1225. *Id.*, at 70.
1226. Rules of the Tribunal, International Tribunal for the Law of the Sea, Art. 110 (3).
1227. Bernard H. Oxman, "The M/V "Saiga" *(Saint Vincent and the Grenadines* v. *Guinea)*, ITLOS Case No. 1, International Tribunal for the Law of the Sea, 4 December 1997 ; 92 *Am. J. Int'l L.* 278 (1998).
1228. *Id.*, at 278, n. 2.

(ii) *The European Court of Justice and Court of First Instance*

Natural and legal persons have both direct and indirect access to the Court of First Instance and to the European Court of Justice [1229]. Since August 1993, all cases filed by natural or legal persons against the Community must be brought first to the Court of First Instance [1230]. The Court of Justice acts as an appellate court [1231] and retains original jurisdiction over preliminary rulings [1232].

Under Article 236 of the EC Treaty, the Court of First Instance has jurisdiction over actions by employees of Community institutions who have complaints regarding their employment [1233]. Although staff cases are a very specialized area of the EC law, they "have a special human interest and importance, since they are virtually the only cases where a private individual (as distinct from a legal person) goes directly to the Court" [1234].

Legal and natural persons may bring disputes directly to the Court of First Instance through an action for annulment under Article 230 of the EC Treaty, challenging the legality of a decision adopted by the Community [1235]. But standing requirements are stringent [1236]. A contested decision must be of "direct and individual concern" to the person instituting the proceeding [1237]. Typically, such cases implicate decisions of the Commission in the field of competition law and anti-dumping regulations of the Council [1238]. The ECJ has declined

1229. See L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* 179 (4th ed., 1994). See generally Paul Craig and Gráinne de Búrca, *EU Law* (2003).

1230. *Id.*, at 75-76.

1231. *Id.*, at 70.

1232. Treaty Establishing the European Community, signed 25 March 1957, as amended, Art. 225 (*ex* Art. 168*a*).

1233. EC Treaty, Art. 236 (ex Art. 179). Jurisdiction was transferred from the Court of Justice to the Court of First Instance in 1989 by a decision of the Council under Article 225 (*ex* Art. 168*a*), Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Community.

1234. Brown and Kennedy, *supra* footnote 1229, at 181.

1235. EC Treaty, Art. 230 (*ex* Art. 173).

1236. Brown and Kennedy, *supra* footnote 1229, at 134 (noting that it is extremely difficult for an individual or company to satisfy the direct and individual concern test); Albertina Albors-Llorens, *Private Parties in European Community Law: Challenging Community Measures* 8 (1996) (calling the *locus standi* conditions that a person must meet before bringing an action for annulment draconian).

1237. EC Treaty, Art. 230 (*ex* Art. 173).

1238. Brown and Kennedy, *supra* footnote 1229, at 134-135.

to broaden the *locus standi* to include other fields such as environmental protection [1239].

In contrast, Member States, the Commission or the Council may challenge any binding act of Community institutions without having to satisfy any further admissibility requirements [1240]. Subject to a number of standing requirements, any natural or legal person may complain to the Court against an Institution of the Community under Article 232 of the EC, challenging its failure to act as required by the Treaty [1241].

Natural and legal persons may also bring actions for damages to the Court of First Instance. The Court has jurisdiction over disputes relating to non-contractual liability arising from damage caused by Community institutions or their servants [1242]. Such actions are no longer dependent on a prior ruling on annulment [1243]. If the claim is for compensation arising from a decision by an institution of the Community, the Court must find that the measure is illegal, but does not need to examine the gravity of the illegality. In the case of Community regulations, however, the Court requires that the illegality be "a sufficiently flagrant violation of a superior rule of law for the protection of the individual" [1244]. Few complaints have been able to satisfy such an exacting requirement. The Court has thus taken "a very restrictive approach in the access of non-privileged applicants to the action for annulment and to the action for damages" [1245].

A claim by a natural or legal person on a matter pertaining to Community law may be indirectly brought before the Court of Justice via a preliminary ruling. Under Article 234 of the EC Treaty, a national court may request the Court of Justice to give a preliminary ruling on a matter of Community law if "a decision on the question is necessary to enable [the national court] to give judgment" [1246], i.e.,

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1239. *Stichting Greenpeace Council (Greenpeace International) and Others* v. *Commission of the European Communities*, European Court of Justice, Case C-321/95 P, Judgment of 2 April 1998, ECR I-1651, paras. 27-31.

1240. Albors-Llorens, *supra* footnote 1236, at 16.

1241. EC Treaty, Art. 232 (*ex* Art. 175). Albors-Llorens, *supra* footnote 1236, at 213.

1242. EC Treaty, Arts. 235 and 288 (*ex* Arts. 178 and 215).

1243. *Aktien-Zuckerfabrik Schöppenstedt* v. *Council*, Case 5/71, 1971 (Part II) *ECR* 975, 983; Albors-Llorens, *supra* footnote 1236, at 205.

1244. *Aktien-Zuckerfabrik Schöppenstedt*, *supra* footnote 1243, at 984; Albors-Llorens *supra* footnote 1236, at 205.

1245. Albors-Llorens, *supra* footnote 1236, at 206.

1246. EC Treaty, Art. 234 (*ex* Art. 177).

when there is no remedy under national law against the decision of the national court, for example, if it was a decision of the highest court [1247]. A national court may request a preliminary ruling on matters such as the interpretation of the EC Treaty or "the validity and interpretation of acts of the institutions of the Community and of the [European Central Bank]" [1248]. The decision to refer is made by the national court alone; the Court of Justice must accept a reference from a national court [1249]. The mechanism of a preliminary ruling on matters of Community law provides an indirect means for individuals to come before the Court and secure their rights under Community law. The claimed rights are derived from Community law, but the remedy is provided through the national courts.

> "The preliminary ruling has proved a particularly effective means of securing rights claimed under Community law . . . The right is claimed under Community law, despite the absence of any provision of national law, or in opposition to national law. The remedy is before the national court, but the scope of the right is determined by the Court of Justice." [1250]

Persons who would not be able to meet the standing requirements for an action for annulment may thus obtain, albeit indirectly, a review of the legality of a Community act through a preliminary ruling [1251]:

> "The case law of the European Court provides plentiful examples of cases where preliminary references from national courts have allowed individuals and undertakings to obtain a ruling on the validity of EC regulations and decisions that they could not possibly have challenged by means of a direct action before the European Court, owing to their lack of *locus standi*." [1252]

The Charter of Fundamental Rights of the European Union (2002) provides for important civil, political, as well as social and labour

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1247. EC Treaty, Art. 234 (*ex* Art. 177); Brown and Kennedy, *supra* footnote 1229, at 213-215.
1248. EC Treaty, Art. 234 (*ex* Art. 177).
1249. *Costa* v. *ENEL*, Case 6/64, 1964 *ECR* 585, 592-593; Brown and Kennedy, *supra* footnote 1229, at 202.
1250. Brown and Kennedy, *supra* footnote 1229, at 193-194.
1251. Albors-Llorens, *supra* footnote 1236, at 177-178.
1252. *Id.*, at 186.

rights. Addressed to the institutions and bodies of the Union, it concerns member States only in the context of implementation of Union law (Art. 51). It grants any citizen of the Union and any natural or legal person residing or having its registered office in a member State the right of access to European Parliament, Council and Commission documents (Art. 42), access to an ombudsman (Art. 43), and the right to petition the Parliament (Art. 44). The legal status of the Charter is still not altogether clear and is expected to be resolved only in 2004.

(e) *International claims tribunals*

Claims commissions or tribunals established since the mid-nineteenth century have often adjudicated individual claims. Conceptually close to an institutionalized mechanism of diplomatic protection, such tribunals normally allowed Governments, but not individuals to present claims directly to the tribunal[1253]. Some recently established claims tribunals have tended to allow individuals to play a greater role.

(i) *Iran-United States Claims Tribunal*

The Iran-United States Claims Tribunal was created in 1981 as one of the components of the complex negotiations that resolved the hostage crisis and the seizure of Iranian assets by the United States[1254]. It has jurisdiction over claims of nationals of the United States against Iran and the claims of nationals of Iran against the United States[1255]. The term "national" encompasses a natural person who is a citizen of either Iran or the United States as well as

> "a corporation or other legal entity which is organized under the laws of Iran or the United States . . . if collectively, natural

1253. See, for instance, Claims Convention between Mexico and the United States, 4 July 1868, reprinted in 137 *The Consolidated Treaty Series* 331 (Clive Parry, ed., 1976); General Claims Convention, signed at Washington 8 September 1923, *US Treaty Series*, No. 678.

1254. Charles N. Brower, "The Lessons of the Iran-U.S. Claims Tribunal Applied to Claims against Iraq", in *The United Nations Claims Commission: 13th Annual Sokol Colloquium* 15 (Richard B. Lillich, ed., 1995).

1255. Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, done 19 January 1981, reprinted in 1 *Iran-United States Claims Tribunal Reports* 9 (1983) ("Claims Settlement Declaration"), Art. II (1).

> persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty percent or more of its capital stock" [1256].

The Tribunal also has jurisdiction over "official claims of the United States and Iran against each other arising out of contractual arrangements between them" [1257], and over "any dispute as to the interpretation or performance of any provision of that Declaration" [1258]. But it does not have jurisdiction over claims brought by either Iran or the United States against a national of the other State [1259].

The vast majority of claims before the Tribunal have been brought by natural and juridical persons. Charles Brower has noted that of the claims of nationals, those by corporations have fared much better than those by individuals [1260]. Most of the small claims were settled by a lump-sum payment in 1990 [1261].

Nationality requirements are imposed not on the claimants but on the claims [1262]. Under Article VII (2) of the Claims Settlement Agreement, a claim must have been owned continuously by nationals of the United States or Iran from the date on which the claim arose until 19 January 1981 (the date the settlement agreement entered into force) [1263]. Thus, departing from the general rules on the continuous nationality of claims, the Tribunal has jurisdiction over a claim that was owned by a person or entity who was not a national of either the United States or Iran at the time of filing, provided that it was owned by a national of either the United States or Iran during the time period specified by Article VII (2) [1264].

Claimants may present their claims directly to the Tribunal if their claims are for US$ 250,000 or more. Claims for less than US$ 250,000 are submitted to the Tribunal by the claimant's Government [1265]. Because of this requirement, commentators are split as to whether a claim is owned by the individuals themselves or by the States

1256. Claims Settlement Declaration, *id.*, Art. VII (1).
1257. Claims Settlement Declaration, *supra* footnote 1255, Art. II (2).
1258. Claims Settlement Declaration, *id.*, Art. II (3).
1259. George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* 80 (1996).
1260. Brower, *supra* footnote 1254, at 19.
1261. *Id.*, at 20.
1262. Aldrich, *supra* footnote 1259, at 45.
1263. Claims Settlement Declaration, *supra* footnote 1255, Art. VII (2).
1264. Aldrich, *supra* footnote 1259, at 45.
1265. Claims Settlement Declaration, *supra* footnote 1255, Article III (3).

through the mechanism of diplomatic protection. Arguing that the claims are owned by individuals, David Caron points to a statement by the full tribunal that "the object and purpose of the Algiers Declaration was to resolve a crisis in relations between Iran and the United States, not to extend diplomatic protection in the normal sense" [1266]. Moreover, the exhaustion of local remedies, a classic requirement for diplomatic protection, is not applicable to claims of nationals [1267]. Further proof that nationals and not the State control individual claims is that nationals file and argue claims before the Tribunal as well as decide whether to withdraw their claims or accept a settlement [1268]. On the other hand, David Bederman has cautioned that "[t]he terms of a claims settlement instrument can alter some aspects of procedures typical of diplomatic protection without the institution losing its character as an international claims tribunal" [1269]. He rightly argues that diplomatic protection certainly played a role in the settlement of small claims by a lump-sum payment in May 1990 [1270].

(ii) *The United Nations Compensation Commission*

The United Nations Compensation Commission (UNCC) was established by the Security Council to review and award claims against the Government of Iraq for damages arising out of the invasion of Kuwait [1271]. The Commission consists of a Secretariat, a Governing Council, and Commissioners [1272]. Rather than acting as a tribunal or a court, the Commission is a "political organ that per-

1266. David D. Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution", 84 *Am. J. Int'l L.* 104, 132 (1990), quoting *Islamic Republic of Iran-United States*, Case No. A/18, 6 April 1984, reprinted in 5 *Iran-US Claims Tribunal Reports* 251, 261 (1984 -I).

1267. Caron, *id.*, at 133-134.

1268. *Id.*, at 134-135.

1269. David J. Bederman, "Eligible Claimants before the Iran-United States Claims Tribunal, in *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* 58 (Richard B. Lillich and Daniel B. Magraw, eds., 1998).

1270. *Id.*, at 59.

1271. Security Council resolution 687 (8 April 1991), UN doc. S/RES/687, paras. 16, 18, and 19. See also resolution 692 (20 May 1991), UN doc. S/RES/0692.

1272. See Michael F. Raboin, "The Provisional Rules for Claims Procedure of the United Nations Compensation Commission: A Practical Approach to Mass Claims Processing", in *The United Nations Compensation Commission: Thirteenth Sokol Colloquium* 119, 120 (Richard B. Lillich, ed., 1995).

forms an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims"[1273].

Access of non-governmental actors to the UNCC is limited. As a general rule, only Governments and inter-governmental organizations may submit claims directly to the UNCC[1274]. International organizations may submit claims only on their own behalf[1275]. A Government may submit claims on behalf of its nationals, residents in its territories, and corporations and other entities organized under its laws[1276]. Allowing States to submit claims on behalf of residents in addition to nationals is a departure from the traditional principles governing diplomatic protection and espousal[1277]. Corporations or other private legal entities may submit their claims directly to the UNCC if the State which is supposed to submit their claims fails to do so within a fixed period[1278]. For some commentators, this fact "underscores . . . that the Commission is not a form of traditional diplomatic protection"[1279]. Finally, the Governing Council may appoint an "appropriate person, authority or body" to submit claims on behalf of persons who "are not in a position to have their claims submitted by a Government"[1280]. Thus, the UNCC Governing Council arranged to have several UN agencies submit claims under this provision on behalf of Palestinians who had suffered losses due to the invasion of Kuwait[1281]. John Crook suggested that the effect of Article 5 (2) is "truly novel" because "an instrumentality of the

1273. Christopher S. Gibson, "Mass Claims Processing: Techniques for Processing over 400,000 Claims for Individual Loss at the United Nations Compensation Commission", in *The United Nations Compensation Commission: Thirteenth Sokol Colloquium* 155, 158 (Richard B. Lillich, ed., 1995), *quoting* Report of the Secretary-General Pursuant to Paragraph 19 of the Security Council resolution 687, UN doc. S/22559 (1991).

1274. Provisional Rules for Claims Procedure, UN doc. S/AC.26/1992/10, Annex ("Provisional Rules"), Art. 5 (1).

1275. Provisional Rules for Claims Procedure, *id.*, Art. 5 (1) *(d)*.

1276. Provisional Rules for Claims Procedure, *id.*, Art. 5 (1) *(a)* and *(b)*.

1277. John R. Crook, "The United Nations Compensation Commission — A New Structure to Enforce State Responsibility", 87 *Am. J. Int'l L.* 144, 149 (1993).

1278. Provisional Rules for Claims Procedure, *supra* footnote 1274, Art. 5 (3).

1279. Crook, *supra* footnote 1277, at 151.

1280. Provisional Rules for Claims Procedure, *supra* footnote 1274, Art. 5 (2).

1281. Carlos Alzamora, "The UN Compensation Commission: An Overview", in *The United Nations Compensation Commission: Thirteenth Sokol Colloquium*, 3, 7 (Richard B. Lillich, ed., 1995).

United Nations is acting to empower stateless and other disadvantaged persons to make international claims" [1282].

Because the Commission does not function on an adversarial model, individual claimants have only a limited opportunity to appear before a panel of Commissioners. The procedure resembles an administrative rather than a judicial process. The Secretariat makes a preliminary assessment of each claim, ensuring that it meets the formal requirements established by the Governing Council [1283]. Claims or categories of claims are reviewed by the Commissioners. The value of the losses suffered is assessed and the Commissioners recommend compensation awards to the Governing Council [1284].

For "urgent claims" [1285], the provisional rules direct panels to make their determinations based on materials submitted to them. No oral proceedings are held, unless a panel determines that special circumstances so warrant [1286]. For "[u]nusually large or complex claims" [1287], the Provisional Rules provide that panels may ask for written submissions and hold oral proceedings. In such cases, "the individual, corporation, Government, international organization or other entity making the claim may present the case directly to the panel, and may be assisted by an attorney or other representation of choice" [1288].

In contrast to the United States-Iran Claims Tribunal and other types of arbitral tribunals which usually focus on corporate and governmental claims, the Commission initially "focused its attention on resolving the claims of individual victims of Iraq's invasion and occupation of Kuwait" [1289]. The majority of individual claims were

1282. Crook, *supra* footnote 1277, at 150.

1283. Provisional Rules for Claims Procedure, *supra* footnote 1274, Art. 14.

1284. Provisional Rules for Claims Procedure, *id.*, Arts. 33-40 (1). Art. 40 (1).

1285. "Urgent claims" are: individual claims for departure from Kuwait or Iraq (Category A claims); individual claims for serious personal injury or death (Category B claims); and individual claims for damages up to US$ 100,000 (Category C claims). See Criteria for expedited processing of urgent claims, UN doc. S/AC.26/1991/1 (1991). Other categories of claims are: individual claims for damages above US$ 100,000 (Category D claims); claims of corporations and other entities (Category E claims); and claims of Governments and international organizations (Category F claims). See Alzamora, *supra* footnote 1281, at 6.

1286. Provisional Rules for Claims Procedure, *supra* footnote 1274, Art. 37 *(c)*.

1287. See Provisional Rules for Claims Procedure, *id.*, Art. 38 *(d)*.

1288. *Id.*

1289. Robert C. O'Brien, "The Challenge of Verifying Corporate and Government Claims at the United Nations Compensation Commission", 31 *Cornell Int'l LJ* 1, 3 (1998); see also Alzamora, *supra* footnote 1281 at 6; Brower, *supra* footnote 1254, at 20-21.

given priority through an accelerated procedure while larger claims were processed afterwards [1290].

(f) *Human rights monitoring bodies*

Both under European and the American human rights systems, individuals and NGOs did not have direct access to the human rights courts, but only to the commissions (access to the European Commission was conditioned on the acceptance by the State concerned of the right of individual petition). Only the Commission or a State party could submit a case to the Court. The practice of the European Court and Commission was modified by allowing the legal representatives of the victims before the Court (at first, victims were allowed to sit with the Commission, then they were allowed to file written statements, and finally, were permitted to address the Court) [1291] and eventually were integrated in the proceedings [1292]. The European system was first significantly modified by Protocol 9, which allowed individuals direct access to the Court (since superseded by Protocol 11) [1293]. Protocol 11, which entered into force in 1998, completely reformed the European system. Under this Protocol, individuals, non-governmental organizations and groups of individuals are allowed to submit applications directly to the Court [1294]. A distinctive feature of human rights organs is the elimination of any requirements regarding the nationality of applicants or victims.

The Inter-American system may be moving in a direction similar to the European system as regards direct access to the Court. "[T]he legal representatives of the victims have been integrated into the delegation of the Inter-American Commission to the Court with the euphemistic designation of 'assistants' to this delegation." [1295] In

1290. See Status of Claims, see also Priority of Payment and Payment Mechanism: Guiding Principles, Decision taken by the Governing Council of the United Nations Compensation Commission at Its 41st Meeting, UN doc. S/AC.26/Dec.17 (1994).

1291. Sands, *supra* footnote 1129, at 546.

1292. Antônio Augusto Cançado Trindade, "The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century", 30 *Colum. Hum. Rts. L. Rev.* 1, 17 (1998).

1293. *Eur. TS* No 140.

1294. European Convention on Human Rights, Art. 34. See also Thomas Buergenthal, Dinah Shelton and David P. Stewart, *International Human Rights in a Nutshell* 149-168 (3rd ed., 2002).

1295. Cançado Trindade, *supra* footnote 1292, at 21.

1996, judges of the Court began asking questions directed to the representatives of the victims, whose briefs were presented to the Court [1296]. By the end of that year, revised Rules of Procedures were adopted which provided that "at the reparations stage, the representatives of the victims or of their next of kin may independently submit their own arguments and evidence" [1297]. Under Article 35 (4) of the 2002 Rules of Procedure of the American Court of Human Rights, individuals have autonomous standing to participate in the Court's proceedings in cases that have been submitted to it.

Under former Article 25 of the European Convention, prior to the entry into force of Protocol No. 11, any person, non-governmental organization or group of individuals who claimed to be a victim of a violation of the rights set forth in the Convention could submit a petition to the European Commission on Human Rights [1298], alleging that he or she was a victim of a violation. Even in the case where the applicant was a non-governmental organization or a group of individuals, the organization or the group itself had to have been a "victim" of a violation [1299]. In that regard, the entry into force of Protocol 11, which allows direct access to the Court, did not alter the situation [1300]. Under the new Article 34 of the Convention:

"The Court may receive applications from any person,

1296. *Id.*, at 23.

1297. Rules of Procedures of the Inter-American Court of Human Rights, Art. 23 (1977), reprinted in Inter-American Court of Human Rights, *1996 Annual Report of the Inter-American Court of Human Rights* 221, 229, OAS doc. OAS/Ser.L/V/III.35, doc. 4 (1997); quoted in Cançado Trindade, *supra* footnote 1292, at 23, n. 82. Regarding the 2002 rules, see Thomas Buergenthal *et al., supra* footnote 1294, at 258.

1298. *Ex* Art. 25.

1299. Martin A. Olz, "Non-Governmental Organizations in Regional Human Rights Systems", 28 *Colum. Hum. Rts. L. Rev.* 307, 346 (1997); *Asociación de Aviadores de la República, Mata et al.* v. *Spain*, App. No. 10733/84, 41 *Eur. Comm'n HR Dec. & Rep.* 211, 222 (1985) (holding that an applicant cannot claim to be the victim of a breach of one of the rights or freedoms protected by the Convention unless there is a sufficiently direct connection between the applicant as such and the injury suffered); *Norris and Nat'l Gay Fed'n* v. *Ireland*, App. No. 10581.83, 44 *Eur. Comm'n HR Dec. & Rep.* 132, 135 (1985). See also Marek Antoni Nowicki, "NGOs before the European Commission and the Court of Human Rights", 14 *Neth. Q. Hum. Rts.* 289, 290-291 (1996) (footnotes discuss additional cases involving non-governmental applicants).

1300. See Council of Europe, Explanatory Report and Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, para. 85, in 33 *ILM* 943, 955 (1994).

> non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto." [1301]

In contrast, the American Convention on Human Rights provides that:

> "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." [1302]

Thus, under the American system, any person or group may submit a petition to the Inter-American Commission even without being a victim of a violation [1303].

The requirement of being a victim for standing purposes limits the ability of NGOs to submit applications in the European system, even for NGOs dedicated to the promotion of their members' rights. Furthermore,

> "[n]ot each right of those protected by the Convention can, by its very nature, be infringed with respect to a non-governmental organization. The extent to which the non-governmental organization can invoke such a right must be determined in the light of the specific nature of that right." [1304]

Non-governmental organizations may, however, appear before the European Court as *amici curiae*. Under Article 36 (2) of the amended Convention, which is modelled on an innovation made in the former Rules of Court in 1983 [1305], the President may invite "any person concerned who is not the applicant to submit written comments or take part in hearings" [1306].

The African system of protection empowers the Commission to

1301. European Convention on Human Rights, Art. 34.
1302. American Convention on Human Rights, Art. 44.
1303. See Cançado Trindade, *supra* footnote 1292.
1304. Nowicki, *supra* footnote 1299, at 291.
1305. Rule 37 (2) of the 1983 Rules of the Court.
1306. Olz, *supra* footnote 1299, at 347; see also Explanatory Report, *supra* footnote 1299, at para. 91; from 1983 to 1994, applications for *amicus curiae* were filed in 33 cases; the Court granted 22 of the motions, Nowicki, *supra* footnote 1299, at 297.

allow individuals and organizations to bring complaints to the African Commission on Human and Peoples' Rights [1307]. Under the new Protocol establishing the African Court on Human and Peoples' Rights, a State may make a declaration accepting that individuals or NGOs may institute cases directly before the Court [1308]. The Court will have jurisdiction for complaints filed by the Commission, States, and African intergovernmental organizations without the need for special consent of the State involved [1309].

The supervisory machinery established by the European Social Charter has recently been reinforced by providing for a system of collective complaints. An Additional Protocol allows NGOs to submit complaints alleging "unsatisfactory application of the Charter" [1310]. Such NGOs include international organizations of employers and trade unions, NGOs that have consultative status with the Council of Europe and have been put on a list established for this purpose, and representative national organizations of employers and trade unions within the jurisdiction of the party against which the complaint is lodged. The complaint is addressed to the Secretary General of the Council of Europe who transmits it to the Committee of Independent Experts. The Committee reports its conclusions to the Committee of Ministers and to the Parliamentary Assembly [1311].

Individuals have standing to bring complaints against States that have accepted the necessary treaties before the Human Rights Committee [1312], the Committee on the Elimination of Racial Discrimination [1313], and the Committee against Torture [1314]. Individuals also

1307. Revised Rules of Procedure of the African Commission on Human and Peoples' Rights, Rules 103-104; Arts. 55-56 of the African Charter on Human and Peoples' Rights.

1308. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Arts. 5 (3) and 34 (6), reprinted in 6 *African Yearbook of International Law* 419 (1998).

1309. Protocol to the African Charter, *supra* footnote 1308, Art. 5 (1).

1310. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Strasbourg, 9 November 1995, *Eur. TS*, No. 158, Art. 1.

1311. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, *id*., Arts. 1-8.

1312. Optional Protocol to the Political Covenant, GA resolution 2200A (XXI), 21 UN, *GOAR*, Suppl. No. 16, at 59, UN doc. A/6316 (1966), Art. 1.

1313. International Convention on the Elimination of All Forms of Racial Discrimination, GA resolution 2106 (XX), 21 December 1965, UN, *GAOR*, 20th Sess., Suppl. No. 14, UN doc. A /6014 (1965), Art. 14.

1314. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA resolution 39/46, Annex, UN, *GAOR*, 39th Sess., Suppl. No. 51, at 197, UN doc. A/39/15 (1984), Art. 21.

have the right to bring complaints under the new Optional Protocol to the Women's Convention [1315].

None of the universal conventions provides for the right of organizations to bring complaints as a group. However, in *Bernard Ominayak, Chief of the Lubicon Lake Band*, the Human Rights Committee dealt with a claim under Article 27 of the Political Covenant (minority rights) as a group complaint, or rather as a collective complaint. The Committee first held that it could not deal with the claim to self-determination since that right is a group right and the Protocol gives the Committee competence over individual rights only. Nevertheless, the Committee proceeded to examine claims under Article 27 on behalf of the Lubicon Lake Band, a group of indigenous people of Canada [1316]. It held that Canada had violated Article 27 through "recent developments [that] threaten the way of life and culture of the Lubicon Lake Band . . ." [1317].

Victims may be represented before the treaty bodies by individuals or organizations. They are frequently represented by both before the Human Rights Committee. The rules of procedure of the Committee on the Elimination of Racial Discrimination explicitly provide for such a representation. Rule 91 *(b)* states that

> "[a]s a general rule, the communication should be submitted by the individual himself or by his relatives or designated representatives; the Committee may, however, in exceptional cases accept to consider a communication submitted by others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim's behalf . . ." [1318].

1315. Optional Protocol to the Convention on the Elimination of Discrimination against Women, GA resolution A/54/4, Annex, 54 UN, *GAOR*, Supp. No. 49, at 5, UN doc. No. A/54/49 (Vol. I) (2000), entered into force 22 December 2000, Art. 2.

1316. See for the Human Rights Committee: *Bernard Ominayak, Chief of the Lubicon Lake Band* v. *Canada*, Communication No. 167/1984, UN doc. No A/45/40 (1990), paras 13.3-13.4. For similar tendencies, see also *Länsman et al.* v. *Finland*, Communication No. 511/1992, UN doc. CCPR/C/52/D/511/1992 (1994). See for the Committee against Torture: *X, Y, and Z* v. *Sweden*, Communication No. 61/1996, UN doc. CAT/C/20/D/61/1996 (1998).

1317. *Bernard Ominayak, Chief of the Lubicon Lake Band* v. *Canada*, *id.*, para. 33.

1318. Rules of Procedure of the Committee on the Elimination of Racial Discrimination, Rule 91 *(b)*.

The Torture Convention provides explicitly that the Committee may receive communications "from or on behalf of individuals" [1319]. Similarly, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women allows communications "by or on behalf of individuals or groups of individuals" [1320].

ECOSOC resolution 1503 (1970) allows individuals and NGOs to present communications to the Human Rights Commission, but the procedure does not provide for the examination of individual complaints [1321]. Communications submitted are examined by a working group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities with a view to the bringing to the attention of the Sub-Commission those communications "which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms" [1322]. The Sub-Commission then considers whether to refer those communications to the Commission on Human Rights. The Commission can then decide if the situation requires further investigation. The procedure is confidential. Most communications under Resolution 1503 have been submitted by NGOs [1323].

III. Non-governmental organizations

(a) *Role of NGOs in law-making and standard-setting activities*

NGOs have been gaining influence in international law, especially in the areas of human rights, humanitarian law, the environment, rights of indigenous peoples, and, increasingly, in the globalization of trade and commerce [1324]. Of course, efforts by NGOs to influence the development and enforcement of the international law are not

1319. Torture Convention, *supra* footnote 1314, Art. 22 (1); Rules of Procedure of the Committee against Torture, Rule 107.

1320. Optional Protocol to the Women's Convention, *supra* footnote 1315, Art. 2.

1321. Economic and Social Council Resolution 1503 (XLVIII), UN, *ESCOR*, 48th Sess., Suppl. No. 1A, at 8 (UN doc. E/4832/Add.1 (1970)).

1322. Resolution 1503, *id*., para. 1.

1323. Felix Ermacora, "Non-governmental Organizations as Promoters of Human Rights", in *Protecting Human Rights: The European Dimension. Studies in Honor of Gérard J. Wiarda* 171, 176 (Franz Matscher and Herbert Petzold, eds., 1988).

1324. Theo van Boven, "The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy", 20 *Cal. W. Int'l. LJ* 207, 221 (1989-1990); Ermacora, *supra* footnote 1323, at 173.

entirely new. They were involved in campaigns against slavery and the traffic in women and children from the mid-nineteenth century. Recently, NGOs have become prominent players in campaigns against anti-personnel land mines, for an international criminal court, and for accountability of perpetrators of atrocities before national and international tribunals and courts. With the increasing penetration of international law into matters of importance to everybody's daily life, there is little justification for complete exclusion of non-States from the participatory process [1325]. The scope, nature, and benefits of such participation, however, continue to be controversial.

The UN Charter empowered the Economic and Social Council to grant consultative status to NGOs in matters within its competence, i.e., in matters of social and economic rights [1326]. The European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations states in its preamble that Member States recognize

> "that international non-governmental organizations carry out work of value to the international community, particularly in the scientific, cultural, charitable, philanthropic, health and education fields, and that they contribute to the achievement of the aims and principles of the United Nations Charter and the Statute of the Council of Europe" [1327].

But sensitive political issues such as peace and security were retained in the exclusive domain of inter-State co-operation [1328]. The playing field of NGOs has nevertheless been considerably expanded since [1329], and they have been gaining influence also in the field of peace and security [1330].

NGOs have made significant contributions to the development, adoption and acceptance of international standards. While continuing with their more traditional role of lobbying political parties, parlia-

1325. Sands, *supra* footnote 1129, at 547-548.
1326. UN Charter, Art. 71.
1327. European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, Strasbourg, 24 April 1986, *Eur. TS*, No. 24, Preamble.
1328. Van Boven, *supra* footnote 1324, 208.
1329. Oscar Schachter, "The Decline of the Nation-State and Its Implications for International Law", 36 *Colum. J. Transnat'l L.* 7, 13 (1997).
1330. Report of the Secretary-General on the Work of the Organization, UN doc. A/44/1, § VII (1989), quoted in Van Boven, *supra* footnote 1324, at 208.

ments and Governments and mobilizing public opinion, they have been monitoring and reporting on human rights violations [1331]. They have performed an important role in providing data to human rights bodies, a development acknowledged and encouraged by such bodies [1332]. The role of NGOs as information providers is also recognized in the Statute of the International Criminal Court. Under Article 15 of the ICC Statute, the Prosecutor may seek information, *inter alia*, from non-governmental organizations [1333].

NGOs have been active "intervenors in human rights procedures" [1334]. They have successfully mobilized Governments to seek, through the competent organs, advisory opinions of the International Court of Justice [1335].

NGOs have also played a greater role in the field of standard-setting. Increasingly, they have been demanding "a say in the formation of international law" [1336] and have provided the initial impetus for the adoption of new instruments [1337]. Although no formal rules of procedure specifically allow this practice, NGOs now routinely present and circulate on the margins of international intergovernmental conferences, or through governmental delegations, drafting proposals in their own name, usually at the working group level. This has been the case, for example, with regard to drafts of the UN Convention against Torture [1338] and the UN Convention on the Rights of the Child [1339]. In the framework of the Council of Europe, NGOs have also been involved in the drafting of several conventions and charters, including the European Convention on the Legal Status of Migrant Workers, the European Convention for the Preven-

1331. Van Boven, *supra* footnote 1324, at 207; Ermacora, *supra* footnote 1323, at 173.

1332. Report of the Human Rights Committee, UN, *GAOR*, 49th Sess., Suppl. No. 40, at 84-85, para. 437, UN doc. A/49/40 (1994).

1333. ICC Statute, Art. 15 (2).

1334. Higgins, in "The Reformation in International Law", *supra* footnote 1113, at 214.

1335. *Id.*, at 215.

1336. *Id.*

1337. C. M. Eya Nchama, "The Role of the Non-governmental Organizations in the Promotion and Protection of Human Rights", in *Bulletin of Human Rights*, 90/1. I. Special Procedures; II. The Role of Non-Governmental Organizations 50, 74-80 (Centre for Human Rights, Geneva, 1991); Niall MacDermot, "The Role of NGOs in Human Rights Standard-Setting", in *Bulletin of Human Rights* 90/1, I. Special Procedures, II.; The Role of Non-Governmental Organizations 42 (Centre for Human Rights, Geneva, 1991).

1338. MacDermot, *Bulletin of Human Rights* 90/1, at 44.

1339. Van Boven, *supra* footnote 1324, at 218.

tion of Torture, the European Cultural Convention and the European Charter for Regional or Minority Languages [1340].

In a few instances, complete texts drawn up by NGOs have been adopted by the UN General Assembly or used as the basis of future work in the Human Rights Commission, and other bodies involved in standard-setting [1341]. The Principles of Medical Ethics drawn up by the Council for International Organizations of Medical Sciences (CIOMS) and the Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances prepared by the International Commission of Jurists are important examples of this trend [1342].

NGOs, such as the International Commission of Jurists, have also drafted important guidelines for the interpretation of existing instruments. The Siracusa Principles (1984) (on derogations in times of emergency) and the Limburg Principles (1986) (on the ESC Covenant) are useful examples. They were circulated as UN documents and are referred to as authoritative sources. Useful normative instruments have also been adopted by the International Law Association, as, for example, the Paris Minimum Standards of Human Rights Norms in a State of Emergency (1984) and the Declaration of Principles of International Law on Mass Expulsion (1986) [1343].

NGOs are effective vehicles for expressing concerns that are not adequately represented by States [1344]. Some commentators have nonetheless expressed the view that NGOs' influence in the field of human rights may be diminishing with the multiplication of procedures allowing individual access to international institutions [1345].

The increasing involvement of NGOs in international law can be seen as a democratization of its formation process: what was previ-

1340. See "Europe through its Associations", *available at* http://www.coe.fr./ong/ngo.htm (visited on 24 March 2000); European Convention on the Legal Status of Migrant Workers, Strasbourg, 24 November 1977, *Eur. TS*, No. 93; European Convention for the Prevention of Torture or Inhuman and Degrading Treatment or Punishment, Strasbourg, 26 November 1987, *Eur. TS*, No. 126; the European Cultural Convention, Paris, 19 December 1954, *Eur. TS*, No. 18; and the European Charter for Regional or Minority Languages, Strasbourg, 5 November 1992, *Eur. TS*, No. 148.

1341. Van Boven, *supra* footnote 1324, 218-219.

1342. *Id.*

1343. *Id.*, at 219-220.

1344. Hobe, *supra* footnote 1115, at 130-131.

1345. Ermacora, *supra* footnote 1323, at 174.

ously done by States alone would acquire a wider base of participants. With the increasing activities and heightened profile of NGOs, however, concerns have been expressed about NGOs' transparency and accountability. Thriving on publicity, which in turn often relies on controversy, NGOs tend to take a partisan view of issues, which militates against compromise solutions. In some cases, these may be laudable qualities, in others, less so. The influence of NGOs on and participation in treaty-making and standard setting processes could not have occurred without the growth in the role of international organizations, which, as José Alvarez observes, have provided "entry points for the NGOs. International organizations have expanded the diversity of actors in treaty-making, benefitting NGOs and other interest groups"[1346].

In some intergovernmental conferences, including the Rome Conference for the establishment of the ICC, NGOs have not only been participants in the negotiations, but some of their members have been a part of some governmental delegations[1347]. Serge Sur is among those who have criticized these developments by emphasizing that States, by renouncing their monopoly on inter-State negotiations, have made themselves accountable to organizations with no recognized legitimacy[1348]. He was particularly critical of those NGOs

> "qui se bornent à des postures normatives, aspirent à devenir des partis politiques internationaux, sans légitimité, sans racines et sans contrôle, et développent une diplomatie parallèle, qui interfère avec les diplomaties étatiques, sans aucune base démocratique"[1349].

Oscar Schachter has warned that "[t]he widespread approbation of civil society associations . . . tends to obscure their diversity and conflicting ends", and argued that

> "to expect that the 'common good' will usually emerge simply from the clash of competing interest groups is hardly realistic. In the real world, we have to look to the State in the final

1346. *Id.*
1347. Serge Sur, "Vers une cour pénale internationale: La Convention de Rome entre les ONG et le Conseil de sécurité", 101 *Revue générale de droit international public* 29, 36 (1999).
1348. *Id.*, at 36-37.
1349. *Id.*, at 36.

analysis to resolve such conflicts on the basis of public principles of justice and the common good" [1350].

(b) *NGO access to international institutions*

Under Article 71 of the UN Charter, the consultative status of NGOs is limited to questions within the competence of the ECOSOC. The Charter does not allow NGOs to address the General Assembly or its committees, nor the Security Council. ECOSOC Resolution 1996/31 gives NGO's a status as observers and allows them to make oral and written statements to the Council and its committees [1351]. As stated in this resolution, the purposes of consultative arrangements are:

> "on the one hand, . . . enabling the Council or one of its bodies to secure expert information or advice from organizations having special competence in the subjects for which consultative arrangements are made, and, on the other hand, to enable international, regional, sub-regional and national organizations that represent important elements of public opinion to express their views" [1352].

Also within the framework of the Council of Europe, a system of consultative relationships with NGOs has been established. Consultative status is governed by Resolution 93 (38) and is based on the need for the information NGOs can provide in their own fields of competence. The Resolution also allows direct representation for these organizations [1353].

Co-operation between the different bodies of the Council of Europe and NGOs covers a wide-range of activities, including North-South dialogue, gender equality, social rights, health, human rights and the environment. The Council has created a permanent structure for co-operation with international NGOs. A Plenary Conference of NGOs, which meets annually, sets the objectives for its Liaison Committee. This committee liaises with departments of the Secretariat of the Council, monitors sectoral NGO meetings, and encourages NGOs to co-operate with the Council [1354].

1350. Schachter, *supra* footnote 1329, at 14.
1351. ECOSOC resolution 1996/31, para. 37 *(f)*.
1352. ECOSOC resolution 1996/31, para. 20.
1353. Council of Europe, Committee of Ministers Resolution (93) 38, paras. 2, 4 and 5.
1354. See "Europe through its Associations", *supra* footnote 1340.

IV. Indigenous peoples

With the development of an indigenous peoples' movement and the multiplication of indigenous peoples' organizations [1355], the concept of "indigenous peoples" has been gaining currency. While still controversial in some quarters, the recognition of a distinct concept of indigenous peoples has been justified by the "destruction of their previous territorial entitlements and political autonomy wrought by historic circumstances of invasion and colonization" [1356]. Many claims by indigenous peoples may be seen as human rights or minority rights. Some distinctive elements of indigenous claims have nonetheless been identified:

> "[T]he central importance of land and territory to group identity and culture; the emerging view of self-determination in relation to indigenous peoples as referring more often to autonomy and control of the group's own destiny and development than to formation of independent States; the development of norms concerning participation by the group and its members in decisions affecting them; and the increasing support for self-identification as a basis of group definition." [1357]

Indigenous rights have been framed in different conceptual structures: human rights and non-discrimination claims, minority claims [1358], self-determination claims, historic sovereignty claims, and claims as indigenous peoples *(sui generis)* [1359]. While the human rights approach has often been the preferred way to address indigenous issues, some commentators, and particularly Benedict Kings-

1355. Benedict Kingsbury, "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy", 92 *AJIL* 414, 421 (1998); Robert K. Hitchcock, "International Human Rights, the Environment, and Indigenous Peoples", 5 *Colo. J. Int'l Envtl. L. & Pol'y* 1, 10 (1994).

1356. Kingsbury, *supra* footnote 1355, at 419.

1357. *Id.*, at 437.

1358. The trend to recognize and protect minority rights in recent times is exemplified by the General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN General Assembly resolution 47/135 (1992); the Council of Europe Framework Convention for the Protection of National Minorities, *Eur. TS*, No. 157 (1995); and the establishment of a High Commissioner on National Minorities in the Framework of the OSCE, "The Challenges for Change", Helsinki Document, Part II (1992).

1359. Benedict Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law", 34 *NYU J. Int'l L. & Pol.* 189 (2001).

bury, have suggested that additional or alternative concepts are needed to address issues that go beyond individual rights and non-discrimination, and are focused on distinct histories, cultures and identities and thus on *sui generis* claims of indigenous peoples [1360]. In terms of human rights, the most important application of Article 27 of the Political Covenant has been the recognition that the failure of a State to protect indigenous land and resources amounts to a violation of the cultural rights of a minority group. In practice, tribunals have tended to recognize the *sui generis* character of indigenous claims and have gone beyond standard minority rights provisions [1361].

The concept of indigenous peoples as a distinct collectivity has been resisted by some States as a potential challenge to the unity of the State. But States' attitudes are changing — with several Governments endorsing a concept of "indigenous peoples", and an increasing acceptance of "principles for relationships with indigenous peoples that incorporate elements of self-determination" [1362]. In the preamble of the 1957 ILO Convention No. 107, the General Conference of the ILO considered that

> "the adoption of general international standards on the subject will facilitate action to assure the protection of the populations concerned, their progressive integration into their respective national communities, and the improvement of their living and working conditions" [1363].

The ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989), by contrast, illustrates the more recent trend to grant ethnically distinct groups a degree of political and economic autonomy within existing State boundaries [1364]. The Convention recognizes

> "the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to

1360. *Id.*, at 205.
1361. *Id.*, at 214.
1362. Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law", *supra* footnote 1359, at 229.
1363. Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, ILO Convention No. 107, Geneva, 26 June 1957, Preamble.
1364. Hitchcock, *supra* footnote 1355, at 11.

maintain and develop their identities, languages and religions, within the framework of the States in which they live"[1365].

There is no accepted definition of "indigenous peoples"[1366]. One definition may be found in the World Bank's Operational Directive on Indigenous Peoples:

> "The terms 'indigenous peoples', 'indigenous ethnic minorities', 'tribal groups', and 'scheduled tribes' describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process.
>
> . . . . . .
>
> Because of the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity. Indigenous people are commonly among the poorest segments of a population. They . . . can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:
>
> *(a)* a close attachment to ancestral territories and to the natural resources in these areas;
> *(b)* self-identification and identification by others as members of a distinct cultural group;
> *(c)* an indigenous language, often different from the national language;
> *(d)* presence of customary social and political institutions; and
> *(e)* primarily subsistence-oriented production."[1367]

Despite the continuing controversy regarding the definitions of indigenous peoples[1368],

> "[t]he concept of 'indigenous peoples', or its local cognates, has become an important unifying connection in transnational activist networks, linking groups that were hitherto marginal

1365. Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, in force 5 September 1991, III *International Labour Conventions and Recommendations* 324 (International Labour Organization, 1996), reprinted in 28 *ILM* 1382 (1989), Preamble.

1366. Hitchcock, *supra* footnote 1355, at 2.

1367. World Bank, Operational Directive on Indigenous Peoples, OD 4.20, September 1991, paras 3-5.

1368. Kingsbury, "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy", *supra* footnote 1355, 416-417.

> and politically unorganized to transnational sources of ideas, information, support, legitimacy and money" [1369].

The recent trend is towards giving greater weight to self-identification. This runs counter to "the traditional view of indigenous peoples as objects of international law, to be defined either by criteria formulated by States or through recognition by States" [1370]. The proposed American Declaration on the Rights of Indigenous Peoples, drafted by the Inter-American Commission on Human Rights, provides that "[s]elf-identification as indigenous shall be regarded as a fundamental criterion for determining peoples to which the provisions of this Declaration apply" [1371]. A similar provision is found in the 1989 ILO Convention No. 169 [1372].

Benedict Kingsbury has warned that, in contrast to NGOs, whose membership for the most part is based on voluntarism and individual choice, the membership of indigenous groups may be ascriptive. It may depend on "birth, and members of the group who wish to detach themselves from it may pay a steep price in terms of identity and access to resources and governance structures" [1373].

The composition of the Arctic Council illustrates the expanded role that indigenous peoples are coming to play in the management and protection of the areas where they live. The Arctic Council was established in 1996 between the eight States bordering the Arctic Ocean [1374]

> "[to] provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic" [1375].

1369. *Id.*, at 416-417, opposition to the application to people of the concept of "indigenous people" has been made by China, India, Bangladesh, Myanmar and parts of Indonesia.

1370. Kinsbury, *supra* footnote 1355, at 440-441.

1371. Proposed American Declaration on the Rights of Indigenous Peoples, doc. OEA/Ser/L/V/.II.95, doc. 6, Art. 1 (2) (1997).

1372. Art. 1 (2).

1373. Benedict Kingsbury, "The Democratic Accountability of Non-Governmental Organizations", 3 *Chic. J. Int'l L.* 183, 187 (2002).

1374. Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden and the United States.

1375. Joint Communiqué and Declaration on the Establishment of the Arctic Council, 19 September 1996, para. 1 *(a)*, reprinted in 35 *ILM* 1386.

The Council includes two categories of participants: Members (States) and Permanent Participants [1376].

C. Conclusions

Classical international law holds that States are the principal and the typical subjects of international law: they possess the totality of the rights of international legal persons. Among these rights, the principal one is sovereignty, which Louis Henkin separates into such factors as independence, equality, autonomy and territorial integrity [1377]. Applying more traditional rubrics, one can observe that individuals cannot make treaties, acquire territory, or (except perhaps in groups of insurgents or belligerents), make war, or, absent special arrangements, sue States before international tribunals [1378]. However, as first authoritatively pronounced in the Advisory Opinion of the PCIJ on the *Jurisdiction of the Courts of Danzig*, States may grant individuals direct rights by treaty [1379].

Responding to the developing needs of the international community, international law may create new subjects endowed with varying legal personality, and various rights, obligations and attributes, a development recognized within the United Nations Organization by the ICJ in the Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* [1380]. Subjects of international law, therefore, need not always have identical rights and obligations. Increasingly, territorial and political entities other than States have been granted limited international personality, including, in some cases, the possibility of becoming parties to treaties and participating in international organizations. Indeed, Robert Jennings and Arthur Watts argue that, to the extent that States treat individuals as endowed directly with international rights and duties, they constitute those individuals as subjects of international law [1381].

We have seen the immense changes that have occurred in the rights and obligations actually granted to individuals and exercised by them, as demonstrated by their access to international institutions

1376. *Id.*, para. 2.
1377. Louis Henkin, *International Law: Politics, Values and Functions* 26-28 (1990).
1378. David J. Bederman, *International Law Frameworks* 78 (2001).
1379. *PCIJ, Ser. B, No. 15*, at 17.
1380. *ICJ Reports 1949*, at 178-180.
1381. *Oppenheim's International Law* (9th ed.), *supra* footnote 1094, at 16.

and tribunals, their participation, albeit indirect, in norm-making, their ability to be involved in protecting their investments, their access to institutions established by treaties for the protection of the environment, their being the subjects of duties under international criminal and humanitarian law, and so on. Under the influence of human rights law, rights have been granted to individuals, and more than ever before it has been recognized that international law exists for individuals and functions on their behalf. We have discussed the increasing access of private companies and even natural persons to decision-making bodies under various investment treaties. These developments do not necessarily stem from a human rights analysis, but from the changing realities of international business organization and investment. Nevertheless, these developments contribute to the panorama in which non-State actors, including individuals, are important and often independent participants.

For these reasons, I am sympathetic to the suggestion made by Rosalyn Higgins that instead of continuing the sterile debate as to whether individuals are or are not subjects or objects of international law, our conversation should turn to individuals as participants in the system of international law.

David Bederman argues that as international legal actors have diversified and the topics of international legal regulation have expanded, the distinction between subjects and objects of international law "has blurred" [1382]. He believes that the debate whether individuals can only be given rights by States, "which pits natural and positive sources of international law is to a large extent irrelevant today. The fact is that persons *do* have rights under international law" [1383].

The debate, however, continues unabated. How we see individuals in this debate depends on whether primacy is given to the evolution and the increasing participation of individuals in the process, or to the formal legal structure. On the one side, Jenning and Watts would grant individuals limited international personality based on their direct international rights and duties. On the other side, while fully recognizing the increasing participation and the rights and obligations of individuals under international law in general and under human rights law in particular, Prosper Weil emphasizes that these

1382. Bederman, *supra* footnote 1378, at 50.
1383. *Id.*, at 77-78.

developments result from the operation of inter-State rules of conventional and customary law. In his view, international law, including the human dimension of the Helsinki process, continues to be an inter-State affair : it is still States that create and apply the rules. The enlargement of individual rights and obligations and the intensification of individual participation in the system do not amount to a fundamental change in the inter-State nature of international law. Individuals are thus nothing more than objects of international law who do not participate directly in the creation of the norms [1384]. A similar opinion has more recently been expressed by Duncan Hollis, who observes :

> "By treaty or by practice, it is States whose conduct determines the rules of international law. What has changed is that in the formation, implementation, and even the enforcement of international law, States have opened the door to allow others some limited level of international sovereignty. Modern States recognize the ability of other actors to have rights and duties on the international plane, a status that, while certainly not equal to States, is sufficient for those actors to participate." [1385]

He concludes that States continue to "have the authority to determine who else may participate" [1386] in the process of creation, implementation and enforcement of international law.

There is a nexus, however, between the quantitative development and the legal structure. We may be reaching a situation in which it would become impossible and impractical for States to abrogate the rights and the duties that individuals or other non-State actors have learned to exercise and to enjoy. There is a growing consensus that the status of the individual in international law is being transformed from a mere object to a subject, a subject whose rights are different and lesser, but a subject nonetheless.

So far, NGOs rather than individuals, have been given some participating rights in some law-making conferences adopting various new standards. Proposals have even been advanced to allow NGOs

1384. Prosper Weil, "Le droit international en quête de son identité", 237 *Recueil des cours* 118-122 (1992).

1385. Duncan Hollis, "Private Actors in Public International Law : Amicus Curiae and the Case for the Retention of State Sovereignty", 25 *Boston Coll. Int'l & Comp. L. Rev.* 235, 250 (2002).

1386. *Id.*, at 255.

to participate in the formation of customary law[1387]. I am doubtful about the coherence and the practicality of such proposals. Opposition centres on the argument that NGOs tend not to be "open, transparent, and accountable"[1388] and that it is difficult to ascertain what is the NGO practice and consensus[1389]. An important exception is the International Committee of the Red Cross which has been accepted as an actor in the formation of customary rules of international humanitarian law. That does not mean that other NGOs do not exercise major influences on the formation of both customary and conventional rules of international law, through public opinion, lobbying, and impact on the interpretation and application of rules. But they do not as yet operate as full partners in the formation of customary law.

We have discussed the increasing access of private companies and even natural persons to decision-making bodies under various investment treaties. These developments do not necessarily stem from human rights analogies, but from the changing realities of international business organization and investment. Nevertheless, they contribute to the panorama in which non-State actors, including individuals, are important and often independent participants.

1387. Isabelle Gunning, "Modernizing Customary International Law: The Challenge of Human Rights", 31 *Va. J. Int'l L.* 211, 221 1991).

1388. Julie Mertus, "Considering Nonstate Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application", 32 *NYU J. Int'l L. & Pol.* 537, 561 (2000).

1389. *Id.*, at 562; Anne-Marie Slaughter, "The Role of NGOs in International Law-Making", International Law and International Relations, Hague Academy of International Law, 285 *Recueil des cours*, 97-100 (2000).

CHAPTER VI

SOURCES OF INTERNATIONAL LAW

This chapter considers the influence of human rights on the sources of international law, especially custom and general principles of law. Custom in relation to the principle *nullen crimen* is discussed in my chapter on the "Criminalization of Violations of International Humanitarian Law". A separate chapter is devoted to the influence of human rights on the law of treaties in contexts other than sources. Of course, in addition to human rights and humanitarian norms, other important community values, such as prohibition of aggression, prohibition of intervention in the internal affairs of States, and protection of environment also impact on the development of sources. For those promoting such values, the doctrine of sources, and of custom especially, has become the principal strategy of creating universal international law.

As Oscar Schachter notes, "[t]he principal intellectual instrument in the last century for providing objective standards of legal validation has been the doctrine of sources" [1390]. Since the end of the nineteenth century that doctrine "lays down verifiable conditions for ascertaining and validating legal prescriptions" [1391]. It

> "provided the stimulus for a methodology of international law that called for detailed 'inductive' methods for ascertaining and validating law. If sources were to be used objectively and scientifically, it was necessary to examine in full detail the practice and related convictions *(opinio juris)* of States." [1392]

However, as our discussion will show, "an inductive factual positive science of international law may be characterized more as a myth than as reality" [1393].

Given the multitude of treaties addressing all areas of human activity, the continuing importance of custom merits an explanation.

1390. Oscar Schachter, *International Law in Theory and Practice* 35 (1991).
1391. Schachter, *supra* footnote 1390, at 35.
1392. Schachter, *supra* footnote 1390, at 36.
1393. Schachter, *supra* footnote 1390, at 37.

As international law becomes more codified, the primary and the most obvious significance of a norm's customary character is that the norm binds States that are not parties to the instrument in which that norm is restated. It is, of course, not the treaty norm, but the customary norm with identical content, that binds such States. Additionally, because treaties typically do not address all of the relevant rules, the identification of the applicable customary rules is also important for States parties.

In countries where customary law is treated as the law of the land but an act of the legislature is required to transform treaties into internal law, custom assumes importance if no such law has been enacted. Certainly, the failure to enact the necessary legislation cannot affect the international obligations of these countries to implement their treaty obligations. Invoking a certain norm as customary rather than conventional in such situations may, however, be crucial, especially for the application of international norms for ensuring the protection of individuals by national courts and institutions.

The transformation of treaty norms into customary law may have certain additional effects beyond its consequences for the internal law of some countries. One such effect, already reflected in common Article 63/62/142/158 concerning denunciation of the Geneva Conventions, as pointed out by the ICJ in the *Nicaragua* case [1394], is that parties could not terminate their customary law obligations by withdrawal. This Common Article provides that the denunciation of one of the Conventions:

> "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience".

The same principle is reflected in Article 43 of the Vienna Convention on the Law of Treaties [1395], which states that the denunciation of a treaty "shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be

1394. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), Merits, ICJ Reports 1986* 14, 113-114 (Judgment of 27 June).

1395. Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, Art. 31 (3) *(b)*, 1155 *UNTS* 331.

subject under international law independently of the treaty". Thus, while this question is obviously important in humanitarian and human rights treaties, it may also be significant where a denunciation or a withdrawal from other normative treaties is contested.

The existence of a denunciation clause in a treaty does not necessarily weaken the claim that some of its provisions are declaratory of customary law. Similarly, the absence of comment in a denunciation clause on the effects of the denunciation on customary law (e.g., Article 99 of Additional Protocol I to the Geneva Conventions, Article 25 of Additional Protocol II to the Geneva Conventions and Article 14 of the Convention on the Prevention and Punishment of the Crime of Genocide) does not mean that certain treaty rules are solely conventional. Such clauses may have been drafted for a variety of reasons (e.g., past practice, implementation, administrative, financial or technical clauses, or settlement of disputes) unrelated to the question of whether or not the treaty is declaratory of customary law. The effects of the denunciation must still be assessed in light of the general international law reflected in Article 43 of the Vienna Convention.

The distinction between a customary and a conventional rule is particularly important in disputes between two States when one of them exercises the right, under Article 60 of the Vienna Convention on the Law of Treaties, to terminate or suspend the operation of a treaty on the ground that the other party has violated an essential provision of that treaty. It should, however, be noted that Article 60 (5) of the Vienna Convention establishes a *lex specialis* for provisions relating to the protection of the human person contained in treaties of a humanitarian character, even where such provisions have not matured into customary law. In the *Nicaragua* case, the ICJ asserted that "if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State in declining to apply the other rule"[1396]. Because, subject to certain limitations, State A may respond to a violation of a rule of international law by State B through a proportional violation of another rule, this comment by the Court is overbroad. Of course, a conventional rule which parallels a customary rule may be subject to different treatment as regards organs competent to verify its implementation. Another effect of this

1396. *ICJ Reports 1986*, at 95 (Judgment of 27 June), *supra* footnote 1394.

distinction is that reservations to the Conventions cannot affect the obligations of the parties under provisions reflecting customary law to which they would be subject independently of the Conventions.

Two statements of the International Court of Justice in the *Nicaragua* case are pertinent here: first, that

> "even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence";

and, second, that "[r]ules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application"[1397]. Obviously, the Vienna Convention's rules on treaty interpretation do not apply to customary law outside treaty context. The Court's cryptic reference to "separate existence" is not illuminating. The potential importance of interpretive practice by State parties is considerable: subsequent practice in the application of the treaty may establish the agreement of the parties concerning its interpretation. That new interpretation may in itself affect customary law. Interpretation and practice may also introduce customary law into the interstices of the treaty, addressing matters which may have been left without regulation or which need clarification. The fewer the number of parties to a normative treaty, the greater the space left for the development of customary law outside the treaty[1398]. The political and moral importance of claims that a norm constitutes customary law has proved important in international disputes and in codification conferences.

In the context of international criminal tribunals, the identification of customary law plays an important role in the interpretation and application of the *ratione materiae* provisions of their Statutes. In addition, customary law provides a yardstick for assessing whether or not the material offences stated in the Statutes may be *ex post facto*. I discuss this question in the chapter on Criminalization of Violations of International Humanitarian Law.

1397. *Id.*, at para. 178.

1398. On the so-called Baxter paradox, and its limitations, see Meron, *Human Rights and Humanitarian Norms as Customary Law* 50-53 (1989).

A. State Practice and Opinio Juris

Traditionally, treaties were regarded as the source "par excellence" of international law. The certainty and precision of treaty law contrasts with the uncertainty and vagueness of customary law [1399]. Since the 1970s however, customary law has regained ground and

> "est devenue la pierre angulaire [du système], au point que le droit coutumier est couramment qualifié de 'général', le droit conventionnel étant réduit au rang d'un droit 'particulier'. Mieux encore, la convention elle-même a été sinon annexée, du moins occupée par la coutume. Parallèlement, la coutume a changé de nature : autrefois processus lent de formation du droit par la stabilité et la consolidation, elle tend aujourd'hui à devenir un procédé volontariste de transformation rapide du droit" [1400].

Custom, suggests Georges Abi-Saab, is "une explication polyvalente qui répond à tous les besoins, y compris celui de hisser le contenu des traités de codification et des résolutions normatives au niveau du droit international général" [1401]. Flauss observed that human rights law contributes to the *"deconventionnalisation"* of international law [1402]. Because of its fluidity, custom is particularly influenced by public opinion and thus by the principal values of the international community. Its political dimension is often obvious.

I. State practice

Article 38 (1) *(b)* of ICJ's Statute describes custom "as evidence of a general practice accepted as law". Because practice demonstrates custom and not vice versa, § 102 (2) of the Third Restatement, of the Foreign Relations Law of the United States of 1987 states, more accurately, that customary law "results from a general

1399. Prosper Weil, "Le droit international en quête de son identité", 237 *Recueil des cours* 9, 160 (1992).
1400. *Id.*, *at* 161.
1401. Abi-Saab, "Cours général de droit international public", 207 *Recueil des cours* 9, 119 (1987).
1402. Flauss, "La protection des droits de l'homme et les sources du droit international : Rapport général [abridged draft version]", Société française de droit international, Colloque de Strasbourg, 29-31 May 1997, at 28 (1997).

and consistent practice of States which is followed by them from a sense of legal obligation".

There has been a trend to expand the concept of "practice", that is, of acts and omissions counted as State practice for the formation of customary law. The movement from the inductive to the deductive method of ascertaining custom is a result of the expansion in what counts as practice of States and the enhanced significance of *opinio juris*. Writers, reflecting a minority view, have denied to "verbal" acts the quality of relevant practice[1403]. Wolfke suggested that "purely verbal acts", such as treaties, declarations, and resolutions had only an "extra-judicial effect" of merely mobilizing international opinion. But he conceded that such acts contributed to the "development of a desirable practice and thus, to the emergence of international custom"[1404]. The dominant view is that both "real" and "verbal" acts are relevant State practice for the process of formation of customary law[1405], as are acts of denial and concealment of conduct proscribed by the law[1406].

Drawing on Ian Brownlie, the ILA's Committee on Formation of Customary Law, lists the following as relevant practice: diplomatic statements, policy statements, press releases, official manuals, instructions to armed forces, comments by Governments on draft treaties, decisions of national courts and executive authorities, legislation, pleadings before the international tribunals, statements and resolutions in international organizations. It acknowledges that "[p]hysical acts, such as arresting persons or seizing property, are in fact rather less common"[1407]. The Committee considered as verbal acts the adoption of resolutions containing statements about customary law by international organizations, particular the General Assembly[1408]. Zemanek suggests that repertories of State practice

1403. See Michael Byers, *Custom, Power and the Power of Rules* 40-41, 133-136 (1999).

1404. Wolfke, "Treaties and Custom: Aspects of Interrelation", in *Essays on the Law of Treaties* 31, 33 (J. Klabbers and R. Lefeber, eds., 1998).

1405. Byers, *supra* footnote 1403, at 134 (1999); Mendelson, "The Formation of Customary International Law", 272 *Recueil des cours* 159, 204-207 (1998).

1406. D'Amato, "Custom and Treaty: A Response to Professor Weisburd" 21 *Vanderbilt J. Transnat'l L.* 459, 466, quoted in Byers, *supra* footnote 1403, 168.

1407. 4th Interim Report of the Committee: The Objective Element in Customary Law, International Committee on the Formation of Customary (General) International Law, International Law Association, Taipei Conference, at 4 (1998).

1408. *Id.*, at 10.

cover "both manifestations of *opinio juris* and State practice in the orthodox sense" [1409].

Mendelson emphasizes the "claims and response" quality of practice relevant to the formation of customary law: "behavior does not count as practice if it is not communicated to another State" [1410]. In contrast, Oppenheim insists that

> "The practice of States in this context embraces not only [their] external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic dispatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere." [1411]

The ICRC's soon to be published study of customary humanitarian law reflects an expansive view of what counts as State practice, including both physical and verbal practice. In the national sources, it included policy statements, opinions of official legal advisers, police and military manuals, military orders, military communiqués, executive decisions, State legislation, judicial decisions, and Governments' statements. In its inventory of practice the ICRC included resolutions of international organizations and their practice [1412]. While acknowledging that operational physical acts on the battlefield have weight, the ICRC attributed particular significance to denials, objections and challenges to acts in violation of the rules. To determine *opinio juris* or acceptance as law, it may also be necessary to look at both physical behaviour and statements [1413]. International tribunals tend to rely on *opinio juris* or general principles of humanitarian law, distilled in part from the great humanitarian conventions as customary law.

1409. Zemanek, "Unilateral Legal Acts Revisited", in *International Law: Theory and Practice. Essay in Honour of Eric Suy* 209, 212 (Karel Wellens, ed., 1998).

1410. Mendelson, "The Formation of Customary International Law", *supra* footnote 1405, at 204.

1411. I *Oppenheim's International Law* 26 (Robert Jennings and Arthur Watts eds., 9th ed., 1992).

1412. Jean-Marie Henckaerts, "Study on Customary Principles of International Humanitarian Law: Purpose, Coverage and Methodology", *Int'l Rev. Red Cross* (No. 835), 660 (1999) at 660-668.

1413. See Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law", 90 *AJIL* 238, 248-249 (1996). For a discussion of the leading case of *Prosecutor* v. *Tadić*, Case No. IT-94-1-AR72, Appeal on Jurisdiction (2 October 1995), reprinted in 35 *ILM* 32(1996), see *id*., 238-244.

The ICJ has adopted an inclusive view of State practice forming customary law. To ascertain the existence (or non-existence) of customary rules, it referred to official views, treaty ratifications, diplomatic correspondence, international organizations' resolutions and declarations [1414]. The ICJ's discussion of the formation of customary and humanitarian law in the *Nicaragua* case had important antecedents in earlier international jurisprudence, especially that implicating human and humanitarian rights [1415]. The ILC also refers to treaties, national and international decisions, national legislation, diplomatic correspondence and opinions of national legal advisers [1416].

Prior to the Universal Declaration of Human Rights, except for minority and labour rights, human rights were left outside international law. Only law based on classical inter-State relations — including protection of aliens, humanitarian intervention, the prohibition of slavery and slave trade —, and humanitarian law, had been considered general international law [1417]. That human rights law is part of general international law is no longer questioned. It is also recognized that human rights have started a process of reform of international law. D'Amato aptly observes that

> "Human rights interests . . . have worked a revolutionary change upon many of the classic rules of international law as a result of the realization by States in their international practice that they have a deep interest in the way other States treat their own interests." [1418]

Through the Nicaragua judgement and the Advisory Opinion on *Nuclear Weapons*, the ICJ has contributed to making human rights and humanitarian norms part of general international law. At the same time it recognized methods of custom formation which favour the creation and the influence of human rights and humanitarian

1414. Byers, *supra* footnote 1403, at 134-135. He cites the *Asylum* case, *ICJ Reports 1950* 265, 277; *Rights of Nationals of the United States of America in Morocco* case, *ICJ Reports 1952* 176, 200; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, *Merits*, Judgment of 27 June 1986, *ICJ Reports 1986* 14.

1415. Meron, *supra* footnote 1398, at 113.

1416. Byers, *supra* footnote 1403, at 135.

1417. Flauss, *supra* footnote 1402, at 28.

1418. D'Amato, "Trashing Customary International Law", 81 *AJIL* 101, 104 (1987).

norms. The Inter-American Commission on Human Rights and the UN Committee on Human Rights [1419] and other treaty bodies have referred to customary human rights law. Flauss observed that "la protection des droits de l'homme est sans conteste la terre d'élection du 'renouvellement' (voire de l'aggiornamento) du processus coutumier" [1420]. He speaks of no less than "un recentrage humaniste du droit international, déjà présent dans le cadre du droit conventionnel" [1421].

Renewed vitality of customary law in the development of international humanitarian law has been demonstrated in the case law of the *ad hoc* international criminal tribunals. The most significant development in the tribunals' case law was the recognition that customary norms apply to non-international armed conflicts [1422]. The identification of customary rules in the context of non-international armed conflicts was also one of the main objectives of the ICRC Study [1423]. In the report to the Security Council which proposed the text of the ICTY Statute, the Secretary-General insisted that

> "the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise" [1424].

A significant development of customary human rights law has taken place also on the national plane. This is true in particular of common law States, where international customary law, in contrast to treaty law, does not require any formal act of incorporation. Customary law has been introduced into the positive law calculus in States not bound by important human rights treaties, notably the

1419. *Roach and Pinkerton* v. *United States*, Case 9647, Inter-American Commission on Human Rights, resolution 3/87 of 22 September 1987, *Annual Report 1985-1987*, doc. OEA/Ser.L/V/II.71 doc. 9, rev. 1, at 147; Committee on Human Rights, General Comment No. 24 (52), adopted on 2 November 1994, Report of the Human Rights Committee, 50 UN, *GAOR* (Supp. No. 40), UN doc. A/50/40, Annex V, para. 8 (1995).

1420. Flauss, *supra* footnote 1402, at 40.

1421. Flauss, *supra* footnote 1402, at 29; quoting Dupuy, "L'individu et le droit international (Théorie des droits de l'homme et fondements du droit international)", 32 *Archives de philosophie du droit* 132 (1987).

1422. Meron, *supra* footnote 1413, at 244.

1423. Henckaerts, *supra* footnote 1412, at 660-668.

1424. Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN doc. S/25704, para. 34 (3 May 1993).

United States[1425]. American scholars' support for customary human rights law has been criticized for being "au service d'une diffusion des valeurs constitutionnelles américaines"[1426]. Some commentators have thus pointed to the concordance between the rights regarded as customary by the Third Restatement of the Foreign Relations Law of the United States and the American Bill of Rights, to the disadvantage of other rights not mentioned in the American Bill of Rights, such as the prohibition of capital punishment for minors[1427]. Yet during the Carter Administration, the United States Government promoted as "internationally recognized rights" not only those implicating human dignity and civil and political rights, but also the right to minimum standard of living[1428].

Different views have been expressed as to the content of customary international human rights law. An expansive approach views the Universal Declaration of Human Rights either as customary *per se*, or as an authoritative interpretation of the human rights clauses in the UN Charter. Another trend, taking into account contrary practice, limits customary human rights to those for which adequate support can be found in the classical requirements for the recognition of custom. A negative approach denies altogether customary law character to human rights[1429]. The majority position recognizes human rights or some human rights as customary law. Critics argue that such a recognition stretches the nature of customary law. They insist that the application of the traditional understanding of the customary process to human rights norms inevitably limits the recognition of human rights as customary law[1430].

It is true that in the field of human rights, the classical exchanges between chancelleries that have characterized customary law process in other areas of international law are rare: "States do not usually make claims on other States or protest violations that do not affect

1425. Flauss, *supra* footnote 1402, at 29-30. Also Simma and Alston, "The Sources of Human Rights Law: Custom, *jus cogens* and General Principles", 12 *Australian Year Book of International Law* 85-87 (1992).

1426. Flauss, *supra* footnote 1402, at 30.

1427. Flauss, *supra* footnote 1402, at 30. Also Simma and Alston, *supra* footnote 1425, at 94-95.

1428. See Schachter, "Les aspects juridiques de la politique américaine en matière de droits de l'homme", *Annuaire français de droit international* 53, 62-67.

1429. Flauss, *supra* footnote 1402, at 40 (who lists some authors supporting such an approach). Also Simma and Alston, *supra* footnote 1425, at 84-85.

1430. Flauss, *supra* footnote 1402, at 40.

their nationals. In that sense, one can find scant State practice accompanied by *opinio juris*." [1431] Schachter therefore proposes "to look for 'practice' and *opinio juris* mainly in the international forums where human rights issues are discussed, debated and adopted" [1432]. Validating the traditional method, he insists that resolutions' "weight as evidence of custom cannot be assessed without considering actual practice" [1433].

In the field of human rights, the concept of "practice" has been extended to include the quasi-universal adhesion to the United Nations Charter, including its human rights clauses, the quasi-universal acceptance of the Universal Declaration and its frequent invocation, the high number of ratifications of universal and regional human rights conventions, the strong support for human rights resolutions in international organizations, the incorporation of human rights standards in national constitutions and laws, the invocation of human rights in national and diplomatic practice, and, especially, in international organizations [1434]. In their trenchant criticism of this concept of practice, Simma and Alston warn that:

> "The process of customary law-making is thus turned into a self-contained exercise in rhetoric. The approach used is deductive: rules or principles proclaimed for instance, by the General Assembly, as well as the surrounding ritual itself, are taken not only as starting points for the possible development of customary law in the event that State practice eventually happens to lock on to these proclamations, but as a law-making process which is more or less complete in itself, even in the face of contrasting 'external' facts." [1435]

They have proposed, instead, to rely on a new type of practice, the *droit de regard* developed in international institutions with regard to States' observance of human rights [1436]. They assert that the range of norms subject to such a scrutiny

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1431. Schachter, *supra* footnote 1390, at 338; also Louis Henkin, "International Law: Politics, Values and Functions", 216 *Recueil des cours* 13, 224 (1989).
1432. Schachter, *supra* footnote 1390, at 336.
1433. Schachter, *supra* footnote 1390, at 336.
1434. Flauss, *supra* footnote 1402, at 41-42. Meron, *supra* footnote 1398, at 79-92.
1435. Simma and Alston, *supra* footnote 1425, at 89-90; also Flauss, *supra* footnote 1402, at 42.
1436. Simma and Alston, *supra* footnote 1425, at 98-99.

> "is comprehensive and embraces all of the dimensions of international human rights law. It thus takes full account of customary norms, norms based on authentic interpretation, and general principles and extends also to soft law norms." [1437]

However, this practice of international organizations can only demonstrate the shrinking parameters of the *domaine réservé* and the expanding scope of matters within international concern. The Simma/Alston proposal is limited to the rather obvious proposition that human rights are a matter of international concern and that a State cannot evade international scrutiny by shielding itself behind the principle of sovereignty. Simma writes:

> "A customary law of human rights, therefore, does exist, but it is to be found on the procedural side, so to speak. As such it makes perfect sense even without the existence of customary law standards in the human rights fields with regard to the substance of such rights and correlative obligations on States." [1438]

Simma and Alston would limit the material relevant to the formation of customary law of human rights to interaction, claims and tolerances between States. They would exclude such valuable sources of custom formation as, for example, normative resolutions. *Droit de regard* would not contribute to differentiating between "rights" with high or low legally binding content. Moreover, by focusing on such interactive State practice as condemnations and denials, the authors do not address their primary concern over the gap between what States say and what they do.

II. Opinio juris

Opinio juris is difficult to identify or prove in relation to any instance of State practice [1439]. It is often inferred from the consistency and the generality of the practice itself. The ILA's Committee on Formation of Customary Law observed that *opinio juris* performs a useful function in distinguishing practice which is relevant

1437. Simma and Alston, *supra* footnote 1425, at 99.
1438. Simma, "International Human Rights and General International Law", in IV (2) *Collected Courses of the Academy of European Law* 155, 222 (1993).
1439. Abi-Saab, "Reflexions on the Contemporary Processes of Developing International Law", Ninth Gilberto Amado Memorial Lecture, delivered at the International Law Commission on 20 June 1985, at 18.

to the formation of customary law from practice based on comity and in identifying significant custom forming practice in cases where practice is ambiguous, for instance when it consists of failure to act [1440].

The classic view has been that State practice is transformed into customary law by the addition of *opinio juris* [1441]. Recent trends often reverse the process: following the expression of an *opinio juris*, practice is invoked to confirm *opinio juris* [1442]. In fields involving fundamental values of the international community, the tendency towards acquiescence by third States in the developing norms and the readiness to condemn inconsistent conduct facilitate the claim of the new norms for customary law status.

These recent trends build on antecedents. Thus the decision of the appeals chamber of the ICTY in the *Tadić* case (1995) is the linear successor to the three previous major decisions of international tribunals that focused explicitly on the means of creating customary international humanitarian law. In each case — the judgment of the International Military Tribunal in the *Trial of Major War Criminals* [1443], the judgment in *United States* v. *von Leeb (“The High Command Case”)* [1444], and the decision of the International Court of Justice in the *Nicaragua* case [1445] — the courts looked primarily to the *opinio juris* rather than to the practice of States in reaching their conclusions.

In the Nuremberg jurisprudence, the tribunals paid little attention to the process or rationale by which various provisions of humanitarian conventions were transformed into customary law [1446]. In contrast, the Hague Tribunal in *Tadić* engaged in a detailed and focused examination of the formation of customary law. Like the Nuremberg courts, however, it relied on such verbal evidence as statements, resolutions and declarations rather than on the battlefield or operational

1440. “The Objective Element in Customary Law”, *supra* footnote 1407, at 2.
1441. Weil, *supra* footnote 1399, at 172-173; Abi-Saab, *supra* footnote 1401, at 171.
1442. Abi-Saab, *supra* footnote 1439, at 13.
1443. Trial of German Major War Criminals, 1946, cmd. 6964, Misc. No. 12, at 65.
1444. 11 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, at 462, 533-535 (1948).
1445. *Military and Paramilitary Activities in and against Nicaragua*, *supra* footnote 1394, at 14, 114, paras. 218-220.
1446. For a discussion of antecedents to Nicaragua, see Meron, *supra* footnote 1398, at 37-41.

practice, which it largely ignored. The Tribunal formally adhered to the traditional twin requirements (practice and *opinio juris*) for the formation of customary international law. Yet in effect it weighed statements both as evidence of practice and as articulation of *opinio juris*, which in the formation of humanitarian and human rights law is cardinal. What the Tribunal did, without explicit acknowledgment, was to come close to reliance on *opinio juris* or general principles of humanitarian law, distilled, in part, from the Geneva and Hague Conventions. Its methodology was thus akin more to that applied in the human rights field than in other areas of international law. In both human rights and humanitarian law, emphasis on *opinio juris* helps to compensate for frequent scarcity of supporting practice. In terminology, however, the Tribunal follows the law of war tradition of speaking of custom even when this requires stretching the traditional meaning of customary law.

Prosper Weil saw in the case law on maritime delimitations, the beginnings (the *esquisse*) of this trend, which was eventually generalized by the ICJ in the *Nicaragua* case[1447]. He observed that in some cases, the ICJ has omitted any reference to practice and established the customary status of a particular rule on the sole basis of convictions or beliefs of States[1448]. In the *Nicaragua* case, the Court referred to the classic doctrine — "[to consider] the rules of customary international law . . . [the Court] has to direct its attention to the practice and *opinio juris* of States"[1449]. However, it added in the next paragraph, that "[t]he Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice"[1450], thus showing the dominance of *opinio juris*. This dominance was confirmed by the way the Court considered the customary nature of the principle of non-intervention. Critics of the Court's decision note the cursory treatment of State practice and the focus on *opinio juris*[1451]. In its Advisory Opinion on the use of nuclear weapons,

1447. Weil, *supra* footnote 1399, at 173.

1448. Weil, *supra* footnote 1399, at 174, referring to *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)*, International Court of Justice (Chamber), Judgment of 12 October 1984, *ICJ Reports 1984* 246, para. 193; *Military and Paramilitary Activities in and against Nicaragua*, *supra* footnote 1394, at para. 212.

1449. *Military and Paramilitary Activities in and against Nicaragua*, *supra* footnote 1394, para. 183.

1450. *Id.*, para. 184.

1451. Charney, "Remarks" in "Disentangling Treaty and Customary Law", 81 *Procs ASIL* 159, 160 (1987); D'Amato, *supra* footnote 1418, at 102.

the ICJ has, however, recognized the role of practice of deterrence [1452].

The Committee on the Formation of Customary Law of the ILA's American Branch warned that

> "[w]hen one looks secondarily to practice, by adjusting the definition of 'practice', or by varying the requirements for quantum, quality, or duration, it is possible to dispense as a practical matter with any requirement for practice at all" [1453].

In examining the relationship between practice and *opinio juris,* Georges Abi-Saab observed that

> "Normative resolutions can have a profound effect on how the process of custom formation itself functions, in the sense that, through them, frequently it is the *opinio juris* that comes first, then practice follows. Thus, not only the chronology but even the proportions between the two elements of custom may change." [1454]

He considers attribution of "law-declaring" significance to General Assembly resolutions as involving a general movement, of which multilateral treaties and codification of international law form a part, towards a *lex scripta* [1455]. He finds this development consistent with the renaissance of custom, one that is democratic and reflects the *desiderata* of the international community [1456]. This form of customary process contrasts with the traditional inductive approach to customary law. It is based on an essentially deductive method, with a secondary role assigned to practice [1457]. Condorelli similarly observed : "de plus en plus la coutume se présente comme un *jus scriptum*, puisque dans nombre de cas elle s'identifie au travers des grandes conventions internationales [humanitaires]" [1458].

1452. *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion of 8 July 1996, *ICJ Reports 1996* 226, at para. 73.

1453. American Branch of the International Law Association, "The Role of State Practice in the Formation of Customary and Jus Cogens Norms of International Law", [1989-1990] Committee Reports American Branch of the International Law Association, 107.

1454. Abi-Saab, *supra* footnote 1439, at 13.

1455. Abi-Saab, *supra* footnote 1439, at 3-4.

1456. Abi-Saab, *supra* footnote 1401, at 173.

1457. Abi-Saab, *supra* footnote 1401, at 177.

1458. Condorelli, "Le droit international humanitaire, ou de l'exploration par la Cour d'une *terra* à peu près incognita pour elle", in *International Law, the International Court of Justice and Nuclear Weapons* 229, 233 (Laurence Boisson de Chazournes and Philippe Sands, eds., 1999).

There is a direct relationship between the importance attributed by the international community to particular norms and the readiness to lower the burden of proof required to establish custom [1459]. While challenging the mainstream approach to customary human rights, Koskenniemi agrees that

> "Some norms seems so basic, so important, that it is more that slightly artificial to argue that States are legally bound to comply with them simply because there exists an agreement between them to that effect, rather than because, in the words of the International Court of Justice, noncompliance would 'shock . . . the conscience of mankind' and be contrary to 'elementary considerations of humanity'." [1460]

Schachter observed that rules that "express deeply-held and widely shared convictions about the unacceptability of the proscribed conduct" are not questioned by States or tribunals on the ground of inconsistent or insufficient practice [1461]. Tomuschat agreed with the ICJ approach in the *Nicaragua* case — which

> "viewed the texts concerned as a manifestation of legal rules which, in order to be recognized as constituent elements of the international legal order, need no validation through the usual processes that bring into being rules of customary law" [1462].

He addressed a "class of customary law", which includes the constitutional foundations of the international community and the rules flowing from these, that is, rules flowing from the principle of sovereign equality and from common values of mankind. He suggested that the identification of these customary principles can be carried out through a deductive, rather than the classic inductive approach to customary law [1463]. Kirgis' "sliding scale" reflects a similar approach:

1459. Meron, *supra* footnote 1398, at 113; Christian Tomuschat, "Obligations arising from States without or against Their Will", 281 *Recueil des cours* 304 (1998).

1460. Koskenniemi, "The Pull of Mainstream", 88 *Michigan LR* 1946-1947 (1990), quoted in Byers, *supra* footnote 1403, 162.

1461. Schachter, "Entangled Treaty and Custom", in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 717, 734 (Yoram Dinstein, ed., 1988).

1462. Tomuschat, *supra* footnote 1459, 259.

1463. Tomuschat, *supra* footnote 1459, 291-303.

> "The more destabilizing or morally distasteful the activity — for example, the offensive use of force or the deprivation of fundamental human rights — the more readily international decision makers will substitute one element for the other [State practice and affirmative showing of an *opinio juris*], provided that the asserted restrictive rule seems reasonable." [1464]

Others have attempted to anchor norms essential to the protection of community values in the concept of *jus cogens*, where State practice, as opposed to *opinio juris,* would be less important. Henkin characterizes such norms as a "new law of fundamental values adopted by the international system" which "would not derive from or depend on State practice or on law made purposefully by the consent of States" [1465].

Byers advocates including common interest in the calculus for the formation of customary law [1466].

The transformation of the relative weight of practice and *opinio juris* in the process of creation of customary law, has led to departure from traditional methods of custom-formation. Obviously, the time required for the maturation of custom has been shortened. In the past, custom was thought to emerge over a fairly long period of time, with the time necessary for a consistent or repetitive practice to consolidate itself, followed by the time necessary for *opinio juris* to emerge [1467]. But changes in the time factor have been less drastic than often suggested. Even with regard to the delimitation of continental shelf, the ICJ recognized that customary rules could rapidly develop from conventional rules if "State practice, including that of States whose interests are specially affected, should have been extensive and virtually uniform in the sense of the provision invoked" [1468]. Such customary development "occur[s] particularly where the new rule has its origin, or is soon reflected in, a multilateral treaty of appropriately general application" [1469].

Distillation of customary rules from treaties enhances the impor-

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1464. Kirgis, "Custom on a Sliding Scale", 81 *AJIL* 146, 149 (1987).
1465. Henkin, *supra* footnote 1431, at 60, 216.
1466. Byers, *supra* footnote 1403, at 163-164.
1467. *Oppenheim's International Law*, *supra* footnote 1411, at 30.
1468. *North Sea Continental Shelf* cases *(Fed. Rep. of Germany/Denmark; Fed. Rep. of Germany/Netherlands)*, International Court of Justice, Judgment of 20 February 1969, *ICJ Reports 1969* 3, 43, at para. 74.
1469. *Oppenheim's International Law*, *supra* footnote 1411, at 30.

tance of legal scholarship. Its role is to fill "the logical void raised by the traditional conundrum of the origin of customary law", by exercising some form of "law-declaring" function [1470].

This role has been particularly important in areas such as human rights and environmental law [1471].

III. Inconsistent practice

In the stage of formation of a customary rule, and even after a rule has attained maturity, State practice does not need to be entirely consistent with the rule. Minor divergences or inconsistent acts by a few States only do not hamper the development of the rule and its continued vitality [1472]. As the ICJ stated in the *Nicaragua* case:

> "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule." [1473]

As regards contrary practice, the Court added:

> "If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule." [1474]

I agree that statements which States make to justify or deny

1470. Kahn, "Nuclear Weapons and the Rule of Law", 31 *Int'l L. & Pol.* 349, at 370 (1990).
1471. *Id.*
1472. The Objective Element in Customary Law, *supra* footnote 1407, at 11; *Oppenheim's International Law*, *supra* footnote 1411, at 29; Mendelson, *supra* footnote 1405, at 213-214.
1473. *Military and Paramilitary Activities in and against Nicaragua*, *supra* footnote 1394, at para. 185.
1474. *Military and Paramilitary Activities in and against Nicaragua*, *supra* footnote 1394, at para. 198.

alleged breaches of international law are important for assessing the significance of the breach for the continued vitality of the customary norm in question. Account must, however, be taken of the fact that States bent on evading compliance with international law commonly resort to factual or legal exceptions or justifications contained in the rule itself and in the relationship of their particular case or situation to that rule. Thus, they shield themselves with self-serving justifications, calculated to minimize international censure. Denials or justifications which they voice may mask more fundamental challenges [1475]. Only infrequently will States frontally challenge the existence of a rule of customary law. Contrary practice may, however, be so rampant that it becomes unclear whether the "norm" or the violations represent the practice of States. In some situations, persistent violations might reach a critical mass nullifying the legal force of a "norm".

Schachter suggested that in the balancing of "verbal rationalizations" as against "actual conduct", normative status of the rule should be taken into account:

> "This special status has been expressed by characterizing such rules as *jus cogens*, and *erga omnes* obligations. They have also been described as 'necessary rules of coexistence' and as principles of 'minimum world order' . . . It is that difference in their normative claim, reflected in the *opinio juris*, that underlies decisions to recognize their continued customary law status even if State practice in regard to them is not uniform or consistent." [1476]

Such special status benefits rules prohibiting genocide, the killing of prisoners of war, torture and large-scale racial discrimination, where there are widely shared convictions about the unacceptability of the proscribed conduct [1477]. A more rigorous compliance with practice is required in other areas of international law:

> "[t]he notion that contrary practice should yield to *opinio juris* challenges the basic premise of customary law. It would not be acceptable in respect of the great body of customary rules — as for example, the law on jurisdiction, immunities, State respon-

1475. Meron, *supra* footnote 1398, at 59-60.
1476. Schachter, "Entangled Treaty and Custom", *supra* footnote 1461, at 734.
1477. Schachter, *id.*

> sibility, diplomatic privileges. In these areas, pertinent changes in State conduct usually create expectations of future behavior that modify the *opinio juris* on applicable law."[1478]

However, as demonstrated by Weil (above), the new methods of custom formation are apparent also in the law of maritime delimitations. Higgins questions a "hierarchical or weighted normativity", or resort to the concept of *jus cogens*, as an explanation why some norms do not lose their normative quality through contrary practice. In the case of torture, she believes that

> "[t]he reason that the prohibition on torture continues to be a requirement of customary international law, even though widely abused, is not because it has a higher normative status that allows us to ignore the abuse, but because *opinio juris* as to its normative status continues to exist. No State, not even a State that tortures, believes that the international law prohibition is undesirable and that it is not bound by the prohibition. A new norm cannot emerge without both practice and *opinio juris*; and an existing norm does not die without the great majority of States engaging in both a contrary practice and withdrawing their *opinio juris.*"[1479]

This view assumes, however, that at some point in time, practice and *opinio juris* conformed, enabling a rule to mature and that, at a later point in time, despite contrary practice, *opinio juris* continued to exist, preserving the customary rule from falling in desuetude[1480].

Another method is to exclude violations of the prohibition of torture, for example, from acts counted as the relevant practice. *Opinio juris* may reflect a set of shared understandings on what should count as State practice legally relevant to the formation of customary law[1481].

This method was followed by an ICTY Trial Chamber in ascertaining the customary status of the prohibition of torture in time of

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1478. Schachter, "New Custom: Power, *Opinio Juris* and Contrary Practice", in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* 531, 538 (1996).

1479. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* 22 (1994).

1480. See Flauss, *supra* footnote 1402, at 42. Also Simma and Alston, *supra* footnote 1425, at 97.

1481. Byers, *supra* footnote 1403, at 148.

armed conflict. The Tribunal emphasizes the widespread acceptance of treaty provisions and denials by States of violations [1482].

A different method of treating inconsistent practice is advocated by Simma and Alston. They propose that certain fundamental human rights be considered not customary law but "general principles of law". Thus the problem of inconsistent practice in relation to customary law would be minimized [1483]. They argue that rather than customary rules, the concept of a recognized general principle fits better the situation where a norm which possesses a strong inherent authority is widely violated. They believe that general principles satisfy the requirements of general acceptance and recognition. Flauss agrees that general principles of law offer a better explanation of human rights principles than does customary law [1484].

That practice is not relevant for "recognition" of general principles of law is not self-evident, however. If understood as general principles of law recognized in municipal legal systems, "practice of some sorts is required": rules and principles which form part of domestic legal systems must be actually applied in State practice [1485]. The use of domestic legislation to establish that a right to environment was recognized under international law has thus been questioned on the ground that mechanisms of enforcement of those constitutional provisions are often lacking [1486].

If treated as general principles of international law, such norms too have to be recognized, or generally accepted. This suggests that "there must be some supporting 'practice' with respect to these principles" [1487]. Absent conforming practice, the identification of the general principles may be subjective, even arbitrary. In the final analysis, general principles prove vulnerable to some of the criticisms addressed against the customary method, which, at least,

1482. *Prosecutor* v. *Furundžija*, ICTY (Trial Chamber), Judgment of 10 December 1998, para. 138.

1483. Simma and Alston, *supra* footnote 1425, at 102-105.

1484. Flauss, *supra* footnote 1402, at 45.

1485. "The Role of State Practice", *supra* footnote 1453, at 111.

1486. Handl, "Human Rights and Protection of the Environment: A Mildly Revisionist View", *Human Rights, Sustainable Development and the Environment* 117, 128-129 (A. A. Cançado Trindade, ed., 1992); Michael R. Anderson, "Human Approaches to Environmental Protection: An Overview", *Human Rights Approaches to Environmental Protection* 1, 20-21 (A. E. Boyle and M. R. Anderson, eds., 1996). Also Schachter, *supra* footnote 1390, at 336, on "window-dressing" in the domain of human rights.

1487. "The Role of State Practice", *supra* footnote 1453, at 111-112.

benefits from some methodological objectivity and wide acceptance of the process.

IV. Persistent objector

Existing and firmly established customary norms are, of course, binding on all States. It is, however, broadly accepted, that a State which from an early stage of the formation of a new rule of customary law has consistently and clearly objected to the new rule, would, as a "persistent objector", not be bound by the rule, even after it has matured into customary law. The persistent objector exception is recognized by a majority, but not unanimity, of writers [1488]. "There is . . . a body of State practice in support of the principle, though it is not as copious as one might at first expect." [1489] The persistent objector exception appears to have been endorsed by the ICJ in the *Asylum* case and in the *Anglo-Norwegian Fisheries* case [1490].

Of course, States are more likely to deny the existence of a customary rule than argue that they are not bound by a generally applicable rule. Persistent objectors may eventually yield under pressure from other States [1491]. The operation of the principle of reciprocity, combined with the reluctance of States to recognize persistent objections, may work against the objecting State. States that accept the new rule are likely to apply it to the objecting State, while the persistent objector may be obliged to apply the old rule towards other States in order to maintain its position as an objector and may thus suffer from a significant disadvantage [1492]. An example is the USSR opposition to the doctrine of restrictive State immunity [1493]. While

1488. Among those who recognize the rule: *Oppenheim's International Law*, *supra* footnote 1411, at 29, Rousseau (1970), Verzijl (1968), Brownlie (1990), Tunkin, Villiger (1985), Wolfke (1974), Danilenko (1993), Mendelson, *supra* footnote 1405, at 227 ff., Maurizio Ragazzi, *The Concept of International Obligations* Erga Omnes 60 (1997). Among who question the rule: D'Amato (1973), Stein (1985), Charney (1985) and to a certain extent, Tomuschat, *supra* footnote 1459, at 284-290. See references in "The Objective Element in Customary Law", *supra* footnote 1407, at 13-14, footnotes 34 and 35.

1489. "The Objective Element", *supra* footnote 1407, at 14; also Mendelson, *supra* footnote 1405, at 234-238.

1490. *Asylum* case, International Court of Justice, *ICJ Reports 1950* 265, 277-278; *Anglo-Norwegian Fisheries* case *(United Kingdom* v. *Norway)*, International Court of Justice, Judgment of 18 December 1951, *ICJ Reports 1951* 116, 131. See Mendelson, *supra* footnote 1405, at 228-233.

1491. "The Objective Element", *supra* footnote 1407, at 14; Mendelson, *supra* footnote 1405, at 234; Ragazzi, *supra* footnote 1488, at 64-65.

1492. Byers, *supra* footnote 1403, at 103-104.

1493. Mendelson, *supra* footnote 1405, 235.

the USSR was denied immunity in foreign courts for acts *jure gestionis*, it had to apply the former rule of absolute sovereign immunity even to those States that refused to recognize such immunity for the USSR and its State instrumentalities. Absent reciprocity in absolute sovereign immunity, the USSR eventually gave up on its objection to restrictive State immunity. A similar imbalance has compelled the United States, the United Kingdom and Japan to abandon their opposition to the 12 miles territorial sea[1494]. Persistent objections thus tend not to be maintained for indefinite periods of time[1495]. In the context of general international law and law-making treaties involving the protection of community interests, Abi-Saab maintains that "l'objecteur tenace ne peut être qu'un phénomène transitoire"[1496]. The opposition to claims of persistent objectors seem to indicate "a preference for society interests and society rules, that is for 'universal public interest', over *ad hoc*, unilaterally created exceptions"[1497].

Contemporary discussions of the status of the objection should however, be seen in the context of the larger process of transformation of the sources of international law. Henkin observed that: "efforts to make the new law purposefully by 'custom' . . . has given the persistent objector principle new vitality, perhaps its first real life"[1498]. In these circumstances, States may have a greater incentive to oppose certain controversial aspects of custom distilled from treaties, as in the case of the US opposition to the prohibition of reprisals against civilians and civilian objects in Additional Protocol I to the Geneva Conventions. An entombment of persistent objections is thus premature.

Can a persistent objection be invoked against fundamental principles of international law? Many writers suggest that the exception cannot operate against *jus cogens*[1499], Tomuschat thus writes that:

> "It is . . . widely accepted that . . . the words 'recognized by the international community of States as a whole' are meant to

1494. Byers, *supra* footnote 1403, 104. Mendelson, *supra* footnote 1405, 236.
1495. Byers, *supra* footnote 1403, 181.
1496. Abi-Saab, *supra* footnote 1401, at 181.
1497. Byers, *supra* footnote 1403, at 181.
1498. Henkin, *supra* footnote 1431, at 59; also Abi-Saab, *supra* footnote 1401, at 180.
1499. Mendelson, *supra* footnote 1405, at 235; Byers, *supra* footnote 1403, at 186; see Ragazzi, *supra* footnote 1488, at 67, footnote 96, for other references.

> express the idea that an overwhelming majority of States is able to produce — and possibly enforce — a new rule of *jus cogens* against a recalcitrant third State." [1500]

A precedent frequently invoked in support of the non-application of the exception to norms of *jus cogens* is the non-recognition of South Africa's opposition to the prohibition of *apartheid* [1501].

The question whether persistent objections against *jus cogens* are possible is sometimes preceded by the question whether the norm concerned has been accepted as *jus cogens* in the first place. In a case concerning the imposition of death penalty to juvenile offenders in the United States, the Inter-American Commission on Human Rights appears to have recognized that a persistent objection cannot be advanced against *jus cogens*: "For a norm of customary international law to be binding on a State which has protested the norm, it must have acquired the status of *jus cogens*." [1502]

In its written pleadings in the *Anglo-Norwegian Fisheries* case, the United Kingdom argued that the persistent objector theory was not applicable to "fundamental principles of international law" [1503]. The ILA's Committee on Formation of Customary Law noted, however, that where a fundamental principle is not *jus cogens*, no precedent exists to support the British position [1504]. A fundamental principle which constitutes *jus dispositivum* such as, for example, the principle of sovereign equality, can be derogated from in voting rules of international organizations.

B. Relationship between Custom and Treaty

As Schachter observes,

> "commentators have observed an increasing tendency on the part of governments and lawyers to consider the rules of international agreements as customary law on one ground or another, and therefore binding on States not parties to the agreement" [1505].

1500. Tomuschat, *supra* footnote 1459, at 307.
1501. Mendelson, *supra* footnote 1405, at 235; Byers, *supra* footnote 1403, at 183; Ragazzi, *supra* footnote 1488, at 71-72.
1502. *Roach and Pinkerton* v. *United States*, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/VII/71, at 168, para. 54.
1503. *Fisheries* case, *ICJ Pleadings*, II, at 426-427.
1504. See also Mendelson, *supra* footnote 1405, at 243-244.
1505. Schachter, *supra* footnote 1461, at 718.

Negotiations in international conferences are perceived as more responsive to the interests of the majority of States than the classic customary process, where the influence of a few States may be preponderant [1506].

Other writers maintain that treaties cannot be regarded as relevant practice for the purpose of customary law [1507]. Wolfke, for example, wrote that "a treaty *per se* is . . . not any element of practice" [1508]. He nonetheless attributed to treaties an important "extra-judicial effect" on the formation of customary law, the mobilization of international opinion [1509]. A similar view is expressed by Byers: "It is accepted that human rights treaties in general play a role in the 'marshalling of shame' against those States which constantly violate human rights." [1510]

This is true particularly of humanitarian conventions. *Oppenheim's* 9th edition distinguishes between sources of State practice and sources of *opinio juris*, and classifies as the latter the conclusion of bilateral or multilateral treaties, and attitudes towards resolutions of the General Assembly and other international fora [1511].

The use of multilateral treaties as evidence of customary law goes back to the trial of war criminals by the Nuremberg Military Tribunal. The Nuremberg Tribunal considered that the rules stated in the Hague Convention and in the annexed Regulations, having "weathered the test of time", had passed into customary law [1512]. Of course, the customary law nature of the practically universally accepted Geneva Conventions is now taken for granted.

Flauss similarly observed that,

> "même si [le droit humanitaire] bénéficait dès avant 1949 d'un fonds de règles coutumières il est patent que c'est l'adoption des Conventions de Genève de 1949 puis des protocoles de 1977 qui favorisera la pleine consécration de ces règles en tant que principes du droit international général" [1513].

1506. Schachter, *supra* footnote 1461, at 722.
1507. For instance, Charney, "Remarks" in "Disentangling Treaty and Customary Law", 81 *Proc. Asil* 159, 160, 163 (1987). See Byers, *supra* footnote 1403, at 167-170, for a discussion of some scholarly views.
1508. Wolfke, *supra* footnote 1404, at 33.
1509. Wolfke, *supra* footnote 1404, at 33.
1510. Byers, *supra* footnote 1403, 169.
1511. I *Oppenheim's International Law*, *supra* footnote 1411, 28-33.
1512. Abi-Saab, *supra* footnote 1439, at 18; Meron, *supra* footnote 1398, at 37-41.
1513. Flauss, *supra* footnote 1402, at 28.

In its Advisory Opinion on the use of nuclear weapons, the ICJ, without any doctrinal discussion of the relationship between treaty and custom, made short references to the Nuremberg Judgment and to the Report of the UN Secretary-General on the Statute of the ICTY. It confirmed that humanitarian treaties demonstrate practice and *opinio juris* for custom formation:

> "The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States." [1514]

Clark minimized the significance of this statement: "the Court clearly reiterated that treaty rules may find their way into customary rules, it did not add anything new to the subject" [1515]. The Court nevertheless combined the discussion of extensive ratifications with non-use of denunciation clauses to reach important conclusions concerning both conduct and expectations.

The interaction between treaty and custom has been the subject of extensive scholarly commentary stimulated by the *North Sea Continental Shelf* cases (1969) and the *Nicaragua* case (1986). In the *Continental Shelf* case in discussing the formation of customary law through treaty provisions, the Court stated that "this process . . . constitutes indeed one of the recognized methods by which new rules of customary international law may be formed" [1516].

It was argued before the Court that ratifications and accessions to a treaty open to all States could be regarded as practice relevant to the formation of customary rules. The Court agreed:

> "With respect to other elements usually regarded as necessary before a conventional rule can be considered to have

1514. *Legality of the Threat or Use of Nuclear Weapons*, *supra* footnote 1452, at para. 82.

1515. Clark, "Treaty and Custom", in *International Law, the International Court of Justice and Nuclear Weapons* 171, 176 (Laurence Boisson de Chazournes and Philippe Sands, eds., 1999).

1516. *North Sea Continental Shelf* cases, *supra* footnote 1468, at para. 71.

> become a general rule of international law, it might be that . . . a very widespread and representative participation in the convention might suffice of itself provided it included that of States whose interests were specifically affected."[1517]

Schachter warned that the Court's dicta taken literally would suggest that "entry into force of a treaty with many parties would *ipso facto* convert it into custom binding on non-parties". Drawing on Thirlway, Schachter explained that

> "the ratifications would be accepted as State practice in the customary law sense only because of the evidence of an intention by a large group of States to bring a treaty rule 'into effective play' for the international law community"[1518].

In the *Continental Shelf* case, the Court, looking primarily at practice of non-parties, insisted on solid evidence of *opinio juris*. Finding it lacking, it refused to recognize as customary the rule of equidistance in the delimitation of continental shelf. In the *Nicaragua* case, the Court, looking primarily at the *opinio juris* of States parties to the UN Charter and the OAS Charter, held that the prohibition of non-intervention constituted not only a conventional but a customary rule. The difference between the two cases can be attributed to the difference between the norms implicated. While the *Continental Shelf* addressed patrimonial and economic interests of the parties, the *Nicaragua* case dealt with broader community values such as the prohibition of intervention in internal affairs of States and the status of common Articles 1 and 3 of the Geneva Conventions, as customary law[1519].

Even before their entry into force, multilateral conventions negotiated in international conferences may sometimes be considered prima facie evidence of customary law. This is true when a conclusion could be drawn from the *travaux préparatoires* that the conventional rule was intended to embody a customary rule, or because States were acting in conformity with the rule not yet in force. The ICJ in the *Continental Shelf* case between Libya and Malta thus stated

> "it cannot be denied that the 1982 Convention is of major

1517. *Id.*, para. 73.
1518. Schachter, *supra* footnote 1461, at 725.
1519. Meron, *supra* footnote 1398, at 25-29, 50-52.

> importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law" [1520].

This phenomenon is certainly true of human rights or humanitarian conventions. As Tomuschat points out, there has been a tendency, especially by the General Assembly and the UN Human Rights Commission, to consider the two International Covenants on human rights as "the relevant yardstick for unobjectionable conduct" [1521] both in discussion of specific themes and of non-party States [1522]. Thus,

> "treaty provisions are considered as reflecting and giving expression to a commonly cherished trust of human civilization, irrespective of further design to establish both consistent practice as well as *opinio juris*" [1523].

I have already mentioned the *Tadić* case (1995) and its contribution to the clarification of the role of custom in relation to humanitarian treaties. Recently, the ICTY Appeals Chamber in *Prosecutor* v. *Strugar and Others* (Decision on Interlocutory Appeal, 22 November 2002, case IT-01-42-AR72), confirmed a Trial Chamber's decision that the jurisdictional basis for the charges against him was not Articles 51-52 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions, but the underlying principles of customary international law recognized therein. The Appeals Chamber held that the violation of these customary principles, prohibiting attacks on civilians and civilian objects, entails individual criminal responsibility.

This approach, while broadly supported, has not gone unchallenged, with some writers objecting to the use of human rights

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1520. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, International Court of Justice, Judgment of 3 June 1985, *ICJ Reports 1985* 13, 30. Also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)*, International Court of Justice (Chamber), Judgment of 12 October 1984, *ICJ Reports 1984* 246, 294.

1521. Tomuschat, *supra* footnote 1459, at 260.

1522. Tomuschat, *supra* footnote 1459, at 260.

1523. Tomuschat, *supra* footnote 1459, at 260.

treaties as evidence of customary rules [1524]. A critic of customary human rights, Weisburd, argued that human rights treaties "cannot represent practice informed by *opinio juris* and can contribute little to establishing their prohibitions as rules of customary law" [1525]. In his view "a treaty is not evidence of *opinio juris* if the parties expressly deny in the treaty text any *opinio juris* as to the legal status of the treaty's rules outside the instrument" and

> "a treaty may deny *opinio juris* even without an express statement to that effect if the treaty contains other evidence demonstrating that the parties would not see the treaty's rules as binding but for the treaty" [1526].

He suggests that this would be the case when a treaty limits party's right to enquire into another party's observance or when remedies are not available [1527].

Whether to attribute customary law significance to a particular treaty depends of course on the entire context, and especially on the circumstances of its adoption and subsequent practice by both parties and non-parties. I agree with Schachter, who distinguished between codification treaties and "treaty rules resulting from widely politicized debates and bloc voting":

> "[c]onventions invoked as customary law are obviously subject to the criteria of State practice and *opinio juris*, but application of these criteria vary with the nature of the convention, the relationship of the convention to basic values, and the process by which the convention came into existence" [1528].

The Geneva Conventions are a prime example of treaties accepted as reflecting customary principles, without, in most cases, any enquiry concerning concordant practice. Some supporting practice is, however, required for all treaty norms claiming customary law status.

The contribution made by the International Law Commission to

1524. For instance, Mendelson, "Remarks in Disentangling Treaty and Customary Law", 81 *Proc. ASIL* 160, 162-163 (1987).

1525. Weisburd, "Customary International Law: The Problem of Treaties", 21 *Vanderbilt J. Transnat'l L.* 1, 29 (1988).

1526. *Id.*, 25.

1527. *Id.*

1528. Schachter, "Remarks" in "Disentangling Treaty and Customary Law", 81 *Proc. ASIL* 158, 159 (1987).

the development of customary international law merits mention. The Commission has "integrated itself into the process of identifying, consolidating, sustaining, adapting and even forming rules of customary, or general international law"[1529]. Although references to the debates, reports, or drafts of the Commission or its rapporteurs have been criticized[1530] — as evidence of customary law — the influence of the work of the ILC on the development of customary law is clear[1531].

> "Conventions which have been adopted on the basis of the Commission's draft articles have on many occasions been treated as providing authoritative evidence of the state of customary law, in some cases before they have entered into force. More dramatically still and reflecting yet more directly the achievement of the Commission in this regard, draft articles produced by the Commission have themselves been regarded as evidence of the position at customary law, even, indeed, before their preparation has been completed."[1532]

However the ILC has been kept out of such "politically important" fields as the negotiation of the 1982 Law of the Sea Convention, human rights, disarmament, and environmental law[1533].

The relevance for custom formation of practice of States parties merits additional comments[1534]. I agree with those who attribute significance to the question how widely a particular treaty has been ratified. Important questions include (1) the normative values stated in the treaty; and (2) the behaviour of States parties[1535]. Acts by State

1529. "Introduction: The Achievement of the International Law Commission", in *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* 1, 11 (UN Sales No. E/F97.V.4, 1997).

1530. Weil, *supra* footnote 1399, at 175-176.

1531. Schwebel, "The Influence of the International Court of Justice on the Work of the International Law Commission and the Influence of the Commission on the Work of the Court", United Nations Colloquium on Progressive Development and Codification of International Law to Commemorate the Fiftieth Anniversary of the International Law Commission, New York, October 1997.

1532. "Introduction: The Achievement of the International Law Commission", *supra* footnote 1529, at 11-12.

1533. Owada, "An Overview of the International Law-making Process and the Role of the International Law Commission", United Nations Colloquium on Progressive Development and Codification of International Law to Commemorate the Fiftieth Anniversary of the International Law Commission, New York, October 1997, at 2.

1534. Meron, *supra* footnote 1398, at 50-53.

1535. Regarding the importance of the behaviour of non-party States with regard to the norms stated in a convention, see Meron, *id*.

parties concordant with the treaty obviously are indistinguishable from acts in the application of the Convention. If it could be demonstrated, however, that in acting in a particular way, parties to a convention believed and recognized that their duty to conform to a particular norm was required not only by their contractual obligations but by customary or general international law as well (or, in the case of the Geneva Conventions, by binding and compelling principles of humanity), such an *opinio juris* must be given probative weight for the formation of customary law. A distinction between an *opinio juris generalis* and an *opinio obligationis conventionalis* has already been suggested by Professor Cheng [1536].

Opinio juris is thus critical for the transformation of treaty norms into general law. To be sure, it is difficult to demonstrate such an *opinio juris*, but this poses a problem of proof rather than of principle. The possibility that a party to the Geneva Conventions, for example, may be motivated by the belief that a particular course of conduct is required not only contractually but by the underlying principles of humanity, is quite real.

How to assess the weight of such *opinio juris*, when not accompanied by practice of non-parties? In the absence of practice extrinsic to the treaty, non-parties are unlikely to accept being bound by principles which the parties may consider to be custom grafted on to the treaty. On the other hand, parties to normative treaties embodying deeply felt community values have a strong interest in ensuring concordant behaviour by non-parties and, thus, in promoting the customary character of the treaty. It is well known that States and non-governmental organizations invoke provisions of human rights and humanitarian treaties characterized as customary or as general law against non-party States guilty of egregious violations of important values of the international community. The effectiveness of this

1536. Cheng, "Custom: The Future of General State Practice in a Divided World", in *The Structure and Process of International Law* 513, 532-533 (R. Macdonald and D. Johnston, eds., 1983). In a different context (concerning the adoption of a treaty at an international conference), Professor Sohn speaks of *opinio juris* in the sense that the provisions of a convention "are generally acceptable". Sohn, "'Generally Accepted' International Rules", 61 *Wash. L. Rev.* 1073 at 1078 (1986) at 1078. He considers a multilateral convention "not only as a treaty among the parties to it, but as a record of the consensus of experts as to what the law is or should be". Sohn, "Unratified Treaties as a Source of Customary International Law", in *Realism in Law-Making: Essays in International Law in Honor of Willem Riphagen* 231 (A. Bos and H. Siblesz, eds., 1986), at 239. On customary law applicable between parties to agreements, see *id.*, at 25.

invocation may depend on the proof of acquiescence in the norm stated in the treaty by non-parties and in their adoption of a particular norm stated in the treaty in their practice.

An important factor is whether States parties observe a particular convention and whether they regard it as normative or contractual. As with other widely ratified treaties, if States parties comply with a particular convention in actual practice, verbally affirm its normative value, and accept it in *opinio juris*, both States and tribunals will be reluctant to advance or to accept the argument that such a convention is solely, or even primarily, conventional. Such observance by the parties will eventually lead, in the perception of Governments and scholars, to the blurring of the distinction between norms of the conventions that are already recognized as customary law and other provisions that have not yet achieved that status.

C. General Principles of Law

There is a considerable doctrinal divergence on the meaning and scope of the "general principles of law recognized by civilized nations" in Article 38 of the Statute of the ICJ. In its narrower sense, these are principles of municipal law, which are applicable to inter-State relations. Their importation into international law takes place through analogies and broad principles and policies, rather than through direct incorporation. As Lord McNair suggested [1537]:

> "International law has recruited and continues to recruit many of its rules and institutions from private systems of law . . . The way in which international law borrows from the source is not by means of importing private law institutions 'lock, stock and barrel', ready made and fully equipped with set of rules . . . In my opinion the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions." [1538]

Even so, these principles have rarely been referred to by the ICJ,

1537. *Oppenheim's International Law*, *supra* footnote 1411, at 37.

1538. *International Status of South West Africa*, International Court of Justice, Advisory Opinion, *ICJ Reports 1950*, at 148; cited in Schachter, *supra* footnote 1390, at 52 (1991).

which prefers to speak of principles of customary or general international law [1539]. Schachter noted that

> "[d]espite the eloquent arguments made for using national law principles as an independent source of international law, it cannot be said that either courts or the political organs of States have significantly drawn on municipal law principles as an autonomous and distinct ground for binding rules of conduct" [1540].

Some measure of acceptance by States for the transfer of such principles into international law is usually expected. In inter-State relations, the general principles of law have found little application. But the importation of municipal law principles may have more of a potential "for the emergent international law concerned with the individuals, business companies, environmental dangers and shared resources" [1541]. Even so, the great expectations of Hersch Lauterpacht, Wilfred Jenks and Wolfgang Friedmann for the building of international law on municipal law analogies and the common law of mankind have only partially been realized. One notable exception is general principles and procedures of municipal criminal laws, which are often invoked by the *ad hoc* criminal tribunals.

Some principles of international standards of civilization, equity, or natural justice, applied in the context of the protection of aliens, and traditionally considered as general principles of law recognized by civilized nations, have, for the most part, been incorporated in and replaced by the contemporary human rights law [1542]. Nevertheless,

> "The fact that equity and human rights have come to the forefront in contemporary international law has tended to minimize reference to 'natural justice' as an operative concept, but much of its substantive content continues to influence international decisions under those or other headings." [1543]

It is disappointing that even in the field of administration of jus-

1539. *Oppenheim's International Law*, *supra* footnote 1411, at 37-38.
1540. Schachter, *supra* footnote 1390, at 51.
1541. Schachter, *supra* footnote 1390, at 53 (1991). Also *Oppenheim's International Law*, *supra* footnote 1411, at 39.
1542. Schachter, *supra* footnote 1390, at 55.
1543. Schachter, *supra* footnote 1390, at 55.

tice and due process, Article 38 (1) *(c)* of the ICJ's Statute — general principles — has not served as one of the principal methods for the transformation of such standards into international law [1544].

The "unforeseen potential" of general principles of law in the field of human rights [1545], has thus not been realized, with one major exception. General principles have played a key role in the European Court of Justice. The original instruments that established the European Communities did not include any provisions guaranteeing human rights and freedoms. It became clear, however, that if the supremacy of the European Communities law over national legislation, including national constitutions, was to be accepted by national supreme courts, the European Communities law had to integrate the principal national guarantees of fundamental human rights. The Court, "n'ayant pas sous la main un catalogue complet de droits et libertés, a dû . . . se tourner vers les principes communs aux droits des Etats membres" [1546]. In numerous cases, the Court has accepted and reaffirmed the applicability of human rights principles. A classic pronouncement is found in the *Wachauf* case:

> "The Court has consistently held . . . that fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court. On safeguarding those rights, the Court has to look to the constitutional traditions common to Member States, so that measures which are incompatible with fundamental human rights recognized in those States may not find acceptance in the Community." [1547]

The Court has also drawn on the European Convention on Human Rights [1548]. Going beyond the main objective of the European Communities — economic integration [1549] — the European Union's human rights policy accepted the triptych: democracy/rule of law/human rights [1550].

A different perspective of Article 38 (1) *(c)* focuses on principles

1544. Meron, *supra* footnote 1398, at 88.
1545. Tomuschat, *supra* footnote 1459, at 315.
1546. Morin, "L'état de droit: Emergence d'un principe du droit international", 254 *Recueil des cours* 9, 237 (1995).
1547. *Wachauf* v. *Germany*, Case 5/88, [1989] *ECR* 2609; quoted in Leben, "Is There an European Approach to Human Rights?", in *The EU and Human Rights* 69, 89 (Philip Alston, ed., 1999).
1548. Leben, *supra* footnote 1547, at 89.
1549. Morin, *supra* footnote 1546, at 239.
1550. Leben, *supra* footnote 1547, at 93-94.

recognized in the international system and not limited to those found in domestic legal systems. General principles of international law may overlap with and be hardly distinguishable from customary law. As Cheng noted:

> "While conventions can easily be distinguished from the two other sources of international law, the line of demarcation between custom and general principles of law recognized by civilized nations is often not very clear, since international custom or customary international law, understood in a broad sense, may include all that is unwritten in international law, i.e., both custom and general principles of law." [1551]

Weil contrasts the general principles of law common to civilized nations mentioned in Article 38 with such "general principles of international law" [1552]. The latter include prohibition of the use of force, of non-intervention, respect for elementary considerations of humanity, and the general principles of humanitarian law. In his view, such principles are essentially customary in character: "loin de relever d'une source autonome de droit international, tous ces principes ont en réalité le caractère de règles coutumières" [1553].

In contrast to Weil, Simma and Alston consider general principles as falling outside the ambit of customary law. They emphasize that such principles do not conform to the classic process of formation of customary law. They draw support from a report of a committee of the International Law Association. Discussing the possibility of formation of "axiomatic" customary rules (e.g., sovereign equality or non-intervention), which would not need to be supported by practice over time, the Committee wrote that "customary law is not necessarily coterminous with that of unwritten law, so that these other forms of unwritten law are not really 'customary law'" [1554]. A prominent advocate of such an approach, Abi-Saab, regards a universal treaty as a medium of "general international law", distinct from customary law [1555]. He considers "general international law" as comprising rules

1551. Bin Cheng, *General Principles of Law* 23 (187), quoted in "The Role of State Practice in the Formation of Customary and *Jus Cogens* Norms of International Law", [1989-1990] American Branch of the International Law Association, Committee Reports, at 111.
1552. Weil, *supra* footnote 1399, at 149.
1553. Weil, *supra* footnote 1399, at 150-151.
1554. "The Objective Element", *supra* footnote 1407, at 10.
1555. Abi-Saab, *supra* footnote 1401, at 210.

and principles invoked "de manière axiomatique, comme une évidence dont l'existence et la provenance n'ont pas à être prouvées":

> "Il n'y a aucune raison pour qu'une telle règle puisse être générée par un certain nombre de précédents considérés comme suffisants pour établir l'existence d'une coutume générale ou universelle, mais pas par un traité accepté par un grand nombre d'Etats, du moins aussi grand que celui des Etats impliqués dans les précédents utilisés pour établir l'existence de la règle coutumière." [1556]

He derives the authority of a universal treaty from *opinio juris* and legal expectations independently of practice [1557]. Of course, a general treaty widely ratified is capable of generating customary law. Fitting axiomatic principles — apart from *jus cogens* — into the present theory of sources is more difficult, however. There is a danger of arbitrariness and subjectivity in asserting that a "principle" which falls short in meeting the criteria of custom is binding on States as a principle of international law.

Obviously, the rapid development of international law-making processes produces an overlap and synergy of sources:

> "The slow pace of the past that led from practice to *opinio juris* and from customary law to its codification in treaty form, has given rise to what Eduardo Jiménez de Aréchaga aptly described as the simultaneous interplay of sources: while a customary rule may be emerging, it is simultaneously being codified and progressively developed in major international conferences, in turn reflecting the views expressed by means of resolutions of international organizations and other acts." [1558]

These developments can be seen, as Jennings suggests, as "a necessary symptom of progress" [1559].

1556. *Id.*

1557. *Id.*, at 210-211.

1558. Orrego Vicuña, "Major Complexities in Contemporary International Law Making", paper presented at the United Nations Colloquium on Progressive Development and Codification of International Law to Commemorate the Fiftieth Anniversary of the International Law Commission, New York, October 1997, at 3. See Jiménez de Aréchaga, "International Law in the Past Third of a Century", 159 *Recueil des cours* 1, 11-34 (1978).

1559. Jennings, "An International Lawyer Takes Stock", 39 *Int'l & Comp. LQ* 513, 519 (1990).

D. International Organizations and Sources of International Law

The enhanced role of international organizations has influenced the process of developing customary law, providing an easier access to State practice and to *opinio juris*. Oppenheim thus noted:

> "Apart from any direct function of international organizations as a potential source of international law, the concentration of State practice now developed and displayed in international organizations and the collective decisions and activities of the organizations themselves may be valuable evidence of general practices accepted as law in the fields in which those organizations operate." [1560]

In a new section of *Oppenheim's* 9th edition, Jennings and Watts speculate on the impact of international organizations upon the sources of international law [1561]:

> "the fact is that the members of the international community have in a short space of time developed new procedures through which they can act collectively. While at present this can be regarded as merely providing a different forum for giving rise to rules whose legal force derives from the traditional sources of international law, there may come a time when the collective actions of the international community within the framework provided by international organizations will acquire the character of separate source of law." [1562]

A similar point is made by Wolfke in the more limited context of international organizations' internal rules: "[a]t present . . . in face of the amassed practice, it is already undisputable that to the triad (conventional and customary rules and general principles) at least rules made by organizations must be added" [1563].

International organizations contribute to the formation of international law also by providing a forum for collective action by

1560. *Oppenheim's International Law*, *supra* footnote 1411, at 31.
1561. *Oppenheim's International Law*, *supra* footnote 1411, at 45.
1562. *Oppenheim's International Law*, *supra* footnote 1411, at 46-47.
1563. Wolfke, "Some Reflections on Kinds of Rules and International Law-Making by Practice", in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* 587 (1996).

States and through preparation of law-making or codification treaties [1564].

I. Resolutions and declarations as instances of State practice

It is frequently asserted that resolutions adopted by international organizations are "instances of State practice which are potentially creative, or at least indicative, of rules of customary international law" [1565]. Confronted with a pre-existing system of international law, new States have sought to promote their interests by the adoption of resolutions and declarations in fora where they have voting majorities. Generally, resolutions of international organizations including the UN General Assembly (except with regard to the budget and internal rules) are not legally binding. The range of scholarly opinion on legal consequences of resolutions concerned with general international law varies widely [1566]. The language of the resolution may provide important indications.

Higgins surveys the entire spectrum of scholarly views from writers who are deeply sceptical of any legal consequences of General Assembly resolutions and who emphasize their recommendatory nature, to those who argue that the General Assembly has a "quasi-legislative" competence, or that it "has secured powers beyond the recommendatory powers" granted by the UN Charter [1567]. Other supporters of "binding" resolutions regard them as an authoritative interpretation of the Charter's Human Rights provision [1568].

Sceptics argue that votes in favour of resolutions or resolutions adopted by consensus do not necessarily reflect any meaningful support for the rules stated in the resolutions. The intermediate position is taken by those who recognize that certain resolutions may, in certain circumstances, contribute to the formation of customary law, or at least indicate developing trends of international law. Supporting such a middle view, Higgins advocates a case-by-case consideration whether a particular resolution expresses a consensus on a customary

1564. *Oppenheim's International Law*, *supra* footnote 1411, at 47-50 (Robert Jennings and Arthur Watts, eds., 9th ed., 1992).
1565. Byers, *supra* footnote 1403, 41.
1566. Rosalyn Higgins, *supra* footnote 1479, at 26.
1567. Rosalyn Higgins, *supra* footnote 1479, at 26-27 (1994). Reviewed opinions include those of G. Fitzmaurice, S. Schwebel, F. Vallat, D. Johnson, G. Arangio-Ruiz, C. Joyner, M. Lachs, O. Schachter, R. Falk, and J. Castañeda.
1568. For a discussion and criticism of this method, see Meron, *supra* footnote 1398, at 82-84.

rule. Her enquiry takes into account the subject-matter of the resolution, the extent of support, the practice in relation to the resolution and the evidence of *opinio juris*. She warns that

> "one must take care not to use General Assembly resolutions as a short cut to ascertaining international practice in its entirety on a matter — practice in the larger world arena is still the relevant canvas, although UN resolutions are part of the picture. Resolutions cannot be a substitute for ascertaining custom; this tasks will continue to require that other evidences of State practice be examined alongside those collective acts evidenced in General Assembly resolutions" [1569].

Following de Aréchaga's analysis of the effect of conventions adopted at codification conferences upon customary law, Abi-Saab finds that there is

> "a growing consensus in literature to the effect that normative resolutions interact with customs exactly in the same way as codification treaties. They can thus potentially have a declaratory, a crystallizing or a generating effect" [1570].

I agree. Because of the values involved and political factors, the classical theory of acquiescence plays an important role here [1571].

In the Advisory Opinion on *Nuclear Weapons*, the Court stated some useful but obvious criteria:

> "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule." [1572]

1569. Rosalyn Higgins, *supra* footnote 1479, at 28.
1570. Abi-Saab, *supra* footnote 1439, at 13, *supra* footnote 1401, at 172-173.
1571. Meron, *supra* footnote 1398, at 89.
1572. *Legality of the Threat or Use of Nuclear Weapons*, *supra* footnote 1452, at para. 70.

An attempt to endow customary law status instantly upon norms approved by consensus or near-consensus at international conferences raises serious questions. First, in some cases it is far from certain that the participating States intended to be bound. In supporting a consensus, a State may be motivated by considerations which have nothing to do with acceptance of the binding character of the norm, at least not at the moment of its adoption. Second, the statements of a representative expressing facially minor reservations to or interpretations of a norm may in fact mask more serious disagreements which the representative prefers not to highlight. Third, the immediately binding character of a norm should not be asserted on the basis of consensus without considering the authority of the representative to commit his or her State. The assertion that by supporting a consensus resolution, a diplomat representing his/her State before an international conference for the purpose of adopting the text of a resolution, may commit his State to recognize the "instant" customary law status of the norms approved may clash with principles of democratic government under law and separation of powers.

This is not to suggest that the sources of international law listed in Article 38 of the ICJ's Statute are comprehensive and immutable. It may well be that one day these sources will be expanded by, for example, attributing a more direct law-creating role to normative resolutions of the General Assembly.

For the time being, however, recognized methods of building customary law provide the flexibility required for promoting the passage of such community values as human rights and humanitarian norms into customary law.

Beside UN General Assembly resolutions, State practice is finding expression through new types of mechanisms which are less structured and less solemn than in the past but that contribute significantly to the identification of consent and will of States. Among such mechanisms there is the widespread phenomenon of the development of "soft law"[1573]. "Soft law" covers a wide range of international instruments, and has a strong presence in the human rights and environment. A prime example, the Helsinki Declaration, has had important effects on human rights and on many normative CSCE/OSCE Human Rights Dimension documents. The 1990 Char-

1573. Orrego Vicuña, "Major Complexities in Contemporary International Law Making", *supra* footnote 1558, at 8.

ter of Paris for a New Europe[1574], although not a binding agreement, reflects the intent of participating States to commit themselves to the protection of human rights and democracy, and to submit themselves to international scrutiny in these fields[1575].

II. Role of NGOs

Although NGOs are discussed also in my chapter on "Subjects of International Law", our discussion of sources cannot be complete without acknowledging the role of NGOs in law-making processes through preparation and adoption of normative drafts, through lobbying, and the media.

The UN Charter reserved NGOs' consultative status to matters within the competence of the Economic and Social Council[1576]. Van Boven suggested that economic, social and human rights matters were regarded as warranting "some degree of non-government involvement"[1577], while political issues such as peace and security were to be the exclusive domain of inter-State co-operation[1578]. This dichotomy is now largely out-of-date, with the role of NGOs being recognized also in matters pertaining to international peace and security, international trade, sustainable development, environment and globalization[1579]. NGOs have had a major influence in prohibiting the use of anti-personnel land mines (Ottawa Treaty) and on the drafting of the ICC Statute and its side-documents.

Mullerson writes of:

> "the growing importance of non-governmental organizations in the law-making process of the international arena, that is the role of world public opinion. These organizations often express values and interests common to mankind as a whole. Although States remain the main law-making authorities, they have to

1574. Charter of Paris for a New Europe, 21 November 1990, CSCE Document, at 7.
1575. Morin, *supra* footnote 1546, at 247.
1576. UN Charter, Art. 71.
1577. Van Boven, "The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy", 20 *Calif. W. Int'l LJ* 207, 208 (1989-1990).
1578. Van Boven, *supra* footnote 1577, at 208.
1579. Report of the Secretary-General on the Work of the Organization, UN doc. A/44/1, § VII (1989), quoted in Van Boven, *supra* footnote 1577, at 208.

> take into account the will of various democratic, antiwar and antinuclear movements." [1580]

Although, "[i]n the final analysis, governments are the decision-makers with regard to the contents and adoption of conventions and other human rights instruments" [1581], NGOs have been "working in and around" the development of conventional law [1582]. NGOs have had a role in the advancement of "post sovereign-State international law".

> "These institutions, for the most part, represent substantive interests quite independent from the State: e.g., the environment, human rights, women's equality, minority rights. Their interest is to push the formal participants in the development of law — still nation-States — in directions justified independently of any particular State's interests." [1583]

Examples of standard-setting activities of NGOs include the Siracusa (1984) and the Limburg Principles (1986), drafted by the International Commission of Jurists and other NGOs, which sought to elaborate interpretative rules for the two human rights Covenants. Such drafts and compilations have been circulated as UN documents and are "occasionally referred to as an authoritative source in the committees that carry out supervisory tasks with respect to the implementation of the two international covenants" [1584]. Texts drawn up by NGOs have been adopted by the UN General Assembly, served as models for the Human Rights Commission, and more generally influenced inter-State standard-setting [1585].

Van Boven explains the increased involvement of NGOs in human rights standards-setting, and in other fields (environmental law) by the present phase of international co-operation "which is supposed to serve common goals and common interests that are vital for the survival of humankind". He adds

> "The international law of human rights is a people-oriented law, and it is only natural that the shaping of this law should be

1580. Mullerson, "New Thinking by Soviet Scholars: Sources of International Law: New Tendencies in Soviet Thinking", 83 *AJIL* 494, 512 (1989).
1581. Van Boven, *supra* footnote 1577, at 212.
1582. Kahn, *supra* footnote 1470, at 369.
1583. *Id.*
1584. Van Boven, *supra* footnote 1577, at 220-221.
1585. Van Boven, *supra* footnote 1577, at 218-219.

> a process in which representative sectors of society participate. This is a logical requirement of democracy. While the origin of contemporary international law and a fortiori of international human rights law is supposed to bend towards serving human and welfare interests, the international law-making process generally follows traditional patterns with a predominant role for States. This is an anomaly and reveals a lack of democratic quality." [1586]

While NGOs have had a salutary influence on the opening up of international processes to additional participants, their own transparency and accountability continue to present troubling questions.

E. Peremptory Rules

I. The acceptance of jus cogens

It is only in Article 103 of the Charter of the United Nations that a hierarchical principle of general international law is made explicit. Its binding character is explained, as Lord McNair puts it, by the "constitutive or semi-legislative character" [1587] of the Charter. This is not to suggest that, apart from Article 103 of the Charter, hierarchical principles are totally absent from international law. Some such rules have been developed in other international organizations. Nevertheless, the reach of hierarchically superior instruments adopted within a particular institution is limited to the legal system of that organization and should not be confused with *jus cogens* [1588].

The ILC's codification of the law of treaties recognized the special importance of certain norms in the international legal order. Peremptory norms are thus mentioned in Articles 53 and 64 of the Vienna Convention on the Law of Treaties, which declare void treaties in conflict with a peremptory norm of international law. Such a norm is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted".

As a matter of practice, States do not conclude agreements to

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1586. Van Boven, *supra* footnote 1577, 224.
1587. A. McNair, *The Law of Treaties* 217 (1961).
1588. Meron, "On a Hierarchy of International Human Rights", 80 *AJIL* 1, 4 (1986).

commit torture or genocide or enslave peoples. Some examples of *jus cogens* commonly cited in the literature tend to be *hypothèses d'école*. States are not inclined to contest the illegality of acts prohibited by *jus cogens*. When such acts do take place, States either deny the factual allegations or justify violations by more subtle or ingenious arguments. Thus, while the principle of *jus cogens* has a moral and political value, its immediate practical effect on the validity of treaties is limited [1589].

The International Court of Justice gave currency to the idea of a hierarchy of human rights norms in the *Barcelona Traction* case by suggesting in its famous dictum that "basic human rights of the person" [1590] create obligations *erga omnes* [1591]. This dictum was construed by the ILC to mean that there is

> "a number, albeit a small one, of international obligations which, by reason of the importance of their subject-matter for the international community as a whole, are — unlike the others — obligations in whose fulfillment all States have a legal interest" [1592].

Obligations *erga omnes* — discussed mainly in the chapter on State responsibility — are not identical with *jus cogens*, but there is, of course, a certain overlap between the two. I have already pointed out that the practice, including that of the ICJ, lags behind the principle of obligations *erga omnes* [1593].

The concept of *jus cogens* has been widely accepted as a moral, ethical and rhetorical notion, but has rarely been applied in actual practice [1594]. Although in the Vienna Convention on the Law of Treaties, *jus cogens* may have contemplated mainly such fundamental Charter norms as prohibition of aggression and unlawful use of force (and have been extended to slave trade, piracy and genocide)

1589. Meron, *Human Rights Law-Making in the United Nations* 190 (1986).
1590. *Barcelona Traction, Light and Power Company, Ltd. (Belgium* v. *Spain)*, *ICJ Reports 1970* 4, 32.
1591. Meron, *supra* footnote 1588.
1592. [1976] 2 (2) *Yb. Int'l L. Comm'n* 99, UN doc. A/CN.4/Ser.A/1976/Add.1 (Part. 2). For a detailed discussion, see Meron, *supra* footnote 1398, at 184-189.
1593. See also Zemanek, "New Trends in the Enforcement of Erga Omnes Obligations", 4 *Max Planck YB UN Law* 2 (2000).
1594. Byers, *supra* footnote 1403, at 184, Tomuschat, *supra* footnote 1459, at 306-307; Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", 96 *AJIL* 833, 843 (2002).

over the years *jus cogens* has been invoked primarily for human rights and humanitarian norms.

Except for a small number of norms, there is still a lack of consensus about the identity of rules that can safely be considered as constituting *jus cogens*. In international debates about use of force, human rights and humanitarian law, the invocation of *jus cogens* has nevertheless been a powerful political and rhetorical tool. It had a major impact on such projects of international codification as ILC's articles on State responsibility (as, for example, in the consideration that *jus cogens* trumps the justification of circumstances excluding wrongfulness).

The ICJ has been cautious in its allusions to *jus cogens*[1595], but separate and dissenting opinions have referred to it[1596]. In the Advisory Opinion on *Nuclear Weapons*, the Court itself stated that

> "It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*ICJ Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[1597]

Condorelli suggests that the Court's "terminological innovation", — intrangressible principles — are associated with, but not identical to *jus cogens*[1598]. It is obvious that the Court deliberately refrained from pronouncing on *jus cogens* in this case.

Flauss wrote that *jus cogens* has been incorporated in a number of national jurisdictions[1599]. Comment 1 to § 702 of the Third Restatement of the US Foreign Relations Law (1987) states that these prohibitory rules of customary law listed in that section constitute *jus*

1595. For instance, *Military and Paramilitary Activities in and against Nicaragua*, *supra* footnote 1394, para. 190. See Christenson, "*Jus Cogens:* Guarding Interests Fundamental to International Society", 28 *Va. J. Int'l L.* 585, 607-608 (1988).

1596. See references in Ragazzi, *supra* footnote 1488, at 46, footnote 12.

1597. *Legality of the Threat or Use of Nuclear Weapons*, *supra* footnote 1452, at para. 79.

1598. Condorelli, *supra* footnote 1458, at 234-235.

1599. Flauss, *supra* footnote 1402, at 47.

cogens and that an international agreement violating them would be void: genocide, slavery or slave trade, the murder or causing disappearances of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized human rights, all of which constitute violations if practised as a matter of State policy [1600].

II. Sources of peremptory rules

The ILC Commentary on draft Article 50 (Article 53 of the Convention on the Law of Treaties) states that it is not the form of a general rule of international law, but the particular nature of the subject-matter with which it deals that gives to a rule the character of *jus cogens* [1601]. Such rules are based not only on law, but as Fitzmaurice noted, on "considerations of morals and of international good order" [1602]. The principle of *jus cogens* has unquestionable ethical underpinnings and unimpeachable antecedents. It may be traced to the distinction in Roman law between *jus strictum* and *jus dispositivum* and to Grotius' references to *jus strictum* [1603].

Beyond the classic examples of norms prohibiting aggression, piracy, genocide, and slavery, identification of *jus cogens* norms has been difficult [1604]. In its Articles and Commentary on the Law of Treaties, the ILC has prudently refrained from suggesting a catalogue of peremptory rules [1605]. At the Vienna Conference,

> "the diverging political agenda of the various States, and their concern that a sample list of peremptory norms might lead to abuse, discouraged all attempts to include examples of *jus cogens* in the final text of the Vienna Convention" [1606].

1600. Meron, *supra* footnote 1589, at 191-192.
1601. Draft Articles on the Law of Treaties, at 67, para. 2. [1966-II] *Yearbook of the International Law Commission*, at 248, para. 2, UN doc. A/CN.4/SER.A/1996/Add.1.
1602. Ragazzi, *supra* footnote 1488, at 49, quoting Law of Treaties: Third Report by G. G. Fitzmaurice, Special Rapporteur (UN doc. A/CN.4/115), in [1958] II *Yearbook of the International Law Commission* 20, 41, para. 76.
1603. Meron, *supra* footnote 1589, at 190.
1604. Verhoeven, "*Jus Cogens* and Reservations or 'Counter-Reservations' to the Jurisdiction of the International Court of Justice", in *International Law: Theory and Practice. Essay in Honour of Eric Suy* 195, 196 (Karel Wellens, ed., 1998); Byers, *supra* footnote 1403, at 186.
1605. Meron, *supra* footnote 1589, at 191.
1606. Ragazzi, *supra* footnote 1488, at 50.

Verhoeven suggests that scarcity of examples of *jus cogens*

> "merely reflects the still rudimentary organization of a 'community' which is no longer a 'family' (of nations) but which has not yet developed into a society. Among States who have little in common to share (beyond the prohibition on unilateral resort to armed force), peremptory norms cannot but remain relatively exceptional . . . This does not mean at all that public policy considerations are necessarily irrelevant in international relations and that treaty obligations should (necessarily) prevail over the interests of 'the international community of States as a whole'." [1607]

Are *jus cogens* rules a sort of customary law plus, or a form of general principles of law?

Many writers suggest that rules of *jus cogens* are customary rules, with a "reinforced" *opinio juris* [1608]. Others argue that the formation of *jus cogens* rules does not follow the classic customary process and that *jus cogens* rules are more akin to general principles of international law [1609]. Tomuschat believes that these rules stem from a "declaratory process" with only an attenuated confirmation by practice:

> "certain deductions from the constitutional foundations of the international community provide binding rules that need no additional corroboration by practice. However, it will always be necessary to ascertain that indeed the international community sticks to its axiomatic premises. In that regard, the regular criteria of customary law keep an important evidentiary function. The deductive method can never be used to oppose the actual will of the international community." [1610]

Sur agrees:

> "For a very long time I believe that *jus cogens* was a stronger variety of custom. In other words there had to exist a general customary rule to which was subsequently attributed the higher status of a rule of *jus cogens* . . . But today I am not

1607. Verhoeven, *supra* footnote 1604, at 196.
1608. Ragazzi, *supra* footnote 1488, at 53-54.
1609. "The Role of State Practice", *supra* footnote 1453, at 122-126; Simma and Alston, *supra* footnote 1425, at 104-105; Simma, *supra* footnote 1438, at 225-226.
1610. Tomuschat, *supra* footnote 1459, at 307.

> entirely certain that that was the intention of the authors of the Vienna Convention. I wonder whether *jus cogens* presupposes, in order for it to exist, a practice. This is not, it would seem, required by the terms of the Vienna Convention, specifically articles 53 and 64. A rule of *jus cogens* is a peremptory norm of general international law, recognized and accepted by the international community of States as a whole. There is no reference to practice. It may be that the recognition, the acceptance, takes place in solemn, declaratory fashion, but it is in no way required that there be a corresponding practice." [1611]

These are attractive suggestions. It may well be that the customary process does not explain well the formation of peremptory rules. But to avoid subjectivity and arbitrariness in the identification of norms of *jus cogens*, I believe it is necessary to show that they have been accepted and recognized as such by the international community as a whole. To maintain the value and credibility of *jus cogens*, it should be limited to few fundamental norms. An inflation of *jus cogens* norms would imperil its very existence.

III. Extension of the concept of jus cogens *beyond law of treaties*

Article 53 of the Vienna Convention defines a norm of *jus cogens* as a norm "from which no derogation is permitted". The meaning of "derogation" has generated controversy. For some, the prohibition of derogation implied the prohibition of "unilateral derogation", i.e., by a norm of municipal law. Others argue that a State acting alone could not "derogate from an international norm" in the technical legal sense. Article 53 would thus cover only derogation by (bilateral or multilateral) treaties [1612].

Weil, for instance, argued that

> "Dans le cadre du droit des traités la question se pose de savoir si les Etats peuvent déroger à une règle de *jus cogens*. Il n'est pas question de dérogation pour ce qui est d'un acte unilatéral : un tel acte ou bien respecte le droit international, ou bien il le viole ; il n'y déroge pas." [1613]

1611. Sur, "Discussion", in *Change and Stability in International Law-Making* 128 (Antonio Cassese and Joseph H. H. Weiler, eds., 1988).
1612. Ragazzi, *supra* footnote 1488, at 58.
1613. Weil, *supra* footnote 1399, at 281.

The ILC Commentary on Article 50 (Art. 53), stated that no derogation from a norm of *jus cogens* is permitted, "even" by agreement between States, thus suggesting that reach beyond the law of treaties [1614] was contemplated. The application of the doctrine of *jus cogens* to unilateral acts is widely, but not unanimously, accepted [1615].

Since violations of human rights and principles of territorial integrity almost always result from unilateral acts of States, rather than from international agreements, the non-treaty aspects of *jus cogens* may be particularly important. Even scholars who reserve *jus cogens* to the law of treaties tend to agree that international public order, public order of the international community, and international public policy do not allow States to violate severally such norms as they are prohibited from violating jointly with other States [1616].

In its draft Articles on State responsibility, the ILC seems to have applied the term of peremptory norms outside the law of treaties to unilateral State action [1617]. In this context, peremptory norms refer to categorical rules of international law, or of international public policy. Judge Mosler who coined the phrase "public order of the international community", characterized such order as

> "consist[ing] of principles and rules the enforcement of which is of such importance to the international community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force. The reason for this follows simply from logic; the law cannot recognise any act either of one member or of several members in concert, as being legally valid if it is directed against the very foundation of law." [1618]

Obviously, the rationale underlying the concepts of *jus cogens* and public order of the international community is the same: because of the decisive importance of certain norms and values to the international community, they merit absolute protection and may not be

1614. Draft Articles on the Law of Treaties, *supra* footnote 1601, at 248.
1615. Christenson, *supra* footnote 1595, at 611-613. See also Verhoeven, *supra* footnote 1604, at 205, applying the doctrine to reservations.
1616. Meron, *supra* footnote 1589, at 196-197.
1617. Gaja, "*Jus Cogens* beyond the Vienna Convention", 172 *Recueil des cours* 271, 296-297 (1981).
1618. H. Mosler, *The International Society as a Legal Community* 18 (1980).

derogated from by States, whether jointly by treaty or severally by unilateral legislative or executive action. It is in this sense that the International Court of Justice, in the case concerning United States Diplomatic and Consular Staff in Tehran, addressed "the imperative character of the legal obligations incumbent upon the Iranian Government" [1619].

In the *Furundžija* case, an ICTY Trial Chamber recognized a number of specific consequences flowing from its holding that the prohibition of torture constituted *jus cogens*. This prohibition would "de-legitimize any legislative, administrative or judicial act authorizing torture" [1620]. Thus, for example, amnesty for acts of torture would give rise to State responsibility and would not be accorded international legal recognition.

For acts violating *jus cogens* norms, third States have both the right and the duty to refrain from recognizing such acts or giving them legal effect [1621]. In the *Pinochet* case, the Spanish Audienca Nacional sitting in full bench held that the Chilean amnesty law did not preclude the exercise of universal jurisdiction by Spain [1622].

The concept of *jus cogens* was also applied by the Arbitration Commission for the former Yugoslavia established by the European Community ("Badinter Commission") in the context of State succession. In its first opinion, the Commission held that:

> "The peremptory norms of general international law and, in particular, respect for the fundamental rights of the individual and of the rights of peoples and minorities, are binding on all parties to the succession." [1623]

A Greek Court of First Instance dismissed a claim of immunity by Germany in a case where the plaintiffs sought an indemnity for atrocities suffered during World War II German occupation. The Court held that Germany could not invoke sovereign immunity for

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1619. *United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)*, International Court of Justice, Judgment of 24 May 1980, *ICJ Reports 1980* 3, 41.

1620. *Prosecutor* v. *Furundžija*, ICTY Trial Chamber, Judgment of 10 December 1998, at para. 155.

1621. On nullity, see Meron, *supra* footnote 1589, at 199-200.

1622. Auto confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena, Sala de lo Penal de la Audiencia Nacional, 5 November 1998, at 8.

1623. Opinion No. 1 of the Conference on Yugoslavia Arbitration Commission, reprinted in 31 *ILM* 1488, 1495, para. 1 (1992).

acts constituting violations of *jus cogens*[1624]. In US courts, however, the plea of sovereign immunity had been upheld even against *jus cogens*. In *Siderman de Blake* v. *Argentina*, a US Court of Appeals held that the *jus cogens* status of the prohibition of torture under international law did not preclude application of sovereign immunity[1625].

1624. *Prefecture of Voiotia* v. *Federal Republic of Germany*, Case No. 137/1997, Court of First Instance of Leivadia, Greece, 30 October 1997, summarized and commented in Bantekas, "Case Note", 92 *AJIL* 765 (1998).

1625. *Siderman de Blake* v. *Argentina*, 965 F. 2d 699, 103 *ILR* 454 (1992). Also *Princz* v. *Federal Republic of Germany*, 26 F. 3d 1166, US App. D.C. 102. See the dissenting opinion by Judge Wald in *Princz* v. *Germany*, 26 F. 3d 1179 (1962) ("Germany waived its sovereign immunity by violating the *jus cogens* norms of international law condemning enslavement and genocide").

CHAPTER VII

INTERNATIONAL INSTITUTIONS

A. Human Rights, Development and Financial Institutions

In this chapter I shall explore the influence of human rights on the law and practice of international institutions.

I. Approaches to development issues

(a) *Right to development*

There has been a growing recognition of the nexus between development and human rights [1626]. The concept of development

> "underwent radical changes from trickle-down growth, to growth with equity and redistribution, to a general conception of development as a process incorporating material and non-material needs, human rights and environmental concerns" [1627].

Human rights doctrine has recognized the right to development, in parallel with the principle of the indivisibility of political, economic, social and cultural human rights.

Forsythe argues that for a long time the United Nations has been "schizophrenic about development and participatory human rights" [1628]. On the one hand, it has promoted standards supporting democracy and participatory rights. On the other hand, it has treated human rights and development as two distinct and separate areas, at least until the 1980s [1629]. In 1986, the General Assembly adopted the Declaration on the Right to Development, which reaffirmed the Universal Declaration and the Political Covenant and provided that:

> "1. The human person is the central subject of development

1626. See Balakrishnan Rajagopal, "Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights", 11 *BU Int'l LJ* 81, 83-85 (1993).
1627. *Id.*, at 97.
1628. David P. Forsythe, "The United Nations, Human Rights, and Development", 19 *Hum Rts. Q.* 334, 335 (1997).
1629. See *id.*, 335-336.

> and should be the active participant and beneficiary of the right to development.
>
> 2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development." [1630]

The Secretary-General's Agenda for Development (1994) explored the nexus between democracy and development:

> "They are linked because democracy provides the only long-term basis for managing competing ethnic, religious, and cultural interests in a way that minimizes the risk of violent internal conflict. They are linked because democracy is inherently attached to the question of governance, which has an impact on all aspects of development efforts. They are linked because democracy is a fundamental human right, the advancement of which is itself an important measure of development. They are linked because people's participation in the decision-making processes which affect their lives is a basic tenet of development." [1631]

Despite earlier reluctance, under the pressure of Western donor Governments, the United Nations Development Programme (UNDP) adopted "democratic governance as an essential feature of development" [1632], with special focus on the participation of local community groups and non-governmental organizations, and such accompanying rights as freedom of association [1633], and became active in support of democratization, institution-building and the strengthening of legislative and judicial systems [1634].

1630. Declaration on the Right to Development, GA res. 925, UN, *GAOR*, 41st Sess., 97th plen. mtg., Annex, Art. 2.

1631. An Agenda for Development: Report by the Secretary-General, UN doc. A/48/935, para. 120.

1632. Forsythe, *supra* footnote 1628, at 338.

1633. See *id.*, at 344-346.

1634. See Ernst Sucharipa and Engelbert Theuermann, "The New United Nations and Human Rights: The Human Rights Perspective in the Integrated Follow-up to United Nations Conferences and in the UN Reform Process", 2 *Austrian Rev. Int'l & Eur. L.* 239 (1997), at 247.

(b) *Sustainable development*

The Brundtland Commission defined "sustainable development" as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" [1635]. The concept of "sustainable development", whose primary objective was the protection of the environment [1636], has grown out of its ecological mould to encompass a comprehensive notion of development, which includes several human rights aspects. Agenda 21, which was endorsed by the UN General Assembly, thus established a link with universality, democracy, transparency, cost effectiveness and accountability [1637].

The Communiqué of the G-7 Summit of Halifax stated that "[d]emocracy, human rights, transparent and accountable governance, investment in people and environmental protection are the foundations of sustainable development" [1638]. The Declaration of the Summit of the Americas of Santa Cruz (1996) similarly reaffirmed that "[s]ustainable development requires that we strengthen and promote our democratic institutions and values" [1639]. The Declaration of Copenhagen on Social Development states:

> "We heads of State and Government are committed to a political, economic, ethical and spiritual vision for social development that is based on human dignity, human rights, equality, respect, peace, democracy, mutual responsibility and cooperation, and full respect for the various religious and ethical values and cultural backgrounds of people. Accordingly, we will give the highest priority in national, regional and international policies and actions to the promotion of social progress, justice and

1635. World Commission on Environment and Development, *Our Common Future* 43 (1987).

1636. See Günther Handl, "The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development", 92 *AJIL* 642, 642 (1998).

1637. Agenda 21, para. 38.2, in Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), Annex II, at para. 38.2, UN doc. A/CONF.151/26 (Vol. III) (1992); see also GA res. 191, UN, *GAOR*, 47th Sess., 93rd plen. mtg., Supp. No. 49 (Vol. I), UN doc. A/47/49 (1992).

1638. Communiqué of the G-7 Summit (Halifax, 16-17 June 1995), at para. 24.

1639. Declaration of Santa Cruz de la Sierra, Summit of the Americas on Sustainable Development (Santa Cruz, 7-8 December 1996), at para. 3.

> the betterment of the human condition, based on full participation by all."[1640]

II. Human rights and international financial institutions

There has been increasing pressure on international financial institutions to take into account the protection of human rights in their projects and activities[1641]. Consequently, the World Bank and — to a lesser extent — the International Monetary Fund (IMF), the two main international financial institutions, have been adjusting their visions of development, their policies and their operations. As some commentators have observed, "World Bank-funded operations now promote such economic, social, and cultural rights as health education, social welfare, jobs, and property"[1642], and the IMF

> "has been known to engage the Member States in discussions of its policies relating to health care, environment, welfare, housing, unemployment, labor markets, military expenditures, and certain aspects of the management of the State's public sector"[1643].

Initially, although the World Bank did not disagree with the broader concept of development as a comprehensive process incorporating economic, social, cultural, political, and spiritual dimensions[1644], it took the view that its mandate was restricted to the "economic aspects" of development[1645]. It invoked its Articles of Agreement, which provide that

> "[t]he Bank and its officers shall not interfere in the politi-

1640. Declaration of the Copenhagen World Summit for Social Development (Copenhagen, 6-12 March 1995), at para. 25, in Report of the World Summit for Social Development, UN doc. A/CONF.166/9 (1995) (hereinafter Copenhagen Declaration).

1641. See Prohibition of Political Activities in the Bank's Work, Legal Opinion by the Senior Vice President & General Counsel, 12 July 1995, at 26 (citing the Canadian House of Commons and the Parliamentary Assembly of the Council of Europe, both of which had called for considering the amendment of the World Bank's Articles of Agreement for that purpose); Ibrahim F. I. Shihata, *The World Bank in a Changing World*, at 573-574 (Vol. II, 1995).

1642. Daniel D. Bradlow, "The World Bank, the IMF, and Human Rights", 6 *Transnat'l L. & Contemp. Probs.* 47, 49 (1996).

1643. *Id.*, at 50; see also Shihata, *supra* footnote 1641, at 567-570 (1995).

1644. See Copenhagen Declaration, *supra* footnote 1640, paras. 25-26.

1645. See Bradlow, *supra* footnote 1642, at 54-55; Ibrahim Shihata, "Democracy and Development", 46 *ICLQ* 635, 635, 640 (1997).

> cal affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I"[1646].

The conclusion was that "the Bank may consider human rights violations in the course of lending decisions if, but only if, they amount to an 'economic consideration'"[1647]. Other multilateral development banks' constitutions contain similar provisions, with the notable exception of the most recently established bank, the European Bank for Reconstruction and Development (EBRD). The agreement establishing the EBRD states in its preamble that the contracting parties are "[c]ommitted to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics"[1648]. It directs the Bank to "promote in the full range of its activities environmentally sound and sustainable development"[1649]. These provisions may have been more important in theory, however, than in the EBRD practice[1650].

Over the years, the World Bank has shown some flexibility in the interpretation of its mandate[1651], as it has begun to recognize that an approach to development based solely on economic growth could not be defended if it did not adequately address alleviation of poverty and the fulfilment of basic human needs. The Bank's position on the interpretation of its mandate is critical, as it has the exclusive authority to interpret its Articles of Agreement[1652]. The Bank thus "began to fund development activities related to health, education, agriculture, and housing", later adding environmental,

1646. Articles of Agreement of the International Bank for Reconstruction and Development, Art. IV, § 10, 27 December 1945, 60 Stat. 1440, 2 *UNTS* 134, amended 17 December 1965, 16 *UST* 1942.

1647. See John D. Ciorciari, "The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement", 33 *Cornell ILJ* 331, 346 (2000).

1648. "Agreement Establishing the European Bank for Reconstruction and Development, Paris, May 29 1990", reprinted in 29 *ILM* 1077 (1990).

1649. *Id.*, Chap. I, Art. 2, § 1 (vii).

1650. See Handl, *supra* footnote 1636, at 645-646, n. 35.

1651. See Shihata, *supra* footnote 1645, at 639-640; Ciorciari, *supra* footnote 1647, at 355-356; Pierre Klein, "Les institutions financières internationales et les droits de la personne", 32 *RBDI* 97, 102-103 (1999).

1652. See Ciorciari, *supra* footnote 1647, at 338.

gender-related, and governance-enhancing projects [1653]. This expansion of the Bank's activities led to involvement in many areas, which have a direct impact on human rights. According to Daniel Bradlow,

> "it seems reasonable to conclude . . . that its operations have a direct effect on the following human rights in its Borrower States: the right to due process; the right to free association and expression; the right to participate in the government and cultural life of the community; the right to work; the right to health care, education, food, and housing; and the rights of women, children, and indigenous peoples to nondiscriminatory treatment" [1654].

It is through the notion of "good governance" that the World Bank and other multilateral development banks have gradually embraced some form of participatory rights [1655]. They have begun to take into account a broad range of considerations now regarded as "sound banking practice", including transparency and public participation in decision making, governmental accountability, and measures against public corruption [1656]. To increase transparency, the World Bank has undertaken to promote public participation as a component in all of its projects and has adopted a new public disclosure policy [1657]. The Bank thus expanded its relations with NGOs. Another innovation is the establishment of the Inspection Panel, which allows individuals to seek redress when the Bank fails to abide by its own rules and procedures (discussed in the Chapter on Subjects of International Law) [1658]. These changes "increase the likelihood that the Bank's operations will be designed and implemented in a way that is sensitive to the human rights issues that may arise in the course of Bank-funded projects and programs" [1659].

The World Bank's general counsel outlined the limits of the Bank's participatory development policy, which, in his opinion, is

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1653. Bradlow, *supra* footnote 1642, at 56.
1654. *Id.*, at 59.
1655. See Ciorciari, *supra* footnote 1647, at 341-342.
1656. See Handl, *supra* footnote 1636, at 649-650.
1657. See Bradlow, *supra* footnote 1642, at 77. See "World Bank Revises Disclosure Policy", World Bank News Release No. 2002/070/S (7 September 2001).
1658. See Bradlow, *supra* footnote 1642, at 76; Shihata, *supra* footnote 1645, at 640; Klein, *supra* footnote 1651, at 108.
1659. Bradlow, *supra* footnote 1642, at 77.

only "meant to allow the people affected by a Bank-financed project to participate effectively in its design and implementation":

> "[While the] Bank's advocacy of participatory development is laudable and may be further encouraged to ensure grassroots development, [t]his does not, however, mean that the Bank has a role in the general political reform of borrowing countries . . . [and while many] Bank activities can no doubt indirectly have effects on the political environment of a country, . . . [t]his indirect influence should not be confused with a political mandate which the Bank does not have under its Articles of Agreement." [1660]

This opinion is central to the major debate whether human rights can be considered only in relation to funded projects or if the general human rights situation in a State may be considered as a "conditionality" for aid. Gunther Handl has observed that "there is no denying that certain human-rights-related conditionalities have become part and parcel of MDBs' routine loan requirements" [1661]. Project-related human rights concerns cannot be easily divorced from the general human rights situation prevailing in the country. Handl insists that

> "[a] country without traditions of a civil society that protect these values generally will not easily succeed in doing so ad hoc, in the limited, specific circumstances of a bank-financed project or program" [1662].

Although the dividing line between legitimate and non-legitimate human rights considerations is nebulous, multilateral banks seem to accept that human rights can be considered whenever they have direct effects on the economic situation of a country, which includes factors regarded as a part of "good governance", such as transparency and accountability [1663]. The decision to include good governance in their mandates further undermines the traditional position against consideration of political issues, since "it is difficult . . . to argue that governments guilty of widespread human rights violations

1660. Prohibition of Political Activities in the Bank's Work, *supra* footnote 1641, at 24.
1661. Handl, *supra* footnote 1636, at 650.
1662. *Id.*, at 650.
1663. See *id.*, at 651.

are practicing sustainable good governance" [1664]. The World Bank's general counsel has recognized that the

> "participation and consultation [of affected people], to be useful at all, require a reasonable measure of free expression and assembly [and that] the Bank would . . . be acting within proper limits if it asked that this freedom be insured when needed for the above purposes" [1665].

He also recognized that

> "[t]o the extent that direct and obvious economic effects of political events or factors can be taken into account by the Bank, an extensive violation of political rights which take pervasive proportions could impose itself as an issue in the Bank's decisions. This would be the case if the violation had significant economic effects or if it led to the breach of international obligations relevant to the Bank, such as those created under binding decisions of the UN Security Council." [1666]

Some scholars have argued that international financial institutions have a legal duty to adopt a sustainable development approach. Such a duty could be inferred from the interpretation of their articles of agreement, from customary law, and from environmental multilateral agreements [1667]. Development banks have an affirmative duty to take reasonable steps to promote sustainable development [1668]. Promoting human rights as such is a more difficult issue. Although international financial institutions do not have a mandate to promote human rights generally, they may have "limited affirmative obligations regarding the enhancement of human rights", as part of "the objectives of international normative concepts, extant or emerging, that bear on sustainable development" [1669].

The World Bank has sought to distinguish between "economic

1664. Bradlow, *supra* footnote 1642, at 65-66.

1665. Prohibition of Political Activities in the Bank's Work, *supra* footnote 1641, at 29-30.

1666. *Id.*, at 30. Bradlow has criticized this statement for its failure to "acknowledge that the Bank has a responsibility to protect people from human rights abuses that occur as a direct result of participating in a Bank funded operation" and "to give clear guidance on how the Bank should treat the recommendations and opinions of international organizations other than the Security Council". Bradlow, *supra* footnote 1642, at 87.

1667. See Handl, *supra* footnote 1636, at 655-661.

1668. See *id.*, at 663-664.

1669. *Id.*

factors" and "political factors", as its mandate prohibits taking the latter into consideration [1670]. Under the current interpretation of the Bank's Articles of Agreement, human rights may be considered "when such rights are of a predominantly economic nature (as opposed to political) or when such rights have a 'direct and obvious effect' on the economic condition of a member nation" [1671]. This working definition, however, leaves a wide margin of discretion. Narrow constructions of the political prohibition have been suggested, constructions that would "only preclude the Bank from interfering in domestic partisan political affairs", but not "preclude the Bank's involvement with internationally recognized human rights" [1672].

Human rights concerns have had less influence on the IMF's operations than on those of the multilateral development banks. The IMF has maintained that "its operations do not have any relation to or impact on other concerns such as human rights, arms transfers or environmental wastage" [1673]. This position has been based on two principal grounds: human rights are within the domestic jurisdiction of States and, thus, not within the IMF's purview; and human rights "are merely political", without any connection with the IMF's focus on balance of payments [1674]. The IMF has thus had less influence than the World Bank on human rights policy of member States [1675]. The IMF's programmes are less wide-ranging than the Bank's and have a shorter time-span. Moreover, the IMF's programmes operate at a macro-level, which may be thought to be less relevant for human rights issues [1676].

Under its Articles of Agreement, the purposes of the IMF are to promote international monetary co-operation, to promote orderly and stable exchange rates, to assist in the establishment of a multilateral system of payments for current transactions, and to give confidence to member States by helping them correct balance of payments problems [1677]. However, over the years, the IMF has been "transformed

1670. See Shihata, *supra* footnote 1645, at 574-576.
1671. Ciorciari, *supra* footnote 1647, at 353; also Klein, *supra* footnote 1651, at 102-103.
1672. Bradlow, *supra* footnote 1642, at 81.
1673. Rajagopal, *supra* footnote 1626, at 83.
1674. *Id.*
1675. See Bradlow, *supra* footnote 1642, at 73.
1676. See *id.*, at 72.
1677. See Articles of Agreement of the International Monetary Fund, 27 December 1945, Art. I, 60 Stat. 1401, 2 *UNTS* 39, amended 28 July 1969, 20 *UST* 2775, amended 1 April 1978, 29 *UST* 2203.

from a monetary institution with a clearly defined scope of operations into an institution whose activities often appear to focus more on developmental than monetary matters" [1678].

Nevertheless, the IMF has taken only few steps to take into account human rights concerns in its internal rules and procedures. NGOs are rarely involved in its consultations; information about its activities is difficult to obtain, and there are no formal mechanisms for those affected by its programmes to hold the institution accountable [1679].

B. Human Rights in the United Nations

The Charter of the United Nations states that one of the purposes of the United Nations is to promote human rights. Nevertheless, the human rights clauses in the Charter are few in number and modest in content. Except for the prohibition of discrimination, they are of such a general character that it is not surprising that initially they were regarded more as programmatic or inspirational than as imposing immediate legal obligations. During the first years of the United Nations, the doctrine of non-intervention in the domestic affairs of States loomed large in an uneasy coexistence with the Charter's human rights clauses. In recent years, this perception of the human rights clauses has undergone a dramatic transformation. The United Nations has been moving from a State-centric approach to an attitude increasingly focused on human rights and individual concerns.

I. UN institutions and the protection of human rights

There is no need for me to discuss organs established to promote human rights, such as the Commission on Human Rights, the Commission on the Status of Women, the many treaty bodies, such as the Human Rights Committee established under the Political Covenant, and the many working groups, rapporteurs and study groups created by the United Nations under the authority flowing from the human rights clauses of the Charter.

There is an obvious tension between the need for the Secretary-General to maintain close relations with member Governments and

1678. Bradlow, *supra* footnote 1642, at 66; see also Rajagopal, *supra* footnote 1626, at 90-92.

1679. See Bradlow, *supra* footnote 1642, at 77-78.

his role in the promotion of human rights. The latter requires a modicum of pressure on Governments and an adversarial approach [1680]. Nonetheless, over the years, succeeding Secretaries-General have raised the profile of human rights. Secretary-General Kofi Annan has gone furthest, stating in 1997 that "As Secretary-General, [he] will be a champion of human rights and will ensure that human rights are fully integrated in the action of the Organization in all other domains." [1681] This evolution conformed to the "system-wide" integration of human rights concerns that was urged by the Vienna Conference on Human Rights [1682] and has been reflected in the work and outcome of such major world conferences as those held in the 1990s: the Cairo Conference on Population and Development, Copenhagen Conference on Social Development, Beijing Conference on Women, and Habitat II Conference [1683].

The centrality given to human rights in the work of the United Nations of late contrasts with earlier years, when human rights were viewed as too controversial, delicate and political for incorporation in peace-keeping, development and many other areas. In the last decade, organizations such as UNICEF or the UNDP have integrated human rights issues in their fields of activity. Symptomatic of these trends has been the fact that "the Convention for the Rights of the Child has become the overarching framework for the work of UNICEF" [1684]. Support for democracy and human rights concerns have increasingly been taken into account also in peace-keeping operations and in election monitoring.

Because of the many diverse demands on the Secretary-General, there was a clear need for a more discrete office dedicated to the protection of human rights [1685]. This realization eventually led to the creation of a distinct, independent, high-level official within the

1680. See Andrew Clapham, "Mainstreaming Human Rights at the United Nations — The Challenge for the First High Commissioner for Human Rights", 7 (ii) *Collected Courses of the Academy of European Law* 159, at 165-172 (1999).

1681. Statement to the Commission on Human Rights, 9 April 1997, quoted in Clapham, *supra* footnote 1680, at 167.

1682. See Ernst Sucharipa and Engelbert Theuermann, "The New United Nations and Human Rights: The Human Rights Perspective in the Integrated Follow-up to United Nations Conferences and in the UN Reform Process", 2 *Austrian Rev. Int'l & Eur. L.* 239, 241-242 (1997).

1683. See *id.*, at 242.

1684. See *id.*, at 247.

1685. See Clapham, *supra* footnote 1680, at 171-172.

United Nations with the responsibility for the promotion and advancement of human rights, the UN High Commissioner for Human Rights (HCHR). As early as 1947, René Cassin first proposed the appointment of a HCHR [1686]. Although this idea was raised from time to time with different degrees of seriousness, it was only with the 1993 Vienna World Conference on Human Rights that a general consensus on a high-level coordinator for human rights activities was reached [1687]. In December 1993, the General Assembly finally adopted the HCHR's mandate. His tasks include:

> "*(a)* To promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights;
>
> . . . . . .
>
> *(g)* To engage in a dialogue with all Governments in the implementation of his/her mandate with a view to securing respect for all human rights;
>
> . . . . . .
>
> *(i)* To coordinate the human rights promotion and protection activities throughout the United Nations system;
>
> *(j)* To rationalize, adapt, strengthen and streamline the United Nations machinery in the field of human rights with a view to improving its efficiency and effectiveness . . ." [1688].

The HCHR is to be guided by a vision of human rights which is universal rather than culturally relative [1689]. Although the co-ordination of human rights efforts across the UN system is part of his mandate, the HCHR has not been given authority over other agencies and organs. The task of the Commissioner is to balance the various competing considerations so as to maximize the promotion of human rights. He should be free from excessive dependence on Governments. Nevertheless, a certain timidity toward abusive Governments has continued, perhaps inevitably, because of the dependence of the HCHR on government support for field missions and technical assistance [1690], and the broader need to engage in negotiations and secure

1686. See *id.*, at 172.
1687. See *id.*, at 15-17.
1688. GA res. 141, UN, *GAOR*, 48th Sess., 85th plen. mtg., at para. 4.
1689. See *id.*, at para. 3 *(b)*.
1690. Helena Cook, "The Role of the High Commissioner for Human Rights: One Step Forward or Two Steps Back?", 89 *ASIL Proc.* 235, 237-238 (1995).

conditions for effective reporting[1691]. These factors tend to undermine the HCHR's effectiveness, as fear of public rebuke and the possibility of a confrontation, are potent factors of accountability[1692].

In the field of criminal justice, human rights concerns have been served by such institutions as the UN Crime Prevention and Criminal Justice Division, based in Vienna, and the UN Congress on the Prevention of Crime and the Treatment of Offenders, replaced in 1992 by an inter-governmental commission. The Congress adopted important standards to guide Governments in their treatment of prisoners. These standards provide greater specificity than human rights instruments, thus improving prospects for implementation. They include:

— The Rules for the Treatment of Prisoners
— The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment
— The Code of Conduct for Law Enforcement Officials
— Basic Principles on the Independence of the Judiciary
— Standard Minimum Rules for the Administration of Justice
— Basic Principles for the Use of Force and Firearms by Law Enforcement Officials
— Basic Principles on the Role of Prosecutors.

These institutional developments are, of course, continuing. Perhaps one day the United Nations will be ready to establish a United Nations human rights tribunal[1693], modelled on the European Court of Human Rights, which might take over the functions of some of the present treaty bodies.

II. Human rights and peace-keeping operations

Since the end of the Cold War, peace-keeping operations have become one of the most prominent activities of the United Nations. Between 1945 and 1987, 13 operations were started. From 1988

1691. See generally Philip Alston, "The UN's Human Rights Record: From San Francisco to Vienna and Beyond", 16 *Hum. Rts. Q.* 375, 388 (1994) (discussing the integration of human rights concerns into other activities, such as development co-operation, peace-keeping, and dispute settlement).

1692. See Clapham, *supra* footnote 1680, at 181, 199-200.

1693. See Yoram Dinstein, "Human Rights: Implementation through the UN System", 89 *ASIL Proc.* 242, 247 (1995); see also Meron, *Human Rights Law-Making in the United Nations* 212-213 (1986).

until 1999, 40 more have been launched[1694]. Even more important than the increase in the number of peace-keeping operations has been the change in the nature of the operations. Early peace-keeping operations gave little consideration to human rights. But, as Theo van Boven has noted, "[t]he awareness is growing that promotion and protection of human rights is an integral part of peacemaking and peacekeeping"[1695]. Beyond cease-fires, truce observations, troop separations and such other military questions which characterized the early peace-keeping operations, recent operations have recognized the role of civilians and political settlements, especially in non-international conflicts. One commentator has rightly concluded that "[a]s a consequence, issues such as human rights and democracy have become an important part of the agenda of these operations"[1696]. The Minister of Foreign Affairs of Germany emphasized the influence of peace-keeping of the internalization of conflicts and the growing importance of human rights[1697].

In this new environment, both the Security Council and the Secretary-General have increasingly taken human rights into consideration in designing peace-keeping operations[1698]. The first UN field mission entrusted with a specific human rights mandate was the UN Observer Mission in El Salvador (ONUSAL), established in 1991[1699]. The cease-fire agreement between the Government of El Salvador and the Fronte Farabundo Martí para la Liberación Nacional (FMLN), concluded under the auspices of the Secretary-General, provided for a UN observer mission to monitor human rights violations after the conclusion of a cease-fire. The mandate of the Mission required both the active monitoring of the human rights situation in El Salvador and the promotion of human rights[1700]. ONUSAL's activities were expanded by further agreements to include judicial reform, the formation of a national civilian police

1694. See United Nations Peacekeeping Operations, available at http://www.un.org/Depts/dpko/.

1695. Theo van Boven, "The Security Council: The New Frontier", 48 *Int'l Comm'n of Jurists Rev.* 12, 22 (1992).

1696. Diego Garcia-Sayan, "Human Rights and Peace-keeping Operations", 29 *U. Rich. L. Rev.* 41, 48 (1994).

1697. UN, *GAOR*, 54th Sess., 8th mtg. at 11, UN doc. A/54/PV.8, at 11 (1999).

1698. See van Boven, *supra* footnote 1695, at 20.

1699. The Mission was established by Security Council resolution 693 (20 May 1991).

1700. See van Boven, *supra* footnote 1695, at 20-21; Garcia-Sayan, *supra* footnote 1696, at 51.

and an office of the human rights ombudsman. The UN Truth Commission for El Salvador found its guiding legal principles in the rules of human rights and international humanitarian law binding on El Salvador[1701]. Similarly, the UN Mission in Cambodia (UNTAC) included an important human rights mandate, in addition to electoral, military and police matters. Human rights aspects covered educational programmes, general oversight of human rights issues and investigation of specific cases[1702]. The United Nations Verification Mission in Guatemala (MINUGUA) was to verify the implementation of the Comprehensive Agreement on Human Rights signed by the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG) in 1994. In the Agreement, the parties requested that in verifying human rights, the United Nations Mission should consider complaints of possible human rights violations and determine whether a violation had occurred. The Agreement defined human rights as those rights recognized in the Guatemalan legal order, including international treaties, conventions and other instruments on human rights to which Guatemala is a party[1703].

In his Annual Report for 1999, the UN Secretary-General observed that multidimensional peacekeeping was now the norm for the United Nations. Peace-keeping tasks thus include:

> "helping to maintain ceasefires and to disarm and demobilize combatants; assisting the parties to build or strengthen vital institutions and processes and respect for human rights, so that all concerned can pursue their interests through legitimate channels rather than on the battlefield; providing humanitarian assistance to relieve immediate suffering; and laying the groundwork for longer-term economic growth and development on the understanding that no post-conflict system can long endure if it fails to improve the lot of impoverished people"[1704].

Despite these developments, some commentators have insisted that human rights are not "yet seen as an essential element of peace-

1701. Thomas Buergenthal, "The United Nations Truth Commission for El Salvador", 27 *Vand. J. Transnat'l L.* 497, 526-527 (1994).

1702. See van Boven, *supra* footnote 1695, at 21.

1703. See Comprehensive Agreement on Human Rights, 29 March 1994, Annex I, Arts. I, IX and X, UN doc. A/48/928 (1994).

1704. Report of the Secretary-General on the Work of the Organization, UN, *GAOR*, 54th Sess., Supp. No. 1, at 12, UN doc. A/54/1 (1999).

keeping"[1705] and that they deserve a higher priority. The inclusion of human rights in peace-keeping mandates of the United Nations requires, of course, that human rights and humanitarian law be respected by UN personnel engaged in peace-keeping operations[1706]. The first HCHR emphasized the importance of human rights training for peace-keepers[1707]. The UN Commission on Human Rights encouraged Governments, UN bodies and organs, the specialized agencies and intergovernmental and non-governmental organizations

> "to initiate, coordinate or support programmes designed to train and educate military forces . . . as well as members of the United Nations peace-keeping or observer missions, on human rights and humanitarian law issues connected with their work"[1708].

The promulgation by the Secretary-General, in 1999, of the long-awaited principles and rules on the observance of international humanitarian law by peace-keepers, drafted in collaboration with the ICRC, were of particular importance[1709]. These rules were designed to "ensure that the required standards [of humanitarian law] are observed"[1710]. Responding to human rights concerns about treatment of children in armed conflicts, the United Nations started assigning full-time advocates of children to peace-keeping operations[1711].

III. Promotion of democracy, election monitoring and nation building

Promotion of democracy and monitoring of elections has become another major area of UN involvement in human rights, and, indeed, of other international institutions.

1705. Clapham, *supra* footnote 1680, at 219.
1706. See Gracia-Sayan, *supra* footnote 1696, at 45; cf. Clapham, *supra* footnote 1680, at 221-224.
1707. See Jose Ayala-Lasso, "Making Human Rights a Reality in the Twenty-First Century", 10 *Emory Int'l L. Rev.* 497, 506-507 (1996).
1708. Extrajudicial, summary or arbitrary executions, UN Commission on Human Rights, res. 1995/73, at para. 13 (1995).
1709. See Observance by United Nations Forces of International Humanitarian Law, Secretary-General's Bulletin, 6 August 1999, UN doc. ST/SGB/1999/13 (1999).
1710. Report of the Secretary-General on the Work of the Organization, *supra* footnote 1704, at 12.
1711. See Barbara Crossette, "Advocates for Children Joining U.N. Peacekeeping Missions", *NY Times*, 18 February 2000, at A8.

(a) *Normative standards*

Several human rights instruments address the issue of free elections. Article 25 of the Political Covenant provides for the right "to take part in the conduct of public affairs, directly or through freely chosen representatives" and "to vote and to be elected at genuine periodic elections . . .". The OAS Charter proclaims that "[t]o promote and consolidate representative democracy, with due respect for the principle of nonintervention" is an essential purpose of the Organization[1712]. It further reaffirms the principle that "[t]he solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy"[1713]. The OAS Permanent Council and OAS Ministers of Foreign Affairs have censured Nicaragua, Haiti and Panama for violating these principles[1714]. Article 20 of the American Convention on Human Rights recognizes several democratic rights: the right to vote, the right to periodic elections with universal and equal suffrage and the secret ballot. In the case of Mexican elections, the Inter-American Commission rejected Mexico's argument that the Commission lacked the competence to "rule on the State Parties' internal political processes". In its view,

> "ratification of the American Convention creates more than an obligation to respect the exercise of the rights recognized therein; it also creates an obligation to guarantee the existence and exercise of all those rights, without distinction, because they constitute a whole and are mutually interdependent. . . . As the Commission stated in Report 01/90, 'Indeed, any mention of the right to vote and to be elected would be mere rhetoric if unaccompanied by a precisely described set of characteristics that the elections are required to meet.' "[1715]

The 2001 Third Summit of the Americas in Quebec and the Declaration of the Quebec City which it adopted, contain robust

1712. Charter of the Organization of the American States, Art. 2, § *b*.
1713. *Id.*, at Art. 3, § *d*.
1714. See Thomas Franck, "The Emerging Right to Democratic Governance", 86 *AJIL* 46, 65 (1992).
1715. *Bravo* v. *Mexico*, Case 10.956, Rep. No. 14/93, *Inter-Am. CHR*, OEA/Ser.L/V/II.85, doc. 9 rev., at 259 (1994) (internal citations omitted), reprinted in Thomas Buergenthal and Dinah Shelton, *Protecting Human Rights in the Americas: Cases and Materials* 514, 520 (4th ed., 1995).

provisions on democracy, human rights and the rule of law. The Declaration breaks new ground in providing that

> "any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summit of the Americas process".

Consultations would be conducted in the event of a disruption of the democratic system. Following upon the Declaration, the Inter-American Democratic Charter adopted in Lima in 2001 provides, in Article 1, that the Governments of the Americas have an obligation to promote and defend democracy. Article 21 provides that the General Assembly shall suspend a State, where an unconstitutional interruption of the democratic order has taken place, from the right to participate in the OAS. Article 7 states that democracy is indispensable for the effective exercise of human rights. Article 3 contains a definition of the essential elements of representative democracy : respect for human rights, the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage, pluralistic system of political parties, and the separation of powers.

Article 3 of Protocol I to the European Human Rights Convention provides that the parties "undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of legislature"[1716]. This provision was interpreted by the European Commission to require "the existence of a representative legislature, elected at reasonable intervals . . ."[1717]. The European Court held that Article 3 of Protocol I, even though its wording has an inter-State texture ("The High Contracting Parties undertake . . ."), gave rise to individual rights and freedoms, as do other provisions of the Convention and its protocols[1718]. It thus implies "subjective rights to vote and to stand for election"[1719], although they may be subjected

1716. Protocol I of the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952, Art. 3.

1717. See *The Greek Case*, 1969 *YB Eur. Conv. on HR* 179 (Eur. Comm'n on HR).

1718. *Mathieu-Mohin and Clerfayt* v. *Belgium*, European Court of Human Rights, 1987 *Eur. Ct. HR* (Ser. A), at paras. 48-50.

1719. *Ahmed and Others* v. *United Kingdom*, European Court of Human Rights (Chamber), 1998 *Eur. Ct. HR*, at para. 75 (1998) (internal citations omitted).

by internal laws to conditions which are not in conflict with Article 3. While States enjoy a wide measure of discretion in the choice of electoral systems, they may not deny the right to vote altogether. Thus, in the case of *Matthews* v. *The United Kingdom*, the Court found that the denial of the right to vote to persons living in Gibraltar in elections for the European Parliament constituted a violation of Article 3 of Protocol I imputable to the United Kingdom [1720].

Human right treaties and declarations also provide for the rights of freedom of thought, freedom of expression and freedom of association which, as Thomas Franck has observed, "are a refinement of an aspect of the older right to self-determination; they also constitute the essential preconditions of an open electoral process . . ." [1721]. The Preamble to the European Convention on Human Rights and Articles 10 and 11 of the Convention, concerning freedom of thought and of association, establish a nexus between democracy and human rights. In the *Case of Ahmed and Others* v. *United Kingdom*, the European Court of Human Rights insisted that the maintenance and further realization of human rights and fundamental freedoms are best ensured by an effective political democracy [1722].

At the Copenhagen Meeting (1990), the Conference on Security and Co-operation in Europe (CSCE) spelled out the content of the right to participate in free and open elections. The participating States affirmed that "democracy is an inherent element of the rule of law", and recognized the "importance of pluralism with regard to political organizations" [1723]. Among the "inalienable rights of all human beings" was the democratic entitlement, including free elections held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure the free expression of the opinion of electors in the choice of their representatives. Rights also include a government representative in character, in which the executive is accountable to the elected legislature or the electorate; and political parties that are clearly separate from the

1720. See *Matthews* v. *The United Kingdom*, European Court of Human Rights (Grand Chamber), 1999 *Eur. Ct. HR*, at paras. 64-65.

1721. Franck, *supra* footnote 1714, at 61.

1722. *Ahmed and Others*, 1998 *Eur. Ct. HR*, at para. 52.

1723. Franck, *supra* footnote 1714, at 66 (quoting from Conference on Security and Co-operation in Europe (CSCE), Document of the Copenhagen Meeting of the Conference on the Human Dimension, 29 June 1990, reprinted in 29 *ILM* 1305, 1308, para. 3 (1990) (hereinafter Copenhagen Document).

State [1724]. These norms suggest a tremendous contraction of domestic jurisdiction. As Thomas Buergenthal has noted,

> "no domestic institution or norm, in theory, is beyond the jurisdictional reach of the CSCE. Here the traditional domestic jurisdiction doctrine, which has tended to shield the oppressive State practices and institutions from international scrutiny, has for all practical purposes lost its meaning. And this notwithstanding the fact that non-intervention in the domestic affairs of a State is a basic CSCE principle. Once the rule of law, human rights and democratic pluralism are made the subject of international commitments, there is little left in terms of governmental institutions that is domestic." [1725]

The Copenhagen document went beyond any existing human rights instruments [1726]. It stated that citizens have the right to expect free elections at reasonable intervals, as established by law; a national legislature in which at least one chamber's membership is freely contested in a popular vote; a system of universal and equal adult suffrage; a secret ballot or its equivalent; free, non-discriminatory candidature for office; freedom to form political parties that compete on a basis of equal treatment; free and fair campaigning, etc. [1727]

In the CSCE Document of the Moscow Meeting, the participating States reaffirmed that

> "issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order",

and

> "categorically and irrevocably declare[d] that the commitments undertaken in the field of the human dimension of the CSCE

1724. See Franck, *supra* footnote 1714, at 66 (citing to Copenhagen Document, *supra* footnote 1723, at para. 5).

1725. Thomas Buergenthal, "CSCE Human Dimension: The Birth of a System", 1 *Collected Courses of the Academy of European Law*, No. 2, at 3, 42-43, quoted in Franck, *supra* footnote 1714, at 68.

1726. See Meron, "Democracy and the Rule of Law" 153 *World Aff.* 23, 24, (1990).

1727. See Copenhagen Document, *supra* footnote 1723, at 1310, para. 7 (1990).

> are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned" [1728].

These principles have been followed in the CSCE (later OSCE) by the creation of machinery for monitoring elections in member States. In the OSCE too, "the democratic entitlement", with its linkage to monitoring and human rights has "trumped the principle of non-interference" [1729]. If international law is still concerned with the protection of sovereignty, "in its modern sense, the object of protection is not the power base of the tyrant . . . but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors" [1730]. In the *Nicaragua* case, the ICJ rejected the contention that election monitoring in independent States is necessarily unlawful:

> "A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of it sovereignty in this field." [1731]

Conceptually, the UN standards for promotion of democracy and the monitoring of elections are derived from and implement in greater detail human rights treaties. Gregory Fox suggests, however, that the UN practice has been based on a parallel set of standards derived from the Security Council's competence to maintain peace and security [1732] or the General Assembly's general mandate to promote peace, development and human rights [1733]. Nonetheless, the legal basis of the entitlement to democracy is well grounded in the principal human rights instruments. Thomas Franck has rightly

1728. CSCE, Document of the Moscow Meeting of the Conference on the Human Dimension, 3 October 1991, Preamble, reprinted in 30 *ILM* 1670, 1672 (1991).

1729. Franck, *supra* footnote 1714, at 83.

1730. W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law", in *Democratic Governance and International Law* 239-258, 249 (Gregory H. Fox and Brad R. Roth, eds., 2000).

1731. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), Merits, ICJ Reports 1986* 14, para. 258.

1732. See also Gregory Fox, "The Right to Political Participation in International Law", 17 *Yale J. Int'l L.* 539, 571, 588-589 (1992).

1733. See also Douglas Lee Donoho, "Evolution or Expediency: The United Nations Response to the Disruption of Democracy", 29 *Cornell Int'l LJ* 329, 335-338.

observed that the "democratic entitlement" has a close relationship with human rights norms:

> "[T]he rules pertaining to self-determination, freedom of expression and the right to participate in free and open elections are closely interwoven strands of a single fabric . . . [G]enerations of democratic entitlement, reinforced by regional systems, not only share many of the same or similar norms, but also have developed common and comparable kinds of institutions, procedures and customs. Each thread reinforces, and is reinforced by, the weave of the cloth." [1734]

Referring to the most important universal and regional human rights instruments, Franck concluded:

> "One can convincingly argue that States which deny their citizens the right to free and open elections are violating a rule that is fast becoming an integral part of the elaborately woven human rights fabric. Thus, the democratic entitlement has acquired a degree of legitimacy by its association with a far broader panoply of laws pertaining to the rights of persons vis-a-vis their governments." [1735]

Indeed, the 1992 UN election guidelines for Member States state that "the basic legal framework for the electoral process must be in conformity with the relevant principles enunciated in fundamental international human rights agreements" [1736].

Important norms have been developed with regard to voter eligibility. In the Namibian and the Cambodian elections, the United Nations promoted voter eligibility criteria based on a link with the territory rather than on ethnicity. The General Assembly's resolutions on South Africa emphasized the non-acceptability of electoral processes based on racial criteria [1737].

The United Nations has also insisted on party pluralism. While the legitimacy of one-party elections is not expressly excluded by human rights instruments, UN electoral monitors have properly

1734. Franck, *supra* footnote 1714, at 77.
1735. *Id.*, at 79.
1736. Enhancing the effectiveness of the principle of periodic and genuine elections: Report of the Secretary-General, UN, *GAOR*, 47th Sess., Addendum, Agenda Item 97 *(b)*, at 1, para. 2, UN doc. A/47/668/Add.1 (1992).
1737. See GA res. 130, UN, *GAOR*, 47th Sess., 92nd plen. mtg., at para. 8 (1992).

insisted on the participation of all major political groupings[1738]. Fox has noted, with regard to the UN decolonization electoral missions, that

> "In insisting on party pluralism the United Nations made clear that the ambiguities of the Political Covenant on this crucial issue would not carry forward into the new era of participatory rights."[1739]

This standard was applied also by later monitoring missions[1740]. Fox has identified a series of standards that the United Nations has developed that go beyond explicit provisions of human rights instruments:

> "(1) citizens must have the opportunity to organize and join political parties, and such parties must be given equal access to the ballot; (2) to the extent the government controls the media, all parties must have the opportunity to present their views through the media; and (3) the election must be overseen by an independent council or commission not tied to any party, faction, or individual, but whose impartiality is ensured both in law and practice"[1741].

Similar norms have been developed by regional organizations. The Inter-American Commission on Human Rights interpreted the general conditions of genuine elections as requiring that there must be several political groups participating in the elections, all on an equal footing[1742]. In the *Greek* case, the European Commission of Human Rights held that the abolition of all political parties was a violation of Article 3 of Protocol I[1743].

More recently, the European Court of Human rights addressed the

1738. See Fox, *supra* footnote 1732, at 578-579.
1739. *Id.*, at 579.
1740. See *id.* at 581 (describing the role of ONUVEN).
1741. Fox, *supra* footnote 1732, at 590. See also Henry Steiner, "Political Participation as a Human Right", 1 *Harv. YB Int'l L.* 77 (1988).
1742. See IACHR, Human Rights, Political Rights and Representative Democracy in the Inter-American System, Annual Report of the Inter-American Commission on Human Rights 1990-1991, OEA/Ser.L/V/II.79, rev.1, doc. 12, 22 February 1991, 514-537, reprinted in Buergenthal and Shelton, *supra* footnote 1715, at 511; see also Fox, *supra* footnote 1732, at 566 (commenting on the Report of the Commission on Cuba). Cf. *Chiiko Bwalya* v. *Zambia*, Human Rights Committee, Communication No. 314/1988, UN doc. CCPR/C/48/D/314/1988, para. 6.6 (1993), reprinted in 14 *Hum. Rts. LJ* 408 (1993).
1743. *The Greek Case*, 1969 *YB Eur. Conv. on HR* 179, 180 (Eur. Comm'n on HR).

question of the dissolution of political parties under Articles 10 and 11 of the European Convention (freedom of opinion and of association). Several cases against Turkey involved the dissolution of political parties[1744]. The Court both reiterated that "[t]here can be no democracy without pluralism"[1745] and determined the limits within which political parties may conduct their activities while enjoying the protection of the European Convention. It took the view that

> "a political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic, (2) the change proposed must itself be compatible with fundamental democratic principles"[1746].

(b) *Practice*

The involvement of the United Nations in the promotion and monitoring of elections began at the height of decolonization and self-determination. It was triggered by the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted in 1960[1747]. A Committee for the implementation of the Declaration, which authorized observer missions for elections and referenda in non-self-governing territories, was established a few years later[1748].

From a right to be asserted against colonial powers, self-determination has gradually come to be viewed as applying also within the territorial State, with, as Fox has noted, the entire territorial State being viewed as the self[1749]. Self-determination has come to be seen

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1744. *United Communist Party of Turkey and Others* v. *Turkey*, Judgment of 30 January 1998, 1998-I *Eur. Ct. HR*, *Socialist Party and Others* v. *Turkey*, Judgment of 25 May 1998, 1998-III *Eur. Ct. HR*, *Freedom and Democracy Party (ÖZDEP)* v. *Turkey*, Judgment of 8 December 1999, 1999 *Eur. Ct. HR*, *Refah Partisi and Others* v. *Turkey*, Judgment of 31 July2001, 2001 *Eur. CHR*.

1745. *Refah Partisi and Others*, *id.*, para. 44.

1746. *Id.*, para. 47.

1747. See Declaration on the Granting of Independence to Colonial Countries and Peoples, GA res. 1514, UN, *GAOR*, 15th Sess, Supp. No. 16, at para. 5, UN doc. A/4684 (1960).

1748. See Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General, para. 12, UN doc. A/46/609 (1991).

1749. See Gregory Fox, "Self-Determination in the Post-Cold War Era: A New Internal Focus?", 16 *Mich. J. Int'l L.* 733, 752 (1995) (reviewing Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (1994)).

as "enabl[ing] the people of a country to choose their political system, their political economic and social institutions and their political leaders, or to make important constitutional political decisions" [1750]. It thus serves as an organizing principle for other goals promoted by international institutions: democratic elections, protection of minority rights and autonomy regimes within existing States [1751]. Thus seen, self-determination contributes to "refocusing autonomy claims from the expectation of independence brought on by the success of decolonization to modes of participation in the domestic political arena" [1752]. Thomas Franck has observed that "the idea of self-determination has evolved into a more general notion of internationally validated political consultation" [1753] and that the "story of self-determination" was the "first building block in the creation of a democratic entitlement" [1754].

In 1988, the General Assembly first established a link between human rights, periodic and genuine elections and democracy by grounding in human rights a rationale for free elections [1755].

In 1992, the Secretary-General stated that "the basic framework for the electoral process must be in conformity with the relevant principles enunciated in fundamental human rights agreements" [1756]. In appropriate circumstances it constitutes also a component of "post-conflict peace-building" [1757].

The last of the decolonization era electoral missions was in Namibia (1989) [1758]. It followed a 1976 Security Council resolution which declared that it was "imperative that free elections under the supervision and control of the United Nations be held for the whole of Namibia as one political entity" [1759]. The mandate was broader

1750. *Id.*, at 752 (quoting Beigbeder, *id.*, at 18) (internal quotation marks omitted).
1751. *Id.*, at 752-755.
1752. *Id.*, at 755.
1753. Franck, *supra* footnote 1714, at 55.
1754. *Id.*
1755. GA res. 157, UN, *GAOR*, 43rd Sess., 75th plen. mtg. at paras. 1-3 (1988).
1756. Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, Report of the Secretary-General, UN doc. A/47/668/Add.1 (1992), at 1, cited in Fox, *supra* footnote 1732, at 778, n. 214 (citing Beigbeder, *supra* footnote 1749, at 111).
1757. An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping, Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992, UN doc. A/47/277-S/24111, para. 56 (1992).
1758. See SC res. 628, 2842nd mtg. (16 January 1989).
1759. SC res. 385, 1885th mtg. at para. 7 (30 January 1976).

than election monitoring : it included overseeing South African withdrawal, the maintenance of peace, and the return of refugees. The success of the elections "represented for many an emerging consensus on the value of democratic governance" [1760].

The electoral mission in Nicaragua (ONUVEN), also established in 1989, was the first monitoring mission to take place in a sovereign State [1761]. The President of Nicaragua requested the assistance of the United Nations. In a letter to the President of the General Assembly, the Secretary-General stressed that it was a request for the verification of the fairness of the entire electoral which had the backing of the other four Central American countries [1762].

The mission was supported by the General Assembly as "an extraordinary measure related to the maintenance of international peace and security" [1763] and was linked to peace-making rather than to human rights [1764]. Later monitoring missions, however, have increasingly been grounded in human rights.

The electoral mission in Haiti (1990) raised novel questions. In contrast to Namibia or Nicaragua, the situation in Haiti lacked a significant international dimension, except for the movement of refugees to the United States [1765]. As Franck observed,

> "[i]n normative terms, Haiti may be understood as the first instance in which the United Nations, acting at the request of a national government, intervened in the electoral process solely to validate the legitimacy of the outcome" [1766].

In the same vein, Michael Reisman noted that "[t]he results of such elections serve as evidence of popular sovereignty and become the basis for international endorsement of the elected government" [1767]. Endorsement may include such advantages as recognition, bilateral

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1760. Fox, *supra* footnote 1732, at 774.

1761. See Margaret Satterthwaite, "Human Rights Monitoring, Elections Monitoring, and Electoral Assistance as Preventive Measures", 30 *NYU J. Int'l L. & Pol.* 709, 720-21 (1998).

1762. Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, Report of the Secretary-General, UN doc. A/46/609, para. 28 (1991).

1763. GA res. 10, UN, *GAOR*, 44th Sess., 35th plen. mtg. at para. 8 (1989).

1764. See Franck, *supra* footnote 1714, at 80.

1765. See Fox, *supra* footnote 1732, at 775 ; cf. Franck, *supra* footnote 1714, at 72.

1766. Franck, *supra* footnote 1714, at 72-73.

1767. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law", 84 *AJIL* 866, 868-869 (1990).

and multilateral assistance and membership in international organizations.

Following the Nicaraguan elections and a backlash against the growing UN involvement in elections in sovereign States, the Secretary-General attempted to limit UN involvement to situations that had a "clear international dimension" [1768]. Nonetheless, after the approval by the General Assembly of the monitoring operations in Haiti "the requirement of an international nexus has faded from official commentary on UN electoral activities" [1769]. It is noteworthy that the Secretary-General in his 1992 Report referred only to a "potential international disruption" [1770] and that in his 1993 report he does not even mention the need for an international dimension as a condition for UN involvement [1771].

During little more than a decade, the task of monitoring (and thereby legitimating) elections in independent nations was normalized: what was once seen as a threat to the sovereignty of member States has become an institutionalized system with its own procedures and practices. As Fox has observed, the failure to limit peace-keeping operations to situations with clear international dimensions "has reinforced the centrality of monitored elections" [1772].

UN involvement in domestic electoral affairs has been criticized for its failure to ensure a long-term consolidation of democratic institutions, especially in post-conflicts contexts [1773]. The validation and legitimation of elections in a national setting raises the question of follow-up verification. The Secretary-General has framed the question in the following terms:

> "If the United Nations certifies that an election was free and

1768. See Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, Report of the Secretary-General, UN doc. A/46/609, at para. 79 (1991); Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General, UN doc. A/47/668, at para. 53 (1992).

1769. Fox, *supra* footnote 1732, at 775-776.

1770. Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General, UN doc. A/47/668, at para. 57 (1992).

1771. See Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General, UN doc. A/48/590, at paras. 59-60 (1993).

1772. Fox, *supra* footnote 1732, at 776.

1773. See Karl J. Irving, "The United Nations and Democratic Intervention: Is 'Swords into Ballot Boxes' Enough?", 25 *Denv. J. Int'l L. & Pol'y* 41, 59-61 (1996).

> fair and therefore the result must be considered valid, does it have a responsibility to follow implementation of the election results? Are there safeguards which might be included within the United Nations electoral verification activities in order to address such situations." [1774]

In his final report on the Mission in Haiti, the Secretary-General had warned that

> "if electoral democracy is to be more than a one-time event in the history of a State with little experience in such matters, a far more sustained effort will have to be made under the auspices of the community of nations" [1775].

International reactions to the overthrow of the President of Haiti and to the resumption of the civil war in Angola suggest that the United Nations may have a continuing role to play [1776], one that presents major challenges to its limited resources. There has been a rising demand for monitoring in subsequent elections, and more generally for a continuing UN role after the first election [1777]. In his 1995 Report, the Secretary-General noted that

> "elections are necessary but not sufficient to ensure the durability of a democratization process. That is why the United Nations has broadened its action to include assistance to constitutional reforms, institution-building and civic education." [1778]

The General Assembly encouraged the Secretary-General

> "through the Electoral Assistance Division, to respond to the evolving nature of requests for assistance and the growing need

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1774. Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General, UN doc. A/47/668, at para. 69 (1993).

1775. Franck, *supra* footnote 1714, at 73 (citing to Electoral Assistance to Haiti: Note of the Secretary-General, UN doc. A/45/870/Add.1 (1991)).

1776. See Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General, UN doc. A/48/590, at para. 53 (1993).

1777. See Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General, UN doc. A/49/675, at paras. 32-36 (1994).

1778. Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General, UN doc. A/50/332, at para. 125 (1995).

> for specific types of medium-term expert assistance aimed at supporting and strengthening the existing capacity of the requesting Government, in particular through enhancing the capacity of national electoral institutions" [1779].

This evolution of election monitoring was recognized by the Secretary-General in his Annual Report of 1999:

> "As the 'age of democratization' has entered into a new phase, the Organization has shifted its electoral assistance strategy to encompass a broader understanding of post-conflict peace-building. Elections that have in the past served predominantly as an exit strategy out of conflict situations are now seen as providing an opportunity for institution-building and the introduction of programmes for good governance.
>
> Elections are a necessary, but not sufficient, condition for creating viable democracies. That requires the establishment or strengthening of democratic infrastructures such as electoral commissions, electoral laws and election administration structures and the promotion of a sense of citizenship and its attendant rights and responsibilities." [1780]

Regional organizations have also become involved in election monitoring. The OAS has carried out such monitoring in countries such as Nicaragua, Haiti, Suriname, El Salvador, Paraguay and Panama. The CSCE/OSCE has also been involved in electoral monitoring. The Paris Charter established an Office for Free Elections to "facilitate contacts and the exchange of information on elections within participating States" [1781]. The OSCE Office for Democratic Institutions (ODIHR) in Warsaw is involved in fact-finding, mediation and negotiations. The OSCE High Commissioner on National Minorities provides early warning about minority problems liable to exacerbate into conflicts, mediates and provides advisory services. The OSCE statement of commitments to the rights of national

1779. GA res. 129, UN, *GAOR*, 52nd Sess., at para. 13 (1997).

1780. Report of the Secretary-General on the work of the Organization, UN, *GAOR*, 54th Sess., Supp. No. 1, paras. 109-110, UN doc. A/54/1 (1999).

1781. Franck, *supra* footnote 1714, at 68 (quoting Conference on Security and Co-operation in Europe, Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, 21 November 1990, reprinted in 30 *ILM* 190, 207). For a discussion of the OSCE, see Thomas Buergenthal, Dinah Shelton and David P. Stewart, *International Human Rights in a Nutshell*, 205-224 (3rd ed., 2002).

minorities (Copenhagen CSCE Conference 1990), has had a major impact on the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992).

Most recently, the role of human rights in nation-building has been emphasized in the case of Afghanistan. Security Council resolution 1378 (2001) expressed strong support for Afghan efforts to establish a transitional administration leading to the formation of a Government which would respect the human rights of all Afghan people, regardless of gender, ethnicity and religion, and which should be broad-based and multi-ethnic. Resolution 1383 (2001), which welcomed the Bonn Agreement (5 December 2001) on provisional arrangements in Afghanistan, noted that these arrangements were a first step towards the establishment of a broad-based, gender-sensitive, multi-ethnic and fully representative Government.

The 2002 UN Human Development Report: Deepening Democracy in a Fragmented World warns, however, that despite the move of many countries into the democratic column, and the replacement of many military by civilian Governments, in many States democratic culture is slow to develop, political institutions are not keeping pace with the needs of governance, confidence in democracy is dwindling, problems of development and poverty are not being addressed effectively, and corruption, abuses, and poverty persist[1782]. While these criticisms may be true, it is inevitable that such drastic changes as transition to democracy will be slow and often imperfect. On the balance, it is undeniable that democracy has become both an expectation of peoples and a universal norm, including in the practice of the United Nations[1783].

IV. Humanitarian and human rights factors in sanctions

Although various States have long used sanctions as a foreign policy tool, it was not until fairly recently that the international community resorted to collective sanctions. Indeed, until the end of the Cold War, the United Nations imposed sanctions rarely — mostly in response to events in Southern Africa. Since the end of the Cold War, Chapter VII sanctions have become a more frequent response

1782. Barbara Crosette, "U.N. Report says New Democracies Falter", *NY Times*, 23 July 2002. The Report published for the UNDP will appear under the imprint of Oxford University Press.

1783. Joshua Muravchik, "Democracy's Quiet Victory", *NY Times*, 19 August 2002.

to transgressions by States[1784]. They are perceived as an intermediate option "falling between the extremes of diplomacy and military intervention"[1785]. Multilateral sanctions have thus been imposed for example on Iraq[1786], the former Yugoslavia[1787], Somalia[1788], Libya[1789], Liberia[1790], Haiti[1791], Rwanda[1792] and the Sudan[1793]. Measures taken include diplomatic sanctions, arms embargo, flight bans, trade sanctions and/or oil embargoes. Several cases have included sanctions against non-State actors, such as the Khmers Rouges (Cambodia)[1794], UNITA (Angola)[1795], the Bosnian Serb forces (Bosnia-Herzegovina)[1796] and the Taliban (Afghanistan)[1797].

Sanctions relate to humanitarian or human rights in two ways. The first concerns the rationale and the justification for sanctions, which may be rooted in the desire to compel compliance with human rights and humanitarian law. As observed by Lori Damrosch,

1784. See Christine Gray, *International Law and the Use of Force* 154-156 (2000).

1785. Joy K. Fausey, "Does the United Nations' Use of Collective Sanctions to Protect Human Rights Violate Its Own Standards?", 10 *Conn. J. Int'l L.* 193, 194 (1994).

1786. See SC res. 661, UN, *SCOR*, 2933rd mtg. (6 August 1990) (trade sanctions); SC res. 670, UN, *SCOR*, 2943rd mtg. (25 September 1990) (air embargo).

1787. See SC res. 713, UN, *SCOR*, 3009th mtg. (25 September 1991) (arms embargo); SC res. 757 UN, *SCOR*, 3082nd mtg. (30 May 1992) (trade sanctions and flight ban).

1788. See SC res. 733, UN, *SCOR*, 3039th mtg. (23 January 1992) (arms embargo).

1789. See SC res. 748, UN, *SCOR*, 3063rd mtg. (31 March 1992) (arms and air embargoes); SC res. 883, UN, *SCOR*, 3312th mtg. (11 November 1993) (freezing of assets, oil equipment).

1790. See SC res. 788, UN, *SCOR*, 3138th mtg. (19 November 1992) (arms embargo).

1791. See SC res. 841, UN, *SCOR*, 3238th mtg. (16 June 1993) (oil and arms embargo, freezing of assets); SC res. 917, UN, *SCOR*, 3376th mtg. (6 May 1994) (trade and financial assets).

1792. See SC res. 918, UN, *SCOR*, 3377th mtg. (17 May 1994) (arms embargo).

1793. See SC res. 1054, UN, *SCOR*, 3660th mtg. (26 April 1996) (diplomatic sanctions); and SC res. 1070, UN, *SCOR*, 3690th mtg. (16 August 1996) (conditional flight ban).

1794. See SC res. 792, UN, *SCOR*, 3143rd mtg. (30 November 1992) (petroleum products embargo).

1795. See SC res. 864, UN, *SCOR*, 3277th mtg. (15 September 1993) (arms and oil embargoes); SC res. 1127, UN, *SCOR*, 3814th mtg. (28 August 1997) (flight and travel ban); SC res. 1173, UN, *SCOR*, 3891st mtg. (12 June 1998) (freezing of assets).

1796. See SC res. 942, UN, *SCOR*, 3428th mtg. (23 September 1994).

1797. See SC res. 1267, UN, *SCOR*, 4051st mtg. (15 October 1999) (flight ban and freezing of assets).

> "[a] growing body of literature draws attention to the value of economic sanctions, especially collective ones, in affirming the international community's commitment to certain fundamental norms, such as nonuse of force, peaceful settlement of disputes and international human rights" [1798].

Violations of humanitarian norms have been invoked as a ground for resort to sanctions in such cases as Iraq, for its treatment of the Kurdish population, Serb controlled areas in the former Yugoslavia and the Federal Republic of Yugoslavia, for violations of humanitarian norms [1799], and Haiti, for violations of human rights.

The second concerns the impact of sanctions on the target State's population. As Hans-Peter Gasser has suggested,

> "[t]here seems to be general agreement that although the purpose of economic sanctions may never be punishment, even less (collective) punishment of the civilian population at large, their impact on individuals quite often ultimately bears a close resemblance to it" [1800].

Selective targeting of sanctions, or "smart sanctions" and the so-called "humanitarian exceptions" have therefore been urged by the Secretary-General to reduce as much as possible sanctions' humanitarian costs to the civilian population [1801].

Among the many approaches to sanctions and their effects, three merit mention. The first approach is strategic and focuses on the effectiveness of sanctions. Can sanctions work effectively when they harm civilians [1802]? Are sanctions not liable to backfire, causing hostility toward the international community and a sense of solidarity

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1798. Lori Fisler Damrosch, *The Civilian Impact of Economic Sanctions, in Enforcing Restraint: Collective Intervention in Internal Conflicts* 274, 277-278 (Lori Fisler Damrosch, ed., 1993).

1799. See Adam Winkler, "Just Sanctions", 21 *Hum. Rts Q.* 133, 143 (1999).

1800. Hans-Peter Gasser, "Collective Economic Sanctions and International Humanitarian Law. An Enforcement Measure under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?", 56 *ZaöRV* 871, 874 (1996).

1801. See Report of the Secretary-General on the work of the Organization, UN, *GAOR*, 54th Sess., Supp. No. 1, at para. 124, UN doc. A/54/1 (1999). See also Simon Chesterman and Béatrice Pouligny, *The Politics of Sanctions, A Policy Brief*, International Peace Academy, Centre for Institutional Studies and Research and the Royal Institute of International Affairs (2002).

1802. See F. Gregory Gause III, "Getting It Backward on Iraq", *Foreign Aff.*, May/June 1999, at 54, 58; John Mueller and Karl Mueller, "Sanctions of Mass Destruction", *Foreign Aff.*, May/June 1999, at 43, 48-50.

within the targeted regime[1803]? Scholars have argued that sanctions often "miss their target" by hurting civilians and leaving elites untouched. Haas noted that

> "[s]anctions can be a powerful and deadly form of intervention. The danger inherent in broad sanctions — beyond missing the true target — is both moral, in that innocents are affected, and practical, in that sanctions that harm the general population can bring about undesired effects, including strengthening the regime, triggering large-scale emigration, and retarding the emergence of a middle class and a civil society."[1804]

In contrast to Haas, some commentators believe "that political change is directly proportional to economic hardship"[1805]. Sanctions can cause a change in the policy of the targeted entity either when they "directly impact the population and only indirectly influence the leaders to change" or when they "lead to change by significantly depriving both the population and leaders of goods and services"[1806]. Reisman and Stevick refer to the "trickle-up" theory of deprivation, which contends that "the increased pain of lower social strata will percolate upward, by some remarkable osmosis, to those who have the capacity to influence decision"[1807].

Others take a morality- or fairness-based approach. They ask: How can sanctions be justified when they harm mostly civilians[1808]? Secretary-General Boutros-Ghali wrote that sanctions

> "raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects"[1809].

Damrosch has suggested normative criteria such as a "*conflict con-*

1803. See Richard N. Haas, "Sanctioning Madness", *Foreign Aff.*, November/December 1997, at 74, 78-79.

1804. *Id.*, at 79.

1805. Larry Minear *et al.*, *Toward More Human and Effective Sanctions Management: Enhancing the Capacity of the United Nations System* 4 (1997).

1806. Fausey, *supra* footnote 1785, at 199.

1807. W. Michael Reisman and Douglas L. Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes", 9 *Eur. J. Int'l L.* 86, 131 (1998).

1808. See Damrosch, *supra* footnote 1798, at 275-276.

1809. Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, UN doc. A/50/60-S/1995/1, at para. 70 (1995).

tainment criterion: . . . a collective response to an internal conflict should be designed with a view to containing the theater of violence and mitigating the level of violence" and a

> "*differentiation criterion*: . . . that the collective response should, to the extent possible, target the perpetrators of violence or other wrongdoing and minimize severe adverse consequences on civilians who are not in a position to bring about cessation of wrongful conduct" [1810].

A third approach focuses on the legality of sanctions regimes in light of applicable human rights and humanitarian standards. Gasser argues, for example, that

> "[i]t may safely be argued that the [Security] Council may not infringe upon treaty obligations which protect basic human rights of the individual, in peacetime or during armed conflicts. . . . [T]here are absolutely binding obligations which tie the hands not only of States individually but also of the Security Council." [1811]

Although "[a]ny decision on economic sanctions must . . . necessarily take human rights into account" [1812]. it is rather in the perspective of international humanitarian law that sanctions have been studied [1813]. Even where the formal threshold of violence required for the application of international humanitarian law has not been reached, humanitarian law terminology has been applied. Adam Winkler thus speaks, in the context of both Haiti and Iraq, of the principle of non-combatant immunity and intentional targeting of ordinary civilians as highlighting the most troubling moral dilemma of economic sanctions [1814]. Reisman and Stevick have argued that sanctions should be subjected to the principles of the law of armed conflict, i.e., the distinction between combatants and non-combatants, and the imperatives of necessity and proportionality, and should be measured by their impact on human rights [1815].

Humanitarian and human rights concerns have affected both normative and institutional considerations. The United Nations has been

1810. Damrosch, *supra* footnote 1798, at 279.
1811. Gasser, *supra* footnote 1800, at 881.
1812. *Id.*, at 880.
1813. See *id.*, at 873.
1814. See Winkler, *supra* footnote 1799, at 147.
1815. See Reisman and Stevick, *supra* footnote 1807, at 94-95.

struggling to develop a more coherent, less *ad hoc*, approach to sanctions. When the Security Council passes a resolution imposing sanctions under Chapter VII, it delegates implementation to a sanctions committee. Each regime has its own committee, which is charged with approving humanitarian exemptions and monitoring implementation. The United Nations has also established an Inter-Agency Standing Committee on the Humanitarian Impact of Sanctions, which includes representatives of United Nations organizations as well as representatives of governmental and non-governmental organizations active in humanitarian assistance. In a statement to the Security Council, the Standing Committee expressed "its concern with respect to the humanitarian impact of [Security Council sanctions] and [its belief] that adverse humanitarian consequences on civilian populations should be avoided"[1816]. It concluded that "[t]he design of sanctions regime should therefore take fully into account international human rights instruments and humanitarian standards established by the Geneva Conventions"[1817].

Security Council resolutions on the Taliban (Afghanistan) refer to violations of international humanitarian law[1818] — including the Geneva Conventions — and violations of human rights and especially to discrimination against women. Resolution 1267 (1999), which imposed sanctions, was adopted under Chapter VII. It was triggered by Taliban's refusal to turn over Osama bin Laden to the country where he had been indicted (the United States), or to a country that would return him to the United States, or to a country where he would be brought to justice[1819]. The resolution declared that the failure of the Taliban to respond to the demand voiced in resolution 1214 (1998) that it stop providing sanctuary to terrorists and cooperate with efforts to bring indicted terrorists to justice, constitutes a threat to international peace and security. Security Council resolution 1378 (2001) called on all Afghan forces to refrain from acts of reprisal and to adhere to their obligations under human rights and humanitarian law. Security Council resolution 1381 (2001) stressed

1816. Statement dated 29 December 1997 by the Inter-Agency Standing Committee on the Humanitarian Impact of Sanctions, UN doc. S/1998/147, at para. 1 (1998).

1817. *Id.*

1818. See SC res. 1193, UN, *SCOR*, 3921st mtg. at preamble, para. 14 (1998); SC res. 1214, UN, *SCOR*, 3952nd mtg. at preamble and para. 7 (1998); SC res. 1267, *supra* footnote 1797, at preamble.

1819. See SC res. 1267, *supra* footnote 1797, at paras. 1-3.

the obligation of all Afghan forces to abide by human rights law, including respect for the rights of women, and by international humanitarian law.

The increased resort to multilateral sanctions has heightened concerns about the negative humanitarian consequences of sanctions for civilian populations. Studies point to increased infant mortality rates, decreased access to clean drinking water, lack of access to medical care, and malnutrition, as well as to negative social and political consequences, including the development of a black market in basic goods, and the increased power of oppressive elites who control access to basic goods [1820].

(a) *Humanitarian exemptions*

Humanitarian exemptions, which allow essential humanitarian items to pass through a sanctions programme once imposed, reflect moral and humanitarian considerations [1821] and are "in keeping with the right of civilian populations to receive humanitarian assistance as recognized in international humanitarian law" [1822]. Article 23 of the Fourth Geneva Convention requires the free passage of medical supplies "intended only" for civilians, and of essential foodstuffs and clothing for women and children [1823]. These exemptions are minimal and "hardly protect all those whom the laws of just war would consider innocent noncombatants" [1824]. The practice of the Security Council has, however, been more liberal than the requirements of Article 23 [1825]. Like Article 54 of Additional Protocol I, prohibiting starvation as a method of warfare, Article 23 is formally applicable to international armed conflicts only. These Articles have, however, provided guidelines for non-international armed conflicts as well.

The principle that the people of the targeted country should be protected from sanctions is reflected in the *Namibia* Advisory Opin-

1820. See Gause III, *supra* footnote 1802, at 58-59.
1821. See Damrosch, *supra* footnote 1798, at 296.
1822. Minear *et al.*, *supra* footnote 1805, at 37.
1823. See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Part II, Art. 23; see also Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, Sec. III, Chap. II, Arts. 76-77.
1824. Winkler, *supra* footnote 1799, at 151. Meron, "Prisoners of War, Civilians and Diplomats in the Gulf Crisis", 85 *AJIL* 104(1991).
1825. See Gasser, *supra* footnote 1800, at 890-891.

ion. The ICJ, in referring to the sanctions against South Africa, stated that the duty not to recognize the South African administration of the Namibian territory "should not result in depriving the people of Namibia of any advantage derived from international co-operation" [1826]. Humanitarian exemptions have become an established feature of UN sanctions programmes.

> "Concerns about the negative impacts of sanctions on civilians have grown in recent years to the point that approval of a resolution imposing sanctions devoid of such pass-through provisions is now unlikely." [1827]

Humanitarian exemptions have been included in Security Council resolutions in most situations [1828]. Resolution 253 (1968) which imposed a comprehensive economic embargo on Southern Rhodesia, for instance, provided for a limited humanitarian exception for exports to Rhodesia of foodstuffs and medical, educational and informational materials [1829]. However, the case of Rhodesia demonstrates an inadequate concern for the sanctions' impact:

> "despite the comprehensive nature of the sanctions, for the 13 years in which they were in force against Southern Rhodesia, there was virtually no formal consideration within the United Nations of the extent to which these sanctions were having a disproportionately injurious impact on the Rhodesian populace and economy" [1830].

Fortunately, over time the international community has become more sensitive to the impact of sanctions on populations.

Sanctions against Iraq adopted in 1991 have been the most comprehensive ever adopted by the United Nations under Chapter VII [1831]. The first measures, adopted a few days following the invasion of Kuwait, included a trade embargo and the freezing of assets. The trade embargo excluded "supplies intended strictly for medical purposes, and, in humanitarian circumstances, food-

1826. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *ICJ Reports 1971* 16, at para. 125 (21 June).
1827. Minear *et al.*, *supra* footnote 1805, at 37.
1828. See Damrosch, *supra* footnote 1800, at 295-296.
1829. See SC res. 253, UN, *SCOR*, 1428th mtg. at para 3 *(d)* (29 May 1968).
1830. Reisman and Stevick, *supra* footnote 1807, at 98.
1831. See *id.*, at 101.

stuffs"[1832]. The determination of what constituted "humanitarian circumstances" was delegated to the Sanctions Committee[1833]. These sanctions — not related to human rights — were maintained by resolution 687 (1991) after Kuwait's liberation. Under this resolution, medical and health supplies were exempted, as were foodstuffs upon notification to the Sanctions Committee. The Sanctions Committee was also authorized to approve "materials and supplies for essential civilian needs" under a no-objection procedure[1834].

The continuation of sanctions against Iraq has been controversial because of serious consequences for the Iraqi population. To reduce the impact of sanctions, the oil-for-food programme, initially refused by Iraq, became effective in December 1996[1835]. While some commentators have advocated the complete lifting of the sanctions because of their undesirable economic, health and educational effects, others have argued that the Government of Iraq not only exaggerated the consequences of the sanctions, but deliberately worsened their effects on the population. Indeed, there is a real dilemma how to treat sanctions when their effects are intentionally exacerbated by the targeted Government. Reisman and Stevick have defined the issue clearly:

> "The plight of innocent Iraqi civilians raises one of the thorniest legal dilemmas of any comprehensive, effective sanctions programme: the proper response of the UN to the government of a target State that deliberately adopts policies which aggravate the sanctions' impact on the most vulnerable, who are then exploited in public relations as a way of eroding the legitimacy of the sanctions programme."[1836]

Haas has argued that

> "[s]anctions . . . should not necessarily be suspended if the humanitarian harm is the direct result of cynical government

1832. SC res. 661, *supra* footnote 1786, at para. 3 *(c)*.
1833. See SC res. 666, UN, *SCOR*, 2939th mtg. at para. 1 (13 September 1990).
1834. SC res. 687, UN, *SCOR*, 2981st mtg., at para. 20 (April 1991).
1835. See Report of the Second Panel Established Pursuant to the Note by the President of the Security Council of 30 January 1999 (S/1999/100), concerning the Current Humanitarian Situation in Iraq, UN doc. S/1999/356, Annex II, paras. 28-42.
1836. Reisman and Stevick, *supra* footnote 1807, at 107.

> policy, such as Iraq's, that creates shortages among the general population in order to garner international sympathy"[1837].

Sanctions against Iraq were declared no longer applicable by Security Council resolution 1483 (2003) following the establishment of a governing "authority" in Iraq.

In the case of Libya, the Security Council imposed diplomatic sanctions, an arms and military assistance embargo and a flight ban in 1992[1838]. Further sanctions — freezing of assets and prohibition of the sale, supply and maintenance of oil refining equipment — were imposed in 1993[1839]. The Sanctions Committee established under resolution 748 (1992) was authorized "[t]o consider and to decide upon expeditiously any application by States for the approval of flights on grounds of significant humanitarian need . . ."[1840]. In Security Council debates, the US representative defended the sanctions as limited and tailored to penalizing the Government of Libya for the offence[1841].

The sanctions were suspended in April 1998 after the transfer for trial by a Scottish court in the Netherlands of two Libyans for the bombing of the Pan Am airflight and are expected to be lifted altogether following the recent settlement of the Lockerbie claims and the admission of Libyan responsibility.

Sanctions were imposed against the Federal Republic of Yugoslavia (FRY) from 1992 through 1995. The Security Council first imposed an arms embargo against all the parties to the conflict in the former Yugoslavia in 1991[1842]. The Security Council later imposed economic sanctions against the FRY in 1992 because of its responsibility for the conflict in Bosnia-Herzegovina. Under Security Council resolution 757 (1992), "supplies intended strictly for medical purposes and foodstuffs notified to the Committee . . . established pursuant to resolution 724 (1991)" were exempted[1843]. Another resolution permitted the approval by the Sanctions Committee of supplies of non-food, non-medical "commodities and

1837. Haas, *supra* footnote 1803, at 82.
1838. See SC res. 748, UN, *SCOR*, 3063rd mtg. (31 March 1992).
1839. See SC res. 883, *supra* footnote 1789.
1840. SC res. 748, *supra* footnote 1838, at para. 9 *(e)*. It seems that this provision essentially contemplated pilgrimages to Mecca.
1841. Security Council Debates, UN doc. S/PV.3063 (1992), at 67 (comments of US Representative Ambassador Pickering).
1842. See SC res. 713, *supra* footnote 1787.
1843. SC res. 757, *supra* footnote 1787, at para. 4 *(c)*.

products for essential humanitarian needs" [1844]. The Security Council established additional sanctions on the FRY and the Bosnian Serb territory in 1993 and later [1845]. The effects of the sanctions on the Yugoslav economy and on the population were difficult to disentangle from other factors that influenced the FRY's economic decline. Reisman and Stevick have argued that

> "[i]n deciding to remove sanctions against the FRY, the UN pursued a carrot-and-stick approach that focused on influencing the behavior of President Milosevic, with scant concern for the possible disproportionate or discriminatory impact that the sanction might have had on the FRY populace" [1846].

The Security Council has suspended some sanctions — passenger air traffic from Belgrade, passenger ferry service to Bari (Italy) and participation in sporting events and cultural exchanges [1847]. These suspensions were regarded as "measures which benefited primarily the people of the FRY, not their rulers" [1848]. The Security Council lifted the sanctions after the signing of the Dayton Peace Accords.

Does the consent of the population to the election of leaders accused of atrocities affect the need to distinguish between the population and the rulers [1849] ? Lori Damrosch has argued that

> "[t]o that extent, they are no longer merely innocent bystanders in a conflict foisted on them by a cruel regime, but are at least partly complicit in that cruelty. Under the circumstances, sanctions have to be continued and probably strengthened, regardless of the absolute impact on civilians. Unfortunately, no version of differentiation is available to spare those who voted against the incumbents or who were not in a position to exercise any choice at all (children, for example)." [1850]

Nonetheless, applying sanctions against the population as a whole

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1844. SC res. 760, UN, *SCOR*, 3086th mtg. (18 June 1992).
1845. See SC res. 820, UN, *SCOR*, 3200th mtg. (1993); SC res. 942, UN, *SCOR*, 3428th mtg. (1994).
1846. Reisman and Stevick, *supra* footnote 1807, at 113.
1847. See SC res. 943, UN, *SCOR*, 3428th mtg., at para. 1 (1994).
1848. See Reisman and Stevick, *supra* footnote 1807, at 113.
1849. See Reisman and Stevick, *id.*, at 119; Damrosch, *supra* footnote 1798, at 305.
1850. See Damrosch, *id.*, at 305.

in such situations without humanitarian exemptions would be at odds with principles of humanitarian law, and in particular with the prohibition of collective punishment.

Humanitarian exemptions may be inadequate, especially for long-term sanctions programmes. The UN Committee on Economic, Social and Cultural Rights thus has observed that

> "[i]t is commonly assumed that these exemptions ensure basic respect for economic, social and cultural rights within the targeted country. . . . However, a number of recent United Nations and other studies which have analysed the impact of sanctions, have concluded that these exemptions do not have this effect. Moreover, the exemptions are very limited in scope. They do not address, for example, the question of access to primary education, nor do they provide for repairs to infrastructures which are essential to provide clean water, adequate health care etc." [1851]

The administration of humanitarian exemptions, however, has been improving.

> "In recent years, a number of changes have been introduced by the Security Council, its various sanctions committees, and the UN Secretariat to make the management of sanctions more clear, consistent, and transparent." [1852]

Proposals to frame and improve humanitarian exemptions include: institution-specific exemptions, which would extend blanket exemptions to certain well-established international humanitarian organizations; item-specific exemptions, which would exempt certain specified items; and country-specific exemptions, which would require committees to create specific exemptions lists for each country under sanctions based on its particular needs and circumstances [1853].

1851. Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights, UN doc. E/C.12/1997/8, at paras. 4-5 (1997).

1852. Minear *et al.*, *supra* footnote 1805, at 39; see also Note by the President of the Security Council: Work of the Sanctions Committee, UN doc. S/1999/92 (1999).

1853. See Minear *et al.*, *supra* footnote 1805, at 45-49.

(b) *Application of humanitarian law to sanctions programmes*

As few treaty provisions pertaining to war-time supplies for the civilian population exist, attempts have been made to expand civilian protections through customary law. Reisman and Stevick have noted that customary international law has defined lawful and unlawful primary targets and traced boundaries for collateral damage, but that such norms have largely been thought irrelevant to non-military measures. Economic sanctions may, however, cause greater collateral damage than military strikes [1854]. They argued that "sanctioners must reasonably maximize discrimination between combatants and non-combatants" [1855]. The need to discriminate between combatants and non-combatants derives directly from the recognition that economic sanctions are a tool of war and are therefore guided by the norms of war. Economic sanctions may only be used "when they are capable of discrimination" [1856]. The political structure of a country will therefore be relevant for designing sanctions regimes. The need for proportionality is compelling whether sanctions are seen as a "tool of war" or as an alternative to war.

The ambassadors of the five permanent members of the Security Council recognized the concept of "side effects" of sanctions in a letter to the President of the Security Council:

> "[w]hile recognizing the need to maintain the effectiveness of sanctions imposed in accordance with the Charter, further collective actions in the Security Council within the context of any future sanctions regime should be directed to minimize unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries" [1857].

The Committee on Economic, Social and Cultural Rights likewise noted that

> "[i]n considering sanctions, it is essential to distinguish

1854. See Reisman and Stevick, *supra* footnote 1807, at 93-94; see also Haas, *supra* footnote 1803, at 78-79.

1855. See Reisman and Stevick, *id.*, at 131-140.

1856. *Id.*, at 132.

1857. Letter Dated 13 April 1995 from the Permanent Representatives of China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council, UN doc. S/1995/300, Annex (1995).

> between the basic objective of applying political and economic pressure upon the governing élite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country" [1858].

Nevertheless, assessments of sanctions by UN bodies have not routinely been based on the main principles of the law of armed conflict, i.e., the distinction between combatants and non-combatants, and the imperatives of necessity and proportionality [1859]. Despite the inclusion of humanitarian exemptions in Security Council's resolutions, legal issues presented by collateral damage have often been ignored, or addressed on an *ad hoc* basis [1860].

Lori Damrosch has suggested as one guiding element that "a program of economic sanctions should not diminish the standard of living of a significant segment of society below the subsistence level" [1861]. Humanitarian law principles point in the same direction. Article 54 of Additional Protocol I prohibits the starvation of civilians as a method of warfare. Gasser extrapolated that "[r]ejecting hunger as a weapon of warfare also means the commitment to undertake relief operations for persons threatened by starvation, or at least to allow and to facilitate such operations" [1862]. The "minimal standard" approach of international humanitarian law to humanitarian assistance is difficult to apply to long-term economic sanctions regimes [1863].

Sanctions to be preferred are those which are specifically targeted, like those imposed on Haitian military leaders, restricting their personal ability to travel, or freezing assets, as in the case of Libya [1864]. Commentators have argued for more targeted sanctions against Iraq [1865]. But doubts about the effectiveness of such sanctions have been voiced [1866], especially when the targeted group can insulate

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1858. Committee on Economic, Social and Cultural Rights, *supra* footnote 1851, at para. 4.
1859. See Reisman and Stevick, *supra* footnote 1807, at 94.
1860. See *id.*, at 96.
1861. Damrosch, *supra* footnote 1798, at 281-282; see also Gasser, *supra* footnote 1800, at 900-901.
1862. Gasser, *id.*, at 882.
1863. See *id.*, at 901.
1864. See Winkler, *supra* footnote 1799, 149-150.
1865. See Mueller and Mueller, *supra* footnote 1802, at 52.
1866. See Damrosch, *supra* footnote 1798, at 298.

itself and its assets [1867]. Another approach has been to limit sanctions to a geographic area, as in the case of areas held by UNITA (in Angola) [1868] and the Bosnian-Serb controlled areas in the former Yugoslavia [1869], but such geographical sanctions may not offer adequate protection to the non-combatant population.

Rejecting the proportionality approach would emphasize the old State-centric approach of international law and transform sanctions into something akin to collective punishment. As Fausey has argued,

> "[w]ith collective sanctions, the human rights deprived by the sanctions are not solely the human rights of those violating others' human rights. . . . The question to be answered is whether the human rights being violated by the target leaders are so important that they warrant depriving others within the target nation (not responsible for the initial violation) of their human rights.
>
> . . . . . .
>
> Holding an entire nation to blame for the acts of a few of its members results in a disproportionate response by the U.N." [1870]

One thing is clear. Under the influence of human rights and humanitarian law, a consensus has emerged that the effects of sanctions on the population of the targeted State must be taken into account. Thus, the XXVIth International Conference of the Red Cross encouraged both States and the Security Council to consider:

> "*(a) when designing, imposing and reviewing* economic sanctions, the possible negative impact of such sanctions on the humanitarian situation of the civilian population of a targeted State and also of third States which may be adversely affected by such measures,
>
> *(b) assessing* the short- and long-term consequences of United Nations-approved economic sanctions on the most vulnerable, and monitoring these consequences where sanctions have been applied,

1867. See Haas, *supra* footnote 1803, at 79-80.
1868. See SC res. 864, *supra* footnote 1795; SC res. 1127, *supra* footnote 1795; SC res. 1173, *supra* footnote 1795.
1869. See Damrosch, *supra* footnote 1798, at 297.
1870. Fausey, *supra* footnote 1785, at 212.

(c) providing, including when subject to economic sanctions, and to the extent of their available resources, relief for the most vulnerable groups and the victims of humanitarian emergencies in their territories"[1871].

V. Multilateral intervention

(a) *Humanitarian assistance*

Humanitarian assistance is usually provided by the United Nations with the consent of the receiving State in situations ranging from environmental and industrial disasters to armed conflicts. Whether such assistance can be provided without State consent continues to present a major controversy. When humanitarian assistance is imposed on a recalcitrant State under a Chapter VII resolution justifying the action on grounds of threat to international peace and security, it tends to blend with forcible humanitarian intervention.

In 1990, the General Assembly adopted a resolution on humanitarian assistance to victims of natural disasters and similar emergency situations, in which it envisaged the establishment of "humanitarian corridors" [1872].

The 1991 debates in the General Assembly on humanitarian assistance revealed a continuing controversy, with views ranging from outright opposition, through support of collective action, to advocacy of unilateral action. The resolution adopted by the General Assembly on emergency humanitarian assistance emphasized the need for State consent:

> "The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance *should be provided* with the consent of the affected country and *in principle* on the basis of an appeal by the affected country."[1873]

1871. XXVIth International Conference of the Red Cross, Resolution IV, Section F, para. 1, reprinted in *Int'l Rev. Red Cross*, January-February 1996, at 73-74. See also XXVIIth International Conference of the Red Cross, Plan of Action for the Years 2000-2003, point 2, para. 10, reprinted in *Int'l Rev. Red Cross*, December 1999, at 880-885.

1872. GA res. 100, 45th Sess., 68th plen. mtg., at para. 6 (1990).

1873. GA res. 182, 46th Sess., 78th plen. mtg., Annex, at para. 3 (1991) (emphasis added).

International treaties do not as yet impose on a State unable to cope with an emergency an obligation to accept humanitarian assistance. Such an obligation can — and should sometimes — be imposed by a Security Council resolution adopted under Chapter VII of the UN Charter. At the very least, respect for the human rights of the population requires that the State concerned should not refuse assistance without the strongest possible reasons [1874].

(b) *Interventions under Security Council resolutions*

Except for legitimate self-defence under Article 51 of the Charter, forcible interventions, including for humanitarian reasons, must be authorized by Chapter VII resolutions. It is such resolutions that provide forcible interventions with the necessary legality. Security Council resolutions authorizing humanitarian intervention to put an end to atrocities are only a part of the increasing involvement of the Security Council in human rights issues. They suggest that a "new relationship" is being created between the enforcement of international law, including human rights law, and the use of military force [1875].

The competence of the Security Council to address human rights has been contested on the ground that it encroaches on the competence of other UN organs, notably the General Assembly and the Commission on Human Rights. The Final Declaration of a 1992 Summit Meeting of the Non-Aligned Movement thus emphasized the importance of ensuring that the role of the Security Council conforms to its mandate as defined in the United Nations Charter, so that there is no encroachment on the jurisdiction and prerogatives of the General Assembly and its subsidiary bodies [1876].

However the majority of Security Council believes, correctly in

1874. See Laurence Boisson de Chazournes and Richard Desgagné, "Le respect des droits de l'homme et la protection de l'environnement à l'épreuve des catrastrophes écologiques : Une alliance nécessaire", 12 *Revue de droit de l'ULB* 29, 42-45 (1995) ; Dietrich Schindler, "The Protection of Human Rights and Humanitarian Law in Case of Disintegration of States", 52 *Revue égyptienne de droit int'l* 1, 22-23 (1996).

1875. See David A. Westbrook, "Law through War", 48 *Buffalo L. Rev.* 299, 317-323 (2000).

1876. Non-Aligned Movement doc. NAC 10/Doc.1/Rev.1, para. 31 (1992), quoted in Philip Alston, "The Security Council and Human Rights : Lessons to Be Learned from the Iraq-Kuwait Crisis and Its Aftermath", 13 *Austl. YB Int'l L.* 107, 137 (1992).

my view, that the Council may deal with human rights issues when appropriate [1877]. A statement issued by the Council at a meeting held at the level of Heads of States in 1992 provides clear evidence of the trend to take human rights into consideration in the work of the Security Council [1878]. Several members made reference to "human rights as an issue of concern to the international community" [1879], while others stressed the need "to strike a balance between the rights of States, as enshrined in the Charter, and the rights of individuals, as enshrined in the Universal Declaration on Human Rights" [1880].

The authority of the Security Council "to order measures necessary to alleviate humanitarian crises such as those witnessed in Somalia, Rwanda, and Haiti" is implicit in the broad authority of the Security Council to deal with situations involving threats to international peace and security [1881]. It is through this authority, and the increasing readiness of the Council to regard non-international armed conflicts as threats to international peace and security, that the Council has authorized interventions in support of human rights and humanitarian norms. The first major Security Council resolution of this kind, resolution 688 (1991) relating to the protection of the Kurdish population in northern Iraq, identified the flow of refugees and cross-border incursions as threats to international peace and security [1882].

The Council may thus tend to view its common law on intervention as a gradual expansion of its competence with regard to transfrontier conflicts based on Chapter VII. Nevertheless, the resolution includes several references to human rights and humanitarian issues. It "[c]ondemn[ed] the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas", and "[d]emand[ed] that Iraq . . . immediately end this repression", although without mandating any implementation measures [1883]. It also "[i]nsist[ed] that Iraq allow immediate access by

1877. See Alston, *supra* footnote 1876, at 136-137.
1878. Note by the President of the Security Council, UN doc. S/23500, at 2 (1992).
1879. Van Boven, *supra* footnote 1695, at 12; see also B. G. Ramcharan, "The Security Council: Maturing of International Protection of Human Rights", 48 *Int'l Comm'n of Jurists Rev.* 24, 27 (1992).
1880. Statement by Zimbabwe, UN doc. S/PV.3046, quoted in van Boven, *supra* footnote 1695, at 12.
1881. Donoho, *supra* footnote 1733, at 351 (footnotes omitted).
1882. SC res. 688, UN, *SCOR*, 2982nd mtg. (1991).
1883. *Id.*, at para. 2.

international humanitarian organizations to all those in need of assistance in all parts of Iraq"[1884] and "[d]emand[ed] that Iraq cooperate with the Secretary-General" humanitarian relief efforts[1885]. A subsequent memorandum between the Secretary-General and Iraq provided for extensive arrangements for the provision of humanitarian assistance "probably without precedent in such a situation"[1886]. As such, "resolution 688 provides the basis for a significant breakthrough in terms of securing access for humanitarian organizations"[1887]. Nevertheless, because the Council could have been more open in referring to human rights violations in Iraq as a principal cause of the intervention, Philip Alston considered the glass as half empty[1888].

Over time, internal conflicts became the most important challenges for the Security Council. The situations in Somalia, Liberia, Rwanda and Haiti have increasingly driven the Security Council to determine that such internal conditions as armed conflict, strife and famine can constitute threats to international peace and security. Trans-boundary effects such as flows of refugees were also invoked by some members of the Council to justify the internationalization of these internal situations, but the focus of the debates and of the resolutions was the internal situation[1889], humanitarian needs and, increasingly, human rights. Refugee flows "have not historically been viewed by the international community as a sufficient threat to peace to justify mandatory collective security measures"[1890]. The more recent trend to consider refugee flows as a major factor justifying the application of Chapter VII represents in itself a significant achievement for human rights, one related to the growing recognition of the impact of internal conflicts and internal atrocities.

The ICTY Appeals Chamber endorsed the more expansive Security Council practice:

> "[T]he practice of the Security Council is rich with cases of civil war or internal strife which it classified as a 'threat to the peace' and dealt with under Chapter VII, with the encourage-

1884. *Id.*, at para. 3.
1885. *Id.*, at para. 7.
1886. Alston, *supra* footnote 1876, at 150.
1887. *Id.*
1888. *Id.*, at 144.
1889. See Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* 285-287 (1996).
1890. Donoho, *supra* footnote 1733, at 363.

> ment or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the 'subsequent practice' of the membership of the United Nations at large, that the 'threat to the peace' of Article 39 may include, as one of its species, internal armed conflicts." [1891]

Distinctions between national and international crises are not clear-cut. As the former UN Secretary-General Pérez de Cuéllar noted in 1990,

> "[t]oday, in a growing number of cases, threats to national and international security are no longer as neatly separable as they were before. In not a few countries, civil strife takes a heavy toll on human life and has repercussions beyond national borders." [1892]

In the statement issued at its meeting held at the level of Heads of States in 1992, the Security Council recognized that

> "[t]he absence of war and military conflicts amongst States does not in itself ensure international peace an security. The non-military sources of instability in the economic, social, and humanitarian and ecological field become threats to peace and security." [1893]

I agree with Philip Alston that

> "[t]his constitutes a clear recognition that purely humanitarian issues, including grave violations of human rights, can amount to threats to international peace and security, thus warranting (and being sufficient to trigger) appropriate action by the Security Council" [1894].

The cumulative effect of actions during the Gulf War, the turmoil in Haiti, and the conflicts in Yugoslavia and Somalia "have changed

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1891. *Prosecutor* v. *Tadić*, ICTY (Appeals Chamber), Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 30 (2 October 1995).

1892. Report of the Secretary-General on the Work of the Organization, UN doc. A/45/1, Sec. IV (1990), quoted in van Boven, *supra* footnote 1695, at 23.

1893. Note by the President of the Security Council, *supra* footnote 1878, at 3 (1992).

1894. Alston, *supra* footnote 1876, at 161.

some of the long-accepted ground rules in terms of the range of measures that might reasonably be contemplated by the international community in order to restore respect for human rights" [1895].

Nevertheless, the selectivity, the case-by-case approach, and the lack of consistent criteria for Security Council action have been criticized, often correctly. Indeed, several of the relevant Security Council resolutions described the situations in Somalia or in Haiti as "unique and exceptional" [1896]. The intervention in Haiti was particularly sensitive because it involved action to support democracy, rather than to stop atrocities. One commentator noted:

> "On the one hand, the Security Council's imposition of economic sanctions and authorization of force against the coup ostensibly reflects the recognition that, at least under certain conditions, disruption of democracy may constitute a threat to international peace justifying collective enforcement action. On the other hand, the circumstances surrounding Haiti, particularly the role of U.S. political interests and practical considerations, may ultimately render the U.N.'s actions in Haiti *sui generis*. The U.N.'s failure to act in on-going situations reinforces this outlook." [1897]

Successive UN Secretaries-General, as well as States participating in Security Council debates, have suggested that guidelines should be adopted by the Security Council in order to identify those internal situations that warrant international action. Zimbabwe proposed that "general principles and guidelines that would guide decisions on when a domestic situation warrants international action, either by the Security Council or by regional organizations" [1898] be drafted. In debates on resolution 688 (1991), France suggested that interventions would be legitimate when violations of human rights "assume the dimension of a crime against humanity" [1899]. Whether it would be wise to constrain future action by the Security Council on the basis

1895. *Id.*, at 108.

1896. See SC res. 841, UN, *SCOR*, 3237th mtg. (1993); SC res. 940, UN, *SCOR*, 3413th mtg. (1994).

1897. Donoho, *supra* footnote 1733, at 331-332 (footnotes omitted).

1898. UN doc. S/PV.3046, at 131 (1992) (comments of Zimbabwe representative Mr. Shamuyarira), quoted in Alston, *supra* footnote 1876, at 167-168; see also Richard B. Lillich, "The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World", 3 *Tul. J. Int'l & Comp. L.* 1, 13-14 (1994).

1899. UN doc. S/PV.2982, at 53 (1992).

of generalized criteria "interpreting" the Charter is not clear, however.

A variety of reasons have been advanced to explain the readiness of the members of the international coalition to use force against Iraq in 1991. Critics alluded to ensuring access to oil supplies and maintaining Western interests in the Middle East following the invasion of Kuwait[1900]. Allies emphasized the protection of human rights of the people of Kuwait and "the desirability of freeing the people of Iraq from the tyranny and oppression under which they had been forced to live for so long"[1901]. The General Assembly itself condemned Iraq for its actions "in violation of the Charter of the United Nations, the International Covenants on Human Rights, [and] other relevant human rights instruments"[1902]. The Security Council lamented the "loss of human life and material destruction"[1903], and expressed its concerns for "the safety and well being of third State nationals in Iraq and Kuwait"[1904]. It also referred to the need for humanitarian assistance for the civilian populations of Iraq and Kuwait[1905], and for respect of the Geneva Conventions[1906]. Human rights issues were invoked in Security Council resolutions concerning the Iraqi repression of the Shiites in the south and the Kurdish population in the north.

The Security Council was seised of the situation in Somalia only in 1992, although the civil war had been going on since 1988. In January 1992, the Security Council directed the Secretary-General to increase UN humanitarian assistance to Somalia and imposed an arms embargo under Chapter VII[1907]. After the conclusion of a cease-fire, the Security Council established an Observer Mission (ONUSOM), with the task of assisting in the delivery of humanitarian assistance. The Secretary-General acknowledged "that this exercise represent[ed] an innovation"[1908]. In the Security Council

1900. See Alston, *supra* footnote 1876, at 110-111.
1901. *Id.*
1902. GA res. 170, UN, *GAOR*, 45 Sess., 69th plen. mtg., at para.1 (1990).
1903. SC res. 661, *supra* footnote 1786, at preamble.
1904. SC res. 664, UN, *SCOR*, 2937th mtg., at preamble (1990); see also SC res. 667, UN, *SCOR*, 2940th mtg., at preamble (1990); SC res. 674, UN, *SCOR*, 2951st mtg., at preamble (1990).
1905. See SC res. 666, *supra* footnote 1833, at preamble.
1906. See *id.*; SC res. 674, *supra* footnote 1904, at preamble.
1907. See SC res. 733, *supra* footnote 1788.
1908. The Situation in Somalia: Report of the Secretary-General, UN doc. S/23693 and Corr.1 (1992), para. 74, quoted in Murphy, *supra* footnote 1889, at 220.

debates and Secretary-General reports, the central theme was the dire situation of the Somali population, but external factors such as the flow of refugees to neighbouring countries, were also recognized [1909]. Despite some agreements between the Somali factions and the United Nations for the deployment of an armed UN force, the situation deteriorated. In November 1992, the Secretary-General reported that Somalia had become a country without a Government or other political authorities with whom the basis for humanitarian activities could be negotiated, and recommended that the Council act under Chapter VII [1910]. Resolution 794 (1992) authorized the intervention of a multinational force led by the United States (UNITAF) "to establish a secure environment for humanitarian relief operations" [1911]. To justify this intervention, which was designed to ensure humanitarian assistance, while emphasizing the unique nature of the situation in Somalia, resolution 794 stated that the human tragedy and obstacles to the distribution of humanitarian assistance constituted a "threat to international peace and security" [1912]. The resolution did not mention such "internationalizing" factors as refugee flows. Sean Murphy noted that despite the references to international peace and security, "[t]he sense of the [Security Council] debate over Resolution 794 was that the domestic situation alone warranted action" [1913]. President George Bush explained US involvement as justified also by the need to protect the safety of Americans and others engaged in relief operations [1914].

Several members of the Security Council, worried that the operation in Somalia would constitute a precedent for UN intervention without the consent of the State concerned, sought to emphasize the specific Somali circumstances, i.e. the absence of central governmental authority [1915], or the situation of a "failed" or a disintegrating State. Indeed, the operation in Somalia presented a unique character

1909. See Murphy, *supra* footnote 1889, at 220-221.

1910. See Letter dated 29 November 1992 from the Secretary-General to the President of the Security-Council presenting five options for the Security Council's consideration, UN doc. S/24868 (1992), reprinted in *The United Nations and Somalia: 1992-1996*, at 209 (1996).

1911. SC res. 794, UN, *SCOR*, 3039th mtg., at para. 7 (3 December 1992).

1912. *Id.*, at preamble.

1913. Murphy, *supra* footnote 1889, at 240; see also Lillich, *supra* footnote 1898, at 7-8.

1914. See Letter to Congressional Leaders on the Situation in Somalia, 28 *Weekly Comp. Pres. Doc*, 2338-2339 (10 December 1992), quoted in Murphy, *supra* footnote 1889, at 237.

1915. See Murphy, *supra* footnote 1889, at 229.

because no governmental authority existed that could have consented to the intervention. Different factions controlled different areas of the country with varying degrees of effectiveness. Sean Murphy suggested a useful generalized principle:

> "When no authorities exist capable of governing a country, the values of political independence and sovereignty normally at stake during an intervention would seem to be minimized. In the case of Somalia, the overwhelming humanitarian values, when weighed against the values of political independence and sovereignty, were found compelling and led to the authorization of foreign forces to intervene. Had there been authorities fully in control of Somalia, it is not clear that the international community would have viewed the decision to intervene in the same way."[1916]

The attempt to disarm the Somali factions led to direct confrontation between those factions and UN forces, and eventually undermined States' support for the mission, leading to the termination of the mission in February 1994[1917], and of the UN operation as a whole in February 1995[1918].

The French initiative for a peace-keeping operation in Rwanda was authorized by the Security Council[1919], which determined that "the magnitude of the humanitarian crisis in Rwanda" constituted a threat to peace and security in the region. In an earlier resolution, the Council had already referred to the "continuation of the situation in Rwanda" as a threat to peace and security in the region[1920]. As in the case of Somalia, emphasis was put on the internal situation rather than on external consequences. The French intervention authorized "a temporary operation under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda . . ."[1921]. Whatever other considerations may have motivated the French initiative[1922], the primary objective was humanitarian[1923]. This opera-

1916. *Id.*, at 238.
1917. See SC res. 897, UN, *SCOR*, 3334th mtg. (1994).
1918. See SC res. 954, UN, *SCOR*, 3447th mtg. (1994).
1919. See SC res. 929, UN, *SCOR*, 3392nd mtg. (1994).
1920. See SC res. 918, *supra* footnote 1792, at preamble.
1921. SC res. 929, *supra* footnote 1919, at para 2.
1922. See Murphy, *supra* footnote 1889, at 259.
1923. See Statement by France in the Security Council, UN doc. S/PV.3392, at 5-6 (1994); Murphy, *supra* footnote 1889, at 257.

tion was accepted by the then recognized Hutu Government, which, at the time, had a seat in the Security Council and approved of the resolution. The French intervention found little support in the international community, however, as neither the United States nor other European States offered to provide forces [1924].

Military intervention in Haiti was considered following the failure of the Haitian military to abide by the Governors Island Agreement. The use of force was authorized by Security Council resolution 940 (1994) [1925]. It was the first time that enforcement action was undertaken to restore democracy in an independent State (although, arguably precedents can be found in sanctions against Rhodesia and South Africa) [1926]. The request of the exiled President of Haiti to the Security Council to take "prompt and decisive action" [1927] was an important consideration in the adoption of the authorizing resolution. In contrast to Bosnia, Somalia, and Rwanda, humanitarian and human rights concerns did not occupy a central place in the debates on the Haitian situation. The

> "overriding concern of the international community . . . seemed to turn more on the fact that a democratically elected leader had been ousted and replaced by a militant group bent on consolidating and maintaining their power" [1928].

Resolution 940 thus authorized member States

> "to use all necessary means to facilitate . . . the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti" [1929].

The threat to peace and security identified by the Council in the resolution re-imposing sanctions consisted in "the situation created by the failure of the military authorities in Haiti to fulfill their obligations under the Governors Island Agreement and to comply with relevant Security Council resolutions . . ." [1930]. In reality, however,

1924. See Murphy, *supra* footnote 1889, at 258.
1925. See SC res. 940, *supra* footnote 1896.
1926. See Donoho, *supra* footnote 1733, at 347, 356; Lillich, *supra* footnote 1898, at 4-5.
1927. Donoho, *supra* footnote 1733, at 347.
1928. Murphy, *supra* footnote 1889, at 265.
1929. SC res. 940, *supra* footnote 1896, at para. 4.
1930. SC res. 917, *supra* footnote 1791, at preamble.

the desire of the United States to avoid a large-scale refugee flow to the United States was critical in promoting an agreement on a Chapter VII resolution.

(c) *Other multilateral interventions*

Historically, so-called humanitarian interventions by States for the purpose of protecting their nationals from imminent danger have been treated as species of self-defence. Intervening States, reluctant to invoke a doctrine of humanitarian intervention, have relied on the right of self-defence[1931]. Where the international community accepted the bona fides of the intervening Government, it was ready to regard such limited and very temporary interventions, on condition that they conformed to the principle of proportionality, as in the case of the Israeli intervention in Uganda, as not amounting to a violation of Article 2 (4) of the UN Charter, which prohibits "the threat or use of force against the territorial integrity or political independence of any State". Article 2 (4) together with Article 51 on the inherent right of individual or collective self-defence against armed attack constitute the ground rules for the use of force by members of the United Nations. The Security Council may, in resolutions adopted under Chapter VII of the Charter, authorize the use of force to maintain or restore international peace and security. Enforcement action by regional agencies is prohibited by Article 53, unless authorized by the Security Council, which has the monopoly on the authorization of the use of force. Nevertheless, since the 1990s, a number of interventions have been carried out without prior Security Council authorization by regional forces acting outside of the United Nations to put an end to atrocities. These interventions did not trigger international condemnation but rather varying degrees of sympathy or acquiescence.

Following the break-out of fighting in Liberia between the Armed Forces of Liberia (AFL) and Charles Taylor's National Patriotic Front (NPFL) in 1989, forces from five West African countries were deployed in 1990 (Cease-Fire Monitoring Group (ECOMOG)) under the aegis of the ECOWAS for the purpose of "keeping the peace, restoring law and order and ensuring that the cease-fire is

1931. Bartram S. Brown, "Humanitarian Intervention at a Crossroads", 41 *William and Mary L. Rev.* 1683, 1703 (2000).

respected"[1932]. There was no formal legal basis for ECOWAS intervention, which was opposed by the then President of the country (Samuel Doe) and by Charles Taylor's NPFL. The intervention was not "limited to the rescue of foreign nationals nor the establishment of buffer zones with neighboring States"[1933], but involved the establishment of a zone around the capital to allow humanitarian relief and to bring about a cease-fire, thus reflecting a concern for the suffering of Liberian people. It was only five months later, in January 1992, with the conclusion of a cease-fire, that the Security Council indirectly endorsed the intervention, commending "the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia"[1934]. And it was only in November of that year, after the breakdown of the cease-fire, that the Council declared that "the deterioration of the situation in Liberia constitute[d] a threat to international peace and security, particularly in West Africa" and imposed an arms embargo[1935]. Although these decisions by the Council did not follow the Charter requirements for authorization of enforcement action by regional organizations, the fact is, as Murphy suggests, that the intervention was largely supported by the international community[1936].

The Report of the 10th Commission of the Institute of International Law on "The Authority under International Law of International Organizations other than the United Nations to Use Force", prepared by Thomas Franck and noted with appreciation by the Institute on 27 August 2003, described the above Security Council decisions as a precedent for approving after the fact that which "when initiated was in violation of the letter of the Charter" (para. 33). On the basis of the Liberia precedent and the treatment by the Security Council of the Kosovo intervention (1999), the Report predicts that some tolerance ("principles of mitigation or exculpation") is more likely to occur with regard to use of force by international organizations other than the United Nations than with unilateral use of force by individual States (para. 42). The Report

1932. Murphy, *supra* footnote 1889, at 150 (quoting ECOWAS, Standing Mediation Committee, Final Communiqué of the First Session, 7 August 1990, para. 11).
1933. *Id.*, at 160.
1934. Note by the President of the Security Council, UN doc. S/22133 (1991).
1935. SC res. 788, *supra* footnote 1790, at preamble.
1936. Murphy, *supra* footnote 1889, at 163.

suggests that it is probable that the customary practice of Charter interpretation by the principal organs will explore a

> "pragmatic middle ground in which subsidiary regional, mutual defence and functional organizations of states will play a role in addressing, even by recourse to force as a last resort, situations that would otherwise result in unbearable tragedy" (para. 52).

In cases of extreme necessity, the Report suggests, recourse to force by an organization of States should "if possible at its inception but if necessary at its conclusion, be approved, incorporated or at least absolved by the Council or the Assembly" (para. 54), presumably under the Uniting for Peace resolution.

The most recent intervention in Liberia, involving the departure of President Charles Taylor, and the establishment of a Multinational Force in Liberia, was authorized and given a defined mandate by Security Council resolution 1497 of 1 August 2003.

The Constitutive Act of the African Union, adopted at Lomé (11 July 2001) recognizes the right of the Union to intervene in the territory of a member State pursuant to a decision by the Assembly in respect of war crimes, genocide and crimes against humanity (Art. 4 *(h)*). Like all decisions of the Assembly on non-procedural matters, such a decision must be one by consensus, or failing consensus, by a two-thirds majority of the member States of the Union (Art. 7). The Constitutive Act may validate regional intervention against atrocities, while limiting action by groups such as ECOWAS without Union authorization. Of course, this development, while of major significance, does not resolve the problem of tension with Article 53 of the UN Charter.

Soon after Security Council resolution 688 (1991), the United States launched "Operation Provide Comfort", intended to provide humanitarian aid to refugees outside Iraq and carry out air drops into refugee areas in northern Iraq. The United States warned the Iraqi authorities not to interfere with the delivery of humanitarian assistance and declared a "no-fly" zone, prohibiting all Iraqi flights north of the 36th parallel[1937]. "Safe havens" were later established in the northern part of Iraq. Another no-fly zone was established south of the 32nd parallel to protect the Shiite population in Southern Iraq.

1937. See *id.*, at 172.

The establishment of the zones was resisted by Iraq [1938], requiring the continuation of enforcement by allied air forces. The acknowledged objective of these measures was to assist the civilian populations, but helping insurgencies may have been a factor [1939].

The United States and its allies grounded the establishment of the safety zones on Security Council resolution 688 [1940], but this position is controversial. Resolution 688 does not explicitly mention the establishment of no-fly zones nor does it authorize the use of force to enforce such zones [1941]. The United Kingdom noted the trend towards a broader principle grounding humanitarian intervention on factors which go beyond the protection of one's own nationals [1942].

This contrasts with the earlier UK position that the protection of human rights does not justify intervention involving the use of force [1943]. Only a few years earlier, the British Foreign Office had stated that

> "[i]n essence . . . the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law" [1944].

The most massive case of forcible intervention by multilateral organization acting outside the United Nations was the NATO action against FRY, or the Kosovo war of 1999. NATO justified its use of force on humanitarian grounds [1945], the saving of Moslem Kosovars from Serbian atrocities. That intervention outside the framework of

1938. See *id.*, at 174, 175, 184.

1939. See *id.*, at 182-183.

1940. See Backgrounder, 18 April 1991 (USIS, Canberra), at 1, quoted in Alston, *supra* footnote 1876, at 126; Murphy, *supra* footnote 1889, at 187-188; see also Oscar Schachter, "United Nations in the Gulf Conflict", 85 *AJIL* 452, 469 (1991).

1941. See Peter Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Appraisal?", 12 *Eur. J. Int'l L.* 437, 445 (2001).

1942. The Expanding Role of the United Nations and Its Implication for UK Policy: Minutes Evidence, Hearing before the Foreign Affairs Comm. of the House of Commons, Sess. 1992-1993, 2 December 1992, at 92 (Statement of Anthony Aust, Legal Counsellor, UK Foreign and Commonwealth Office), quoted in Murphy, *supra* footnote 1889, at 189.

1943. See Gray, *supra* footnote 1784, at 26-27.

1944. United Kingdom Foreign Policy Document No. 148 (1984), reprinted in 57 *BYBIL* 614, 619 (1986).

1945. See Antonio Cassese, "Ex iniura ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", 10 *EJIL* 23.

the UN Charter reopened the debate on the balance between the protection of State sovereignty and the prohibition of the use of force on the one hand, and the protection of human rights, on the other[1946].

Denouncing the intervention, China's Minister of Foreign Affairs stated the classic case based on sovereignty and non-interference:

> "A regional military organization, in the name of humanitarianism and human rights, bypassed the United Nations to take large-scale military actions against a sovereign State, thus creating an ominous precedent in international relations. This act was a violation of the United Nations Charter and other universally recognized norms governing international relations.
>
> . . . . . .
>
> [The] issue of human rights is, in essence, the internal affair of a given country, and should be addressed mainly by the Government of that country through its own efforts . . . Sovereign equality, mutual respect for State sovereignty and non-interference in the internal affairs of others are the basic principles governing international relations today. In spite of the major changes in the post-cold-war international situation, these principles are by no means out of date."[1947]

The opposite position was voiced by Germany's Minister of Foreign Affairs:

> "The international community could no longer tolerate a State waging war against its own people and using terror and expulsion as a political instrument. . . . No Government has the right to use the cover of the principle of State sovereignty to violate human rights. Non-interference in internal affairs must no longer be misused as a shield for dictators and murderers."[1948]

While acknowledging the inability of the Council to agree on an intervention, and the clash between State sovereignty and the imperative of acting to stop gross violations of human rights, the UN Secretary-General warned that "enforcement actions without Security

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1946. Brown, *supra* footnote 1931, at 1687-1690; Gray, *supra* footnote 1784, at 24-26.

1947. UN, *GAOR*, 54th Sess., 8th plen. mtg., at 15, 16, UN doc. A/54/PV.8 (1999).

1948. *Id.*, at 11 (1999).

Council authorization threaten the very core of the international security system founded on the Charter of the United Nations", adding that "only the Charter provides a universally accepted legal basis for the use of force"[1949]. The intervention thus involved a collision between two basic principles of the UN Charter, sovereign equality and the protection of human rights[1950].

Most commentators regarded the intervention as a violation of the Charter provisions on the use of force, but differed on the gravity and the acceptability of the violation[1951]. Supporters argued that the departure from the Charter was necessary and acceptable, especially in light of the multilateral character of the intervention[1952]. They focused on the gross violations of human rights and humanitarian law committed by the FRY, such as large-scale killings of civilians, ethnic cleansing, rapes and wilful destruction of property. The Secretary-General of NATO and officials of States participating in the operations invoked humanitarian justifications[1953]. The British Government stated in January 1999 before the House of Commons Select Committee on Foreign Affairs that international law provided the legal basis warranting intervention in view of the humanitarian crisis in Kosovo. Professor Greenwood explained:

> "International law has evolved to the point where it no longer regards the way in which a State treats its own citizens as an internal matter. The development of human rights law, the long campaign against apartheid in South Africa and the decisions to give the criminal tribunals for Yugoslavia and Rwanda and the new International Criminal Court jurisdiction over

1949. Report of the Secretary-General on the work of the Organization, UN, *GAOR*, 54th Sess., Supp. No. 1, at para. 66, UN doc. A/54/1 (1999).

1950. See Hilpold, *supra* footnote 1941, at 452; Marcelo G. Kohen, "L'emploi de la force et la crise du Kosovo: vers un nouvel désordre juridique international", 32 *RBDI* 122, 123-124 (1999).

1951. See generally "Editorial Comments: NATO's Kosovo Intervention", 93 *AJIL* 831 (1999); Bruno Simma, "NATO, the UN and Use of Force: Legal Aspects", 10 *EJIL* 1 (1999); Kohen, *supra* footnote 1950, at 132. See also Independent International Commission on Kosovo, The Kosovo Report: Conflict, International Response, Lessons Learned (OUP, 2000), at 288-289.

1952. See Louis Henkin, "Kosovo and the Law of 'Humanitarian Intervention'", 93 *AJIL* 831, 831-832 (1999); Ruth Wedgwood, "NATO's Campaign in Yugoslavia", 93 *AJIL* 835, 839 (1999); Andrew Field, "The Legality of Humanitarian Intervention and the Use of Force in the Absence of United Nations Authority", 26 *Monash Univ. L. Rev.* 339, 358 (2000).

1953. Brown, *supra* footnote 1931, at 1687-1690; Kohen, *supra* footnote 1950, at 134-136.

> international crimes committed in civil wars, mean that Kosovo is an international concern.
>
> International law is not static. In recent years, States have come, perhaps reluctantly, to accept that there is a right of humanitarian intervention when a government — or the factions in a civil war — create a human tragedy of such magnitude that it constitutes a threat to international peace. In such a case, if the Security Council does not take military action, then other States have a right to do so."[1954]

More reluctant to acknowledge humanitarian intervention as a rationale for the intervention, the United States refrained from endorsing a legal rationale for the intervention. Instead, it relied on Security Council resolutions[1955].

While adhering to the view that the Kosovo intervention was illegal, Antonio Cassese opined, on the basis of the increasing readiness of States to intervene against internal atrocities with the acquiescence of others, that a customary exception to the prohibition on the use of force may eventually emerge[1956], but has not yet materialized[1957]. When a draft resolution to condemn the intervention was proposed in the Security Council, it was rejected by a vote of twelve to three (China, Namibia and the Russian Federation), thus providing some international validation for the intervention[1958]. Louis Henkin suggested that by accepting the settlement imposed on the FRY, the Security Council had in fact ratified the intervention[1959]. Given the criticisms of the intervention by several States, it is doubtful, however, that a customary rule justifying such an intervention has been accepted[1960]. But the fact is that relatively few States condemned the Kosovo intervention as contrary to the UN Charter[1961].

1954. Christopher Greenwood, "Yes, but Is the War Legal?", *The Observer* (28 March 1999); Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2003).

1955. See Gray, *supra* footnote 1784, at 33-35.

1956. See Cassese, *supra* footnote 1945; see also Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo", 93 *AJIL* 841, 843-844 (1999); Wedgwood, *supra* footnote 1952, at 835.

1957. See Antonio Cassese, "A Follow-up: Humanitarian Countermeasures and *Opinio Necessitatis*", 10 *EJIL* 791, 796 (1999).

1958. See UN doc. S/1999/328, mentioned by Cassese, *supra* footnote 1945.

1959. See Henkin, *supra* footnote 1952, 833.

1960. See Gray, *supra* footnote 1784, at 38; Hilpold, *supra* footnote 1941, at 460; Kohen, *supra* footnote 1950, at 140-141.

1961. Cassese, *supra* footnote 1945, at 792.

The debate on the legality of intervention without the State's consent and in the absence of Security Council authorization continues unabated. The Secretary-General's speech before the General Assembly in 1999 on humanitarian intervention, where he recognized that a "developing international norm in favor of intervention to protect civilians from wholesale slaughter will no doubt continue to pose profound challenges to the international community", was criticized by many developing States as an erosion of the principle of sovereignty. Thus, the President of Algeria, for example, stated,

> "[W]e remain extremely sensitive to any undermining of our sovereignty not only because sovereignty is our final defence against the rules of an unequal world, but because we are not taking part in the decision-making process by the Security Council nor in the monitoring of their intervention." [1962]

In the *Nicaragua* case, the ICJ rejected protection of human rights as a legal justification for the use of force.

> "[W]hile the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*." [1963]

In the cases brought by Yugoslavia against NATO States, the ICJ rejected the request for provisional measures, limiting itself to confirming that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter" [1964].

It is now recognized that States cannot invoke State sovereignty as a shield of impunity for egregious violations of human rights and

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1962. Quoted in Innocencio Arias, "Humanitarian Intervention: Could the Security Council Kill the United Nations?", 23 *Fordham Int'l LJ* 1005, 1010 (2000).

1963. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), Merits*, *supra* footnote 1731, para. 268.

1964. Case concerning *Legality of Use of Force (Yugoslavia* v. *United States of America)*, Request for the Indication of Provisional Measures, Order of 2 June 1999, para. 33.

that the treatment of their citizens is no longer entirely a matter of domestic jurisdiction[1965]. But States that grossly mistreat their citizens still insist on the attributes of their national sovereignty[1966]. What, then, is the present state of the law in light of the tolerance shown by the international community or large segments thereof towards multilateral interventions by groups of States acting outside the United Nations? This tolerance reflects the growing, but far from unanimous, acceptance of the idea that the international community cannot remain passive in the face of massive atrocities, such as genocide and crimes against humanity, even when action to save lives involves a violation of the Charter[1967]. Although action by a single State or by a group of States presents the same legal questions, the larger and the more representative the intervening group, the less the risk for an arbitrary and abusive action, and the greater the likely tolerance by the international community. Absence of condemnation by a majority of the Security Council members and, even more, some kind of a prospective or even retrospective blessing by the Council, though not amounting to an authorization of the use of force under Chapter VII, may provide useful indicia of a pull towards legality[1968], especially since the practice of UN organs is a source of an authentic interpretation of the Charter.

These developments have generated interest in codifying rules or guidelines for humanitarian interventions outside the Charter[1969]. In

1965. See *Problems and Prospects for Humanitarian Intervention*, Stanley Foundation, 2000, at 13.

1966. See Reisman, *supra* footnote 1730, at 255-256; in "Using 'Any Necessary Means' for Humanitarian Crisis Response", a conference convened by the Stanley Foundation, participants outlined four scenarios where sovereignty would not be a legitimate defence against outside intervention: if a sovereign State cannot or will not protect its citizens from genocidal or non-genocidal mass killing; in the event of mass displacement under pressure of violence; where there are systematic violations of group rights (e.g. apartheid) and when a democratically elected Government have been overthrown by force. Several participants expressed the view, however, that the use of force should only be contemplated in the first two cases (at 23 (2001)).

1967. See Westbrook, *supra* footnote 1875, at 302, arguing that

> "the old ideas of national interest, international law and diplomacy, and the use of force have been transformed in our time. As a result, the concepts no longer relate to one another in the same way they long did. In particular, international law is no longer defined in opposition to force."

1968. See "Using 'Any Necessary Means' for Humanitarian Crisis Response", *supra* footnote 1966, at 34-35; Wedgwood, *supra* footnote 1952, at 839.

1969. See Brown, *supra* footnote 1931, at 1722 ff.; see also, International Peace Academy Conference Report, Humanitarian Action: A Symposium Summary, 20 November 2000, pp. 4-6.

a thoughtful proposal, Louis Henkin has advocated pursuing an exception to the veto for humanitarian interventions: recognized regional organizations might resort to humanitarian interventions if authorized in advance by a vote of the Security Council not subject to the veto[1970]. The difficulty with this proposal is that it is improbable that the permanent members of the Council will waive their veto rights even in this limited context.

Proposals for rule-making are not new[1971]. Many have argued that "better and more objective standards for intervention are needed"[1972]. Suggested guidelines would direct, for instance, that the use of force should be collective in nature, limited in scope, proportionate to achieving the humanitarian objects, and consistent with humanitarian law[1973]. Perhaps the most prominent of such proposed guidelines is contained in the Report on "The Responsibility to Protect: Report of the Commission on Intervention and State Sovereignty" (2001), a result of an initiative by the Government of Canada. The Report states where a population is suffering from serious harm as a result of internal war, insurgency, repression or State failure, in case of failure of the Security Council to act, alternative options include action by the General Assembly under the Uniting for Peace resolution, or action by regional or sub-regional organizations, subject to their seeking subsequent authorization from the Security Council.

In the context of Iraq, in 1991, Oscar Schachter expressed reservations to a "codified" approach, warning against

> "a tendency on the part of those seeking to improve the United Nations to prescribe a set of rules for future cases, usually over-generalizing from past cases. Each crisis has its own configuration. Government will always take account of their particular interests and the unique features of the case. While they can learn from the past, it is idle and often counterproductive to expect them to follow 'codified' rules for new cases."[1974]

1970. See Henkin, *supra* footnote 1952, at 835.

1971. See for instance the works of the International Law Association in the mid seventies, cited in Hilpold, *supra* footnote 1941, at 455-456.

1972. See *Problems and Prospects for Humanitarian Intervention*, *supra* footnote 1965, at 11.

1973. See *id.*, at 22-23.

1974. Lillich, *supra* footnote 1898, at 14 (citing Oscar Schachter, "Commentary", 86 *Am. Soc'y Int'l Proc.* 320 (1992)).

There is, indeed, room for scepticism about laying down detailed rules for future Council action, or for decision-making outside of the United Nations. Such rules or guidelines might encourage abuses of the law governing the control of use of force and imperil the development of future common law through the practice of the Security Council. The Henkin proposal does not present such dangers, as it does not suggest new criteria for interventions, and fashions modified procedural rules for the Council. But the prospects of its acceptance by the P-5 are slim. The evolution of a common law for multilateral humanitarian interventions to put an end to egregious atrocities, with principles and parameters, when the Security Council cannot act, as proposed by Antonio Cassese, should be encouraged.

(d) *Rhetoric and reality*

It is difficult to see the 2003 invasion of Iraq as authorized by Security Council resolution 1441 (2002). Nor can the intervention derive an adequate cloak of UN legitimacy from resolution 687 (1991). The unlimited power of the United States prevailed over the patience which a more determined effort to arrive at an agreement within the Council would have required. The result was an essentially unilateral action by the United States and the United Kingdom.

Resolution 1441 was focused on weapons of mass destruction. Human rights concerns, regime change, and the need to end the terrible repression of the people of Iraq were not even mentioned. Resolution 1483 (2003), recognizing the "Authority" under which the occupying powers would be operating, provides that reporting on the promotion of human rights is one of the responsibilities of the Secretary-General's Special Representative for Iraq. Despite this timid return to human rights rhetoric, the relief at the end of a murderous regime is necessarily mixed with concerns about the future of the UN collective security system, and the disequilibrium between the power of the United States and the power of other permanent members of the Security Council.

Some commentators have even announced the utter collapse of that system. I am not so pessimistic. The system has passed through a significant trauma but it continues to play an important role. The unilateral character of the invasion of Iraq for example has created great difficulties in getting additional Governments to provide peace-keeping troops for security in Iraq or money for reconstruc-

tion. Lessons drawn from the alienation of the United States from its traditional European allies in 2003 and its global implications may yet cause the momentum to swing towards a revival of international solidarity and a more balanced and effective role for the Security Council.

However, even a more pessimistic view about the prospects for a better system of international peace and security, and the present fragility of the fundamental principles of the Charter, cannot obscure the enormous influence that human rights have exercised on international institutions particularly in areas such as promotion of human rights and democracy, and resort to humanitarian interventions and sanctions as weapons against atrocities and repression. These achievements remain undiminished. I am confident that they will continue to be so.

BLANCHE