The Hague Academy of International Law

The Humanization of International Law

Theodor Meron

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The Humanization of International Law

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THE HAGUE ACADEMY OF INTERNATIONAL LAW

The Humanization of International Law

by

Theodor Meron

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For Monique

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Introduction

My object in this book 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 and humanitarian law on general international law. Although human rights and humanitarian norms are central to this book, this is not a book about human rights and humanitarian law. Rather, this is a book about the radiation, or the reforming effect, that human rights and humanitarian 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 and humanitarian norms 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-centered to individual-centered.

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. In such important areas as territory of State, or settlement of disputes, for example, human rights have had little impact. But we must recognize and assess that influence where it can be found.

1 *See, e.g.,* Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (1989); Human Rights Law-Making in the United Nations (1986).

Chapter 1: 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 supplanted 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 1950's, 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).[1] 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.[2] Historically, reciprocity has been central to its development, serving as a rationale 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 attend-

1 *See* Theodor Meron, Henry's Wars and Shakespeare's Laws (1993); Bloody Constraint: War and Chivalry in Shakespeare (1998). For a recent study *see* Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (2004).

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

ant collective sanctions of classical international law: belligerent reprisals *durante bello* and war reparations *post bellum*."[3] 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 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.[4] The current changing

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

4 Meron, *The Normative Impact on International Law of the International Tribunal for former Yugoslavia*, [1995] Israel Y.B. Hum. Rights 163.

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.[5]

This is not surprising, given that robust efforts had to be made to humanize the behavior 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 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. However, even in other areas of international law, conclusory treatment of customary law is becoming common. This is true even of the International Court of Justice. 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 study on customary rules of International Humanitarian Law.[6] Public opinion, the media, the NGOs and the ICRC have played a critical role in promoting such

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

6 Theodor Meron, War Crimes Law Comes of Age, ch. XVII and the Epilogue (1998); Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law (2005). I was one of the reporters and served on its steering committee of experts.

tendencies. The jurisprudence of the ICTY, however, has dealt with customary law more rigorously.

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.[7] The influence of processes followed in the human rights field on the development of customary law by humanitarian law tribunals is well-known.[8] 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 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, Kovač and Vuković*, 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. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly wrongful act generating State responsibility.[9]

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7 Meron, *supra* note 5, at 56-57; Meron, *The Humanization of Humanitarian Law,* 94 ASIL 239 (2000); Koller, *The Moral Imperative: Towards a Human Rights-Based Law of War*, 46 Harv. Int'l L.J. 231 (2005).

8 Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, *in* Meron, *supra* note 5, at 262.

9 Case No. IT-96-23-T & IT-96-23/1-T, paras. 489-90 (2001); Mettraux, *Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 Harv. Int'l L. J. 238, 290-91 (2002). The Appeals Chamber agreed with the Trial Chamber that "the public official requirement is not

Thus, a perpetrator of "private" torture may be subject to individual criminal responsibility under national and international law even if his conduct does not rise to torture under the UN Convention against Torture. 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 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 19th 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)[10] contained several elements characteristically belonging to the domain of human rights: such elements included the prohibition of rape,[11] enslavement and slavery,[12] of distinctions between captured enemies on grounds of color – in effect, a guarantee of equal treatment of captured combatants.[13] 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]."[14]

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. The strong language of the Martens Clause explains its resonance and influence in the formation and interpretation of the law of war/international humanitarian law. The rhetorical and ethical language of the clause has compensated for its

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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." Judgement of 12 June 2002, at para. 148. *See also* Nina Jørgensen, The Responsibility of States for International Crimes (2000).

10 Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (April 24, 1863). For analysis, *see* Meron, *Francis Lieber Code and Principles of Humanity*, 36 Colum. J. Trans'l L. 269, *reprinted in* Meron, *supra* note 6, at 131.

11 *Id.*, Art. 47. *See generally*, Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424 (1993).

12 Lieber Code, *supra* note 10, Art. 43.

13 *Id.*, Arts. 57-58.

14 *Id.*, Art. 23.

somewhat vague and indeterminate legal content and exerts a strong pull towards normativity.[15]

The atrocities of World War II gave birth to the human rights movement, to the recognition of human rights as a fundamental principle in the UN Charter, to the insistence on individual criminal responsibility, to the judgment of the Nuremberg Tribunal and to the promulgation of the Universal Declaration of Human Rights (1948). 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 explains 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.[16]

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15 Meron, *Martens Clause, Principles of Humanity and the Dictates of Public Conscience*, 94 AJIL 78 (2000).

16 Lauterpacht, *The Problem of the Revision of the Law of War*, [1952-53] 29 Brit. Y.B. Int'l L. 381-82.

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):

> The High Contracting Parties, conscious of their obligation to come to an agreement in order to protect civilian populations from the horrors of War, undertake to respect the principles of human rights which constitute the safeguard of civilization and, in particular, to apply, at any time and in all places, the rules given hereunder:
> (1) Individuals shall be protected against any violence to their life and limb.
> (2) The taking of hostages is prohibited.
> (3) Executions may be carried out only if prior judgment has been passed by a regularly constituted court, furnished with the judicial safeguards that civilized peoples recognize to be indispensable.
> (4) Torture of any kind is strictly prohibited.
>
> These rules which constitute the basis of universal human law, shall be respected without prejudice to the special stipulations provided for in the present Convention in favour of protected persons.[17]

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.[18] The International Court of Justice (ICJ) has already paid it the highest tribute by describing it as a reflection of "elementary considerations of humanity."[19]

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.[20]

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)

17 Commentary on the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 20 (Oscar M. Uhler & Henri Coursier ed., 1958).

18 Gutteridge, *The Geneva Conventions of 1949*, [1949] 26 Brit. Y.B. Int'l L. 294, 300.

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

20 Doswald-Beck, *Implementation of International Humanitarian Law in Future Wars*, 71 US Naval War College 39, 47-48 (1998).

beneficiaries of humanitarian protection, *i.e.* individuals and groups of individuals."[21] The ICRC Commentary notes that the First and Third Geneva Conventions provide for certain mechanisms that permit protected persons to invoke their rights against the detaining Party without a necessary intervention of their national State.[22]

This symbiotic relationship is further stimulated by the work of human rights bodies.[23] 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 naiveté 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, pummeling 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 parties, protecting the governed from their governments. Under human rights law, no one may be deprived of life except in pursuance of a judgement by a competent court. The two

21 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).

22 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 75UNTS 31, 6UST 3114.

23 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.

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 70's 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[24] 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 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 instrument would not apply in relations between any of the parties to the conflict.[25] The Fourth Hague Convention's *si omnes* clause threatened the integrity of Nuremberg prosecu-

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

25 *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."

tions. In the *Trial of German Major War Criminals* (Nuremberg 1946), the defense 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."[26] 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 defense 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 against the Soviet Union.[27] 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 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."[28]

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.[29]

Common Article 1 of the 1949 Geneva Conventions, which provides that "The High Contracting Parties undertake to respect and ensure respect for the

26 *Trial of German Major War Criminals*, Cmd. 6964, Misc. No. 12, at 65 (1946). Meron, *supra* note 5, at 38-39.

27 *11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, at 462 (1948).

28 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.

29 Commentary on the Geneva (I) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 22, at 30.

present Convention *in all circumstances*,"[30] epitomizes the denial of reciprocity. The ICRC Commentary to Geneva Convention I further emphasizes the unconditional and nonreciprocal 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."[31]

Another aspect of common Article 1, which the International Court of Justice has held to be declaratory of customary law,[32] also 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 endeavor 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.[33] 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 analog to the human rights principle of *erga omnes*.[34]

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 belliger-

30 Abi-Saab, *The Specificities of Humanitarian Law*, *supra* note 21, 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).

31 Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 22, at 28-29.

32 Military and Paramilitary Activities in and Against Nicaragua, *supra* note 19, at 114.

33 Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 17, 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* note 22, at 26, and Meron, *supra* note 5, at 27- 30. For influential supportive literature, see especially Condorelli & Boisson de Chazournes, *supra* note 30, and Abi-Saab, *supra* note 21.

34 *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)* (New Application), 1970 ICJ Rep. 3, 32, discussed in Meron, *supra* note 5, at 188-201.

ent 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 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.[35] Additional Protocol I prohibits 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,"[36] such as nuclear or toxic materials. Articles 3(2) and 3(7) of Protocol II to the Convention on Conventional Weapons prohibit reprisals through the use of mines, booby-traps and other devices. 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 United States does not accept a total ban on reprisals against civilians and civilian objects.

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

35 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.

36 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.

and unfairness of reprisals,"[37] they 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."[38]

The ICTY, however, has strongly supported the prohibition of reprisals against civilians as grounded in customary law. An ICTY 1996 trial court decision held that the prohibition of reprisals against the civilian population and individual civilians is an integral part of customary law and must be respected in all armed conflicts, even when the other party engages in wrongful conduct.[39] In an ICTY trial court judgement in 2000, 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.[40] 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[41] 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,[42] even though State practice is scant or inconsistent. But given the scarcity of practice and diverse views of States and commentators, the invocation of the Martens Clause may not suffice to justify this conclusion. Of course, the question of what acts are considered reprisals should be taken into account. 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.

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

38 *Id.* at 302.

39 *The Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, para. 17 (Decision of March 8, 1996).

40 *Prosecutor v.Kupreskić*, No. IT-95-16-T, Judgement, para. 530 (Jan. 14, 2000).

41 *See* Meron, *supra* note 15.

42 *Kupreskić*, *supra* note 40, at paras. 527-31.

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 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 POW's and civilians.[43] Reprisals were openly practiced 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.[44]

Indeed, 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 outlawing of reprisals is also supported by the ICRC Study of Customary International Humanitarian Law.[45] Rule 145 of the ICRC study states, soundly, that "[w]here not prohibited by international law, belligerent reprisals are subject to stringent conditions." Thus, the purpose of reprisals, taken in reaction to a prior violation of international law, may only be to induce the adversary to comply with the law; reprisals may only be carried out as a measure of last resort and thus after warnings; they must be proportionate to the violation; the decision to resort to reprisals must be taken at high level; reprisals must cease as soon as the unlawful acts which triggered them have been discontinued. Rules 146 and 147 prohibit outright belligerent reprisals against persons and objects protected by the Geneva Convention and the Hague Convention for the Protection of Cultural

43 Meron, *The Time has Come for the United States to Ratify Geneva Protocol I*, 88 AJIL 678 (1994).

44 Kalshoven, *Human Rights, the Law of Armed Conflicts, and Reprisals*, Int'l Rev. Red Cross, No. 121, April 1971, 183, at 186.

45 *Supra* note 6.

Property. Rule 148 prohibits reprisals in non-international armed conflicts. The United States does not accept a total ban on reprisals against civilians and civilian objects.

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 Conventions), it does not enable the termination of obligations on grounds of breach.[46] For example, the denunciation 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, as during the second Intifada (2002-05), there has been an unfortunate return to a large-scale resort to reprisals against civilians by all sides.

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]

46 De Preux, *The Geneva Conventions and Reciprocity*, Int'l Rev. Red Cross, No. 244, Jan.-Feb. 1985, 25, at 26.

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* note 22, 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 cited or otherwise referred to in several national military manu-

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, July 29, 1899, 32 Stat. 1803, 1 Bevans 247; Convention [No. IV] Respecting the Laws and Customs of War on Land, with annex of regulations, Oct. 18, 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, Aug. 12, 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, Aug. 12, 1949, Art. 62, 6 UST 3217, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 142, 6 UST 3316, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 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* Dec. 12, 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* Dec. 12, 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, Oct. 10, 1980, pmbl., para. 5, 1342 UNTS 137.

53 The resolution requested that the Secretary-General urge member states of the United Nations system, pending the adoption of new rules of international law relating to armed conflicts, 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 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).

als, 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 analyzing its principal features.

I. The Origins of the Clause

As formulated in 1899, the Martens Clause read:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, 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."

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

54 For the U.S. manuals, see U.S. dep't of the Army, The Law of Land Warfare, para. 6 (Field Manual No. 27-10, 1956); U.S. Dep't 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]. See also United Kingdom Ministry of Defence, the Manual of the Law of Armed Conflict (2004). For the German manual, *see* Federal Ministry of Defense, 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."

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 174–76.

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, constituted 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 U.S. Military Tribunal noted that "not only the wording (which specifically mentions the 'inhabitants' before it mentions the 'belligerents'), but

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* note 6, 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 135–38 (1900); Ministère des Affaires Etrangères, La Haye, Conférence Internationale de la Paix 1899, Troisième partie, Deuxième Commission, at 111–16 (1899).

58 Georges Abi-Saab, *The Specificities of Humanitarian Law, supra* note 21, at 265, 274.

59 *Altstötter*, 6 Law Reports of Trials of War Criminals 40, 58–59 (United Nations War Crimes Commission, 1948) (U.S. Mil. Trib. 1947). For the customary law underpinnings of rules protecting the population of occupied territories, see General Orders No. 101 issued by the U.S. War Department for the occupation of Santiago de Cuba after the capitulation of the Spanish forces (July 18, 1898). The order, cited in the *Altstötter* case, reflects the Lieber Code and anticipates the Hague Regulations, *supra* notes 10 and 25. *See* 1898 Foreign Relations of the United States 783–84.

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]

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 sometime, 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]

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60 *In re* Krupp and others, 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. 1948).

61 *Id*.

62 15 Law Reports of Trials of War Criminals, *supra* note 27, at xiii (1949).

63 *See* Abi-Saab, *supra* note 21, at 275.

64 Protocol I, *supra* note 36.

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 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]

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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, & Bruno Zimmermann eds., 1987).

67 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226, 406 (July 8) (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* note 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* note 67, at 406.

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]

III. The Clause and General Principles

Principles of humanity are not different from elementary considerations of humanity, a concept to which judges, arbitrators, rapporteurs, and others have long attempted to give specific meaning. It has been applied in particular to obligations of States. In the *Corfu Channel* case, the ICJ observed that Albania's "obligations [were] based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war."[72] Earlier, the arbitral tribunal in the *Naulilaa* case of 1928 applied what appears to be similar principles of humanity to limit the scope of permissible reprisals: "[la représaille] est *limitée* par les expériences de l'humanité."[73]

In the merits phase of *Military and Paramilitary Activities in and against Nicaragua*, the ICJ considered that "the conduct of the United States may be judged according to the fundamental general principles of humanitarian law" and that certain rules stated in common Article 3 "constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity.' "[74]

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70 *See* Meron, *supra* note 5, at 34, 72.

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

72 *Corfu Channel case (UK v. Alb.) (Merits),* 1949 ICJ Rep. 4, 22 (Apr. 9).

73 Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portuguaises du sud de l'Afrique, 2 R.I.A.A. 1013, 1026 (1928).

74 *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.),* Merits, 1986 ICJ Rep. 14, 113–14, para. 218 (June 27) [hereinafter *Nicaragua*]. This statement of the Court was invoked by the UN Secretary-General in his report on the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY). In this context [of crimes against humanity], it is to be noted that the International Court of Justice has recognized that the prohibitions contained in common article 3 of the 1949 Geneva Conventions are based on "elementary considerations of humanity" and cannot be breached in an armed conflict, regardless of whether it is international or internal in character.,' Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), para. 48 n.9, UN Doc. S/25704 (1993), *reprinted in* 32 ILM 1163, 1191 (1993).

In the decision pursuant to Rule 61 in the *Martić* case, which concerned means and methods of war, a trial chamber of the ICTY attributed to principles of humanity and the Martens Clause the prohibition against attacking the civilian population as such, as well as individual civilians, the prohibition of reprisals against civilians, and the general principle limiting the means and methods of warfare to proportional ones. According to the Trial Chamber, these norms emanate from elementary considerations of humanity and from the Martens Clause, which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts.[75] In the *Furundžija* case, the ICTY mentioned the Martens Clause to support the proposition that the prohibition of torture is a part of customary international law.[76]

Together with the principle of chivalry, the British *Manual of Military Law* cites the Martens Clause as an argument for establishing parameters for the kinds and degrees of violence that may be used by a belligerent.[77] United Nations rapporteurs have also relied on elementary considerations of humanity in assessing the protection of humanitarian norms and human rights in various countries. Thus, the Special Rapporteur on the situation of human rights in Kuwait under Iraqi occupation noted, under "elementary considerations of humanity," three customary principles are incorporated in the Martens Clause:

> (i) that the right of parties to choose the means and methods of warfare, *i.e.* the right of parties to choose the means of injuring the enemy, is not unlimited; (ii) that a distinction must be made between persons participating in military operations and those belonging to the civilian population to the effect that the latter be spared as much as possible; and (iii) that it is prohibited to launch attacks against the civilian population as such.[78]

As mentioned above, in the *Corfu Channel* case, the ICJ stated that elementary considerations of humanity apply in peace as in war. Thus, the Security Council has invoked them even outside the context of an armed conflict to condemn the use of weapons against civil aircraft in flight. The Council described such use

> as being incompatible with elementary considerations of humanity, the rules of customary international law as codified in article 3 *bis* of the Chicago Convention, and the standards and recommended practices set out in the annexes of the Convention.[79]

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75 *Prosecutor v. Martić*, Review of the Indictment Pursuant to Rule 61, No. IT–95–11–R61, paras. 12-13 (Mar. 13, 1996).

76 *Prosecutor v. Furundžija*, Judgement, No. IT–95–17/1–T, para. 137 (Dec. 10, 1998).

77 UK Manual, *supra* note 54, para. 3.

78 Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, para. 36, UN Doc. E/CN.4/1992/26.

79 SC Res. 1067, para. 6 (July 28, 1996).

IV. The Clause and Public Conscience

Dictates of public conscience can be examined from at least two perspectives. First, they can be seen as public opinion that shapes the conduct of the parties to a conflict and promotes the development of international humanitarian law, including customary law. The latter happens, for example, when governments are moved by public opinion to regard certain developing norms as already declaratory of customary law, or as *jus nascendi*. This was precisely how the Rome Conference on the Establishment of an International Criminal Court formulated certain crimes in its proposed statute.[80] One example is the war crime of conscripting and enlisting children into armed forces or groups, or using them to participate actively in hostilities (Article 8(2)(e)(vii)). Strong public opinion trumped weak foundations in the practice of States.

Second, dictates of public conscience can be seen as a reflection of *opinio juris*. Although popular opinion, the *vox populi*, may be different from the opinion of governments, which constitutes *opinio juris*, the former influences and helps to form the latter. Both aspects of dictates of public conscience have been recognized by diplomats and judges. The Italian representative in the Sixth Committee of the UN General Assembly declared that:

> There was ... a need to reaffirm "the Martens Clause" ... and in particular, to recognize that humanitarian laws and the demands of world opinion still have a great role to play as the sources of principles of international law applicable when written rules proved to be inadequate. A third source would in the future have to be added to them, namely, respect for the fundamental worth of the human person, which was the basis for the protection of human rights.[81]

He added that "it was to the extent that humanitarian treaty law was rooted in the public conscience that it was gradually transformed into general international law applicable to all States."[82]

Although weapons or means of warfare are seldom prohibited on the sole basis of their incompatibility with such general principles as those of humanity or the dictates of public conscience, abhorrence of a particular weapon can be an important factor in the development of treaty prohibitions. Such a sense of abhorrence contributed to the adoption of treaty prohibitions on bacteriological (biological) and chemical weapons. In addition, principles of humanity have been invoked rhetorically in attempts to humanize the behavior of parties using certain methods of warfare. Christopher Greenwood, who believes that "public conscience" is too vague a term to serve as a basis for a separate rule of law, agrees

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80 *See* Meron, *supra* note 6, at 304–09.

81 UN GAOR, 6th Comm., 28th Sess., 1452d mtg., at 306, para. 46, UN Doc. A/C.6/SR.1452 (1973).

82 *Id.*

that the Martens Clause is one of the factors that may lead States to adopt a ban on a particular weapon or means of warfare.[83]

In its oral submissions in the *Nuclear Weapons* case, Australia emphasized the role of human rights in shaping the "dictates of public conscience," arguing that "[i]nternational standards of human rights must shape conceptions of humanity and have an impact on the dictates of public conscience." Moreover, "[i]nternational concern for human rights has been one of the most characteristic features of this era of international law."[84] Referring to international environmental treaties and declarations, Australia asserted that "these instruments, whether they themselves apply to nuclear weapons or not, provide cumulative evidence that weapons having such potentially disastrous effects on the environment, and on civilians and civilian targets, are no longer compatible with the dictates of public conscience."[85]

Judge Weeramantry, dissenting in the same case, recognized the role of the human rights movement in shaping the "dictates of public conscience":

> The enormous developments in the field of human rights in the post-war years, commencing with the Universal Declaration of Human Rights in 1948, must necessarily make their impact on assessments of such concepts as "considerations of humanity" and "dictates of public conscience".[86]

That public opinion – so influential in our era – has a role to play in the development of international law is not an entirely new phenomenon. For example, a nineteenth-century Spanish army manual, *Reglamento para el servicio de campaña*, discussing "notions of the Law of Nations and the Rules of War," notes that international law develops progressively as civilization advances and that compliance with its rules is based on "the noble and eternal ideas of humanity, justice and good faith." It adds that "the principal authority, the most impartial and respectable judge, the organ and regulator, is public opinion ... . It condemns irregular acts, creates usages and customs, [and] gives sovereign and final judgements."[87]

Recent manuals make the same point. The UK military manual, published in 1958, states that "no State can afford to be wholly regardless of public and world opinion."[88] The Australian manual emphasizes that the requirement of training in

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83 *See* Greenwood, *Historical Development and Legal Basis*, in Handbook of Humanitarian Law in Armed Conflicts 129 (Dieter Fleck ed., 1995).

84 International Court of Justice – Requests for Advisory Opinions on the Legality of Nuclear Weapons – Australian Statement, 1996 Austl. Y.B. Int'l L. 685, 699 [hereinafter Australian Statement].

85 *Id*. at 703.

86 *Nuclear Weapons Advisory Opinion*, *supra* note 67, at 490.

87 Reglamento para el servicio de campaña, Art. 826 (1882), *reprinted in* Estado Mayor del Ejército, Manual de derecho de guerra 329–30 (M–O–23–1, 1986).

88 UK Manual, *supra* note 54, para. 619.

the law of armed conflicts is based in part on the fact that violating that law "will have an adverse impact on public opinion (both national and international). In the event of any violation, close media scrutiny could leave the [Australian Defence Force] and Australia vulnerable to adverse comment and loss of domestic and international support."[89]

Whether public opinion has had the effect proclaimed for in the rhetoric of international law is debatable. Over time, however, its influence has undoubtedly grown. Is "public conscience" as it appears in the Martens Clause, with its moral overtones, the same as public opinion? Whose public conscience is meant? That of one belligerent, both or all belligerents, an alliance, a bloc, the United Nations? By definition, public conscience and public opinion have a popular basis. Under the influence of the civil society, nongovernmental organizations (NGOs), and the media, the common assumption tends to be that public opinion is a force for good and that it invariably serves humanitarian causes. Alas, this is not always true. In Slobodan Milošević's Serbia, support for harsh measures against the Kosovars was, at least tacitly, widespread. Such attitudes are not exceptional in a world characterized by religious and ethnic hatreds. "Bad" public opinion is not always limited to one country. In pre-World War II Europe, anti-Semitism and fascism were popular. Subject a country or countries to a barrage of hate propaganda and a monster of public opinion will rise. In contemplating public opinion, Myres McDougal advocated the more selective concept of community expectations formed by *authoritative* decision makers. While his approach might not be generally acceptable, the question remains how to mold public opinion through the infusion of moderating and humanitarian views to make it worthy of public conscience. This is a challenge that we cannot ignore.

V. The Clause and the Nuclear Weapons Opinion

The advisory opinion and pleadings in the *Nuclear Weapons* case provide a useful frame of discussion for analyzing and interpreting the Martens Clause. At one extreme of the spectrum was the Russian Federation, which asserted that the formulation of a complete code of the laws of war in 1949 and 1977 had made the Martens Clause redundant.[90] There was general agreement, however, on the narrowest common interpretation of the Clause; namely, that customary international law continues to apply after the adoption of a conventional norm. But broader layers of interpretation inspired strong disagreement. Thus, the United Kingdom argued:

> While the Martens Clause makes clear that the absence of a specific treaty provision on the use of nuclear weapons is not, in itself, sufficient to establish that such

89 Australian Defence Force, Law of Armed Conflict Training, para. 7 (DI(G) OPS, 1994).

90 *See* Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, Int'l Rev. Red Cross, No. 317, Mar.–Apr. 1997, at 125, 127.

> weapons are capable of lawful use, the Clause does not, on its own, establish their illegality.[91]

In addition, stated the United Kingdom, customary law cannot simply be derived from general humanitarian principles.[92] The United States agreed that, in the absence of treaty provisions, means of warfare remain subject to customary law but insisted that the Clause cannot transform public opinion into customary law.[93]

Other States argued, however, that prohibitions could arise and be generally binding by virtue of general principles of international law and of humanity, which do not require the consent of States.[94] The Clause was seen as providing that actions that are not explicitly prohibited by a treaty or customary rule are not *ipso facto* permitted and that the conduct of the parties to a conflict is judged not only in accordance with treaties and custom, but also in light of general principles of international law referred to in the Clause.[95] The legality of any particular conduct could thus be directly assessed by those principles.

Australia took a position at the broadest end of the interpretive spectrum. In its oral submissions, Australia, underlining the dynamic development of principles of humanitarian law on the use of chemical weapons from the Hague Declaration concerning Asphyxiating Gases of 1899 to the Chemical Weapons Convention of 1993, stated that "[e]ven if the use or threat of nuclear weapons was not *per se* inconsistent with elementary considerations of humanity and the dictates of public conscience in the past, this does not determine whether it is *per se* inconsistent with those principles today."[96] Dissenting in the *Nuclear Weapons* case, Judge Shahabuddeen asserted that the application of the Martens Clause did not depend on proof of the separate existence of a rule of international law:[97] Judge

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91 Written statement of the United Kingdom, *Nuclear Weapons Advisory Opinion*, 1996 ICJ Pleadings (June 2, 1994), *reprinted in* 1995 Brit. Y.B. Int'l L. 712, para. 32.

92 *See* John Burroughs, The Legality of Threat or Use of Nuclear Weapons 102 (1998).

93 *See id.* The United States interprets the Martens Clause as recognition of the continued validity of customary rules that have not been altered by treaty, and of custom as a potential source of new rules. *See* Burrus M. Carnahan, Customary Rules of International Humanitarian Law, Report on the Practice of the United States 6-2 (unpublished, 1997) (prepared for the ICRC).

94 James Crawford for the Solomon Islands, *cited in* Burroughs, *supra* note 92, at 102.

95 *See* Ticehurst, *supra* note 90, at 126.

96 *Id.* at 694.

97 *Nuclear Weapons Advisory Opinion*, *supra* note 67, at 408. *Compare Prosecutor v. Kupreškić*, No. IT–95–16–T Trial Chamber Judgement, para. 525 (Jan. 14, 2000), where ICTY Presiding Judge Antonio Cassese stated:

> True, this Clause may not be taken to mean that the "principles of humanity" and the "dictates of public conscience" have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice. However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those

Weeramantry made similar points in his dissenting opinion, stressing the need for any legal system to draw on and to apply general principles: "[B]eyond the domain of express prohibitions, there lies the domain of the general principles of humanitarian law ... ."[98]

Referring to the Hague and Geneva Conventions, the Court confirmed the customary character of fundamental rules of international humanitarian law.[99] Specifically, the Court found that the Martens Clause was an expression of preexisting customary law[100] and that its "continuing existence and applicability" were beyond doubt. It affirmed that principles and rules of humanitarian law do apply to nuclear weapons.[101] But, in the absence of specific customary or conventional prohibitions on the use of nuclear weapons, the Court was not ready to conclude that their use "would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance."[102] The Court nonetheless, regarded the use of nuclear weapons as "scarcely reconcilable with respect for such principles."[103] The context of this statement suggests that the Court used the principle of distinction and the prohibition on causing unnecessary suffering as its yardsticks, rather than principles of humanity and the dictates of public conscience.

VI. 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

instances the scope and purport of the rule must be defined with reference to those principles and dictates.

98 *Nuclear Weapons Advisory Opinion*, *supra* note 67, at 493.

99 *Id.*, para. 79.

100 *Id.* at 259, para. 84.

101 *Id.* at 260, para. 87.

102 *Id.* at 262, para. 95.

103 *Id.*

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."[104] In armed conflicts, however, belligerents have strong interests and may be sorely tempted to resort to a restrictive reading of the law of 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.[105] 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 UN 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 opin-

104 *Military and Paramilitary Activities*, *supra* note 19, at 95.

105 *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, Jan.–Feb. 1997, at 35, 49.

ion."[106] 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 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."[107]

But other trends are equally visible. A U.S. 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.[108] 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 violence that do not reach the threshold of an armed conflict are implicitly distin-

106 2 U.S. Dep't of the Army, International Law 15 (No. 27–161–2–1962), *quoted in* Meron, *supra* note 5, at 36.

107 Oscar Schachter, International Law in Theory and Practice 36 (1991).

108 U.S. Dep't of the Air Force, *supra* note 54, at 1–6.

guished 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[109] 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.[110]

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.[111] 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 contradictory 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 high. The Protocol applies to "situations at or near the level of a full-scale civil war"[112] 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 con-

109 *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."

110 Meron, *supra* note 6, at 309.

111 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).

112 *Id.*, para. 79.

tested (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."[113] 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."[114] However, the applicability of the Geneva Conventions, including Geneva Convention No. IV to the conflict in Iraq and its occupation, including including Geneva Convention No. IV

Fortunately, thresholds of applicability have recently been blurred and, at times, deliberately disregarded. The recently published 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 (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 U.S. 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."[115] 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.[116] The U.S. approach brings about a comprehensive application of international humanitarian law and should be emulated by other countries. The trend toward disregarding the need to

113 Aldrich, *Human Rights and Armed Conflict: Conflicting Views*, 67 ASIL Proc. 141, 142 (1973).

114 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).

115 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.

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

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 also to non-international armed conflicts.[117] 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.[118] 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, 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, or ban rape,

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

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

> torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering 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?[119]

In the same vein, in the recent case of the *Prosecutor v. Delalić* (*Čelebići* case) (Judgement 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 development.[120] 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."[121] 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 governments vis-à-vis populations over which they exercise power, authority or jurisdiction, regardless of nationality. Segments of the Geneva Conventions and Protocols, for

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

120 Minimum Humanitarian Standards, *supra* note 111, paras. 86-87.

121 *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).

example, now apply to the relations between a State and its citizens, especially in internal conflicts.[122]

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 1990's. 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.[123] 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)"[124] 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.[125] Given the character and the scope of FRY's involvement in the conflict, the conflict could be seen as an international armed conflict.[126] 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 national-

122 *See generally*, Meron, Human Rights in Internal Strife, *supra* note 2, at 30-33.

123 *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.

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

125 *See* Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AJIL 236 (1998), *reprinted in* Meron, *supra* note 6, 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).

126 *See id.*

ity 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,[127] 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:

> 263. Bearing in mind the relative merits of the 'effective link' and the 'agency' approaches, this Trial Chamber wishes to emphasize the necessity of considering the requirements of article 4 of the Fourth Geneva Convention in a more flexible manner. The provisions of domestic legislation on citizenship in a situation of violent State succession cannot be determinative of the protected status of persons caught up in conflicts which ensue from such events. The Commentary to the Fourth Geneva Convention charges us not to forget that 'the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests' and thus it is the view of this Trial Chamber that their protections should be applied to as broad a category of persons as possible. It would, indeed, be contrary to the intention of the Security Council, which was concerned with effectively addressing a situation that it had determined to be a threat to international peace and security, and with ending the suffering of all those caught up in the conflict, 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.
>
> 264. The law must be applied to the reality of the situation before us ...
>
> 265. ... it is clear that the victims of the acts alleged in the Indictment were arrested and detained mainly on the basis of their Serb identity. As such, and insofar as they were not protected by any of the other Geneva Conventions, they must be considered to have been 'protected persons' within the meaning of the Fourth Geneva Convention, as they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State.
>
> 266. This interpretation of the Convention is fully in accordance with the development of the human rights doctrine which has 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

127 Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 17, at 46.

> 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.[128]

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.[129]

In accepting a broader interpretation of the grave breaches provisions, the ICTY in the *Čelebići* case[130] quoted the ICRC Commentary to the Fourth Convention, namely that "the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests."[131]

In the appeal of the *Tadić* case (July 15, 1999), the ICTY Appeals Chamber gave its imprimatur to a new interpretation of protected persons.[132] First, departing from the Trial Chamber's use of Nicaragua's imputability test, the Appeals Chamber found that at the relevant time and place, there was an international armed conflict:

> The Appeals Chamber therefore concludes 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. Hence, even after 19 May 1992 [dec-

128 *Prosecutor v. Zejnil Delalić et al.*, Case IT-96-21-T, Judgment of 16 November 1998, paras. 263-266 (footnotes omitted).

129 Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 17, at 51.

130 *Prosecutor v. Zejnil Delalić et al.*, *supra* note 128, paras. 271-273.

131 Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 17, at 21.

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

> laration 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.[133]

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.[134] 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-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.[135]
>
> 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 correla-

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

134 *Id.*, at para. 169.

135 *Id.*, at para. 166.

> tively are not subject to the allegiance and control, of the State in whose hands they may find themselves ... Article 4 intends to look at the substance of relations, not to their legal characterisation as such.[136]

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."[137] In the *Čelebići* case, the Appeals Chamber similarly stated that "[t]he nationality of the victims for the purpose of the application 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."[138]

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.[139] It was not until the 1949 Conventions, however, that "the existence of rights conferred on protected persons was affirmed"[140] 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, agreements by which either States or the individuals themselves

136 *Id.*, at paras. 167-168.

137 Case IT-95-14/1-A, Judgement of 24 March 2000, para. 151.

138 Case No. IT-96-21-A, Judgement of 20 February 2001, para. 84.

139 *Supra* note 28, Arts. 42, 62 and 64.

140 Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 22, at 82.

purport to restrict the rights of protected persons under the Conventions will have no effect. Common Article 6/6/6/7 reads in part:

> No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, *nor restrict the rights which it confers upon them*. (Emphasis added).

Humanitarian law's notion of *jus cogens* differs conceptually from that in Article 53 of the Vienna Convention on the Law of Treaties. 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 labor to "the mercy of modifications dictated by chance, events or under the pressure of wartime circumstances."[141] 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.[142] 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 character

141 Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 17, at 71.

142 Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 22, at 83.

allowing' the beneficiaries 'to claim them irrespective of the attitude adopted by their home country'.[143]

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).[144] 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.[145] Traditionally, 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.[146] Under the Geneva Conventions, all Contracting Parties have the duty either to prosecute or to

143 *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, July 26-August 3, 1946), Geneva, 1947, p. 71.

144 P.C.I.J., Ser. B. No. 15, at 17-18 (Advisory Opinion of March 3, 1928); Rosalyn Higgins, *Conceptual Thinking about the Individual,* in International Law: A Contemporary Perspective 476 (Richard Falk, Friedrich Kratochwil & Saul H. Mendlovitz eds. 1985); Janis, *Individuals as Subjects of International Law*, 17 Cornell Int'l L. J. 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* note 2, at 33-40.

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

146 Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554 (1995), *reprinted in* Meron, *supra* note 6, at Ch.XIII.

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,[147] 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 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.[148]

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.[149] But as World War I had shown, the conclusion of peace could come considerably later than the actual

147 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).

148 Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 17, at 36; Baxter, Jus in Bello Interno: *The Present and Future Law*, in Law and Civil War in the Modern World 518, 527-28 (John Moore ed., 1974).

149 Hague Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention No. IV, *supra* note 25, Art. 20.

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."[150] World War II further "exposed the inadequacies of both the Hague and the Geneva formulation."[151] 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.[152]

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."[153] Their repatriation is not conditional on the conclusion of an armistice or a peace treaty.[154] If no agreement is concluded, prisoners of war must be released unilaterally.[155] 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.[156] 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

150 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* note 28, Art. 75.

151 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).

152 *Id.*, at 44.

153 Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 35, 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).

154 Dinstein, *The Release of Prisoners of War*, supra note 151, at 44.

155 *Id.*

156 Charmatz and Witt, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 Yale L.J. 391, 401 (1953).

of origin] which is ready to accept them".[157] The reasons for this rejection were, however, related to the availability of asylum and the fear of abuse by the detaining powers.[158]

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. In October 1952, the United Nations Unified Command stated:

> The United Nations Command is willing to return all prisoners excepting those who would violently resist repatriation. The Communists, however, have insisted on the return of all prisoners by force if necessary. An issue of principle has thus been posed on which the Unified Command cannot yield without disregard for the fundamental principles of human rights and individual freedom embodied in the Charter.[159]

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 argued that "forcible repatriation was inconsistent with the humanitarian basis, and thus the spirit, of the Geneva Convention."[160]

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.'"[161] 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.[162]

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157 Commentary on the Geneva Convention (III) relative to the Treatment of Prisoners of War, *supra* note 150, at 542.

158 Mayda, *The Korean Repatriation Problem and International Law*, 47 AJIL 414, 433 (1953); *also* Charmatz & Witt, *supra* note 156, at 402-405.

159 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.

160 *Id.*, at 18-19.

161 Mayda, *supra* note 158, at 435.

162 *Id.*

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."[163] The issue was finally resolved in mid-1953 by a special agreement. "[T]he prisoners who [had] not exercised their right to be repatriated"[164] 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).[165]

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.[166] 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."[167] Some Iranian prisoners asked UN investigators whether at the end of the hostilities they would be returned to Iran without their consent.[168] The ICRC questioned prisoners as to their wishes. Those wishing to remain in the territory of the detaining State were allowed to do so.[169] 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

163 General Assembly Resolution 610 (VII), 7 GAOR (Supp. No. 20), at 3, UN Doc. A/2361, para. 2. (1952).

164 Agreement on Prisoners of War, signed at Panmunjom, June 8, 1953, *reprinted in* 47 AJIL, supp., 180, 182.

165 Dinstein, *supra* note 151, at 41.

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

167 Quigley, *Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War After The Close of Hostilities*, 5 Am. U.J. Int'l & Pol'y 73, at 81 (citing ICRC communiqués) (1989). *Also*, Report of the Mission dispatched 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).

168 Quigley, *supra* note 167, at 82.

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

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."[170]

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."[171] 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.[172]

In the Dayton Peace Agreement, the ICRC was similarly entrusted with the task of privately interviewing and determining the "onward 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."[173]

Practice informed by human rights 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 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.[174] 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

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

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

172 *Id.*, at 102.

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

174 Meron, Human Rights in Internal Strife, *supra* note 2, at 12-28.

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,[175] the applicable human rights protections should be resorted to to fill the void.

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.[176]

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."[177] 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.[178]

The Court has thus interpreted Article 6 of the Covenant in light of principles of international law applicable in armed conflict. Such interpretation is of course supported by Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

In the Advisory Opinion of July 9, 2004, on Legal Consequences of the Construction of the Wall in the Occupied Palestian Territory, the Court, citing its *lex specialis* statement in *Nuclear Weapons*, held, more generally, that except for derogations of the kind stated in Article 4 of the International Covenant on Civil and

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

176 *Nuclear Weapons Advisory Opinion, supra* note 67, at 240.

177 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* note 2, at 24.

178 *Supra* note 67.

Political Rights, "the protection offered by human rights conventions does not cease in case of armed conflict,"[179] and that both humanitarian and human rights law were applicable in Occupied Territories.[180] Through a process of interpretation of the Geneva Conventions and human rights conventions, and particularly the International Covenant on Civil and Political Rights, the court found that the both the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child were applicable to the occupied territories, alongside the Geneva Convention and the Hague Convention No. IV.[181]

In the *Furundžija* case, the ICTY emphasized that the general principle of respect for human dignity: "is the basic underpinning and indeed the very raison d'être of international humanitarian law and human rights law." Similarly in the Čelebići case, the Tribunal stated:

> 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. Their provisions seek to guarantee the basic human rights to life, dignity and humane treatment of those taking no active part in armed conflicts and their enforcement by criminal prosecution is an integral part of their effectiveness.[182]

In the *Abella* case, the Inter-American Commission on Human Rights argued that its authority to apply international humanitarian law derived from the overlap between norms of the American Convention on Human Rights 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.[183]

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

179 Para. 106.

180 Para. 114.

181 Paras. 89- 114.

182 *Prosecutor v. Zejnil Delalić et al.*, *supra* note 128, para. 200.

183 *Abella et al. v. Argentina*, *supra* note 23, 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, Sept. 1998, at 505.

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.[184]

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."[185] 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.[186] 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.[187]

A legal opinion of the U.S. 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:

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184 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* note 35), 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* note 36), derogations rather similar to limitation clauses under the Political Covenant.

185 General Assembly Resolution 2444 (XXIII), 23 UN GAOR Supp. (No. 18), at 50, UN Doc. A/7218, preamble (1969).

186 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).

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

> In deciding what constitute gross violations resort should first be had to the specific examples set out [in the Act] …
> In addition, guidance may be found in widely accepted statements in sources of international law. For example, it would seem difficult to describe as less than "gross" those violations described as graves breaches in the Geneva Conventions …[188]

As early as 1967, the Security Council considered that "essential and inalienable human rights should be respected even during the vicissitudes of war."[189] The Security Council resolution 1041 (1996) 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.[190] 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.[191]

A number of human rights guarantees have been applied to prisoners of war in situations of international armed conflicts. Missions dispatched by the Secretary-General to inquire 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 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.[192]) But it could be encompassed by Article 14 (respect for the person of prisoners). Undeterred, 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.[193]

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188 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).

189 Security Council Resolution 237 (June 14, 1967), preamble.

190 Security Council Resolution 1041 (Jan 29, 1996); *also* Resolutions 1059 (May 31, 1996), 1071 (Aug. 31, 1996) and 1083 (Nov. 27, 1996).

191 Security Council Presidential Statement 1999/6 (Feb. 12, 1999), para. 2; *also* para. 7.

192 Commentary on the Geneva Convention (III) relative to the Treatment of Prisoners of War, *supra* note 157, at 144-145.

193 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.

As for Iraq, the Parliamentary Assembly of the Council of Europe condemned "Iraq's record of disregard for human rights and inhuman treatment of prisoners of war ..."[194] 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.[195]

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.[196] 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."[197]

Even in the absence of explicit mandates, human rights rapporteurs have referred to humanitarian law to examine issues that 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).[198] Similarly, when non-State entities

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S/16962, Annex, para. 294 (1985).

194 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).

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

196 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).

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

198 O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, Int'l Rev. Red Cross, No. 324, Sept.1998, at 481,

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).[199]

Where 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."[200] 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[201] 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 analyze issues that mainly concern situations of armed conflict. Such themes as the use of mercenaries, sexual violence 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.[202] 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."[203]

482-483 (citing UN Doc. E/CN.4/1993/45, para. 113, and E/CN.4/1994/58, paras. 112-116).

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

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

201 *Id.*, at 485-486.

202 *Id.*, at 482.

203 Extrajudicial, Summary or Arbitrary Executions. Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, UN Doc. E/CN.4/1996/4, para. 493.

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).[204] The Parties to the San Jose Agreement (1991) requested the UN 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.[205] The Mission endeavored 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.[206]

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

In some cases, UN reporters are given such a prominent humanitarian law mandate that it is no longer appropriate to describe them as human rights reporters. A recent case in point is the Security Council Resolution 1564 which requested the International Commission of Inquiry on Darfur (the Cassese Commission) to investigate reports of violations of international humanitarian and human rights law in Darfur and to determine whether acts of genocide have been committed. The report of the Commission[207] served as the basis for the referral of the situation in Darfur to the Prosecutor of the International Criminal Court.[208]

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, includ-

204 O'Donnell, *supra* note 198, at 484. The Mission was established by Security Council Resolution 693 (May 20, 1991).

205 First Report of the United Nations Observer Mission in El Salvador, UN Doc. A/45/1055- S/23037, Annex, paras. 17-19 (1991).

206 *Id.*, paras. 50-52.

207 S/2005/60.

208 S/RES/1593 (2005).

ing international treaties, conventions and other instruments on the subject to which Guatemala is a party.[209]

In a case brought before the Inter-American Commission on Human Rights arising from military action taken by the U.S. in Panama in December 1989, the U.S. 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. [in its view] those legal authorities are "extraneous to and fall outside the scope of the Commission's jurisdiction to interpret and apply."
>
> [and] the Commission is not an appropriate organ to apply the provisions of the Fourth Geneva Convention to the United States since the U.S. has not given "express authority" to the Commission to do so. The Fourth Geneva Convention "provides a wholly separate series of internal procedures and remedies for its enforcement, including the use of protective powers, the activities of the International Red Cross and its national counterparts, and the conducting of inquiries.[210]

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:

> Where it is asserted that a use of military force has resulted in noncombatant deaths, personal injury, and property loss, the human rights of the combatants are implicated. In the context of the present case, the guarantees set forth in the American Declaration are implicated. This case sets forth allegations cognizable within the framework of the declaration. Thus the Commission is authorized to consider the subject matter of this case.[211]

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

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

210 *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).

211 *Id.*, 329.

> 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 …[212]

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.[213] 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:

> both common Article 3 and Article 4 of the American Convention protect the right to life and, thus, prohibit, inter alia, summary executions in all circumstances. 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 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.[214]

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.[215]

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212 *Abella et al. v. Argentina*, *supra* note 23, para. 148.

213 *Id.*, paras. 154-156.

214 *Id.*, para. 161.

215 *Supra* note 67.

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(1), which states that measures of derogation in time of emergency may "not be inconsistent with a State's other international obligations."[216]

The American Court of Human Rights did not go as far as the Commission. 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.[217] 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 protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.[218]

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 Southeastern Turkey.[219] Neither the United Kingdom nor Turkey recognized the applicability of common Article 3 or Additional Protocol II to the situation in Northern Ireland or Southeastern 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

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216 Signed 22 November 1969, OAS TS No. 36, at 1; OAS Off. Rec. OEA/Ser.L/V/II.23 doc. Rev. 2.

217 *Las Palmeras* Case, Preliminary Objections, 4 February 2000, ACHR Reports, Series C, No. 67, para. 33.

218 *Bámaca Velásquez* Case, Judgement of 25 November 2000, ACHR Reports, Series C, para. 208.

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

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.[220] 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.[221] 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.[222] In these 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 labor, destruction of property, forced deportations and separation of families in the context of occupation.[223] 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.[224]

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.[225]

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

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

221 *Id.,* para. 202.

222 Reidy, *supra* note 219, at 518.

223 *Cyprus v. Turkey*, *supra* note 220.

224 *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.

225 *Loizidou v. Turkey* (Preliminary Objections), European Court of Human Rights, Judgment of 23 March 1995, 1995 Eur.Ct.H.R. Rep. (Ser. A) No. 310, para. 62.

> 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 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.[226]

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.[227] 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."[228] In the more recent *Banković* case, (discussed in the chapter on international tribunals), 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.[229] The European Court of Human Rights[230] used such concepts to interpret the State obligations under the European Convention on Human Rights. The Inter-American Commission[231] and Court of Human Rights[232] have followed suit.

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

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

228 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).

229 *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.

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

231 *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).

232 *Neira-Alegria v. Peru*, Inter-American Court of Human Rights, Judgment of 19 January 1995, 1995 Inter-Am. Ct. H.R. 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.[233]

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-dis-

233 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).

crimination, 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. Even when these rules manifestly do apply, it is generally acknowledged that, in contrast to the rules applying in international armed conflicts, they provide only the bare minimum of protection.
>
> 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.[234]

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.[235] The initiative took shape in the

234 Minimum Humanitarian Standards, *supra* note 111, at, paras. 8-9.

235 Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument,* 77AJIL 589 (1983); *Towards a Humanitarian Declaration*

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.[236] But it has encountered opposition from some governments, and particularly, some human rights NGO's, 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 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,

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on Internal Strife, 78 AJIL 859 (1984); Draft *Model Declaration on Internal Strife,* Int'l Rev. Red Cross, No. 262, Jan.-Feb 1988 at 59; Human Rights in Internal Strife, *supra* note 2; 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).

236 Minimum Humanitarian Standards, *supra* note 111; 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).

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 therefore be ineffective. But the Helsinki Declaration[237] has shown how effective political and moral commitments can be. The recent developments tending to blur the thresholds for the applicability of international humanitarian law, and resulting in greater applicability of protective norms in internal conflicts, through customary law and treaties with broader scopes of applicability, already serve 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-defense 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."[238] 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 on a large scale is in itself sufficient to meet the

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

238 Lieber Code, *supra* note 10, at Arts. 29-30. See also Meron, Francis Lieber's Code and Principles of Humanity, *reprinted in* Meron, supra note 6, at 133.

> requirement of necessity for self-defence. 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.[239]

Proportionality for purposes of *jus in bello* has a more traditional sense. This strain of proportionality was at the center 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.[240] 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.[241]

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

239 Schachter, "United Nations Law in the Gulf Conflict," 85 AJIL 459, 460-61 (1991).

240 *Id*. at 466.

241 *Nuclear Weapons Advisory Opinion*, *supra* note 67, at paras. 41-42.

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." Thus, "the 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.[242] 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 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 noncombatants that is clearly disproportionate to the military advantage gained in an attack on military objectives. [243]

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242 Hays Parks, "The Protection of Civilians from Air Warfare," Israel Y.H.R. 65, at 77-83 (1998).

243 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.

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.[244] Attempts were made to bring up to date the regulation of means and methods of warfare ("Hague Law").[245] 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 of hostilities.[246] 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.[247]

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."[248] 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

244 M. Bothe, K. Partsh and W. Soft, New Rules for Victims of Armed Conflicts 274-75 (1982).

245 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.

246 Bothe and al., s*upra* note 244, at 275; Sandoz and al., Commentary on the Additional Protocols, *supra* note 66, paras. 1830-1831.

247 *Supra* note 17, at 10.

248 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).

and chemical weapons.[249] 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.[250]

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:
> – 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,[251] 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;[252]

249 Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War (1956), Articles 8-9.

250 Bothe and al. *supra* note 244, at 275.

251 Respect for Human Rights in Armed Conflicts. Report of the Secretary-General, A/7720, para. 19 (1969).

252 Tehran Conference on Human Rights (1968), Resolution XXIII.

In Resolution 2444 (XXIII) (1969) entitled "Respect for Human 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 ... [253]

This resolution, which the United States considered as declaratory of customary law,[254] 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.[255]

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."[256] 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.[257]

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

253 General Assembly Resolution 2444 (XXIII).

254 Meron, *supra* note 5, at 69-70.

255 Respect for Human Rights in Armed Conflicts. Report of the Secretary-General, A/7720, para. 20 (1969).

256 *Id.*, para. 21 (1969).

257 Respect for Human Rights in Armed Conflicts. Report of the Secretary-General, A/8052, para. 13 (1970).

adopted at least one annual resolution on the reaffirmation and development of humanitarian law at each of its sessions.[258]

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.[259] 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."[260] 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.[261]

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 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.[262]

This exchange reflects the recurrent clash (in the Rome Conference, for example) between those, especially in the human rights community, who seek a total

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

259 General Assembly Resolution 2675 (XXV).

260 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).

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

262 CDDH, Official Records, CDDH/III/SR.21, para. 7, cited in Bothe *supra* note 244, at 361.

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."[263] 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, 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. By stating in the elements of crime that "[s]uch advantage may or may not

263 Hays Parks, *The Protection of Civilians from Air Warfare*, [1998] Israel Y.B. Hum. Rights 65, 97.

be temporally or geographically related to the object of the attack", the ICC Preparatory Commission has 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 George 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.[264]

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.[265] These rules are now codified in Article 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;

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264 Abi-Saab, *supra note 21*, 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."

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

> 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 rejects the use of weapons which cause additional suffering for no military gain."[266] The Declaration did not prohibit all use of explosive munitions. It distinguished between "anti-personnel" (certain specified small caliber rifle bullets) and "anti-material" (artillery shells) munitions. Kalshoven thus rightly observed that whatever the injuries artillery shells can inflict on individual soldiers, they would be considered indispensable and not be sacrificed on the altar of humanity.[267]

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 U.S. 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. [268]

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.[269] 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 U.S. representative's formulation of the proportionality test at the Lucerne Conference (1974):

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266 Greenwood *in* Fleck and *al., supra* note 83, at para. 119.

267 Frits Kalshoven, *Arms, Armaments and International Law*, 191 Recueil des Cours at 208 (II-1985).

268 U.S. Air Force Pamphlet 110-31, 19 Nov 1976, para. 6.

269 Doswald-Beck, *International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality or the Threat or Use of Nuclear Weapons*, Int'l Rev. Red Cross No. 316, 35 (1997), at 45.

> … 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. [270]

To render the concept of military advantage more objective, resort to comparison with existing weapons has been suggested. A legal memorandum of the U.S. 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.[271]

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:

> 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.[272]

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270 Statement of the Chief of the International Affairs Division (W. Solf), at the Lucerne Conference at 709 (1974) [1974] Digest of United States Practice in International Law 708-09 (Arthur W. Rovine ed.).

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

272 Cassese, *Weapons Causing Unnecessary Suffering: Are they Prohibited?*, 58 Rivista di Diritto Internazionale 12, 18 (1975),

Some participants at the 1899 Hague Conference had taken the view that weapons causing "incurable wounds" were also unlawful.[273] They urged support for such humanitarian factors as the degree of disability, the risk of death, the overburdening of medical resources, and public opinion.[274] 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.[275] Nevertheless, the German Military Manual adopts a test based on the effects on humans to define prohibited weapons.[276]

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.[277] 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 purpose 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 considera-

273 *Id.*, at 17.

274 Robblee, *supra* note 260, at 418.

275 Robin M. Coupland , The SirUS Project (1997), at 14.

276 Meyrovitz, *The Principle of Superfluous Injury or Unnecessary Suffering*, Int'l Rev. Red Cross No. 299, 98 at 118 (Mar.-Apr. 1994).

277 Coupland, *supra* note 275, at 14.

> tion 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.[278]

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 use of weapons is sometimes caused by the humanizing effect of public opinion[279] 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 disparity 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[280]

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."[281]

b) Weapons that are Inherently Indiscriminate

The prohibition of indiscriminate attacks is distinct from, but closely related to the principle of proportionality.[282] 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."[283] Doswald-Beck wrote that the Court thus assimilated an indiscriminate attack to a direct attack on civilians.[284] Indiscriminate means and methods of warfare are defined in Additional Protocol I as:

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278 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).

279 Doswald-Beck, *supra* note 20, at 46-47.

280 Aubert, *supra* note 248, at 477-478.

281 Louise Doswald-Beck and Gérald Cauderay, *The Development of New Anti-Personnel Weapons*, Int'l Rev. Red Cross, No. 279, at 565, 574-75 (1990).

282 Doswald Beck *supra* note 269, at 38.

283 *Nuclear Weapons Advisory Opinion*, *supra* note 67, at para. 78.

284 Doswald Beck *supra* note 269, at 38.

> (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.[285]

One of the criteria for labeling 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."[286] 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.[287]

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,[288] 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 U.S. military manual suggests an empirical approach: [w]hat 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."[289]

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

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285 Additional Protocol I, *supra* note 36, at Article 51 (4).

286 Doswald Beck *supra* note 269, at 41.

287 Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War (1956), Article 14

288 Kalshoven, *The Conventional Weapons Convention: Underlying Legal Principles*, Int'l Rev. Red Cross No. 279, Nov.-Dec. 1990 510,517.

289 US Manual (FM27-10), *supra* note 54, para. 34.

> … humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect 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.[290]

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.[291] 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."[292] Regarding the legality of collateral damage, the United States argued that this depended on the principle of proportionality, requiring a case-by-case assessment.[293] 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.[294]

Some States argued that any use of nuclear weapons would violate the principle of distinction.[295] Thus, Egypt suggested that

> [t]he use of nuclear weapons is prohibited not because they 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.[296]

The United States and the United Kingdom responded:

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290 *Nuclear Weapons Advisory Opinion*, *supra* note 67, at paras 78-79.

291 Matheson, *The ICJ Opinions on Nuclear Weapons*, 7 Transnational Law & Contemporary Problems 354 (1997), at 363 (at note 49) (discussing Egypt, India, Mexico, Sweden).

292 *Id.*, (at note 50) (discussing Netherlands, Russia, the United Kingdom).

293 *Id.,* at 362.

294 *Nuclear Weapons Advisory Opinion*, *supra* note 67, para. 95.

295 Matheson, *supra* note 291, at 362 (at note 45) (discussing Egypt, India, Mexico, Solomon Islands).

296 Verbatim Record, 1 November, at 39; in Burroughs , *supra* note 92, at 96.

> 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.[297]

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."[298] 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.[299]

The United States' argument thus was that nuclear weapons can be used in a manner limited to military objectives. The Court declined to make a determination, considering that "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."[300]

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.[301]

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

297 Matheson *supra* note 291, at 362 (at note 46).

298 Verbatim Record, 15 November 1995, at 85; in Burroughs, *supra* note 92, at 96.

299 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* note 67, at para. 94.

300 *Nuclear Weapons Advisory Opinion*, *supra* note 67, at paras. 94-95.

301 *Id.*, Individual opinion of J. Guillaume, at 59.

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

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.[302] In reality, it is difficult to envisage uses of nuclear weapons which would not violate the principles of distinction and proportionality, and the prohibition of causing unnecessary suffering.

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."[303] 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.[304] 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.

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302 *Id.,* at para. 105.

303 *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* note 275, at 12.

304 *Nuclear Weapons Advisory Opinion*, *supra* note 67, at paras. 52, 57.

c) The Regulation of Weapons Causing Unnecessary Suffering and of Indiscriminate Weapons

Up to the early 1970s, the prevailing notion was that the regulation of specific weapons belonged to the field of disarmament and was outside the scope of humanitarian law. In the Conference of the Committee on Disarmament, military considerations were given major weight.

In 1971 and 1972, the ICRC convened a conference of government experts on the reaffirmation and development of international humanitarian law applicable in armed conflicts. During the conference's second session, the representatives of 19 governments asked the ICRC "to consult with experts on the question of the use of such conventional weapons as may cause unnecessary suffering or be indiscriminate in their effect". This consultation resulted in a purely descriptive report which made no specific proposals prohibiting or restricting the use of certain weapons. The subject was discussed both during the preparatory work and throughout the diplomatic conference (1974-1977), but the 1977 Protocols Additional to the Geneva Conventions contain no formal prohibition on specific weapons. Additional Protocol I merely states the general principle prohibiting the use of weapons and methods of warfare of a nature to cause superfluous injury or unnecessary suffering[305] and indiscriminate methods and means of combat.

At the request of the XXIInd International Conference of the Red Cross, the ICRC convened the first session of the Conference of Government Experts on Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects in Lucerne in 1974. Another meeting of the Conference of Government Experts was held in Lugano in 1976. Resolution 22 of the diplomatic conference recommended that a Conference of Governments should be convened not later than 1979 with a view to "reaching agreements on prohibitions or restrictions on the use of specific conventional weapons, including those which may be deemed to be excessively injurious or have indiscriminate effects, taking into account humanitarian and military considerations." The General Assembly's support for this recommendation[306] led to the 1980 United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects.

The resulting 1980 Convention is structured as a basic Convention with annexed Protocols. The preamble to the 1980 Convention recalls the general principles of the protection of the civilian population against the effects of hostilities and the prohibition on the employment of methods and means of warfare likely to cause superfluous injury or unnecessary suffering. The Protocols provide for the prohibition of certain weapons (non-detectable fragments and booby-traps) and restrictions on the use of others (mines and incendiary weapons). Fenrick has

305 Resolution 22 was adopted by the CDDH recommending that a conference of governments should be convened no later than 979 with a view to reaching "agreements on prohibitions or restrictions on the use of specific conventional weapons". The General Assembly of the United Nations supported their recommendation.

306 Resolution 32/152 (1977), 33/70 (1978) and 34 (1979).

noted that although the Conference was entitled "United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects",

> neither the Convention nor its annexed protocols specifically deemed any weapons to be excessively injurious or to have indiscriminate effects. They simply prohibited weapons which cause injury by means of undetectable fragments and imposed restrictions on the use of mines, booby-traps, and incendiary weapons.[307]

The Protocol on non-detectable fragments (Protocol I) prohibits the use of weapons whose fragments in the human body escape detection by X-rays. It is doubtful whether such weapons have ever been used. Prohibiting these weapons was proposed because many at the time believed that the United States had used such weapons in Vietnam. The prohibition "received unanimous support because none of the States participating in the Weapons Conference had such weapons in their inventory nor did they foresee any conceivable use of such weapons."[308] Nonetheless, two aspects of the prohibition are noteworthy. The first is that the prohibition

> is in line with earlier prohibitions on use of conceivable but not really existing methods or means of warfare, such as the gas projectiles of 1899. The other remarkable aspect is that this particular ban is one of the very few successes scored in the struggle to protect not only civilians but combatants as well from the effects of specified weapons.[309]

Incendiary weapons present two main military advantages: effectiveness over a wide area, and low-cost, easy manufacture. These advantages explain their frequent use in guerrilla warfare. Incendiary weapons are extremely destructive.[310] The injuries they cause (burns and lesions due to the release of toxic gases) are particularly painful and, for effective treatment, require more hospital facilities than ordinary bullet or shrapnel wounds. Protocol III to the 1980 Convention introduced the regulation of the use of incendiary weapons.[311] Under the Protocol, it is prohibited to use incendiary weapons to attack:

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307 William Fenrick, *The Conventional Weapons Convention: A Modest but Useful Treaty*, International Review of the Red Cross, No. 279, at 498, 499 (1990); Frits Kalshoven, *The Conventional Weapons Convention: Underlying Legal Principles*, Int'l Rev. Red Cross No. 279, at 510, 515 (1990).

308 Fenrick, *supra note 265*, at 503.

309 Kalshoven, *supra* note 267, at 252.

310 Aubert, *The International Committee of the Red Cross and the Problem of Excessively Injurious or Indiscriminate Weapons*, Int'l Rev. Red Cross No. 279, 477 (Nov.-Dec.1990), at 489.

311 US Manual (FM27-10), *supra* note 54, at 18; British Manual, *supra* note 54, at para. 109.

– the civilian population or civilian objects;
– any military objective within a concentration of civilians, from an aircraft;
– any such objective using means other than aircraft unless it is clearly separated from the concentration of civilians and precautions have been taken to avoid harming them.

Although Protocol III does not actually prohibit the use of incendiary weapons, Doswald-Beck has suggested that "the political sensitivity of incendiary weapons has in practice virtually eliminated their use against personnel."[312] The recent use of thermobaric weapons – which appear related to the so-called fuel-air explosives – against cave complexes in Afghanistan may raise doubts about this sanguine perspective.

Of course, the negotiation of prohibitions or regulations of additional weapons is a continuing process. In 2003, the parties to the CCW adopted Protocol (V) on Explosive Remnants of War, and thus minimize the risks and effects of explosive remnants of war in post-conflict situations. Explosive remnants of war (ERW) are defined as unexploded ordnance (UXO), including cluster bombs, which cause major humanitarian problems and mines other than anti-personnel mines, including anti-vehicle mines, as well as abandoned explosive ordinance. The Protocol requires marking, removal and destruction of explosive remnants of war in territories under a party's control.[313] Negotiations are continuing towards the adoption of yet another protocol, one restricting and regulating the use of anti-vehicle mines (AVM) or mines other than anti-personnel mines[314]

d) Anti-Personnel Land Mines

In the 1970s, political and technical factors triggered interest in restricting land mines. The development of scatterable land mines has enhanced the military effectiveness of landmine warfare. It has led to changes not only in the mines themselves but also in their usage. No longer confined to defensive tactics, the use of land mines has expanded to offensive strategies.[315] For example, scatterable land mines were used in Vietnam and Cambodia as "long-term, land-denial" weapons. The USSR also used this method in Afghanistan, as "offensive weapons of terror and vengeance, often expressly targeted against civilians."[316] Concerns for the security of the civilian population have been heightened by such developments,[317]

312 Doswald-Beck *supra* note 20, at 70, n. 39.

313 David Kaye and Steven A. Solomon, *The Second Review Conference of the 1980 Convention on Certain Conventional Weapons*, 96 AJIL 922, 933 (2002).

314 *Id*. at 931.

315 *Land mines, a Deadly Legacy* 266 (1993).

316 McCall, *Infernal Machines and Hidden Death: International Law and Limits on the Indiscriminate Use of Land Mine Warfare*, 24 Ga. J. Int'l & Comp. L. 229, (1994), at 245.

317 Andrew C.S. Efaw, *The United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law*, 159 Military L.R. 87, at 107

and by the more extensive use of mines by armed groups, both in "conventional non-international armed conflicts" and in terrorist actions.[318]

The basic policy underlying the Land Mines Protocol (1980) is to prohibit "in all circumstances to direct [land mines] either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects."[319] Since both deliberate targeting of civilians and civilian objects and indiscriminate use are prohibited, mines may be directed only at military objectives. All feasible precautions must be taken to protect civilians from the effects of these weapons. The Protocol provides for restrictions on the use of mines (other than remotely delivered mines), booby-traps and other devices in populated areas. It also prohibits the use of such weapons in any city, town, village or urban area in which combat is not taking place or does not appear to be imminent. This prohibition applies unless the mines are placed on, or in the close vicinity of, a military objective belonging to the adverse party or unless measures have been taken to protect the civilian population, such as the posting of warning signs or the posting of sentries or fencing. The use of remotely delivered mines is prohibited unless they are used within an area which is itself a military objective and unless their location can be recorded or a neutralizing mechanism exists to deactivate them, once they no longer serve any military purpose. Advance warning must be given of any delivery of such mines which may affect the civilian population except if circumstances do not permit. The parties to a conflict must record all minefields.

Land Mines Protocol II mainly addresses the protection of civilians and non-combatants.[320] The use of land mines against military personnel is not prohibited, even though certain types of mines could be "of a nature to cause unnecessary suffering."[321] The Protocol, however, prohibits in all circumstances the use of any booby-trap in the form of an apparently harmless portable object which contains explosive material and detonates when it is disturbed. The same applies to booby-traps which are attached to a protective emblem such as the red cross or the red crescent, to the wounded or the dead, to medical equipment or to children's toys.

The Protocol contains few new limitations on the use of land mines. The provisions merely spell out, for land mines, the application of the general rules regulating the means and methods of warfare. Fenrick concluded that "[i]n sum-

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(1999).

318 Carnahan *The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 22 Rev. de Droit Pénal Militaire et de Droit de la Guerre 118 (1983), at 121-122.

319 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). Geneva, 10 October 1980, Article 3(2), 1342 UNTS 168, 19 ILM 1529 (1980).

320 Carnahan, *supra* note 318, at 121-122.

321 McCall *supra* note 316, at 263.

mary, the Protocol on the uses of mines is a modest advance in the law; for the most part, it merely codifies national practice."[322]

The amended CCW Protocol II (1996) introduced a number of welcome changes. The scope of the Protocol was extended to common Article 3 conflicts.[323] All remotely delivered mines had to be equipped with a self-destruct device and a back up self-deactivation feature, "which is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position."[324] Non-remotely delivered mines must be equipped with a self destruct mechanism or be confined to monitored perimeter-marked areas protected by fencing or other means to ensure the exclusion of civilians from the area.[325] The Protocol also addresses issues such as detectability, clearance, transfer, and recording.

The results of the 1996 Review Conference were widely criticized because they fell short of a total prohibition.[326] Support for the 1996 Amended Protocol and support for a complete ban on land mines were not contradictory, however. The restrictions on the use of land mines imposed by the Amended Protocol were the most stringent that could be accepted on the basis of consensus. As Matheson noted, it was better to adopt an instrument acceptable to States opposed to a total ban than to adopt a total ban in which those States would not participate.[327]

Meanwhile, support for a total ban on the use of land mines grew rapidly. In just five years, the initial call in 1992 by six NGOs led to a coalition of about a thousand (the "International Campaign to Ban Land Mines").[328] The efforts were not entirely civilian, for the original founder of the coalition was the Vietnam Veterans of America Foundation. A number of senior retired military officers supported these efforts, asserting that the harmful effects of antipersonnel mines outweigh their military utility.[329] A total ban on land mines had been urged by numerous intergovernmental organizations, including the Council of Europe, the OAS, the OAU and the Arab League. Support for a total ban found strong expression in a string of General Assembly resolutions on land mines.

At the end of the 1996 Review Conference, the Canadian delegation announced that Canada would host a meeting of pro-ban States to develop a strategy towards a global ban on anti-personnel mines. At the closing session of that First

322 Fenrick, *supra* note 265, at 498, 506 (1990); also Matheson, *The Revision of the Mines Protocol*, 91 AJIL 158, 159 (1997).

323 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and other Devices (as amended), Article 1 (2), 35 ILM 1206 (1996).

324 *Id.*, Article 6(3).

325 *Id.*, Article 5(2).

326 Matheson *supra* note 322, at 165.

327 *Id.*, 165-166.

328 Doswald Beck *supra* note 20, at 49.

329 *Id.*, at 11 (at note 47). Referring to the conclusions of an ICRC-mandated military study Anti-Personnel Land Mines: Friend or Foe (1996) and an open letter by 15 retired US generals and brigadiers to President Clinton in April 1996.

Ottawa Conference (1996), the Canadian Foreign Minister appealed to all governments to return to Ottawa before the end of 1997 to sign such a treaty. This initiative was immediately supported by ICRC President, Cornelio Sommaruga, by the UN Secretary-General and by the International Campaign to Ban Land Mines (ICBL).[330] The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction was signed in December 1997 by 121 governments and entered into force on March 1, 1999. By that date, 134 States had signed or acceded to the treaty and 65 had ratified it. The ICRC noted that the treaty "had become law more quickly that any previous multilateral arms-related agreement."[331] However, the fact that the United States, China and Russia have remained outside greatly weakens the Treaty's effectiveness. Although the Ottawa Treaty applies in all circumstances, there is no specific reference to the application of the treaty to all the parties to a conflict. Thus, in terms, the treaty regulates only the behaviour of States.

In the existing framework of international humanitarian law, a ban on the use of land mines can be supported by three different rationales. The first is that the use of land mines is inherently indiscriminate. That argument is weakened by the continued role of Protocol II. The adoption of a Protocol imposing limitations on the use of means of warfare is based on the premise that if the weapon is used according to the rules, its use is permissible, and thus that it can be used in a way consistent with the principle of distinction.

The second rationale is that humanitarian considerations outweigh military necessity. Studies of this question have led to inconclusive results. In preparation for the Review Conference of the CW Convention, the ICRC convened a meeting of military experts in order to study the military use of anti-personnel mines. The majority of the participants were professional military combat engineers. They came to the conclusions that: i) no alternative meets military requirements in the way anti-personnel mines do; ii) anti-personnel mines are the most cost-effective system available to the military; and iii) anti-personnel mines create the worst post-war effects unless they have self-destructed, self-neutralized or been removed. The military experts concluded that "[i]n summary, the military do not regard alternative systems as being viable."[332] Thus, the military efficiency of mine warfare was difficult to contest. The ICRC, nonetheless, sponsored a study on the use of mines in modern warfare. Challenging the conclusions of the military experts, the ICRC study argued that antipersonnel land mines have lost much of their utility in the context of "conventional international conflicts."[333]

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330 Maslen and Herby, *An International Ban on Anti-Personnel Mines: History and Negotiation of the "Ottawa Treaty,"* Int'l Rev. Red Cross No. 325 Dec. (1998), 693, at 694.

331 ICRC and Federation of Red Cross Societies, Joint Communication to the Press, 1 March 1999.

332 ICRC, Symposium of Military Experts on the Military Utility of Anti-Personnel Mines, January 1994, 299 IRRC 170, at 178 (1994).

333 ICRC, Les mines terrestres anti personnel. Des armes indispensables? (1996), at 44-49.

The third rationale is that land mines should be banned because limiting or regulating their use proved unworkable. Doswald-Beck argued that Protocol II to the Convention on Certain Conventional Weapons applicable to land mines, particularly in rules relating to military objectives and to the marking and recording of mines, has presented difficulties that have "led the international community to ban antipersonnel mines altogether as indiscriminate weapons."[334] Drawing on the case of prohibition of chemical weapons after the First Word War, [335] the ICRC was in fact arguing that the harmful practical effects of the use of certain weapons outweighed any consideration of military necessity. [336] It therefore advocated a total ban, not regulation of use.

e) Laser Weapons

As with the ban on land mines, "the call for the ban on blinding laser weapons, although originated by the governments of Sweden and Switzerland and primarily pursued by the International Committee of the Red Cross, was boosted by the support it received from various human rights organizations."[337] The Protocol, which bans laser weapons designed to disable combatants by blindness, is designed essentially for the protection of combatants, although the wide dissemination of such weapons would have endangered civilians as well.[338] Perhaps because of the abhorrence of causing blindness, States, in this case, have been less reluctant to limit for the sake of combatants their choice of means of warfare.

The ICRC draft proposal aimed at banning blinding as a method of warfare rather than just as a type of weapon.[339] The final protocol, however, aligned with other conventional weapons conventions that ban specific types of weapon. The protocol is based on the principle of the prohibition of unnecessary suffering. But it expands the criteria traditionally used to determine if a weapon causes unnecessary suffering by taking into account the long-term impact of blind veterans on their home societies.[340] Although the U.S. Army Judge Advocate General had issued an opinion upholding the legality of such weapons assessed by

334 Doswald-Beck *supra* note 20, at 50.

335 ICRC, Report of the International Committee of the Red Cross 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, 299 IRRC 131 (1994).

336 *Id.*, at 132.

337 Doswald-Beck *supra* note 20 at 48-49.

338 ICRC Campaign Brochure, Blinding Weapons, Gas, Lasers (undated).

339 Louise Doswald-Beck, *New Protocol on Blinding Laser Weapons*, Int'l Rev. Red Cross, No. 312, at 272, 279 (1996).

340 Burrus Carnahan and Marjorie Robertson, *The Protocol on 'Blinding Laser Weapons': A New Direction for International Humanitarian Law*, 90 AJIL 484, at 484-485 (1996).

the traditional criterion of unnecessary suffering,[341] the ban may have succeeded because several governments did not consider blinding laser weapons militarily necessary.[342] Moreover, the ban was adopted before the weapon's actual use on the battlefield. It has been sugested that the Protocol gives effect to Article 36 of Additional Protocol I[343] (which provides that in the study, development and adoption of a new weapon, means or methods of warfare, a party is under an obligation to determine whether its employment is prohibited by the Protocol or other applicable rules of international law).

H. 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 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

341 Memorandum of Law on the Use of Lasers as Antipersonnel Weapons (1988), in Nash, Cumulative Digest of United States Practice in International Law, ICRC Study, US Report, Annex 3-5.

342 Carnahan and Robertson, *supra* note 340, at 487.

343 Doswald-Beck, *supra* note 339, at 296.

could legitimately be considered an 'effective contribution to military action.'"[344] 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."[345] 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 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 world-wide 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 September 11, 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.[346]

International humanitarian law has been based on a fundamental neutrality – color 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, 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

344 George Aldrich, *Yugoslavia's Television Studios as Military Objectives,* 1 Int'l L.F. 149-50 (1999)

345 *Id.* at 150

346 Meron, *supra* note 5, at 38-40.

taken for granted. Indeed, even in civil wars, the model was a government fighting against a rebel 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 philosopher Michael Walzer has written that the very definition of "terrorism is the deliberate violation" of those norms:

> for ordinary citizens are killed and no defense is offered ... in terms of their individual activities ... they are simply killed to deliver a message of fear to others like themselves.[347]

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. In this context, treatment of detainees accused of terrorism (Abu Ghraib, Guantanamo) has given rise to serious concerns. Interrogations aimed at obtaining information must be subject to humane rules and the prohibition of torture must be strictly applied.[348] There must be a modicum of due process and possibility of review of detention. Detention without trial and conviction cannot continue for ever: there must be a certain finality to detention and deprivation of freedom.

Atrocities are often committed by nongovernmental actors, whose rights and obligations have not yet been defined by international law. The leaders of nongovernmental 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. Egregious acts such as beheading of captives and deliberate targeting of civilians by terrorists and insurgents are shocking the conscience of humanity.

The allied bombing campaign in Afghanistan (2001-02) 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,

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

348 See Eric Schmitt, *Army, in Manual, Limiting Tactics in Interrogation*, NYT, Apr. 28, 2005.

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.[349] In any event, there is no reason why Article 5 of Geneva Convention III should not be complied with. That Article provides 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", in the language of Additional Protocol I to the Geneva Conventions or taking an "active part in hostilities" in the language of common Article 3, 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 defense committees, and of computer networks attacks. Whether such activities bring about a loss of civilian immunity from attack, the duration of such a loss of immunity, the legal regime applicable upon capture, 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. Since 2003, the ICRC has been convening meetings of experts to address these questions and the future of the notion of direct participation and the need for clarification.

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 cooperation in criminal law enforcement appears to have been somewhat 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-defense in the UN Charter, of war itself, and of the legitimate parties to war[350]

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, honor, mercy and chivalry, must be vigorously pursued. Values of

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

350 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).

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.[351] The creation of a culture of values is thus indispensable. This job cannot be left to lawyers alone.

351 Nicholas D. Kristof, *A Toast to Moral Clarity*, NYT Dec. 27, 2002.

Chapter 2: Criminalization of Violations of International Humanitarian Law

A. Introduction

In this chapter, I shall discuss the influence of human rights and humanitarian norms 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 offenses of international concern and, in some 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 International Law Commission, veterans of the Nuremberg and Tokyo proceedings, individuals such as Rafael Lemkin (who advocated the adoption of the Genocide Convention) and a handful of academics (most notably M. Cherif Bassiouni), among others, helped keep alive the heritage of Nuremberg and the promise of future prosecutions of serious violators of international humanitarian law.

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 superpower cooperation 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.[1] Several African countries, (Uganda, the Central African Republic and the Democratic Republic of Congo),

1 Developments in the Law – International Criminal Law, 114 Harvard L. Rev. 1943, 1952-1954 (2001).

parties to the Rome Statute, referred – under Article 13(a) to the Prosecutor of International Criminal Court (ICC) cases of atrocities committed on their territories, and the Security Council, acting under Chapter VII of the Charter and Article 12(3) of the ICC Statute, referred to it the case of Darfur.

A number of prosecutions linked with World War II events took place (Australia, Canada, UK, Latvia, Italy). Prosecutions of persons accused of more recent violations of international humanitarian law took place in the former Yugoslavia, in Rwanda and in Ethiopia, and other countries. 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.[2] 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 courts 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.[3] Governments have been determined to deal 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) com-

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2 *See Current Developments*, 48 ICLQ 937, 937-65 (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.

3 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 & Allan Rosas, *A Declaration of Minimum Humanitarian Standards*, 85 Am. J. Int'l L. 375 (1991); Asbjørn Eide, Allan Rosas & Meron, *Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards*, 89 Am. J. Int'l L. 215 (1995).

For descriptions of non-international armed conflicts, see common Article 3 of the Geneva Conventions, *infra* note 3, 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 Dec. 12, 1977 1125 U.N.T.S. 609, *reprinted in* 16 ILM 1442 [hereinafter Protocol II].

mon to the Geneva Conventions for the Protection of Victims of War,[4] 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.

International lawmaking and various diplomatic conferences – for example, the conference that adopted the Additional Protocols to the Geneva Conventions in 1977 – have, on the whole, been unsympathetic toward extending the protective rules applicable to international wars to civil wars – an attitude that has in the past dampened prospects for redress through orderly treaty making. Because conferences often make decisions by consensus and try to fashion generally acceptable texts, even a few recalcitrant governments may prevent the adoption of more enlightened provisions.

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. These and other recent developments warrant a fresh examination of the present state and future direction of the criminal aspects of international humanitarian law especially those applicable to

4 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 U.S.T. 3114, 75 UNT.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. *See also* Hague Convention on the Protection of Cultural Property, May 14, 1954, art. 19(4), 249 U.N.T.S. 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 Dec.12, 1977, art. 4,1125 U.N.T.S. 3, *reprinted in* 16 ILM 1391 (1977) [hereinafter Protocol I].

non-international armed conflicts, conflicts that occur with far greater frequency than international armed conflicts.

The Security Council's Statutes for the Criminal Tribunals for the former Yugoslavia and Rwanda have contributed significantly to the development of international humanitarian law and its extension to non-international armed conflicts,[5] 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.[6] 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[7] 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.[8] The adoption of the ICC Statute is a major step in this direction.[9]

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5 *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).

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

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

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

9 *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); M. Cherif Bassiouni, The Statute of the International Criminal Court (1998); The Rome Statute of the International Criminal Court (Mauro Politi & Giuseppe Nessi eds. 2001); Reflections on the International Criminal Court (Herman A.M. von Hebel, Johan G. Lammers & Jolien Schukking eds. 1998); The International Criminal Court: Recommendations on Policy and Practice (Thordis Ingadottir eds. 2003).

The enforcement of international humanitarian law cannot, however, depend on international tribunals alone. National systems of justice have a vital, indeed, the principal, role to play here. To be sure, the record of national prosecutions of violators of such international norms as the grave breaches of the Geneva Conventions is disappointing, even when the obligation to prosecute or extradite violators is unequivocal. A lack of resources, evidence and, above all, political will has stood in the way. International criminal jurisdiction addressed in isolation, will not eliminate abuses. Greater reliance on international humanitarian law by national prosecutors and judges is necessary.

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.[10] The offense 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.[11]

Although departing from the law of war tradition of extending protection only to people who belong to the enemy, the Nuremberg Charter thus maintained the law of war imprint by limiting the crimes to wartime crimes.

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10 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].

11 82 U.N.T.S. 280 (emphasis added).

"Principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" were affirmed by the General Assembly.[12] 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,[13] 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."[14] 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...".[15] The Apartheid Convention (1973), which declared apartheid a crime against humanity, does not contain any reference to an armed conflict.[16] 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 character."[17] 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

12 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).

13 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, r*eprinted in* 1 Ferencz 488; 1 Friedman 908, Article II.

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

15 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, 754 UNTS 73, Article 1.

16 International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243, Article I.

17 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), Article 5 [hereinafter ICTY or Yugoslavia Statute].

and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character."[18] 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.'"[19] 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, as the Prosecutor points out, 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.[20]

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.

The jurisprudence of the ICTY made an important contribution to the clarification of the elements of crimes against humanity under the ICTY Statute. In its judgement in the case of the *Prosecutor v. Kunarac* (June 12, 2002), the Appeals Chamber laid down the principal elements: The civilian population which is subjected to the attack must be the primary rather than an incidental target of the attack. The requirement that the attack must be widespread or systematic comes in the alternative, and is disjunctive rather than cumulative. "Widespread" refers to the large-scale nature of the attack, while "systematic" refers to the organized nature of the acts of violence. In contrast to the attack, the individual acts of the accused could be single or limited in number. Neither the attack nor the acts of the accused need to be a part of a policy or plan. The required nexus between the acts of the accused and the attack consists of two elements: the commission of an act which by its nature or consequences is a part of the attack, and knowledge on the part of the accused that there is an attack against the civilian population and that his act is part thereof. In terms of the required *mens rea*, the accused must have had the intent to commit the offense with which he is charged, known that

18 Report of the Secretary General, *supra* note 10, para. 48.

19 *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.

20 *Prosecutor v. Duško Tadić, Decision on the Defense 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. L.J. 239, 266-67 (2002); International Crimes and the *Ad Hoc* Tribunals (2005).

there is an attack on the civilian population and that his acts comprise part of that attack. However, the motives of the accused are irrelevant, and a crime against humanity can be committed for purely personal reasons.

These elements of crimes against humanity were reconfirmed and elaborated upon in the judgement of the Appeals Chamber in the case of the Prosecutor against *Kordić and Čerkez* (17 December 2004). In determining the scope of the civilian population, the Appeals Chamber considered that Article 50 of Additional Protocol I contained a definition of civilians and the civilian population, which may largely be viewed as reflecting customary law and thus relevant for crimes against humanity.

The Statute of the ICC confirms that no nexus with an armed conflict is required.[21] 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."[22] 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 offenses 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 80's 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.[23] The Statute defines several of those crimes: extermination, enslavement, deportation or

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

22 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), Article 7.

23 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

forcible transfer of population, torture, forced pregnancy, persecution, apartheid and enforced disappearances of persons.[24] In contrast to the ICTR Statute and to the early interpretation of the ICTY Statute by an ICTY Trial Chamber,[25] the ICC Statute does not require a discriminatory motive, except for the crime of persecution.[26] 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.[27]

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."[28]

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."[29] 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 systematic nature as well as criminal intent (*mens rea)*. There is no question, however, that the offenses 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

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of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

24 *Id.*, Article 7(2).

25 *See* Meron, *War Crimes Law Comes of Age*, *in* Meron, War Crimes Law Comes Age 296, 299 n.16 (1998).

26 Robinson, *supra note* 21, at 46-47.

27 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, 15 July 1999, at para. 305.

28 *Supra*, note 22, Article 7(1)(h).

29 Robinson, *supra* note 21, at 53.

human rights violations supports the view that the former need not be linked with war.[30]

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" (Article 3, chapeau).[31] 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.[32]

Clearly, crimes against humanity overlap to a considerable extent with the crime of genocide.[33] 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 Statutes' 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 Council adopted a Statute for the International Tribunal for Rwanda in 1994.[34] 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,[35] in the view of some commentators, treats the ensemble of conflicts in the former Yugoslavia as international.[36] For others, it leaves the question of the characterization of each

30 For further discussion, see Meron, *supra* note 5, at 85.

31 Rwanda Statute, UN Doc. S/RES/995, art. 3.

32 *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).

33 See generally William Schabas, Genocide in International Law (2000); Cherif Bassiounni, Crimes Against Humanity in International Criminal Law (1999).

34 Rwanda Statute, *supra* note 31.

35 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. U.N. Doc. A/49/342-S/1994/1007, para. 19 (1994).

36 O'Brien, *supra* note 5, at 647.

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 offenses. First, like the ICTY Statute, the ICTR Statute grants the Tribunal the power to prosecute persons who have committed genocide.[37] 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,[38] was affirmed long ago by the International Court of Justice.[39] 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.[40]

Apart from Article 2, on grave breaches of the Geneva Conventions, which addresses international armed conflicts, the ICTY's 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.[41] The ICTY has been applying Article 3 of its Statute both to international and non-international armed conflicts. The jurisdiction of the ICTR (Article 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

37 Rwanda Statute, *supra* note 31, art. 2.

38 Genocide Convention, *supra* note 14.

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

40 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 Dec. 12, 1977, 1125 U.N.T.S. 609, *reprinted in* 16 ILM at 1442 [hereinafter Protocol II].

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

measures (Article 15 of the ICCPR) is a fundamental principle of criminal justice that must be observed in all circumstances by national and international tribunals.[42] 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 behavior 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.

The egregious acts listed in Article 4 of the Rwanda Statute, such as murder, the taking of hostages, pillage, degrading treatment and rape, constitute offenses 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 offenses 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.[43] It follows, therefore, that the principal requirements of Article 15(1) of the International Covenant on Civil and Political Rights[44] 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.

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42 Theodor Meron, *supra* note 39 at 96 (1989).

43 *See* Meron, *supra* note 7, at 127. A similar provision is contained in Article 24(1) of the Yugoslavia Statute.

44 Opened for signature Dec. 16, 1966, 999 U.N.T.S. 171.

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."[45] The fact that offenses *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."[46] 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 U.S. 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."[47] 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 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 offenses.

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

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

46 Marc J. Bossuyt, Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights 331-32 (1987).

47 *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).

of individuals accused of violating the rules of land warfare stated in the Convention:

> [Y]et the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders .... 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.[48]

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."[49]

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."[50] 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.[51]

In the *RuSHA* case, the Tribunal added that the acts of which the defendants were accused were in violation "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."[52] 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 offenses 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 author-

48 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, 1 Official Documents Trial Documents, at 220-21 (1947).

49 *Id.* at 253.

50 *11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, at 534 (1948).

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

52 4 *id.* at 597, 618.

ity 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 offenses 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 offenses 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 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 judgement of March 24, 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:

> 126. There is nothing in that principle that prohibits the interpretation of the law through decisions of a court and the reliance on those decisions in subsequent cases in appropriate circumstances. The principle of legality is reflected in Article 15 of the ICCPR. What this principle requires is that a person may only be found guilty of a crime in respect of acts which constituted a violation of the law at the time of their commission. In the instant case, the acts in respect of which the accused was indicted, all constituted crimes under international law at the time of their commission. Inhuman treatment and wilfully causing grave suffering or serious injury to body or health under Article 2 of the Statute were violations of the grave breaches provisions

> of the Geneva Conventions, and outrages against personal dignity under Article 3 of the Statute constituted a violation of the laws or customs of war, at the time of the commission of the crimes.
> 127. There is, therefore, no breach of the principle of *nullum crimen sine lege*. That principle 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.[53]

In the *Čelebići* case, the Appeals Chamber confirmed the *Aleksovski* decision:

> 160. Whereas, as a matter of strict treaty law, provision is made only for the prosecution of grave breaches committed within the context of an international conflict, the Appeals Chamber in *Tadić* found that as a matter of customary law, breaches of international humanitarian law committed in internal conflicts, including violations of common Article 3, could also attract individual criminal responsibility.
> ….
> 173. The Appeals Chamber is similarly unconvinced by the appellants' argument that such an interpretation of common Article 3 violates the principle of legality. The scope of this principle was discussed in the *Aleksovski* Appeal Judgement, which held that the principle of *nullem crimen sine lege* does not prevent a court from interpreting and clarifying the elements of a particular crime. It is universally acknowledged that the acts enumerated in common Article 3 are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15(2) of the ICCPR, "criminal according to the general principles of law recognised by civilised nations." [54]

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 offenses, even offenses 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:

> 196. The principle of *nullum crimen sine lege* "does not prevent a court from interpreting and clarifying the elements of a particular crime". Nor does it preclude the progressive development of the law by the court. But under 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 prosecut-

53 Appeals Chamber Judgement, IT-95-14/1-A, 24 March 2000, paras. 126-27.

54 IT-96-21-A, 20 February 2001, paras. 160, 173-74.

> able and punishable, or by criminalizing an act which had not until the present time been regarded as criminal.
> 197. 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 … .
> 198. Accordingly, the Tribunal's Statute was not intended to create new criminal offences. Instead, as stated by the Appeals Chamber, in establishing the Tribunal, the Security Council "simply created an international mechanism for the prosecution of crimes which were already the subject of individual criminal responsibility". 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. Each Trial Chamber is thus obliged to ensure that the law which it applies to a given criminal offence is indeed customary. The Trial Chamber must further be satisfied that this offence was defined with sufficient clarity for it to have been foreseeable and accessible, taking into account the specificity of customary international law.
> 199. The Trial Chamber must be satisfied that a given act is criminal under customary international law, because, for instance, a vast number of national jurisdictions have criminalized it or a treaty provision which provides for its criminal punishment has come to represent customary international law. On the other hand, as stated by the *Delalić* Appeals Chamber, "a finding of individual criminal responsibility is not barred by the absence of treaty provision on punishment of breaches". The Trial Chamber may also, as suggested by the Appeals Chamber, be satisfied that, in the language of the ICCPR, those acts were "criminal according to the general principles of law recognized by the community of nations". For criminal liability to attach, it is not sufficient, however, merely to establish that the act in question was *illegal* under international law, in the sense of being liable to engage the responsibility of a State which breaches that prohibition , nor is it enough to establish that the act in question was a crime under the domestic law of the person who committed the act.[55]

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:

> 203. In the absence of any clear indication in the practice of States as to what the definition of the offence of "violence to life and person" identified in the Statute may be

55 Trial Chamber Judgement, IT-98-32-T, 29 November 2002, paras. 196-99.

> under customary law, the Trial Chamber is not satisfied that such an offence giving rise to individual criminal responsibility exists under that body of law[56]

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 customary international law at the time it was allegedly committed. The scope of the Tribunal's jurisdiction *ratione materiae* may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed.[57]

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.[58]

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 com-

56 *Id*. at paras 203-204.

57 *Prosecutor v. Milan Milutonović*, Appeals Chamber, Case No. IT-99-37-AR72, para 9.

58 *Id*., at paras. 37-38.

mand 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 command 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 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 legal 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 ... .[59]

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 parts 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.[60]

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 customary law. However, Article 4 of the Protocol, on

59 U.N. Doc. S/1995/134, para. 12 (1995).

60 Case No. ICTR-96-4-T, Judgement of 2 September 1998, para. 608.

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.[61] 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 offenses listed constituted crimes under the law of Rwanda and the violators were thus subject to prosecution.[62] Other ICTR cases have usually followed the *Akayesu* approach.[63]

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.[64] 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."[65] In its final report, the United Nations War Crimes Commission (for Yugoslavia) was equally categorical.[66]

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61 *Id*. at para. 610.

62 Case No. ICTR-95-1-T, Judgement of 21 May, 1999, para. 157.

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

64 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* note 4, see Articles 129-30.

65 Unpublished comments (Mar. 25, 1993).

66 The U.N. 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 internal 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.
>
> ... .

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."[67] 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,"[68] or a normative floor, for international conflicts. With amazing speed, international conceptions of common Article 3 have changed and a perception of criminality of violations of international humanitarian law in non-international armed conflicts has emerged.

The U.S. Joint Chiefs of Staff proposed defining "other inhumane acts" referred to in Article 5 of the Yugoslavia Statute (crimes against humanity) as encompassing various offenses stated in common Article 3 of the Geneva Conventions, which "are part of customary international law and, therefore, [are] consistent with the principle of *nullum crimen sine lege*."[69] The International Law Section of the American Bar Association took a similar position.[70]

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

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> 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.
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> U.N. Doc. S/1994/674, annex, paras. 42, 52, 54 (1994).

67 U.N. Doc. S/PV.3217, at 15 (May 25, 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 Nicolic (Nov. 7, 1994) states at paragraph 16.2 that Nicolic "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* note 5, at 646.

68 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. U.S.*), Merits, 1986 ICJ Rep. 14, 114 (June 27).

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

70 *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).

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.[71] 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,[72] and the principle of individual criminal responsibility in international law,[73] were applicable.

In contrast to the ICTY Statute, on which there is abundant contemporaneous documentation, the ICTR Statute is lacking in documented legislative history. However, one thing is clear. 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. For Rwanda, at least, one of the most important weaknesses of international humanitarian law was remedied through the Statute adopted by the Security Council under Chapter VII.

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 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."[74] Because Rwanda is a party to both the Geneva Conventions and the Additional Protocols, and because these were applicable as the law of Rwanda, the customary law character of common Article 3, which has been explicitly recognized by the International Court of Justice,[75] and of Protocol II was not an issue. The question whether these treaty provisions, which prohibit certain enumerated acts, establish the individual criminal responsibility of the perpetrators, that is, whether the proscriptions applicable to non-international armed conflicts are criminal in character was categorically answered in the Stat-

71 *See* Rene Degni-Sequi, Report on the Situation of Human Rights in Rwanda, U.N. Doc. E/CN.4/1995/7, para. 54 (1994).

72 *See* U.N. Doc. S/1994/1125, annex, paras. 90-93 (1994). Rwanda has been a party to Protocol II since 1984.

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

74 Report of the Secretary-General, *supra* note 10, para. 34.

75 *See* Military and Paramilitary Activities in and against Nicaragua, *supra* note 68, 1986 ICJ Rep. 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.

ute and the jurisprudence of the Tribunals and, with regard to several provisions of Protocol II, in the Treaty of Rome.

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.[76] Treaties typically obligate contracting States to enforce their norms and punish those who commit listed offenses.[77] 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 offense.

Treating violations of common Article 3 as a basis for individual criminal responsibility is affirmed by some national military manuals or laws. The U.S. Department of the Army's Field Manual, for example, lists common Article 3[78] 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."[79] The U.S. 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 Article 3 for war crimes.[80] The recent German Military Manual actually describes some violations of common Article 3 and Protocol II as "grave breaches of international humanitarian law."[81] On April 27, 2001 the Swiss Military Court of Cassation confirmed the conviction

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

77 *See* Yoram Dinstein, *International Criminal Law*, 20 Isr. L. Rev. 206, 221-22 (1985).

78 U.S. Dep't of the Army, The Law of Land Warfare, para. 11 (Field Manual No. 27-10, 1956).

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

80 Regarding the exercise of jurisdiction over war crimes, see U.S. Dep't of the Army, *supra* note 78, para. 505(d). Regarding the law to be applied, see *id.*, para. 505(e). *See also* 10 U.S.C. § 802(a)(9)-(10) (1988) (listing the following persons, among others, are subject to the U.C.M.J.: 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 U.S. authority under international law to prosecute violators is, in my view, clear, the U.S. 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 offenses occurred in civil wars in other countries.

81 Federal Republic of Germany, Federal Ministry of Defense, Humanitarian Law in Armed Conflicts Manual, para. 1209 (1992).

of a Rwandan national under Art. 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[82] and the 1929 (Geneva) Convention Relative to the Treatment of Prisoners of War,[83] 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 offenses, 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.[84] The extent to which the prohibition is addressed to individuals, whether the prohibition is unequivocal in character, the gravity 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."[85] 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."[86] 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.

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82 Oct. 18, 1907, 36 Stat. 2277, 118 L.N.T.S. 343 [hereinafter Hague Convention No. IV].

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

84 *See generally* Nguyen Quoc Dinh, Droit International Public 621 (Patrick Daillier & Alain Pellet eds., 5th ed. 1994); Theodor Meron, War Crimes Law Comes of Age 239-40 (1998).

85 *United States v. von Leeb*, 11 Trials of War Criminal, *supra* note 50, at 462, 537, 539-40 (1948) ("The High Command Case").

86 Trial of the Major War Criminals, *supra* note 48, at 223.

Typically, norms of international law have been addressed to States. They have engaged, in case of violation, the international responsibility of the State.[87] 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. International conventions[88] 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,[89] general principles of law recognized by civilized nations, and general principles of penal law.[90] 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

87 *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 Y.B. Int'l L. Comm'n, pt. 2, at 73, 95-96, U.N. Doc. A/CN.4/SER.A/1976/Add. 1 (pt. 2).

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

89 *See* Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 Brit. Y.B. Int'l L. 58, 65 (1944); s*ee also* Lord Wright, *War Crimes under International Law*, 62 L.Q. Rev. 40, 42 (1946). 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* note 82, Preamble.

90 Draper, *supra* note 76, at 18.

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.[91] 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 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.[92] 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[93] (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" (Article 29).[94]

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.

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 provi-

91 United Nations War Crimes Commission, *supra* note 45, at 34-35.

92 Treaty of Peace with Germany, June 28, 1919, 2 Bevans 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 Am. J. Int'l L. 95, 112-15 (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 offenses "against the laws and customs of war or the laws of humanity." 14 Am. J. Int'l L. at 117.

93 *Supra* note 83.

94 118 L.N.T.S. 303.

sions 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 P.O.W. Convention.[95] 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 August 12, 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.[96]

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.[97] I disagree. Although international trials were not contemplated by the Conventions, which envisaged cooperative 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

95 *See* Meron, *supra* note 39, at 37-41.

96 As happened in the case of rape, see Meron, *supra* note 6, at 426-47 (concerning the readiness of the International Committee of the Red Cross and the U.S. Government to regard rape as a grave breach or war crime). It may be noted that the indictments presented by the Prosecutor against Meakić and others (Indictment No. 2, paras. 22.8-22.10 (Feb. 13, 1995)), and against Tadić and others (Indictment No. 3, paras. 4.2-4.4 (Feb. 13, 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, Judgement of 12 June 2002, at paras. 125-33, 179-85.

97 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).

the Geneva Conventions as among States parties,[98] 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.

The victorious powers in World War II had the competence under both international and domestic law to prosecute Nazi war criminals. As occupying States, they exercised territorial power over the defeated Germany. They could also establish the International Military Tribunal to act jointly on their behalf. Although the Geneva Conventions system of grave breaches contemplates national enforcement through national law, I see no difficulty in having these offenses 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 offenses 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 State to apply its laws to certain offenses 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. In my view, universality of jurisdiction does not depend on the nature of the conflict, *i.e.*, whether the conflict is international or non-international in character, but on the nature and the gravity of the offense. The critical question is whether international customary law, or widely ratified conventions, recognize a breach of the law as a serious violation of international law triggering the right of third states to prosecute violations. Given the inadequacy of international criminal tribunals, universality of jurisdiction constitutes a useful element of mechanisms of enforcement. The right of states to prosecute crimes *jure gentium* can be seen as an analogue, *mutatis mutandis*, of the prerogative of all states to invoke obligations *erga omnes* against states that violate fundamental rights of the human person.

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98 Meron, *Prisoners of War, Civilians and Diplomats in the Gulf Crisis*, 85 Am. J. Int'l L. 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 & 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."

Of course, not all things prohibited by international law constitute offenses involving the individual criminal responsibility of individuals and not all offenses involving such individual responsibility are subject to universality of jurisdiction. As Rosalyn Higgins has observed, few are the offenses 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.[99] 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."[100] The Court of Appeals built on the previous *Eichmann* jurisprudence[101] and on section 404 of the American Law Institute's Restatement of Foreign Relations Law of the United States.[102]

In a more recent case, *United States v. Ramzi Ahmed Yousef*,[103] 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 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[.]"[104] The universality principle permits a State, without contacts to the State in which the crime occurred[105] to prosecute a few offenses recognized as offenses 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 and is thus not subject to universal jurisdiction.[106]

In recent years, treaties creating universal jurisdiction have been increasingly concluded in matters such as the safety of civil aviation and maritime navigation,

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99 Rosalyn Higgins, Problems and Process 58 (1994).

100 *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 457 U.S. 1016 (1986).

101 *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).

102 Restatement (Third) of the Foreign Relations Law of the United States §. 404 (1987) [hereinafter Restatement].

103 327 F. 3d 56 (2nd Cir. 2003).

104 *Id.*, at 105.

105 *Id.*, at 103.

106 *Id.*, at 104-06.

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,[107] 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.[108] Other States might be able to use their general legislation in the criminal field for such purpose.

Under the impact of the ICTY and the ICTR,, investigations and prosecutions have taken place in Germany, the Netherlands, Sweden, Belgium and Switzerland for acts committed in the former Yugoslavia, and in Denmark and Belgium for acts committed in Rwanda. Mandatory prosecution (or extradition) 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),[109] 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

107 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.

108 *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 (Feb. 10, 1999), Arts. 1(1) and 7, reprinted in 38 ILM 918 (1999).

109 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, Aug.5, 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* note 108. 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.

Ariel Sharon. On June 27, 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 assises on the basis of the 1993 law. On June 8, 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 assises was rejected by the Court of Cassation on January 9, 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 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."[110] 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 individual 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 April 17, 2002, in effect narrowed the

110 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, par. 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 Judgement, see, Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, 13 EJIL 877 (2002); Antonio Cassese, *supra* note 109, at 853 (2002).

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.[111] However, the highest court, the Cour de Cassation, decided on February 12, 2003, that Sharon could not be prosecuted only as long as he enjoyed his Prime-Ministerial immunity. The court did not block the prosecution of a co-defendant, a former Israeli Army chief-of-staff.[112]

A new law adopted on August 15, 2003[113] 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. On 25 March 2005, the Cour d'arbitrage of Belgium (which performs some of the functions of a constitutional court) rescinded this law in part.[114] It found that the discretionary control exercised by the Federal Prosecutor – who is hierarchically subject to the executive branch – was not a sufficient guarantee for potential victims. The Cour d'Arbitrage stated that a review of the Federal Prosecutor's decision not to prosecute must be allowed before an independent and impartial judge, except when the Federal Prosecutor decides not to prosecute a case that falls under the jurisdiction of another court, either foreign or international. The reason for this exception is to avoid allowing the victims to pursue a complaint before a judge for the mere purpose of artificially sustaining a political debate involving foreign officials. Thus, the law requires a clear personal or territorial connection to Belgium and strict control by the Prosecutor, as well as, in certain cases by a judge. 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

111 *Belgian Court rejects suit against Sharon"*, International Herald Tribune, 27 June, 2002.

112 Cour de Cassation, Section Française, 2E Chambre; NYT Feb. 13, 2003.

113 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 procedure pénale, C-2003/21182, Moniteur belge, 7 août p. 40511.

114 Cour d'arbitrage, Arrêt no. 62/2005, 23 March 2005.

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."[115] 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 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."[116]

Following the report presented by rapporteur Christian Tomuschat and his commission, the Institute of International Law adopted in its Krakow session (August 26, 2005), an important resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes. Article 1 of the Resolution considers universal jurisdiction in criminal matters as an additional ground of jurisdiction, allowing a state to prosecute alleged offenders irrespective of the place of commission of the crime and regardless of any link of active or passive nationality or other grounds of jurisdiction recognized by international law. Article 2 states that universal jurisdiction is primarily based on customary law but it can also be established under a multilateral treaty in the relations between the contracting parties, in particular by virtue of clauses which provide that the state in whose territory an alleged offender is found shall either extradite or try that person. Under Article 3 of the Resolution, universal jurisdiction may be exercised over international crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the Geneva Conventions or other serious violations of international humanitarian law committed in international or non-international armed conflicts. Apart from investigations and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting state or on board a vessel flying its flag or an aircraft registered under its laws. In my view, this requirement has the advantage of discouraging abusive resort to universality of jurisdiction and *in absentia* trials.

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

115 Princeton Principles on Universal Jurisdiction, Principle 1, available at <http://www.princeton.edu/~lapa/unive_jur.pdf>.

116 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.

the principle of universal jurisdiction apply to violations of international humanitarian law committed in internal armed conflicts? The Krakow resolution on the Institute of International Law, above, answers this question in the affirmative. 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[117] – although such trials were not required by international law, and (outside of the Nuremberg Charter) the offenses 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.[118] Even States committed in principle to territorial criminal jurisdiction may and do provide by statute for prosecutions regarding particular categories of offenses committed outside their territories. Often the acts concerned are recognized as criminal by international treaties, and less frequently by customary law, and sometimes by both. Obviously, universal jurisdiction over international offenses 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."[119] 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.

117 *See* 11 Reports of Trials of War Criminals, supra note 50, at 28-48 (1949).

118 *See* Restatement, *supra* note 102, § 402. *See also* Richard R. Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, 28 Brit. Y.B. Int'l L. 382, 391 (1951). The U.S. Constitution grants Congress the power to define and punish offenses against the law of nations and permits it to make acts committed abroad crimes under U.S. law, Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 Am. J. Int'l L. 880, 881-82 (1989).

119 Princeton Principles on Universal Jurisdiction, Principle 3, available at <http://www.princeton.edu/~lapa/unive_jur.pdf>.

Many commentators agree that crimes against humanity are subject to universal jurisdiction.[120] And it is increasingly recognized that the crime of genocide[121] (despite the absence of a provision on universal jurisdiction in the Genocide Convention) may also be prosecuted by any State.[122] Is this also true, however, of violations of common Article 3 and Additional Protocol II to the Geneva Conventions (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

120 Dinstein, *supra* note 77, at 211-12; Baxter, *supra* note 118; 1 Oppenheim's International Law 998 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537, 2555, 2593-94 & n. 91 (1991); M. Cherif Bassiouni, Crimes Against Humanity in International Law 510-27 (1992). *See also* Judgment of Oct. 6, 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. U.N. Doc. A/AC.244/1/Add. 2, para. 23 (1995) [hereinafter U.S. Comments].

121 Restatement, *supra* note 102, § 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. Y.B. 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 & n. 2 (1989). In his separate opinion in the Genocide case before the International Court of Justice, ad hoc Judge 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, 1993 ICJ Rep. 325, 443, para. 110 (Order of Sept. 13).

122 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.

of other breaches."[123] 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,[124] 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.[125] The command of Article 1 that all the contracting parties must respect and ensure respect[126] 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 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 offenses. 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 offenses 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 offenses 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 offenses that are recognized by the community of nations as of universal concern, and as subject to universal condemnation.[127] 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

123 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).

124 *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits*, 1986 ICJ Rep. 14 (June 27).

125 *Id.* at 114.

126 On Article 1, see Luigi Condorelli & Laurence Boisson de Chazournes, *Quelques remarques a 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* note 4, 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.

127 *See, e.g.*, Restatement, *supra* note 102, § 404.

breaches."[128] Röling argued, however, that the Geneva Conventions apply only between belligerents,[129] 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.

I would not like to suggest that all violations of the Geneva Conventions must thus be treated as offenses. 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. For example, would a third State have the right to prosecute a foreign army officer for failure to comply with Article 94 of the Third Geneva Convention, which requires notification on recapture of an escaped prisoner of war? Or with Article 96, which requires that a record of disciplinary punishments be kept by the camp commander? 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

128 B.V.A. Röling, *supra* note 47, at 342. *Accord* Howard S. Levie, Terrorism in War: The Law of War Crimes 192-93 (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 & 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* note 76, at 45.

129 *See* Röling, *supra* note 47, at 359.

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 protests by the national State of the accused are rejected, would that State prevail in an international action against the prosecuting State alleging violation of accepted jurisdictional principles delineating the competence of States to punish acts committed outside their territory? Would the prosecuting State incur international responsibility for the prosecution? If the activity at the core of the prosecution is a significant international offense clearly giving rise to international concern, such as murder in violation of common Article 3, the prosecution would be legitimate, provided the accused is present in the territory of the prosecuting third State, and provided the person concerned does not benefit from recognized immunity under international law, as in the already discussed *Yerodia* case before the ICJ. There has been some support for applying the universality of jurisdiction doctrine not only to criminal prosecutions but also to civil claims.[130]

In situations not clearly regulated by treaties, difficulties could 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 offenses in internal conflicts, the likelihood that two States will compete *bona fide* for the exercise of criminal jurisdiction is quite remote.[131] 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."[132] Violations of the Protocol that are not defined as grave breaches have consequences similar to those resulting

130 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).

131 On the traditional scope of universal jurisdiction, see Kenneth Randall, *Universal Jurisdiction Under International Law,* 66 The TEX.L.Rev.785, 788 (1988).

132 Protocol I, *supra* note 4, art. 90(2)(c)(i).

from violations other than grave breaches of the Geneva Conventions and may, in some cases, be prosecuted as war crimes by third States.[133]

G. War Crimes and Universal Jurisdiction

Those concerned about the recognition of the violations of common Article 3 and Protocol II as international offenses should remember that, until fairly recently, questions were raised even about universal jurisdiction over war crimes, which is now largely taken for granted.[134] 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.[135] 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.[136] Hersch Lauterpacht opened the

133 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 & 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. L.Q. 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 Development of International Humanitarian Law Applicable in Armed Conflict, Geneva (1974-1977), Official Records, Doc. CDDH/SR.44 (May 30, 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.

134 *See* Restatement, *supra* note 102, § 404; Oppenheim's International Law, *supra* note 120, at 470.

135 *See* Draper, *supra* note 76, at 21. *Compare* G. Brand, *The War Crimes Trials and the Laws of War*, 26 Brit. Y.B.Int'l L. 414, 416 (1949).

136 *See* Röling, *supra* note 47, at 359-60. *See also* United Nations War Crimes Commission, *supra* note 45, at 30.

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."[137]

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 undertaken would then be determined, as it is now between allied or associated belligerents, by the convenience of the forum. If a neutral State should, by reason of the availability of the accused, witnesses, and evidence be the most convenient locus in which to try a war crime, there is no reason why that State should not perform that function.[138]

The laws and usages of war are, of course, universal, and war crimes are crimes against the *jus gentium*.[139] 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*.[140] 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 offense (murder, manslaughter or culpable homicide) that constituted a violation of the laws and customs of war.[141] 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. As the British report suggested:

> War crimes, or grave breaches of the 1949 Geneva Conventions, wherever in the world they are committed, are already triable in the United Kingdom under the Geneva Conventions Act 1957... . Parliament did not demur from the proposition that war crimes are offences sufficiently serious for the British courts to be given juris-

137 Lauterpacht, *supra* note 89, at 64.

138 Baxter, *supra* note 118, 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).

139 14 Trials, *supra* note 50, at 15.

140 Thomas Hetherington & William Chalmers, War Crimes: Report of the War Crimes Inquiry, 1989, CMND 744, at 45.

141 For other States' war crimes legislation, see *id.* at 65-74.

> diction over them, whatsoever the nationality of the person committing them and wheresoever they were committed.[142]

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.[143] The Austrian Military Manual clearly recognizes the principle of universality of jurisdiction over war crimes: "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."[144]

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

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142 *Id.* at 60.

143 *Id.* at 72-73. *See also* L.C. Green, *The German Federal Republic and the Exercise of Criminal Jurisdiction*, 43 U. Toronto L.J. 207, 208 (1993). The Canadian law, in its most pertinent part, reads as follows:

> [E]very person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,
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> ...
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> (b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada, and subsequent to the time of the act or omission the person is present in Canada.

[1987] 1 R.S.C. ch. 37.

Arnold Fradkin, who served as lead counsel for the prosecution in several Canadian war crimes cases, made this comment on the Canadian legislation:

> A second subsection provides extraterritorial jurisdiction on the basis of the person's presence in Canada where, at the time of the crime, Canada could have, in conformity with international law, exercised jurisdiction over the person with respect to the crime committed. This expresses what is known in international law as the "universal jurisdiction" concept. Certain crimes are committed not against a particular State but against the international community, and therefore any State in which the offender is located has the right to try the offender.... War crimes are crimes against humanity and should be subsumed under that same principle of universal jurisdiction.

Holocaust and Human Rights Law: The Fifth International Conference, 12 B.C. Third World L.J. 37, 48 (1992) (footnotes omitted).

144 Bundesministerium fur Landesverteidigung, Truppenfuhrung, para. 52 (1965) (translation by author).

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.[145] Universal jurisdiction over military personnel can be exercised under the Code of Military Justice.[146] The United States does have, however, ample authority under both the U.S. 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 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.[147] 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

145 *See* U.S. Dep't of the Army, *supra* note 78, paras. 506-07. Under the War Crimes Act, 18 U.S.C. § 2441 (2000) U.S. 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 N., IV. On U.S. anti-terrorism legislation having effect in the United States, see 18§ 2332 b; on the killing of U.S. nationals outside the United States, see 18§ 2332 a.

146 See Douglas 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).

147 *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).

Article 4(a) of the Statute,[148] thus correcting course in the ICTR's jurisprudence. *Rutaganda* has since been followed in *Semanza*.[149]

The Appeals Chamber of the ICTR had not previously endorsed a particular definition of the nexus requirement.[150] The Appeals Chamber of the ICTY had done so twice. The first time, in the *Tadić* Jurisdiction Decision, the Appeals Chamber said in dictum that the offenses had to be "closely related" to the armed conflict, but it did not spell out the nature of the required relation.[151] In the *Kunarac* Appeals Chamber Judgement, it endorsed the same standard and gave the following elaboration:

148 ICTR, Appeals Chamber, Judgment of May 26, 2003, Case No. ICTR-96-3-A (9987/A-9714/A), paras. 556-85.

149 ICTR, Appeals Chamber, Judgment of May 20, 2005, Case No. ICTR-97-20A (5874/H-5730H), paras. 365-71).

150 The Rutaganda Appeals Chamber Judgement reviewed the prior ICTR case law: "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 Judgement, 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 judgements. 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 Judgement 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 Sept. 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 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 Jan. 2000, para. 260. In *Ntakirutimana*, the Trial Chamber acquitted the accused of the count under Article 4(a) of the Statue 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 Feb. 2003, para. 861." See, however, Rutaganda Appeals Chamber Judgement, in French "ICTR-96-3-A, 9987/A-9714/A, 26 May 2003, *paras*. 556-585.

151 *The Prosecutor* v. *Duško Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 70 ("*Tadić* Jurisdiction Decision").

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. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. The Trial Chamber's finding on that point is unimpeachable.
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.[152]

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152 *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 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.
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> ….
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> 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.

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 Judgement indicated, the determination of a close relationship between particular offenses and an armed conflict will usually require consideration of several factors, not just one. Particular care, the *Rutaganda* Appeals Chamber Judgement 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 that a nexus between the armed conflict and Rutaganda's participation in the particular killings charged.[153]

Since the Trial Chamber's erroneous conclusion concerning the required nexus supplied the only basis for its acquittal of Rutaganda 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."[154]

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,[155] which is primarily addressed to international wars, to non-international armed conflicts is therefore useful.[156] 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;[157] 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 (Article 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 offenses committed in non-international armed conflicts that are subject, under the treaty, to the universal jurisdiction of the contracting parties.

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153 Rutaganda Appeals Chamber Judgement, *paras,* 579-81.

154 Article 24 of the Statute.

155 May 14, 1954, 249 U.N.T.S. 240.

156 *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.")

157 *See id.*, art. 28.

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[158] was arguably addressed to international wars only, this limitation has been overridden by customary 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."[159] Similarly, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, of January 13, 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.[160] 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.[161]

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

158 June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

159 Apr. 10, 1972, art. 1, 26 U.S.T. 583, 1015 U.N.T.S. 163.

160 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 & Ralf Trapp, A Commentary on the Chemical Weapons Convention 12-13 (1994).

161 *See* Krutzsch & Trapp, *supra* note 160, at 109-15; S. Treaty Doc. No. 21, *supra* note 160, at 40-41.

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 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 offenses 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 offenses 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.[162]

The *ad hoc* Tribunals for Yugoslavia and Rwanda have concurrent 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.[163]

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162 *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain) (New Application)*, 1970 ICJ Rep. 3, 32 (Feb. 5).

163 *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 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 offenses 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 offenses 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.[164] Thus, in situations of non-international armed conflict, the question of whether or not an offense 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 provisions of the Treaty of Rome criminalizing violations of common Article 3 and some violations of Additional Protocol II.[165]

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 offense was committed.[166] This rare example of a law providing for

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the Matter of Dušco Tadić, Case No. 1 of 1994 (Nov. 8, 1994); Decision of the Trial Chamber in Case No. 1 of 1994, IT-94-1-D (Nov. 8, 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 Karadić, Ratko Mladić and Mico Stanisić (Apr. 21, 1995), Decision by the Trial Chamber in Case No. IT-95-5-D (May 16, 1995); and, concerning the Lasva River Valley Investigation, Decision by the Trial Chamber in Case No. IT-95-6-D (May 11, 1995).

Regarding the relations between national courts and the proposed 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 129-38, 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* U.S. Comments, *supra* note 120, 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.

164 Case No. IT-96-23&23/1-A, Judgement of 12 June 2002, para. 58.

165 Rome Statute of the International Criminal Court, Arts. 8(2)(c)-8(2)(e).

166 Loi de 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,

comprehensive universal jurisdiction over perpetrators of atrocities[167] committed in internal conflicts in foreign countries has, as pointed out, been reassessed and narrowed down.

I. The Challenges Facing the International Criminal Tribunal for the former Yugoslavia

The ICTY was established in 1993 and has undertaken the first international prosecutions of war crimes since Nuremberg. As was the case at Nuremberg, the Tribunal's creators hoped that it would do more than simply mete out justice to individual wrongdoers. It would also help to create an impartial record of atrocities committed during the Yugoslav conflicts: It would offer victims a sense of vindication: And, by doing all of those things, it would contribute to reconciliation and reconstruction in the republics of the former Yugoslavia.

It would exceed the capacity of any single court to bring more than a partial reckoning to the vast scale of those crimes – the murders, rapes, and deportations; the acts of torture, destruction, and cruelty. But, if with painful slowness at first, this Tribunal has helped to bring to account a considerable number of accused of high rank, and is now doing so with growing confidence and efficiency. These larger social and political goals are all vitally important, and one may of course debate how well the Tribunal has achieved them.

In this discussion, I would like to concentrate on what may seem like more mundane institutional and procedural problems that have arisen as the Tribunal has gradually developed into an experienced criminal court. Structure and proce-

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additionnels à ces Conventions, Moniteur Belge, Aug. 5, 1993; *see also* Eric David, Principles de Droit des Conflits Armes 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 (Feb. 10, 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.

167 Other warrants involved the killing of Belgian peacekeepers, among others. Parquet de Bruxelles, Crimes de guerre au Rwanda, Press Communique No. 30.99.3959/94 (May 30, 1995) (on file with author).

dure are often as important in determining outcomes as substantive law. Without adequate solutions to structural questions the Tribunal cannot hope to fulfill its larger missions.

The Tribunal represents an enormous experiment in international co-operation and legal institution building. It has 16 permanent judges from 16 countries and nine ad litem judges. The judges sit in three trial chambers, with a total of six three-judge benches, and one appeals chamber. The Appeals Chamber is composed of seven judges, two of whom are appointed from the International Criminal Tribunal for Rwanda, and each appeal is decided by five Appeals Chamber judges.

After 10 years in operation, the Tribunal's chambers have handed down hundreds of decisions. For its substantive law, the Tribunal has precedents, especially from Nuremberg, but also from national jurisdictions, upon which to draw. Nuremberg's legacy in international criminal proceedings was quite modest. For its methods of organization and its rules of procedure, the Tribunal has had to rely much more on the creative work of its judges and staff. Let me outline six institutional challenges the Tribunal has confronted.

The first concerns the very method by which the Tribunal's procedures are established, which is determined by the fact that, unlike the International Criminal Court, the ICTY is not the product of a treaty resulting from extended negotiations. Rather, the Tribunal was created by the Security Council of the United Nations pursuant to its powers under Chapter VII of the U.N. Charter to respond to threats to international peace and security.

Establishment by the Security Council had some clear advantages. For one, the likely refusal of Yugoslav Republics to participate raised no obstacle to the Tribunal's creation. For another, the Tribunal's governing Statute could be drafted quickly. But without a treaty process, there was no Assembly of State Parties to serve as a legislature, as it were, that would assume functions such as drafting rules of procedure and evidence. In a sense, the Security Council was the legislature. It adopted the Statue, and it could be called upon and is still called upon when major policy questions required. But, when it came to the Rules of Procedure and Evidence, which were needed to put meat on the bones of the Statute, it was left to the judges of the Tribunal to act as the legislators. And this secondary legislative flesh has been substantial. The ICTY has 127 Rules of Procedure and Evidence filling about 110 pages of text.

This role of the judges as quasi-legislators may seem strange. In most civil law countries, it is the legislature that revises the code of criminal procedure. For the International Criminal Court, a preparatory commission drafted the rules of procedure and evidence, and, as I noted, it is the Assembly of State Parties that has adopted them. In the United States, the system, at least on the federal level, is a little closer to that of the ICTY. For while it is the national Congress that must approve changes in the rules, it is the judges who propose them – and, much of time, the judges get their way.

Despite its novelty, I think entrusting the judges with the authority to write their own rules of procedure and evidence has largely proven a success. Admit-

tedly, there have been many, perhaps too many, revisions. Some 36 versions of the rules in less than 11 years. But the high frequency of changes reflects in significant part two attributes of the ICTY that have nothing to do with the rules' judicial authorship: i) the challenge of bringing together concepts from different legal traditions in a workable amalgam: and ii) the novel problems – particularly with respect to collection and presentation of evidence – that are created by prosecutions that rest on cooperation by sovereign governments and that concern an area in which some of the current political authorities are not fully committed to assisting the Tribunal. The large number of revisions also reflects one of the main advantages of having the judges do the rule-writing: the ability quickly to take into account lessons learned from concrete experiences in the courtroom.

A second major institutional challenge, or set of challenges, for the Tribunal has arisen from the length and complexity of its trials. The average criminal trial in the U.S. is quite brief. Even for felonies, in the United States trials rarely run longer than a few weeks. At the Yugoslavia Tribunal, by contrast, the average length of our trials is 13,5 months and 17,5 months including judgement writing time. The Tribunals' Statute restricts it to "serious violations" of international humanitarian law, and the Prosecutors have by and large concentrated on high-level perpetrators. Often, the crimes charged, connected to entire military campaigns, occurred over the course of months or years, across many locations, and involved many defendants. The Milošević case offers one illustration. It is not typical, but it is not so far from the norm as one might think. Milošević is actually only one of four defendants who were originally indicted together. With 66 counts, hundreds of witnesses, tens of thousands of pages of documents – most of which must be translated from Serbo-Croatian into French and English, the Tribunal's working languages – trials are extremely complex. It encompasses three separate indictments for Kosovo, Croatia, and Bosnia and Herzegovina. The defendant's health has led to a great number of delays and to a reduced schedule, in which the Trial Chamber sits only 3 days a week. Trials of this magnitude call for extraordinary energy and judicial skill.

Let me mention two implications of our trials' unusual length.

1. First, many defendants remain in detention before judgement for years at a time. Many defendants, and a number of commentators, have reasonably questioned whether such lengthy pre-trial detention is consistent with the presumption of innocence enshrined in Article 21 of the ICTY Statute and Article 14 of the International Covenant on Civil and Political Rights, with the normal practice of provisional release, and with international human rights entitlements to a speedy trial. This is a difficult question, made somewhat more difficult, on a practical level, because the Netherlands has not been willing to allow defendants to be provisionally released in the Netherlands, insisting instead that they be sent out of the country, thus increasing the uncertainty whether the person who has been provisionally released will return for trial. But on balance, I think the Tribunal has reasonably found that such detention is not a violation of the Statute or international human rights standards – once a judge has confirmed that the evidence support-

ing an indictment shows a reasonable probability that the accused committed the offences charges. Above all, three factors lead me to that view. The crimes charge – genocide, crimes against humanity, and war crimes such as grave breaches of the Geneva Conventions, – are exceptionally grave. Unlike domestic courts, the ICTY lacks a police force to which it can turn to seek assistance in compelling the attendance of defendants. And, unfortunately, the governments who could most effectively supply that kind of policing assistance have often been less than co-operative. Despite these difficulties the Tribunal in recent years has been willing to grant provisional release in more cases, largely under the influence of the European Convention on Human Rights.

2. A second implication of our trial's great length has been the need to craft a workable regime of interlocutory appeals, that is, appeals before the conclusion of the trial. In the United States, such appeals are exceptional. Normally, a defendant must wait until the trial judgement, and then raise all his claims of error. Given the extraordinary duration of trials at the ICTY – and the normal practice of detention during trial – it was initially thought that a more permissive system for interlocutory appeals was appropriate, particularly if a challenge to a trial chamber ruling might result in the dismissal of particular charges, and thus in the shortening of the trial, or even in the dismissal of the indictment. Moreover, since the Appeals Chamber of the ICTY started out with a limited caseload, it could render its decisions on such appeals quite quickly.

   The initially generous rule on interlocutory appeals, designed in significant part as a response to long trials, unfortunately led to a flood of appeals, often of minor evidentiary rulings, that only delayed the progress of trials all the more. As a result, in 2002 the Tribunal decided to restrict the possible grounds for interlocutory appeals and to require permission, or, in technical terms, certification from the trial chamber before most issues could be raised in an interlocutory appeal. The regime of interlocutory appeals at the Tribunal is still probably more lenient than in most domestic systems, but it has moved back in the direction of domestic practices. We are now looking again at the question whether these appeals could be more effective.

Judges writing the rules and trials lasting for years are not the only peculiarities of the ICTY. A third important cluster of differences between ICTY cases and typical domestic criminal prosecutions arises from the difficulties of gathering evidence from distant countries that have only recently emerged from armed conflict, without the assistance of an effective police force, and frequently without the full cooperation of the governments in the region. We do not have the advantages of the Nuremberg tribunals which had police power to search for evidence in Germany and could benefit from the meticulous archives – a paper trail – left behind by the Nazis. The ICTY must rely on the co-operation of supportive governments and of individuals who often may realistically fear reprisals if they cooperate openly. Governments are often willing to share information only if its

sources are kept confidential, a demand clearly in tension with the defendant's right to challenge fully the evidence against him. The ICTY has had to devise a system – principally regulated by Rule 70 of our rules of procedure and evidence – permitting confidential information sharing at the investigative and pre-trial stages but requiring disclosure if information is actually used in evidence at trial. But, in recognition of the Tribunal's utter dependence on the assistance of states, states supplying confidential information are permitted to block the use at trial of the information they have provided. The ICTY's dependence on courageous eyewitnesses from the former Yugoslavia has required an elaborate system for protecting the identities of witnesses and the use, in some cases, of testimony via video link, with the face of the witness blocked out and the voice modified. Unfortunately, despite these efforts, it seems clear that quite a few potential witnesses have been physically attacked – and many more threatened – to prevent their cooperation with the Tribunal.

In domestic criminal cases, it occasionally may turn out that important evidence is discovered late in the proceeding. At the ICTY the problem of an incomplete evidentiary base is much more common. There are even cases in which defendants have claimed that governments have deliberately withheld information to shield some defendants and implicate others. In order to cope with the problem of a shifting evidentiary foundation, the ICTY has a rule permitting the admission of additional evidence even on appeal under some circumstances. But at some point, of course, criminal proceedings must reach a conclusion. The balance between fairness (or should one say confidence in accuracy), on the one hand, and finality, on the other – a balance that all systems of criminal justice must strike – thus presents particular challenges at the ICTY.

A fourth institutional challenge faced by the ICTY has been the need to find a sensible combination of elements from different legal traditions. As at Nuremberg, the structure of our trials draws more heavily on the common law adversarial model than on the civil law inquisitorial system. It is largely the responsibility of the parties to develop their cases – to collect and present documentary evidence, to seek out and to examine witnesses. The judges do not investigate and compile dossiers; it is up to the Prosecutor and her assistants to compile the basic evidence supporting an indictment. This tilt toward the adversarial model may have several sources: the precedent of Nuremberg; the fact that the U.S. Department of Justice made a detailed and comprehensive proposal concerning rules of procedure and evidence early on in the process of establishing the Tribunal's structure; and the perception that having the judges stand between the parties rather than being allied with the prosecution would help ensure the essential appearance of impartiality, particularly for a court whose cases are politically charged and whose judges, though of many nationalities, are not nationals of the same states as the defendants.

Another significant common law characteristic is the possibility of guilty pleas before the Tribunal. As I mentioned before, as of early 2005, a total of 17 defendants have pleaded guilty at the ICTY. I recognize that some are hesitant about the resort to plea agreements, in large measure because of the egregious nature of

the crimes charged and because of the Tribunal's role in providing vindication for victims and contributing to the creation of an accurate record for terrible atrocities. Yet I believe that, with genuine expressions of remorse and properly detailed acknowledgement by defendants of their participation in the crimes for which they admit guilt, plea agreements can play a constructive role. In some cases, a forthright and specific acknowledgement of guilt may offer victims as much consolation as, or perhaps even more than, a conviction following repeated protestations of innocence. Moreover, as a practical matter, the co-operation secured through plea agreements plays an important role in securing convictions of more important participants in large-scale crimes, and the time and resources saved by avoiding trials in some cases contribute significantly to the Tribunal's ability to meet the deadlines indicated by the Security Council for the completion of its work and enable those in detention to have their cases heard more quickly. Guilty pleas could also bring to the victims a faster sense of vindication of justice.

Of course, plea agreements are not binding on the Tribunal, and in some cases the sentence pronounced by the Trial Chamber did not follow the range stipulated in the plea agreement. In the case of *Momir Nikolić,* the Trial Chamber found that egregious circumstances required a sentence of 27 years, even though the Prosecutor recommended a range of 15 to 20 years pursuant to the plea agreement. Similarly, in the case of *Dragan Nikolić* the Trial Chamber pronounced a sentence of 23 years, despite the joint recommendation of the Prosecutor and the Defence for a sentence of 15 years. In such cases, the convicted person may of course appeal the sentence, which is now routinely done.

The Trial Chambers enjoy considerable discretion in imposing sentences, but that discretion is not unlimited. In fixing the appropriate sentence, a Trial Chamber must consider the following factors: the convicted person's individual circumstances, aggravating and mitigating factors, the gravity of the offense, and the general sentencing practices of the courts of the former Yugoslavia. When a plea agreement is involved, the Trial Chamber must also give due consideration to the parties' recommendation. Under Rule 62*ter* (B) of the Tribunal's Rules of Procedure and Evidence, a plea agreement cannot and does not bind the Trial Chamber. But the parties' recommendation bears considerable importance, because it involves an admission by the accused of his or her guilt and reflects a meeting of the minds between the parties concerning what they believe constitutes a fair sentence. Thus, where a Trial Chamber deviates from the sentence recommended in the plea agreement it must give reasons for the departure.

If the Tribunal bears many characteristics of common law courts, civil law contributions are evident as well. First of all, the fact-finders are judges, not lay jurors. And although judges play a more passive role than do those, for example, in civil law countries, they take a more active part, particularly in examining witnesses, than do judges in criminal trials in common law jurisdictions. In realm of appeals. The most striking civil law element is the provision for appeals by the prosecution on equal terms with the defence. In common law jurisdictions, the prosecution's right to appeal is normally tightly circumscribed, and it often cannot appeal factual determinations at all.

Although the first version of the Rules of Procedure and Evidence, adopted in February 1994, revealed a very strong common law theme, the extensive amendments since 1994 show that the Rules have progressively taken much guidance from the civil law system. With the aim of combining fairness and expeditiousness of trial, the Tribunal's proceedings are now less adversarial in character, with the Judges moving away from being the mere arbiters of proceedings to a more active role in the judicial process. The change is affecting all phases of the proceedings before the Tribunal. This can be demonstrated with the appointment of pre-trial and pre-appeal judges for example. In July 1998, Rule 65 *ter* established the functions of a pre-trial judge, whose role has only increased since then. The pre-trial judge coordinates communications between the parties during the pre-trial phase of a case, convening status conferences on a regular basis under Rule 65 *bis*. He or she ensures that proceedings are not unduly delayed and takes any measures necessary to prepare the case for a fair and expeditious trial. Such measures include ordering the parties to meet to discuss issues related to the preparation of the case; recording points of agreement and disagreement on matters of law and fact; and constituting files to be submitted to the Trial Chamber and compiling the list of witnesses called to testify, together with the facts they will testify to, the corresponding points in the indictment, the estimated length of time required for each witness, and the anticipated length of the parties' cases. A similar procedure exists in the Appeals Chamber, where a pre-appeal judge convenes status conferences that allow persons in custody to raise issues in relation to the appeal proceedings and also enables the pre-appeal judge to monitor the status of the appeal and raise related issues with the parties as needed.

The role of the trial judge has also changed considerably over time. In light of the documents received from the pre-trial judge, the Trial Chamber may determine the number of witnesses the Prosecutor may call and the time available to the Prosecutor for the presentation of evidence, sometimes calling upon the Prosecutor to shorten the examination-in-chief for some witnesses. The Trial Chamber may intervene in a like manner in relation to the defence case during the pre-defence conference under Rule 73 *ter*. Furthermore, pursuant to an amendment of July 2003, The Rule 73 *bis* now allows the Trial Chamber to limit the Prosecution's evidence to a number of crime sites or incidents that are reasonably representative of the crimes charged.

The area where the blending of common law and civil law attributes is perhaps most interesting is in the Tribunal's rules of evidence. Perhaps because our fact finders are professional judges rather than lay jurors and perhaps because of the difficulties of collecting evidence of war crimes from a region still torn by bitter social and political division, our rules of evidence are quite liberal and not overly technical. In these respects, they draw more heavily on the civil law than on the common law model. The Tribunal rules' expressly provide that its judges are not bound by any national rules of evidence and, in Rule 89(C) that Chambers "may admit any relevant evidence which it deems to have probative value." Thus our rules do not incorporate the elaborate law of hearsay familiar in common law jurisdictions.

Along these lines, Rule 92 *bis*, initially adopted in December 2000, allows a Trial Chamber to admit, in lieu of oral testimony, evidence of a witness in the form of a written statement. Such evidence may be used to prove the matter asserted in the testimony, other than an act or conduct of the accused as charged in the indictment. The rule provides guidance for the Trial Chamber regarding the factors for and against admitting such evidence: the person making the statement must declare that its contents are true and correct, and that the declaration must be witnessed by an authorized person. The Trial Chamber may nonetheless require the witness to appear for cross-examination. The Appeals Chamber also held recently, in an appeal in the Milošević case, that a Trial Chamber may permit a party to admit a written statement and forgo the examination-in-chief, if the witness is present in court, available for cross-examination and questioning by judges, and attests that the statement accurately reflects the testimony he or she would give if examined, provided the Trial Chamber determines that this procedure would be in the interest of justice. Thus, while there are restrictions on the admission of evidence through written statements, they are much looser than those of many common law systems.

Still, the judges of the Tribunal have built at least some threads of the common law world's hearsay concerns into the Rules. Rule 89(D) authorizes – but does not require – Chambers to "exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial." Under the rubric of that Rule, the ICTY's Appeals Chamber has instructed the Trial Chambers to consider the hearsay character of evidence as one factor possibly threatening the fairness of trials and thus to be balanced against the evidence's probative value. If the roles of the parties suggest that our trials draw heavily on the common law adversarial model, our rules of evidence then show a more complex mix and a greater indebtedness to civil law exemplars.

A fifth interesting challenge facing the Tribunal is the contours of the defendant's right to self-representation. Two prominent accused currently tried by the Tribunal have chosen to represent themselves. I refer to former President Slobodan Milošević and to Vojislav Šešelj, the leader of the Serbian Radical Party. Article 21 of the Tribunal's Statue, which enumerates the rights of the accused, provides that the accused shall be entitled "to defend himself in person." In *Milošević*, more recently, the Trial Chamber imposed counsel on the defendant because his extended periods of ill health had repeatedly disrupted the trial during the presentation of the Prosecution's case. On appeal, the ICTY Appeals Chamber affirmed the trial judges' power to assign counsel to a defendant even in the face of his strenuous opposition – the basic need for a minimally efficient judicial management required as much. However, the appellate decision also held that the Trial Chamber had placed overly strict restrictions on Milošević's ability to participate in his trial even when his health allowed. Under the principle of proportionality, the Appeals Chamber held, Milošević had to be allowed to maintain as active a role in his trial – including taking the lead in presenting and examining witnesses

– as his health would allow.[168] In this context, it may be of interest to note that, in articulating the principle of proportionality, the Appeals Chamber drew on the European Court of Human Rights as well as precedents from national jurisdictions and the United Nations Human Rights Committee.

The Trial Chamber in the *Šešelj* case took a somewhat different approach, appointing a standby counsel, to assist the accused in the preparation of his case when the accused so requests, without depriving the accused of the right to defend himself.

The issue of what steps a standby counsel is permitted to take will, I expect, continue to confront the judges of the Tribunal.

A sixth live concern to our Tribunal is the problem of creating a coherent sentencing scheme, with the sentences reflecting the gravity of the crimes committed yet not foreclosing the chance of rehabilitation. Contrary to the practice of several countries, our Tribunal does not have a strictly defined sentencing regime or sentencing guidelines. The Tribunal's Statute provides only very general guidance on the issue. Article 24 of the Statute, which addresses the penalties the Tribunal may impose, states that the Trial Chambers shall "take into account such factors as the gravity of the offence and the individual circumstances of the convicted person." The Article does direct the Trial Chambers to consider "the general practice regarding prison sentences in the courts of the former Yugoslavia," but stops short of mandating an adoption of the region's sentencing regime. The Tribunal has taken a number of steps to study the problem, and to address the challenge of creating a well-structured sentencing regime.

The first institutional challenge I discussed concerned the Tribunal's birth. The last I would like to mention concerns its eventual demise. Unlike the International Criminal Court, which is intended to be a permanent body, the ICTY is an *ad hoc* tribunal that was never intended to live forever. The Security Council has urged the Tribunal to conclude all trials by 2008 and all appeals by 2010. Given those deadlines, clearly the ICTY will only be able to take up the cases of a small fraction of those who committed war crimes during the Yugoslav conflict. Arrangements must be made for the orderly and fair prosecution of the many small-scale war criminals still at large in the region of the former Yugoslavia. I say small-scale, but by that I mean small as measured largely by the number of the victims, not the gravity of the crime, which often involves murder, torture, rape, and other forms of terrible violence. Given the bitterness of the ethnic and political divisions that remain in the former Yugoslavia, establishing courts that are both effective and free from ethnic and religious bias presents an enormous challenge. Some progress has been made on this front through the establishment of courts in the U.N.-administered areas of Kosovo. These courts, whose prosecutors and judges are a mix of local and foreign lawyers, have overseen trials in the last few years. Even more recently, through the joint efforts of the Tribunal and

168 *Slobodan Milošević v. Prosecutor*, Appeals Chamber, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Case No. IT-02-54-AR73.7 (Nov. 1, 2004).

the Office of the High Representative for Bosnia and Herzegovina, a special war crimes chamber within the State Court of Bosnia and Herzegovina in Sarajevo has been established. Initially, at least, this chamber will consist of both local and foreign prosecutors and judges. I look forward to the day when domestic war crimes trials that meet international human rights standards can be conducted in the region of the former Yugoslavia.

One thing must be clear, however: a strict application of the target dates for the completion strategy must not result in impunity, particularly for the most senior leaders suspected of being most responsible for the crimes within the Tribunal's jurisdiction. Nor should the approach of deadlines lead to a diminution in respect for the right of the accused to a fair trial and to present a full defence. One of the components of the Tribunal's "completion strategy" is the referral of lesser cases from our Tribunal to competent domestic courts. The Prosecutor has already begun sharing information from files and materials of unindicted persons, with prosecutors and investigators in the region for possible domestic prosecution.

But for those cases in which individuals have already been indicted by the Prosecutor and the indictment confirmed by a Judge of the Tribunal, a formal procedure has been rule 11 bis. Either on its own motion or on that of the Prosecutor, a trial chamber may decide to refer the case of such individuals for trial by an appropriate court of a domestic jurisdiction. This could be a court in the State where the individual was arrested, in the State where the alleged crime was committed, or any other State willing and able to prosecute the case. If the trial chamber satisfies itself that the person to be transferred is not a senior leader responsible for ICTY crimes and if the domestic court can provide a fair trial up to international standards of due process and human rights, the trial chamber may refer the case. A special bench of Judges to examine these motions and decide whether the criteria have been met has been appointed.

One issue is whether a domestic court exists to take the case over and prosecute the accused according to international standards. Another matter is detention facilities. Obviously detention facilities for the accused must also meet international standards of fairness and due process.

J. The International Criminal Court

Two events with enormous institutional and normative implications for international humanitarian law are the UN Diplomatic Conference of plenipotentiaries in Rome (June 15-July 17, 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 July 17,1998, 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 offenses 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 offenses 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 preempt 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 offenses. 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 offenses 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.[169]

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 December 9 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 offenses. The articles on crimes against humanity and on war crimes are, on the whole, enlightened, credible and up to date.

169 See generally, Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 New England L. Rev. 241, 249 (2000).

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 offenses 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 offense of persecution (Article 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 para. 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 commission 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 eleven offenses, building on but significantly adding to the Nuremberg list. These offenses 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.[170] 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."[171] 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

170 Rome Statute of the International Criminal Court Art. 7(1).

171 *Id.,* Art. 7 (2) (b).

further demonstrates the importance attributed by the Statute to the criminalization of offenses against women.[172]

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.[173]

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.[174] The offense 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 offenses in non-international armed conflicts.

The second section, paragraph 8(b), is a very important and rather comprehensive statement of offenses 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 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 starva-

172 *Id.*, Art. 7 (2) (c).

173 *Id.*, Art. 7 (2) (d).

174 *Id.*, Art. 7 (2) (e).

tion 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).[175] Additional weapons can be included in an annex to the Statute by a future amendment.[176] 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 offenses 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.

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 offenses 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

175 Geneva Protocol 17 June 1925; Hague Declaration IV, 3 29 Jul 1899.

176 Art. 8(2)(b)(xx).

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 offenses – 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 fifteen 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 offenses enumerated in these sections of the Statute.

The offenses 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[177] (Article 9). Such elements shall assist the Court in the interpretation and application

177 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 State Parties. In contrast, adoption of rules of procedure and evidence in the ICTY and the ICTR is the responsibility of judges.

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 offenses against 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 Article 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 (Article 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.[178]

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 normally given is that the jurisdiction would catch individuals and not States. While formally correct, this answer presents problems where the individuals have acted in the line of duty, and 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 where the crimes have been committed or by the national State of the accused, the treaty effectively lets off tyrants of non-party states, 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 was far from clear that the United States would permit referral of cases to the ICC under Chapter VII of the Charter (Article 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, thus putting the end to impunity and enhancing accountability. Such a response would also benefit from the power

178 See Meron, *Defining Aggression for the International Criminal Court*, 25 Suffolk Transnat'l L. Rev. 1 (2001).

and authority of the Security Council. Fortunately – by abstaining – the United States did not block the referral of the situation in Darfur to the ICC (2005), thus enabling the ICC to make its contribution to combating impunity there.

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. While this exemption has not been subsequently renewed, the Security Council resolution 1593(2005), referring the situation in Darfur to the ICC, states that nationals of contributing non-party states shall be subject to the exclusive jurisdiction of that contributing states.

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. The U.S. policy of persuading states to pursue such agreements involves, in some cases, pressure to cut military assistance or other assistance to recalcitrant states.

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.

K. 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?

Due Process is one important point of intersection between international humanitarian law and domestic criminal process. There is a great deal of similarity between the norms of due process reflected in international law and due process norms in the law of enlightened nation states. Since World War II, and particularly during the last few decades, there has been a growing recognition, both in the international arena and within individual states, of certain fundamental norms protecting individuals during criminal trials. These norms, such as the right to an impartial tribunal, the right to be assisted by counsel of one's choice, the right to a speedy trial are crucial to safeguard individuals from vindictive prosecution or abuse of state judicial power. These are rights to a fair trial or to due process of law. Often inspired by national laws and constitutions, due process norms, once introduced in an international instrument, serve as examples to other states and are often incorporated in their national laws. As more states adhere to a certain due process right, the more accepted it becomes as a norm of international law, in some cases gaining universal acceptance as customary law, a general principle of law, or even a peremptory norm. One of the most important, and most comprehensive instruments codifying due process rights in criminal trials is the International Covenant on Civil and Political Rights. There are a number of regional instruments which contain norms of criminal due process substantively similar to those of the International Covenant: the European Convention on Human Rights, the Inter-American Convention on Human Rights and the African Charter on Human and Peoples' Rights. The requirements of due process contained in many of these conventions have been further elucidated in the decisions of the courts set up to ensure compliance with such regional norms. The decisions of these courts, and especially of the European Court of Human Rights on the right to a fair and speedy trial, and the right to representation, have often been cited by the ICTY.

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.[179] They had only rudimentary procedural rules. Certain minimum rights, however, were guaranteed:

179 *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.

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.[180]

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 defense. However, the Charter and the procedure reflected a compromise with civil law traditions,[181] 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 offenses 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,"[182] which inspired Article 21 of the ICTY Statute.[183]

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 defense. These standards inspired provisions for the full respect of the rights of the defense, the right of the accused to be present at his trial, the fact that the Tribunals were not empowered to impose the death penalty,

180 *Id.*, para. 20.

181 Meron, *From Nuremberg to The Hague, in* Theodor Meron, War Crimes Law Comes of Age Ch. X (1998).

182 Report of the Secretary-General, *supra* note 10, at para. 106. See generally, Salvatore Zappalà, Human Rights in International Criminal Proceedings (2003).

183 Rwanda Statute has a similar provision.

and the right to appeal against a decision.[184] The ICTY Statute, in Articles 20-21, contains a list of specific guarantees which seek to ensure that individuals tried in our courtrooms are afforded the protections of due process. These articles often track the corresponding provisions in the Political Covenant. They often reflect customary international law.

The first right I will mention is the right to be represented by counsel. This rights has been recognized in Article 14(3) of the Covenant and by Articles 18(3) and 21(4) of the Statute. The presence of an effective counsel will normally ensure that all norms of due process are followed during the criminal proceedings. The right has several components. First, the defendant has a right to select a counsel of his own choosing. This right allows an effective defence, because the representation is based on mutual trust between the defendant and the counsel. Obviously, this choice is not unconstrained, as the counsel must possess certain mandatory qualifications for practice before ICTY. The chief administrative officer of the Tribunal, the Registrar, has certain powers of oversight over the defence bar and authority to regulate their compensation.

For the right to counsel to have meaning, there must be a mechanism to pay for counsel where the defendant lacks financial resources to do so himself. The ICTY Statute provides the defendant with the right to have a free counsel assigned in any case where the defendant lacks sufficient means for legal representation. Where counsel's costs are covered by the state, in national proceedings, there is no international requirement of due process that counsel be of the defendant's own choosing. In practice, however, it is important to adhere as closely as possible to the principle that the defendant has a right to counsel of his own choice, and thus ensure that the defendant and counsel have a relationship of mutual trust. Accordingly, the ICTY allows an indigent defendant to select his own counsel.

The right of the defendant to refuse counsel and to conduct his defense himself is recognized by the Covenant and by the Statute. This right is controversial because, obviously, a defendant who is not trained in law is not able to present as well prepared a defense as a professional lawyer. It is important to remember, however, that at trial, it is the guilt or innocence of the defendant himself that is at issue; and so the defendant must have the right to present the kind of defense he likes.

Judges have, however, an independent obligation to ensure that the trial is fair, even where the defendant chooses to represent himself. In particular situations, as in the case of former President Slobodan Milošević, who is on trial before ICTY and who refused legal representation, the judges decided to appoint a group of three lawyers as "friends of the court" with instructions to help the Court ensure that the accused receives a fair trial. They therefore make motions to the court, are present during the hearings, address the court on a variety of issues, and, on one occasion, they even appealed one of the court's ruling to the Tribunal's Appeals Chamber. While the friends of the court take steps for the

184 Report of the Secretary-General, *supra* note 10, paras. 23-26.

accused's benefit, they do so pursuant to their judicial instructions to help ensure that the trial is fair, not as agents of the defendant.

However, because of Milošević's illness, scheduling accommodations necessary to allow him to represent himself without endangering his health significantly delayed the progress of the trial. The Trial Chamber therefore decided that counsel be assigned to the accused, despite his objections. The Chamber contemplated allowing Milošević active participation in the trial, but that participation would be secondary to that of the assigned counsel and contingent on permission of the Chamber in any given instance. On interlocutory appeal, the Appeals Chamber,[185] held that the right of self-representation may be curtailed when the defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial. The court may restrict the right of self-representation not only in the case of intentional disruption, but also when disruptions are caused by the defendant's illness. The Appeals Chamber held that it was within the Trial Chamber's discretion to assign counsel to Milošević, notwithstanding his opposition. The Appeals Chamber decided, however, that the restrictions imposed on the accused were grounded on a fundamental error of law in that the Chamber failed to recognize that any restrictions imposed on his right to represent himself must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial. The Appeals Chamber considered that a proportionality principle was called for and that the Trial Chamber's restrictions were excessive. In reversing the Trial Chamber's Order on Modalities, the Appeals Chamber held that the Trial Chamber should craft a working regime that minimizes the practical impact of the assignment of counsel, except to the extent required by the interests of justice. Under the then prevailing circumstances, where the accused was well enough to participate in the trial, it was an abuse of discretion to curtail his participation dramatically on the grounds of health. If his health deteriorates gravely, the presence of assigned counsel would enable the trial to continue, even if the accused is temporarily unable to participate.

In another case, that of Vojislav Šešelj, who also chose to represent himself, the trial judges appointed what is called a "stand-by counsel." These are lawyers who are present in court during the hearings and with whom the accused may, at any time he chooses, consult. The judges in that case indicated that if, at some point during the trial, they conclude that a fair trial is impossible with the defendant continuing to defend himself, they could order the stand-by counsel, who is already familiar with the case, to take over the defense.

Another important norm of international due process is the requirement of speedy trial. This norm has two components. First, there is the right – see Article 9(3) of the Covenant – to be released from detention if the accused is not brought to trial within a reasonable time. Second, there is a right to be tried within reason-

185 *Slobodan Milošević v. Prosecutor*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 Nov. 2004, Case No. IT-02-54-AR73.7

able time, as stated in Article 14(3)(c) of the Covenant. The right to a speedy trial is crucial to the guarantee of a fair trial because undue delays may cause the loss of evidence or the fading of the memories of witnesses. The ICTY Statute mandates that the trial be expeditious. Of course, the requirements that both the detention and the trial last only a reasonable time must be analyzed in the context of a particular case. In the ICTY, both pre-trial stages and the trials themselves are quite lengthy. This is due to the complexity of the cases, the difficulty in investigating events which took place a decade or so ago, the challenge of bringing witnesses who reside in other countries, the sheer number of these witnesses, the need to translate thousands of pages of documents, and the need to rely on states and the international community for means of enforcing our orders.

Next, I would like to mention what is perhaps the most fundamental criminal due process right enshrined in international law, the presumption of innocence, essential to protect human dignity and to preserve the basic concept of justice and fairness. All the major human rights instruments and the ICTY Statute (Art. 21(3)) guarantee this right. The presumption of innocence is relevant to requests of individuals to be released provisionally pending trial. At the beginning of the Tribunal's life, these requests were granted only in exceptional cases. The presumption of innocence was not regarded as a bar to denying a defendant's application for provisional release. In practice, 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."[186] Under the ICTY Rules of Procedure and Evidence, in contrast, the general rule was the detention of the accused; provisional release was the exception. Rule 65 thus provided that:

> (A) Once detained, an accused may not be released except upon an order of a Trial Chamber.
> (B) Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.[187]

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 cir-

186 International Covenant on Civil and Political Rights, 19 December 1966, G.A. Res. 2200 (XXI), 21 UN GAOR, Supp. (No. 16), at 52, UN Doc. A/6316, Art. 9(2).

187 (ICTY) Rules of Procedure and Evidence, Doc. IT/32/REV 26, Rule 65 (30 December, 2002).

cumstances to qualify for provisional release are justified by the extreme gravity of the offences with which persons accused before the International Tribunal are charged and the unique circumstances under which the International Tribunal operates."[188] 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. A complicating factor has been that the Netherlands, as the host country, insists that a person granted provisional release must be returned to his home country, which makes the accused's return for trial more uncertain. More recently, the Tribunal began granting these requests with a greater frequency, in part concluding that guarantees provided by the states of the region were adequate. 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. So far, all individuals released provisionally returned to face trial upon request.

The presumption of innocence also relates to the issue of guilty pleas. The Prosecution does not need to prove the guilt of the accused when he agrees openly to acknowledge it. Guilty pleas are supervised by the Trial Chambers, who are not bound by the recommendations of the Prosecutor.

Finally, I will mention the right of the accused to be tried in his presence, which prohibits trials *in absentia*. This right assumes the ability of the accused to face his accusers and the judge, provides for credibility of the proceedings and strengthens the ascertainment of truth. The presence of the defendant during his trial allows him to participate actively in the trial and to present an adequate defense. The international law on this issue is not fully crystallized. The Political Covenant prohibits trials *in absentia* by guaranteeing the right to be present at one's trial. Other international instruments, however, do not prohibit such trials. The right is also guaranteed in many national jurisdictions, but some of them impose limitations, such as for cases where the accused flees the jurisdiction during trial or after having been given notice of the charge, or where the conduct of the accused renders the continuance of the proceedings in his presence impossible. Some civil law countries, notably France, allow i*n absentia* trials in certain circumstances. The Statute of the ICTY specifies, following the Covenant, that the accused has the right to be tried in his presence, a provision interpreted to prohibit trials *in absentia*. This right protects the accused and ensures the effectiveness of the proceedings in the ICTY.

188 *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).

I have not attempted to present an exhaustive catalogue of the protections that international due process offers to a criminal defendant, but rather to mention those which are most fundamental and which proved to be particularly important to the work of the Tribunal. The application of due process norms to the cases before our Tribunal has not always been straightforward. We had to clarify the meaning of these terms, and had to balance them against each other. We also had to keep an eye on how the application of these norms of due process affects the overall reputation, integrity and efficiency of our judicial proceedings.

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 60 (provisional release) Article 63 (trial in the presence of the accused), Article 66 (presumption of innocence), and Article 67 (rights of the accused). Article 58 states that a warrant of arrest shall be issued when there are reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court and when arrest is necessary to ensure that person's appearance, to ensure that the person does not obstruct or endanger investigations, or to prevent the person from continuing to commit crimes.

L. Judicial Independence and Impartiality in International Criminal Tribunals[189]

I. The Setting

Many countries have a long and sophisticated tradition of judicial independence and impartiality. For international criminal tribunals, of course, the subject is relatively new. Drawing on the experience of judges in international courts and my own experience, I would like to emphasize a few themes that I think are crucial to the notions of judicial independence and impartiality in international courts, especially international criminal tribunals.[190] Because of the exceptionally broad scope of its work, with literally hundreds of interlocutory decisions on procedural and substantive issues and many decisions resolving appeals from judgment, the International Criminal Tribunal for the Former Yugoslavia (ICTY) serves as an instructive vehicle for a broader discussion. Before turning to the Tribunal, however, I shall set out the subject in its broader, primarily national setting.

189 I am grateful to Judges Iain Bonomy, Thomas Buergenthal, Amin El-Mahdi, and Fausto Pocar, and to Clifton M. Johnson for their comments; to my judicial clerks Igor Timofeyev and Julian Davis Mortenson for their invaluable help; and to Stephen Kostas for his excellent editorial eye.

190 Basic Principles on the Independence of the Judiciary, UN Doc. A/CONF.121/22/Rev.1, at 59 (1985), *available at* <http://www1.umn.edu/humanrts/instree/i5bpij.htm>.

a) The Role of Judicial Independence

Judicial independence is critical for the rule of law. First, judges who are independent of political or other pressures will adjudicate the disputes brought to them with an eye to the guiding legal principles and without any undue influence by external sources. This posture will solidify public respect for the courts and lead the people and governments to turn to the courts more often for the credible settlement of their disputes. The ability to resolve disputes fairly is also essential to a stable economy and polity. The economic and political actors need to believe that an impartial arbiter will adjudicate their differences, and that their reliance on the existing laws and regulations will be honored. In resolving disputes, judges explain and clarify those laws and regulations. When judges are independent and act in accordance with the law, their decisions have a certain predictability, because they are based on existing law, judicial precedent, and the unbiased application of that law to the facts at issue. This predictability allows the political and economic actors to plan their behavior accordingly, contributing greatly to the political stability and economic prosperity of a society.[191]

Judicial independence is also instrumental in the protection of individual rights. Such rights may be enshrined in the country's constitution or laws, but an authority, such as the courts, must be empowered to review, independently and impartially, citizens' complaints and, if necessary, order that infringed rights be vindicated. To do so effectively, judges must be assured that, irrespective of their ruling, no unpleasant repercussions will be visited on them in terms of threats of dismissal, demotion, or even salary diminution.

The third, and most important, aspect of judicial independence is that independent courts are the indispensable means of holding a government to its nation's laws. In a law-abiding society, the government itself may be brought before the court, as in the example of alleged infringement of individual rights I just mentioned, and held to account if it oversteps its authority. This feature has implications not only for the protection of individual rights, but also, in many countries, for the maintenance of separation of powers and federalism. In a system with competing authorities, be it the executive and the legislature, or the national government and the regional government, friction and even outright conflicts are bound to arise. Some of this friction can, and often will, be resolved through political mechanisms. It is unrealistic, however, to expect that all such conflicts will be resolved in this manner. The courts, as neutral, respected, and independent arbiters, offer an alternative way to resolve political (and sometimes social) disputes within the national society, as well as the international community.

191 This function of judicial independence, as well as two other functions discussed below, is well discussed in Paul Gewirtz, *Independence and Accountability of Courts*, 24 Global L. Rev. 7 (2002) (in Chinese). An English translation of the article is available from the China Law Center at the Yale Law School at <http://chinalaw.law.yale.edu/htm1/publications.htm>.

b) Ensuring Judicial Independence

What, then, is necessary to ensure the independence of the judiciary? While there are many necessary elements, one of the most crucial in my view is public respect for the courts and the judge's conduct. Another contributing element is the judge's self-perception as independent and impartial. These factors are mutually reinforcing, for if the courts are viewed as impartial, they will be respected; and a court that enjoys public respect will find it easier to display independent judgment and, if necessary, to confront powerful governmental or societal interests. An international judge's conduct as an independent judge requires additional comment. Not all judges in international courts have previously served as judges in another setting; many have been diplomats, academics, and legal advisers, but not judges. A person accepting a judicial office on an international court must therefore accept the values, the duties, and the instincts of one who holds such an office. Thus, for an international judge to conduct himself in an impartial and independent way may require adaptation and discipline. The synergy between the personal perception and the court's culture of judicial independence is critical in helping the newcomer adapt to a whole new universe of judicial thinking and action.

A third requirement for ensuring the independence and impartiality of a judge, whether national or international, lies in the transparent nature of the judicial process. As Justice Cullen stated in his lecture on the judge and the public, quoting Jeremy Bentham, publicity is the best guarantee of probity.[192] Invoking Lord Diplock, Justice Cullen added that not being "hidden from the public ear and eye" is "a safeguard against judicial arbitrariness"[193] and a source of public confidence in the administration of justice.

Fourth, judicial impartiality cannot be ensured without a reasoned decision. Giving clear reasons for a judgment and bringing to light the judge's reasoning process are essential safeguards against judicial wrongdoing.

Thus, the reciprocal relationship between public respect for the courts and the judge's impartial comportment is enhanced by the openness of proceedings and reasoned judgments, which also generate public respect for the courts.

The impartiality and independence of judges is typically ensured in national constitutions and statutes, and in the statutes of international courts and tribunals, but it is also rooted in unwritten conventions and traditions of judicial integrity. Such legal and constitutional guarantees are essential, but insufficient.

On the national plane, the selection and appointment of judges may in some circumstances endanger the principle of separation of powers, and hence the independence of the judiciary. After all, the methods of selection of judges and their tenure primarily raise questions about their independence; it scarcely bears repeating that a dependent judge can hardly be impartial. Judicial appointments by the executive can be consistent with judicial impartiality and independence only if security of tenure is guaranteed, if not permanently, then at least for a reason-

192 Lord Cullen, The Judge and the Public, 1999 Scots L. Times (News) 261, 261B62.

193 *Id.* at 262.

able period of time. Thus, a trial by a Scottish sheriff, whose appointment was subject to a one-year limit[194] and to the "power of recall"[195] by the lord advocate during that period, ran afoul of Article 6(1) of the European Convention on Human Rights, which guarantees trial by an independent and impartial tribunal. The court therefore remitted the case for a new trial, to be held by a permanent sheriff.[196] Another decision held, in contrast, that a judge appointed for a three-year period without a power of recall, had adequate security of tenure to constitute an independent and impartial tribunal in conformity with Article 6(1).[197]

On the international plane, the political environment in which international courts, especially international criminal courts, function brings greater attention to the credibility of the institution, and the performance of the international judge as an independent and impartial arbiter is constantly under scrutiny.

To maintain the judiciary's reputation for impartiality, the institution must have a variety of internal mechanisms either to filter out potential bias or to correct it before the result becomes final. One such mechanism is multijudge panels. At the ICTY, all trials are conducted by a bench of three judges and appeals by a bench of five, in some categories preceded by the determination of good cause by a bench of three. A majority of these judges must agree on the outcome and the rationale. This structure prevents a single member who may be biased from influencing the result. The judges, moreover, discuss the case among themselves prior to agreeing on a decision, and this discussion helps to correct any latent biases, because a judge is confronted with, and has to respond to, logical arguments of his colleagues. Another mechanism is appellate review. In the ICTY, the right of appeal is granted to both parties. This right is also recognized by many international instruments, although with some limitations. Appellate review seeks to ensure that decisions of lower courts are accurate and uniform, and that injustice is not committed. Allegations of bias by trial judges can also be raised at this stage. Review enhances judicial independence in another way: by correcting judicial error internally, it reduces the need for other institutions to step in and deal with abuses or mistakes within the court system. Another mechanism that can be mentioned is internal committees and guidelines, which ensure compliance with judicial ethics.

II. International Courts

a) Selection of Judges

As with national judges, it is often asked whether judges who sit on international courts enjoy sufficient security of tenure for independence and impartiality. In the case of my court, the ICTY, the judges are nominated by member states of the

194 *Starrs v. Ruxton*, 1999 Scot. Crim. Cas. Rep. [SCCR] 1078 (H.C.J.).

195 *Id.* at 1079.

196 *Id.* at 1080

197 *Kearney v. Her Majesty's Advocate*, No. XC917/03 (Scot. H.C.J. Dec. 17, 2004) (unpublished).

United Nations, short-listed by the Security Council, and then elected by the UN General Assembly.[198]

Judges of the International Court of Justice (ICJ) must be elected by both the General Assembly and the Security Council; and those of the International Criminal Court (ICC) by an assembly of state parties.[199] Unlike federal judges in the United States, none of us holds tenure for life; nor, unlike those in the United Kingdom, until a mandatory retirement age. Instead, we are elected for a specified term (in my own case, four years; in the case of an ICJ judge, nine years), with the possibility of reelection.[200] In the International Criminal Court, except for the first election, which involved selection by lot to serve three, six, or nine years, the nonrenewable term of office is nine years.[201]

Judges of the European Court of Human Rights have six-year renewable terms (subject to adjustments during the first elections); and those of the European Court of Justice, six-year renewable terms.[202] In the International Tribunal for the Law of the Sea, judges serve for nine-year periods and may be reelected.[203] In most international courts except the ICC, the terms are thus renewable.

Overt campaigning by judges may create a perception of inappropriate politicization, not to mention distraction from the work at hand. Such campaigns are incompatible with the dignity of the judicial function. I have thought at times that a ban on direct electioneering by judges might well be attractive. It would certainly raise some practical problems, for example, campaigning by judges might simply be replaced by proxy campaigns by national governments, but, in principle at least, keeping judges at one remove from the political process might benefit both the perceived impartiality of courts and the efficiency and effectiveness of individual judges. This step would not, however, eliminate political horse-trading between governments that may have little to do with the personal qualifications of candidates for international judgeships. Lengthening the terms of judges would add to the prospects of independence. Nonrenewable long terms offer the best protection of independence but may sacrifice essential expertise. A trade-off is needed and it is open to question whether the present arrangements can be im-

198 Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res. 827, annex, Art. 13 *bis* (May 25, 1993), 32 ILM 1203 (1993), *as amended through* May 19, 2003, available at <http://www.un.org/icty> [hereinafter ICTY Statute].

199 ICJ Statute Arts. 7B10; Rome Statute of the International Criminal Court, July 17, 1998, Art. 36, 2187 UNTS 3 [hereinafter ICC Statute].

200 ICJ Statute Art. 13(1); ICTY Statute, *supra* note 198, Art. 13 *bis*(3).

201 ICC Statute, *supra* note 22, Art. 36(9)(a), (b), UN Doc. A/CONF.183/9, July 17, 1998,

202 European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 23(1), Eur. T.S. No. 5, 213 UNTS 222 (entered into force Sept. 3, 1953); Treaty Establishing the European Community, March 25, 1957, Art. 233, 298 UNTS 11, as amended by Treaty of Nice, Feb. 26, 2001, 2001 O.J. (C 80) 1, consolidated version, 2002 O.J. (C. 325) 1.

203 United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Annex VI, Art. 5, 1833 UNTS 397, 561 (entered into force Nov. 16, 1994).

proved upon. I tend to believe that nonrenewable long terms provide the more satisfactory solution.

Concern is often expressed that a judge on an international court who is apprehensive about the prospects of renomination by his government or reelection may decide cases so as not to antagonize powerful UN member states, and especially his own state. Of course, the problem typically arises in courts that deal with disputes between states, but even in international criminal courts, which try individual defendants, a perception of bias in favor of or against a state may arise. Let me first state that I have no doubt that any conscientious judge sitting on an international court, any person who fully accepts the obligations inherent in the judicial office, decides cases before him only in accordance with the law and his judicial conscience. But the possibility that the public may perceive a judge as biased because of extrajudicial considerations counsels strongly for international judges to be scrupulously impartial in their decision making. Anything else would be antithetical to the very notion of judicial office – especially when a judge makes a ruling, or writes an opinion, that could be seen as favoring his own state. Such bias could even be perceived in international criminal courts that deal with individual criminal liability; for example, if a judge refused to order his own government to produce documents. I am not suggesting, of course, that a judge should alter his view as to the legal outcome in such a case, because disadvantaging a state solely to remove such a perception would be just as wrong. I merely underscore the importance of being sensitive to the possibility of a public perception of bias. Judges, as a rule, do not explain their rulings in press interviews, and so cannot respond directly to public criticism or allegations of partiality in the media. Instead, the judges put their effort into producing a reasoned and persuasive opinion that elaborates, in language that should be understandable both to lawyers and to the general public, the rationale for a particular decision. If the opinion is persuasive and clearly explains why the decision was correct in terms of law, it will resonate as such with the public and go a long way to counter possible allegations of bias.

Nevertheless, the prospects of reelection create a problem that may affect a judge's decision-making process. In the U.S. domestic law system, it is often suggested that the election of state court judges renders them less independent and more apt to resolve cases according to the preferences of the voting public. This predicament is particularly characteristic of criminal matters – in which it often pays to be perceived as tough on crime – and of high-profile social issues, such as the First Amendment religion cases. In the United States, the independence of state judges has also been threatened by the need for those that are elected (rather than appointed) to amass campaign contributions to gain or retain office.

Comparable cases can readily be imagined in an international criminal tribunal. For example, a judge may believe that, under the facts and the law, a given defendant should not be found guilty of the charges against him; but the judge's renomination by his government or reelection is scheduled to take place within the next year, and this defendant is reviled throughout the world as a major war criminal. Judges driven by career concerns rather than by a desire to reach the right result might be tempted to shade their rulings regarding such a defendant so

as to convict him and make their constituencies happy. Once again, it is primarily the culture of judicial integrity that we must rely on to foreclose such a result, although considerable weight must be given to the expectation of states that the judges they nominate will exercise their duties with complete impartiality.

b) The Role of the ICTY President

A subtler concern about influence presents itself regarding the ICTY president's power over the makeup of judicial panels. As president of the Tribunal, I assign the full panel of judges for both trials and appeals proceedings. Thus, when a defendant is brought before the ICTY, it is up to me to determine which three judges will decide his fate at the trial level. Similarly, when a verdict has been entered at the trial level and the defendant and prosecutor file their appeals, I am responsible for naming the bench of appeals judges. The ICC system is somewhat similar, as the Court's presidency assigns both trial chambers and pretrial chambers.[204] How much discretion does this power to assign judges amount to in practice? In terms of raw numbers, the structure of the ICTY leaves me much less leeway at the appeals level: for any given appeal, I must select a five-judge panel from a total of seven judges in the appeals chamber.[205] But at the trial level, I appoint a trial panel of three from one of the already existing trial chambers. A trial chamber is composed of three permanent judges and up to six *ad litem* judges. Each panel selected must include at least one of the permanent judges.[206] Much can be said for the random assignment of cases to judges and benches. Random assignment is typically practiced in U.S. federal district courts and courts of appeals. It has the advantage of preventing "judge shopping" by the parties and lobbying by a

204 ICC Statute, *supra* note 22, Art. 61(11); Regulations of the Court, May 26, 2004, UN Doc. ICCBBD/01B01B04, Art. 46, *available at* <http://www.icc-cpi.int>.

205 See the following provisions of the ICTY Statute, *supra* note 198. Article 12(3): "Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members." Article 14(3): "After consultation with the permanent judges of the International Tribunal, the President shall assign four of the permanent judges elected or appointed in accordance with Article 13 *bis* of the Statute to the Appeals Chamber and nine to the Trial Chambers." And Article 14(4):

> Two of the permanent judges of the International Tribunal for Rwanda elected or appointed in accordance with article 12 *bis* of the Statute of that Tribunal shall be assigned by the President of that Tribunal, in consultation with the President of the International Tribunal, to be members of the Appeals Chamber and permanent judges of the International Tribunal.

206 *Id.*, Art. 12(2). As president, I have the authority to assign judges from one chamber to another, but this power is seldom exercised because judges sit on multiple cases at any given time, and to move them among the chambers would be disruptive and might result in contamination. *See* ICTY Rules of Procedure and Evidence, *as amended*, UN Doc. IT/32/Rev.36, Rule 27(C) (2005) [hereinafter Rules] (permitting the president "at any time temporarily [to] assign a member of a Trial Chamber or of the Appeals Chamber to another Chamber").

judge to be assigned a particular case. Judge shopping is not a problem in international criminal courts, but a judge's lobbying to be on a particular case might be. Why, then, have international criminal tribunals not adopted random assignment? There are some good reasons: In most instances, trials at the Tribunal are very long and complicated. Their date of conclusion is hard to predict with any measure of confidence. At the same time, the Tribunal is under constant pressure from the United Nations to ensure that it operates at maximum efficiency. One trial must follow another, with a minimum gap. These two factors combine to make it impracticable for a lottery to determine the assignment of cases to a trial chamber. Even though assigning cases to a trial chamber and selecting the three judges to sit on them falls to the president, in making those assignments he does not act according to his arbitrary discretion or in response to any lobbying by judges. Rather, the assignment of cases is determined by practical considerations.

To ensure that the Tribunal operates at maximum capacity, a working group keeps a constant eye on the progress of cases through the Tribunal, and it identifies which cases are ready for trial and which trial chamber is available to take them. In this respect, the assignment of cases is determined by matters beyond any one party's control. For example, the working group may in January determine that if a trial in one of the trial chambers is completed by June, then case *x*, which is expected to be ready for trial at that time, should be assigned to that chamber in early July. However, any number of things may prevent that trial chamber from completing its case in June as expected, or case *x* from being trial ready in early July as expected. A case that was projected for assignment to the first trial chamber may end up being assigned to another one. Thus, while not a lottery, our assignment process partakes of a sort of controlled randomness.

As another, and in some ways even more important, example of the power of the president to constitute a bench that will deal with a particular case, the Yugoslavia and Rwanda Tribunal presidents actually control the permanent makeup of the appeals chamber itself – the body that has the final say on the law that governs both Tribunals. The mechanics of this power require some explanation.[207] The two Tribunals share a single seven-judge appeals chamber, of which only one member is defined by statute: the ICTY president. That leaves six judges, four of whom are named by the Yugoslavia Tribunal president, and two by the Rwanda Tribunal (ICTR) president. They must choose from the permanent judges elected to their respective Tribunal, after consultations with the other judges of their Tribunal. In theory, then, the ICTY president could "stack the deck" in the appeals chamber to lock in ideological uniformity. As evidenced by the dissents and vigorous debate in the appeals chamber, this does not happen because of the prevailing culture of judicial integrity.

The self-regulating culture of the Tribunal also curtails my leeway to some extent, since transparent workload surveys show how the cases are allocated among the judges. Another important check on my activities stems from my posi-

207 ICTY Statute, *supra* note 198, Art. 14.

tion as an elected president, which makes me answerable to my colleagues. Under our system, the Tribunal must rely on the conscientious goodwill of the president and the institution's culture of impartiality, as watched over by his colleagues, to avoid inappropriate ideological control over panel memberships. But ultimately the integrity of the system rests on the integrity of all the judges, so that the composition of the bench should have no predictable effect on the judicial result. In some ways, this last reflection holds true for judicial impartiality more generally: the best defense of that principle lies in the culture of judicial independence and integrity, which must be fostered at the Yugoslavia and Rwanda Tribunals and in legal settings throughout the world.

The president's role as head of the institution poses other potential problems. Under the Statute, the president is also an appeals judge and the presiding judge of both the ICTY and the ICTR appeals chambers.[208] As the head of the institution, the president of the Tribunal has a public, nonjudicial function and is required to make representations to the Security Council and the General Assembly regarding the work of the Tribunal and the implementation of its mandate. The president's role as spokesperson for the Tribunal involves him in diplomatic and political functions, but that function may not detract from, or impinge upon, his work as a judge of the Tribunal and the presiding judge of the appeals chambers. In representing the Tribunal before the Security Council and the General Assembly, the president must explain the work of the Tribunal and try to ensure maximum political and financial support for its continued operation. He must also protect the Tribunal as a whole from inappropriate encroachment, even by the Council. An example may be useful here. Following my statement to the Council on October 9, 2003, I was asked by the representative of the United Kingdom to describe the appropriate guidance for the Council to give the Office of the Prosecutor in its preparation of additional indictments. I answered:

> It is entirely appropriate for the Council to define ... broad goals and objectives. I must say that it would not be appropriate for the Council to go into great detail in such directives, because such directives should not encroach upon ... prosecutorial independence ... . In other words, broad guidelines, yes; specific guidelines that encroach on her prosecutorial independence, no.[209]

A president's relations with the prosecutor raise yet another set of questions. In civil law jurisdictions, judges and prosecutors are sometimes interchangeable; they both belong to ministries of justice and are not subject to strict mores prohibiting association and most contacts. In common law jurisdictions, however, it is inappropriate for a judge to have any dealings – professional or other – with the prosecutor, outside, as a general rule, inter partes contacts in the courtroom or in the judge's chambers. At the Tribunal, the judges or the chambers are one of its three organs, and the prosecutor and the registrar are the others. Each of

208 *Id.*, Art. 14(2).

209 UN Doc. S/PV.4838, at 30 (2003).

the three shares a common interest in ensuring the efficient disposal of cases and an adequate supply of resources from the international community. Coordination is thus essential to the smooth and efficient functioning of the institution. To this end, the president meets with the prosecutor and/or the registrar to discuss administrative matters related to the Tribunal's functioning, and at times they appear jointly to make public statements regarding the Tribunal's work and to attend various official functions. Communications by the prosecutor to the Security Council must be channeled through the president. However, it is clearly inappropriate for the president and the prosecutor to discuss any judicial matters, or any of the cases pending before the Tribunal, that could give rise to any apprehension of bias on the president's part.

c) When Judges Should Recuse Themselves

Another possible bias that could endanger the public perception of impartiality of the judiciary would be a preexisting preference for a particular outcome. Judges are expected to approach any case brought before them with openness, bearing in mind the presumption of innocence of the accused, and with the intention to reach a decision only after having heard from both parties and having reviewed the facts and the applicable law. This open-mindedness is crucial to solidifying public and governmental respect for the courts. It indicates to every litigant that he will have a fair day in court because the judges are willing to listen to his arguments and, should they have merit, hold for him.

Of course, judges are not empty vessels that the litigants fill with content. Judges are selected, at least in the international courts and in many countries such as the United States and the United Kingdom, from prominent members of the legal profession. They already have a wealth of experience, as practitioners or academics, or sometimes government officials. At some point in their judicial career, they will be called upon to rule on issues they had considered as practicing lawyers or civil servants, or written about as academics. These situations raise the question of whether a judge should recuse himself from a given case, on the basis either that he cannot be impartial or that his impartiality can be questioned by a reasonable observer. These two considerations are related, but separate. In the first scenario, if a judge concludes that he cannot be impartial because he has already formed an opinion on the issue, he must, of course, recuse himself. This test can be described as subjective. In these circumstances, he is unable to act as a judge to weigh competing legal positions and assess the merits of each party's case. This point is particularly cogent when the judge holds a firm view that is arguably inconsistent with prevailing law.

The second scenario is more complicated. There, the judge actually concludes that he can act impartially in the case, but that others may reasonably perceive him as partial.[210] This test can be described as objective. Here, the judge recuses himself not because he cannot exercise his judicial function, but to preserve the

210 *See Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte* Pinochet Ugarte, [1999] 1 All E.R. 924 (H.L.) (*Pinochet II*).

integrity of his court and the concept of law. A well-known British jurist, Lord Hewart, famously remarked eighty years ago in *Ex parte McCarthy* that "[j]ustice must not only be done, but should manifestly and undoubtedly be seen to be done."[211] In some situations the reputation of the judiciary may be compromised if even an appearance of bias is created, and caution and concern for the reputation of the court therefore often counsel recusal.

Three such situations come to mind. The most obvious is where the judge may have a financial or similar stake in the outcome.[212] Even though he may consider that personal interest unimportant, the public may justly question the impartiality of someone who stands to profit from his own decision. In the second scenario, the judge has a strong personal connection to one of the parties. If this connection may suggest to outside observers that the judge is likely to be swayed by it, recusal is again called for. Care must be taken, however, that judges do not feel forced to step aside from cases when they are merely acquainted with some of the litigants, or loosely connected to them in some other way. To require recusal, the connection must be so strong as to prompt a reasonable observer to question the judge's ability to render an impartial judgment.

The third, and perhaps the most difficult, situation involves the judge's previous public expression of an opinion that could be viewed as prejudging the case before him. The controversy in the ICJ *Wall* case as to whether Judge Nabil Elaraby should recuse himself because of previous statements about the Palestinian question is an example.[213] My own Tribunal faced this question a few years ago. In *Prosecutor v. Furundžija*, the defendant sought on appeal to disqualify the presiding trial judge (and to vacate the opinion in which this judge had participated). The judge (Florence Mumba) had been a member of the UN Commission on the Status of Women, which investigated allegations of mass and systematic rape in the former Yugoslavia and called for their prosecution by the ICTY.[214] The defendant, who was charged with torture and aiding and abetting the war crime of outrages upon personal dignity, including rape, argued that this judge's management of his trial created the appearance of partiality because a reasonable observer could have concluded that she used the trial and judgment to promote the legal and political agenda of the Commission on the Status of Women, which she had helped to establish.[215] The appeals chamber rejected the defendant's claim and elaborated what I believe is a workable rule for deciding when a judge should disqualify himself. This principle covers the examples of bias, real or perceived, that I gave earlier; a judge should recuse himself if there is a showing of actual

211 *Rex v. Sussex Justices, ex parte* McCarthy, [1924] 1 K.B. 256, 259.

212 *See, e.g.*, Stephen G. Breyer, *Judicial Independence in the United States*, 40 St. Louis U.L.J. 989, 994 (1996).

213 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Order (Int'l Ct. Justice Jan. 30, 2004).

214 *Prosecutor v. Furundžija*, Judgment, No. ITB95B17/1BA, paras. 169B70 (July 21, 2000).

215 *Id.*

bias or an appearance of bias. The latter can be manifested in two ways: first, if the judge "is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties";[216] and second, if "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[217]

I am confident that this rule is workable. Indeed, it was recently followed by the Special Court set up to prosecute atrocities committed during the civil war in Sierra Leone. The defendants had requested that the court's president be disqualified because, in a book he had previously published, he had written that the armed organization to which the defendants belonged was guilty of crimes against humanity.[218] The president refused to disqualify himself, but his colleagues disagreed and ordered his recusal.[219] They concluded that a reasonable bystander who read the passages in question could have legitimate reason to fear that the judge who wrote them lacked impartiality.[220] Notably, the recused judge accepted the decision and the rationale. He stated that, while he held no preconceived views on the guilt or innocence of the defendants, his earlier criticisms of the organization to which they belonged could give rise to the perception that he could not judge them with an open mind.

A recent Scottish decision introduced additional elements into the calculus of considerations that must be balanced: the platform the judge had used to publish his out-of-court comments and their tone and style. In this case, where the High Court of Justiciary was asked to apply judgments of the Strasbourg Court as the law of Scotland, the bench of three ruled for the dismissal of a criminal appeal. The presiding judge published an article shortly after the decision in which he strongly criticized the European Convention on Human Rights. Apart from making hostile references to the European Convention, the article quoted an earlier lecture by the judge concerned warning that the Canadian Charter on Human Rights based on the European Convention would provide "a field day for crackpots, a pain in the neck for judges and legislators, and a goldmine for lawyers."[221]

On appeal, the court stated that the article would create in the mind of an informed observer the apprehension of bias against the Convention and the rights deriving from it. The court attached particular importance to the tone of the ar-

216 UN Doc. S/PV.4838, at 30 (2003).

217 *Id.*

218 *Prosecutor v. Sesay*, Decision on Disqualification of Justice Robertson from Appeals Chamber, No. SCSLB2004B15BAR15, paras. 1B6 (Mar. 13, 2004) (quoting Geoffrey Robertson, Crimes Against Humanity (The Struggle for Global Justice (2002)).

219 *Id.*, para. 18.

220 *Id.*, para. 15 (stating that "[t]he crucial and decisive question is whether an independent bystander so to speak, or the reasonable man, reading [the relevant passages from *Crimes Against Humanity*] will have a legitimate reason to fear that Justice Robertson lacks impartiality").

221 *Hoekstra v. Her Majesty's Advocate*, 2000 SCCR 367, 368 (H.C.J.).

ticle, which it found suggestive of hostility to the operation of the Convention in Scotland. The situation would have been different, said the court, had the judge published an article in a legal journal, phrased in moderate language, that discussed the drawbacks of incorporating the Convention into the law. The court went on to say: "But what judges cannot do with impunity is to publish either criticism or praise of such a nature or in such a language as to give rise to a legitimate apprehension"[222] that they cannot apply that branch of the law impartially. Thus, the presiding judge did not pass the objective test of impartiality, and the appeal on which his bench had decided had not been decided by three impartial judges. The court ordered that further proceedings be conducted by three different judges.

Also worth mentioning in the recusal context is an interesting and, generally speaking, rare issue that presented itself at the Yugoslavia Tribunal in the "*Čelibići* case." Judge Elizabeth Odio Benito, who was on the trial panel in *Čelibići*, was elected as the second vice president of Costa Rica partway through the trial but continued to serve as a trial judge. On appeal in *Čelibići*, the defendants contended that Judge Odio Benito's position in domestic government meant that she no longer possessed the necessary judicial independence required by international law.[223] The appeals chamber appeared to acknowledge that active service as a member of a national executive branch might be incompatible with service on the Yugoslavia Tribunal.[224] In the circumstances of Judge Odio Benito's case, however, the chamber noted that she had declined to assume any vice presidential functions until completing her duties on the trial panel in *Čelibići*.[225] If she had been serving in an active capacity as vice president while still serving on the *Čelibići* bench, or had drawn any income from her government, the appeals chamber would have been much more likely to find an appearance of impropriety. Under those circumstances, her dual loyalties as a political official of her nation and member of its political hierarchy, on the one hand, and as an international judge whose positions on the case before her had nothing to do with her nationality, on the other hand might well have appeared to be a conflict of interest to a reasonable observer.

A lesson that can be derived from these cases is that, while the judge whose impartiality is challenged should be the first to assess whether to recuse himself, there may also be occasions when the judge refuses to stand aside, in which case the other members of the court may revisit and rule on the question. Those making such a decision must be at pains to do so in the proper spirit of fairness and responsibility.

These kinds of issues are likely to recur at the international tribunals. The judges have usually been chosen precisely because of their expertise in interna-

222 *Id.* at 382.

223 *Prosecutor v. Delalić*, Judgment, No. ITB96B21BA, para. 677 (Feb. 20, 2001).

224 *Id.*, para. 683.

225 *Id.*, para. 684.

tional or criminal law, typically as evidenced by a lengthy trail of publications, judicial decisions, or public statements. Their having spoken or written on some of the issues that come before them in their role as judges is to be expected. Usually, if previous writings have not prejudged the responsibility of specific individuals or prejudged contested factual situations, I would think that a judge's prior comments in an academic context should not be worthy of recusal, certainly not when the judge has the openness of mind to be willing to reconsider his prior position. But drawing lines may be somewhat difficult: when does the expression of a purely academic view about a legal issue in international law raise the appearance of partiality?

My own Tribunal is currently striving to determine the best way to resolve such questions when a judge declines to step down of his own accord. Our Rules provide that all such issues are resolved by the bureau, the five-judge body composed of the president and vice president of the Tribunal and the presiding judges of the three trial chambers.[226] But first, the presiding judge of the chamber attempts to resolve the issue through informal consultation with the judge whose impartiality has been challenged. If a mutually satisfactory resolution cannot be reached, the question is referred to the bureau, whose decision on recusal is not subject to appeal. As one might imagine, there are differing opinions about who should be the ultimate authority on this matter.

d) The Courts and the Public

As the courts decide an increasing number of important issues in public life, they become more visible to the public and, of course, the media. When certain public or private sectors disapprove of decisions by the courts, they often express this criticism openly. Of course, the right to such public expression is an integral element of a free society and a free press. As public institutions, courts should not be immune from criticism. On occasion it is even beneficial. Constructive criticism facilitates self-examination and self-improvement by the judiciary. In addition, if the interpretation of a particular law is being criticized, it may motivate the legislature to review the law and improve it, or, in the case of international tribunals, to seek amendment of the governing statute or rules.

But sometimes the criticism is unfounded and excessive, such as when it is motivated solely by dislike of the result, without any regard to the court's underlying reasoning or the supporting law; or when particular judges are targeted for reasons unrelated to their professional performance. While responsible and measured criticism of a judgment is legitimate, attacks on the court, its prestige, and its credibility are rarely so. Abusive attacks on a judge or a court may strike at the

226 Rule 15(B) of the Rules of Procedure and Evidence, states:

> Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question, and if necessary the Bureau shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

administration of justice itself and may even be subject to contempt proceedings, when available.[227]

The judges cannot cave in under this pressure, for it would amount to an abandonment of their judicial function. While they have limited means of responding to such criticism, judges can do certain things to enhance the public's understanding of their work. In the ICTY, and in some other courts, judges read out an extensive unofficial summary of every judgment they deliver, which is then distributed to the press. A further solution is for the president or spokesperson to engage the media in the service of the court by explaining and clarifying general institutional goals and policies, while steering clear of comment on any pending case. Obviously, for a judge who decided a case, especially as one of several judges, to interpret judicial decisions to the media would seldom be wise, and in certain circumstances might be inappropriate. But in case of egregious error or gross misrepresentation by the media, a correction by the judge cannot be entirely excluded. Helping journalists report notable judicial decisions accurately so that the public becomes better informed increases appreciation of the importance of our work and is a legitimate public relations function.

Judicial independence is indispensable to a law-based society. Many important structural safeguards facilitate judicial independence, such as lifetime tenure and nonremovability until a certain retirement age. But judicial independence also depends on public support for the judiciary as an institution, and to earn that support the judiciary must appear scrupulously impartial in its decision making. Together with fidelity to the law, impartiality is a means of ensuring the accountability of an independent judiciary in a democratic society and in the international community.

M. The Contribution Made by International Criminal Tribunals to the Effectiveness of International Law

The last twelve years have seen the birth of many institutions dedicated to the prosecution of violations of international criminal law. The family that began with the ICTY and ICTR has mushroomed to include the special court in Sierra Leone, the court in East Timor, the national court in Cambodia, the national court in Iraq, the hybrid courts in Kosovo, the Special Chamber of War Crimes in Sarajevo, and of course first and foremost the permanent International Criminal Court. These are impressive developments, especially if one considers that for half a century, Nuremberg did not have a single successor. Apart from a few national-level trials, such as in France, Israel, and Germany, very little happened in the fifty years after World War II in terms of actual prosecutions for war crimes. In this atmosphere, impunity flourished. Even so, this period saw the adoption of some of the most important instruments of international humanitarian law and the dramatic development of the treaty-based system dealing with crimes against international law. There was also an evolving sense that the exercise of universal

227 Cullen, *supra* note 192, at 263.

jurisdiction by national courts might to a degree fill the gap left behind by absence of a successor to Nuremberg.

The ICTY and ICTR, as creatures established by the Security Council drawing its authority from Chapter VII, have transformed the international legal landscape. The tribunals proved even in the early stages of their existence that the international investigation and prosecution of genocide, war crimes, and crimes against humanity are credible and feasible. They also showed that the accused's right to a fair trial will be protected, demonstrating that international criminal justice is indeed possible.

These tribunals were fashioned as powerful institutions, with the binding authority of the Security Council radiating to all their orders. In reality, having the theoretical backing of the Security Council did not always transform into an effective exercise of power. Especially in the early years of the Tribunals' existence, the great powers and NATO were not ready to carry out arrests manu militari. Of course, such arrests are essential to the effectiveness of international criminal tribunals. But power can be exercised in an infinite variety of means, such as pressure on governments, conditionality of aid, and negotiating for the entry into NATO and the EU. We are now, in the early 2005, benefiting from an unprecedented political support of the international community, which resulted in a large number of very senior indictees arriving at The Hague during the last few months. During the last few years, the Security Council, NATO, the EU, and the big powers have finally been giving full muscle to the orders of the tribunals regarding the arrest of the still-missing senior indictees. This increasing enforcement of arrest orders by the ICTY and the ICTR, while still imperfect, is already changing the conversation on effectiveness of international courts. The growing possibility of eventual arrest, confiscation of assets, and the risk of travel abroad, is having a growing impact.

With better enforcement, there has been increased political pressure brought to bear on regions affected by serious violations of international humanitarian law. Although the international community feels extreme outrage at serious violations of humanitarian law, that reaction tends to wane with time. The political pressure on the region to prosecute the criminals domestically, to institute adequate measures for the protection of victims and witnesses, and to take local measures to prevent further atrocities diminishes over time unless there are frequent reminders to the international community of the need to fully carry out our mission of delivering justice to those principally responsible. The international criminal tribunals provide such reminders on a regular basis. Whenever the tribunals issue an indictment or arrest warrant or insist on the provision of evidence or the protection of witnesses, an international legal obligation arises. This obligation permits heightened pressure by the international community in a direct and focused manner; failure to comply with the tribunals can lead to censure by the Security Council.

The existence of international tribunals has encouraged domestic governments to take responsibility for trying and punishing perpetrators themselves. Several jurisdictions are now bringing their own criminal statutes in line with international humanitarian and international criminal law so that they can conduct

trials on their own territory. In the case of the former Yugoslavia, it is becoming ever more certain that trials of serious violations of international humanitarian law will increasingly be conducted by local judiciaries. This is in no small measure due to the transfer of knowledge, evidence, and expertise from the ICTY to domestic courts in the region. A key example is the recently established War Crimes Chamber within Bosnia and Herzegovina, a joint project of the Tribunal and the Office of the High Representative. This Chamber is now fully operational, incorporating national and international judges as well as national and international prosecutors. Certainly, the presence of such courts operating close to the scene of crimes and close to the victims and the perpetrators will increase the awareness and deterrent effect of international criminal law in the region.

As a result of the contributions of international tribunals, international humanitarian law has grown far more in the last fifteen years than it had in the half-century following Nuremberg. There have been significant advances in the concept of the applicability of international criminal law to non-international conflicts. The ICTY has also given a robust, yet credible, reading to international customary law. Clarifying crimes against humanity has been one of the Tribunal's most important contributions. Even more important, now that we see so many non-governmental actors, is the fact that the tribunals have departed from the post-WWII understanding of international law and held that not only state officials, but also non-governmental actors may be criminally liable for crimes against humanity. The ICC Statute points in the same direction.

Another key contribution has been the development of a gender crimes jurisprudence. Rape and violence against women have long been accepted as natural consequences of war. The Nuremberg and Tokyo tribunals recorded a substantial amount of evidence of sex crimes committed during WWII, but gave virtually no treatment to these crimes in their judgements. The ICTY and ICTR have been groundbreaking in this area. The tribunals have successfully prosecuted various forms of sexual violence as instruments of genocide, crimes against humanity, and crimes of war, thus developing a crucial area of international humanitarian law. There is no question that important developments , apart from the substantive area of international humanitarian law, have taken place with regard to general principles of criminal law, particularly with regard to duress, superior orders, and command responsibility. Perhaps most importantly, the tribunals have considerably developed a comprehensive system of criminal procedure and evidence that incorporates the procedural safeguards set forth in human rights treaties. This was a pioneering effort, as Nuremberg's procedural legacy was thin. One need only to read the Statute, rules, and elements of crimes of the International Criminal Court to witness the impressive legacy of the tribunals.

The tribunals have also generated an unprecedented interest in humanitarian law and in punishing those who violate it. War crimes and crimes against humanity have firmly entered the mainstream of political debate and U.N. decision-making. The revival of international humanitarian law has encouraged various countries to adopt statutes under the principle of universality of jurisdiction, granting competence to their national courts over violations of international humanitarian

law committed in other states and enacting laws permitting the delivery of indicted persons to an international criminal tribunal. National jurisdictions are increasingly prosecuting war crimes cases, involving both crimes committed on their own territory and crimes committed on foreign soil.

It is sometimes said that we must forego justice in order to preserve peace, I believe that the two are mutually reinforcing and that each is necessary to the preservation of the other. A good recent example of the effect of the ICTY on peace and security in the former Yugoslavia is the unprecedented return of refugees across ethnic lines in Bosnia and Herzegovina, an event that is a direct result of the existence of the ICTY.

In broader terms, however, the ability of criminal tribunals to contribute directly to peace is somewhat difficult to measure. For instance, observers have suggested that the tragic events in Kosovo in 1999, which occurred long after the ICTY was established and operational, demonstrated that the ICTY failed to produce the deterrent effect that the Security Council planned. Similarly, one could suggest that the recent horrors in Sudan indicate an absence of a deterrent effect on the part of international criminal law.

There is significant force to these arguments. However, I do not think that they are grounds for abandoning any claim to deterrence on behalf of international criminal tribunals. We would hardly say that domestic criminal law has no deterrent force simply because some citizens continue to commit murder or assault. It is impossible to measure how many such crimes would occur were there no system of punishment in place.

We are moving towards a situation where taken together, international courts, mixed courts, and national courts, together with the principle of universality of jurisdiction approach a critical mass in which every leader will have to think of the consequences of ordering or tolerating atrocities, leading to the more effective deterrence.

The tribunals have demonstrated that international criminal law is feasible, that international norms can and will be enforced. They have helped cement the idea that rule of law is an integral part of the peace process. These developments are undoubtedly encouraging, but it is clear that there is a great deal of hard work ahead to ensure that international criminal law becomes primarily a tool of deterrence, and only secondarily of punishment.

As regards the ICC, its future effectiveness could be greatly improved by the Security Council referring cases to it under Chapter VII. Speaking as an American scholar, I believe that it is in the interest of our country not to block such referrals to the ICC. I am happy such a referral is now a reality in the case of Darfur. Our historical commitment to ending impunity, especially in situations such as Darfur, and to establishing the rule of law globally, and thus preventing or deterring atrocities, must be respected.

Over the years, the Security Council has played an important role by using its power and prestige to fight impunity, to establish individual criminal responsibility for perpetrators of atrocities and to impose sanctions on those who violate human rights and humanitarian norms. The Council's decisions, taken under

Chapter VII, to establish ad hoc tribunals in 1993 and 1994 – half a century after Nuremberg – were seminal moments. They led not only to the trial and punishment of senior figures responsible for atrocities in the Balkans and Rwanda, but also to the creation of a whole new corpus of jurisprudence on international criminal law, procedure and evidence – a body that will be the historic legacy of the ad hoc tribunals. Of course, much remains to be done to combat impunity outside the areas covered by the jurisdiction of the ad hoc tribunals. The Council has the power and the responsibility to do all it can to advance those goals.

I see the Council's referral – under Chapter VII – of the situation in Darfur to the International Criminal Court as a critical next step in the historic evolution of the anti-impunity principle. The referral underscores the world community's resolute commitment to the principle that perpetrators of such crimes against humanity will be held to account. It also demonstrates the potential of Chapter VII and its beneficial uses in advancing accountability in all parts of the world.

N. 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 now struggle to provide the many detainees with speedy trials. Under international pressure Croatia has improved its cooperation 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 indicted 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.[228] This court

228 U.N. Doc A/57/806, 6 May 2003.

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, applies both national (Sierra Leone) and international law.[229]

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.[230] 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."[231] 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 cooperation 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,[232] 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,[233] 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 more limited.

The work of both Tribunals demonstrates that international investigations and prosecutions of persons responsible for serious violations of international humanitarian law are possible and can be credible. No less, the rules of procedure

229 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).

230 Finding a civilian ex-governor guilty of crimes against humanity, N.Y.T. Aug.14, 2002, but acquitting military and police officials of such crimes N.Y.T. Aug.15, 2002.

231 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, August 22, 2000, at 6.

232 See *e.g .Prosecutor v. Tadić*, No. IT-94-1-AR72, Appeal on Jurisdiction, paras. 28-40 (Oct. 2, 1995), 35 ILM 32 (1996) [hereinafter Interlocutory Appeal].

233 See *e.g. Prosecutor v. Kanyabashi*, No. ICTR-96-15-T, Decision on Jurisdiction (June 18, 1997), *summarized by* Virginia Morris *in* 92 Am. J. Int'l L. 66 (1998).

and evidence each Tribunal has adopted now form the vital core of an international code of criminal procedure and evidence.

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 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 implemented ("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 vigor 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 August 12, 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.[234] Despite the potential for a more expansive vision even in 1964,[235] the criminal aspects of international humanitarian law remained limited and the prospects for its international enforcement poor, right up to the eve of the atrocities committed in Yugoslavia. How different the law is today!

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234 Wolfgang Friedmann, The Changing Structure of International Law 168 (1964).

235 *See generally* Meron, *Is International Law Moving towards Criminalization?* 9 Eur. J. Int'l L. 18 (1998).

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.[236] 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,[237] 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.[238]

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 readiness 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 Con-

236 *See e.g.*, *Tadić* Interlocutory Appeal, *supra* note 20.

237 *See* Meron, *Classification of Armed Conflict in the Former Yugoslavia:* Nicaragua's *Fallout*, 92 Am. J. Int'l L. 236 (1998).

238 See the Judgement of the ICTY Appeals Chamber in *Prosecutor v. Kunarac* and others (12 June 2002), Case No. IT-96-23& IT-96-23/1-A.

vention 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 cooperation 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 offenses 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 3: 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[1] 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 centers of authority. Bruno Simma has noted the "particularly intensive role of international organizations in the law-making process" in the field of human rights.[2] 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, labor 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 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 norma-

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1 Second Report on Reservations to Treaties by Alain Pellet, Special Rapporteur, International Law Commission, 48th Sess., 6 May-26 July 1996, ¶ 87, U.N. Doc. A/CN.4/477/Add.1 (1996) [hereinafter Second Report on Reservations to Treaties].

2 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).

tive 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[.][3]

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."[4] The Vienna Convention on the Law of Treaties[5] 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,"[6] while Article 60(5) refers to "provisions relating to the protection of the human person contained in treaties of a humanitarian character[.]"[7] 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

3 G.G. Fitzmaurice, *Reservations to Multilateral Conventions*, 2 Int'l & Comp. L.Q. 1, 15 (1953).

4 Oscar Schachter, International Law in Theory and Practice 81 (1991).

5 Vienna Convention on the Law of Treaties, *opened for signature* 23 May 1969, U.N. Doc. A/CONF.39/27 and Corr.1 (1969), 1155 U.N.T.S. 331, *reprinted in* 63 Am. J. Int'l L. 875 (1969), 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

6 *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*, U.N. Doc. A/CONF.80/31 and Corr.2 (1978), *reprinted in* 72 Am. J. Int'l L. 971 (1978), 17 I.L.M. 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 I.L.M. 543 (1986).

7 Vienna Convention, *supra* note 5, art. 60(5).

> 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.[8]

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.[9]

The root of this problem is, of course, the International Law Commission (ILC)'s 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.[10]

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 solidarity".[11] 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[,]"[12] the distinction between normative and contractual treaties did not find expression in the codification of the law of treaties,[13] perhaps because "it is very difficult to distinguish between treaties in terms of substantive criteria."[14] The definition and nature of "multilateral treaties" thus remains a neglected issue in the codified law of treaties.[15]

As Reuter has noted, a fundamental change in the way conventional instruments were concluded occurred with the emergence of multilateral treaties.[16] 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

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8 Shabtai Rosenne, Developments in the law of Treaties 1945-1986 73 (1989).

9 *Id.*, at 83-84.

10 Ian Sinclair, The Vienna Convention on the Law of Treaties 242-244 (2nd ed., 1984); Rosenne, *supra* note 8, at 72-73.

11 Paul Reuter, Introduction to the Law of Treaties 2-3 (2nd ed. 1995).

12 *Id.*, at 3.

13 Rosenne, *supra* note 8, at 80-81.

14 Reuter, *supra* note 11, at 27.

15 Rosenne, *supra* note 8, at 80-81.

16 Reuter, *supra* note 11, at 2.

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.[17]

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.[18] 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.

Of course, normative treaties are usually not woven from the same uniform codificatory fabric.[19] 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.[20] 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.[21]

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."[22] 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 U.N. treaty – making conferences and the right to become parties to those trea-

17 *Id.*, at 2-3.

18 *Id.*, at 3; Rosenne, *supra* note 8, at 80-81.

19 Reuter, *supra* note 11, at 27.

20 Second Report on Reservations to Treaties, *supra* note 1, ¶¶ 82-83.

21 Vienna Convention, *supra* note 5, art. 60(5).

22 First Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, art. 1(d), U.N. Doc. A/CN.4/144 (1962), *in Law of Treaties*, 2 Y.B. Int'l L. Comm'n 31 (1962).

ties.[23] 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.[24] 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 bilateral element in the relations created by the performance of the treaty.[25]

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.[26] In the *Reservations to the Genocide Convention* Advisory Opinion,[27] in the *Nicaragua* case,[28] and in the *Nuclear Weapons* Advisory Opinion,[29] the Court assumed, without much inquiry, that the Genocide Convention,[30] the Geneva Conventions of 1949,[31] and The Hague Convention on Laws and Customs of War on

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23 Rosenne, *supra* note 8, at 81-82.

24 G.A. Res. 3233 (XXIV), U.N. GAOR, 29th Sess., 2280th plen. mtg. (1974).

25 Rosenne, *supra* note 8, at 83.

26 *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain) (New Application)*, 1970 I.C.J. 3, 32 (Feb. 5) [hereinafter Barcelona Traction case].

27 Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of Crimes of Genocide, 1951 I.C.J. 15 (May 28) [hereinafter Reservations to the Genocide Convention Advisory Opinion].

28 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. (June 27).

29 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J., Declaration of J. Bedjaoui, ¶ 13 [hereinafter Nuclear Weapons Advisory Opinion].

30 Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 U.N.T.S. 277.

31 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 12 Aug. 1949, 6 U.S.T. 3114,TIAS No. 3362, 75 U.N.T.S. 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 Aug. 1949, 6 U.S.T. 3217, TIAS No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), 12 Aug. 1949, 6 U.S.T. 3316, TIAS No. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 12 Aug. 1949, 6 U.S.T. 3516, TIAS No. 3365, 75 U.N.T.S. 287.

Land (1907)[32] declare customary law. In the *Reparations for Injuries Suffered in the Service of the United Nations* case,[33] 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 commonly 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.[34]

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.[35]

Similarly, in its famous and controversial General Comment No. 24, the Human Rights Committee stated:

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32 Hague Convention Respecting the Laws and Customs of War on Land, 18 Oct. 1907, 36 Stat. 2277, TS No. 539.

33 Advisory Opinion on Reparations for Injuries Suffered in Service to the United Nations, 1949 I.C.J. (April 11).

34 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. H.R. (ser. A) No. 2, ¶ 29 (1982).

35 *Austria v. Italy*, App. No. 788/60, 4 Y.B. Eur. Conv. on H.R. 116, at 140 (1961) (Eur. Comm'n on H.R).

> 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 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.[36]

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.'"[37]

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:

> 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

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36 General Comment No. 24 (1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.5 (2001), p. 150, at ¶ 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).

37 Report of the Human Rights Committee, Vol. I, U.N. GAOR, 50th Sess., Supp. No. 40, at (vii), U.N. Doc A/50/40 (1995) (emphasis added by the Human Rights Committee).

> and may ignore such evidence of the intentions of the parties as are to be found in the *travaux préparatoires*.[38]

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.[39] 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.[40]

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 embodied in – or derivable from – the text which they finally draw up, and may not therefore legitimately be sought elsewhere save in special circumstances; and *a fortiori* may certainly not be subsequently imported under the guise of objects and purposes not thought of at the time. 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.
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> (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.[41]

38 Sinclair, *supra* note 10, at 133.

39 Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) (1975).

40 Sinclair, *supra* note 10, at 133.

41 *National Union of Belgian Police v. Belgium*, 19 Eur. Ct. H.R. (ser. A) (1975) (separate opinion of J. Fitzmaurice, para. 9). *See also* separate opinion in *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) (1975).

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."[42] 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.[43]

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.[44] An example would be the holding of the European Court of Human Rights in the *Loizidou* case[45] that territorial restrictions on the acceptance of its jurisdiction other that those expressly provided in the Convention were invalid.[46] 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. In the case of Mamatkulov and Abdurasulovic v. Turkey, the European Court of Human Rights examined the character of interim measures by reference to general principles of international law, drawing in particular on the practice of other international courts. Applying a dynamic and evolutive approach, and in the light of general principles of international law, the law of treaties and international case-law, the Court related the interpretation of the scope of interim measures to the context of the pertinent proceedings. It concluded that any state party addressee of interim measures must comply with them to avoid irreparable harm being caused to the victim of the alleged violation.[47] In the judgement of

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42 Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, *in* Recueil des Cours 101, 188 (Hague Academy of International Law 1998)[A-26]; *also* Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 Am. J. Int'l L. 1, 18-20 (1985).

43 Charney, *supra* note 42, at 92.

44 *Id*., at 70-71.

45 *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995).

46 Charney, *supra* note 42, at 70.

47 Judgement of 6 February 2003, at para. 110.

4 February 2005 in the case of *Mamatkulov and Askarov v. Turkey*, the Court held that whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending, and that preservation of rights of the parties represents an essential objective of interim measures in international law.[48] By failing to comply with the interim measures indicated, Turkey was found to be in breach of its obligations under the Convention.[49]

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."[50] 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 are signatories, can supply guidelines which should be followed within the framework of Community Law."[51] 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.[52] 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.[53] 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

48 Para. 124.

49 *Id.* at para. 128.

50 Case 4/73, *Nold, Kohlen-und Baustoffgroßhandlung v. Commission*, 1974 E.C.R. 491, at 507, ¶ 13.

51 *Id.*

52 Case No. 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority*, 1986 E.C.R. 723-750.

53 Charney, *supra* note 42, at 135.

> 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.[54]

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.[55] 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 ... .[56]

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 claim to a higher hierarchical status, or *jus cogens*, and should, in case of conflict, prevail over those agreements.[57]

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."[58] 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.[59]

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

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54 *Id*., at 136.

55 New Problems of the International Legal System of Extradition with Special Reference to Multilateral Treaties, Rapporteur M. Karl Doehring, 60 Y.B. Institute Int'l L. 214 [1983-II] (1984). *Id*., at 136.

56 *Id*. at 306.

57 Meron, Human Rights Law-Making in the United Nations 194-96 (1986).

58 Antonio Cassese, Human Rights in a Changing World 166 (1990).

59 *Id*.

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.[60] In other words, the Court concluded that 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,[61] 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.[62]

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 (March, 9 1987), the victim's detention and death having 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

60 *Loizidou v. Turkey,* 310 Eur. Ct. H.R. (ser. A) ¶ 95 (1995). See also *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) ¶¶ 60-97 (1988).

61 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 (Nov. 1995).

62 Second Report on Reservations to Treaties, *supra* note 1, ¶¶ 229-230.

victim's arrest and murder by governmental authorities or agents.[63] While joining in the decision of the Court, Judge Antônio A. Cançado Trindade pointed to the limitations in the law of treaties 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.[64]

Judge Hersch Lauterpacht's dissent in the *Norwegian Loans* case is the *locus classicus* for the traditional approach. In his interpretation of 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,[65] 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, 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.[66]

Not only human rights bodies, but also the ICJ have 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 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

63 *Blake v. Guatemala*, Preliminary Objections, 1996 Inter-Am. Ct. H.R., ¶ ¶ 33-34 (July 2).

64 *Id.*, Separate opinion of J. Cançado Trindade, ¶ ¶ 11-15.

65 Norwegian Loans (*France v. Norway*), 1957 I.C.J. 9, at 55-56 (July 6) (separate opinion of J. Sir Hersch Lauterpacht).

66 William A. Schabas, *Reservations to Human Rights Treaties*: *Time for Innovation and Reform*, 32 CAN. Y.B. INT'L L 39, 74 (1994).

Bosnia was a party to the Genocide Convention at the date of the introduction of the request,[67] 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.[68]

In the *La Grand* 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 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.[69] But the Court refrained from pronouncing on the additional argument of Germany that these rights of the detained persons constituted human rights.

In the *Wall* advisory opinion (2004), the ICJ interpreted a number of treaties to maximize human rights and humanitarian protections. First, it interpreted the Fourth Geneva Convention so as to confirm its applicability to the territories occupied by Israel.[70] As regards the applicability of human rights conventions to those territories, the Court first reaffirmed its ruling in the *Nuclear Weapons* Advisory Opinion (1996), that the protection of the International Covenant on

67 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Preliminary Objections, 1996 I.C.J. 595, ¶¶ 22-23 (July 11).

68 *Id.*at ¶ 34.

69 *La Grand* Case *(Germany v. United States)*, International Court of Justice, Judgement of 27 June 2001, ICJ Rep. 466, at 89.

70 At para. 101.

Civil and Political Rights does not cease in time of war, except by operation of Article 4 of the Covenant whereby certain protections may be derogated from in time of national emergency.[71] Elaborating further on the relationship between human rights and humanitarian law, the Court held – considering the object and purpose of the Covenant – that it is applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory,[72] and thus to the occupied territories. It reached similar conclusions with regard to the International Covenant on Economic, Social and Cultural Rights,[73] and the Convention of the Rights of the Child.[74]

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."[75] 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.[76] 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."[77] Simma suggests that dynamic interpretation is prevalent for human rights treaties in part because human rights obligations must be implemented within national legal systems.[78] 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 subsequent norm of general

71 *Id.*, at para. 105.

72 *Id.*, at para. 111.

73 *Id.*, at para. 112.

74 *Id.*, at para. 113.

75 Simma, *supra* note 2, at 187.

76 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), 1971 I.C.J. 16, 31-32 (June 21).

77 Simma, *supra* note 2, at 185, *citing Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 15-16 (1978).

78 *Id.*, at 187-188.

international law having the same character."[79] 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"[80] 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."[81] 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.[82] 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."[83] 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."[84]

Of course, one of the difficulties with a hierarchy of norms in 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.[85] 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."[86] He has suggested that peremp-

79 Vienna Convention, *supra* note 5, art. 53. *See generally* Antonio Cassese, International Law 142-148 (2001).

80 Sinclair, *supra* note 10, at 167.

81 *Id*., at 17.

82 *Cited in* Rosenne, *supra* note 8, at 283.

83 *Id*., at 282.

84 Stanislaw E. Nahlik, *The Grounds of Invalidity and Termination of Treaties*, 65 Am. J Int'l L. 745 (1971), *quoted in* Sinclair, *supra* note 10, at 17-18.

85 Meron, *On a Hierarchy of International Human Rights*, 80 Am. J. Int'l L. 1, 3 (1986).

86 Reuter, *supra* note 11, at 143.

tory norms might "have gone beyond the customary stage and reached the firmer status of general principles of public international law."[87]

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.[88] 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, 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.[89] 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.[90]

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

87 *Id.*, at 145.

88 Sinclair, *supra* note 10, at 215.

89 *Id.*, at 226 Rosenne, *supra* note 8, at 282-283.

90 Rosenne, *supra* note 8, at 286.

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,[91] 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 it remains valid and in force as between States A and C, D, E, Z."[92]

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.[93]

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.[94] Most sources refer to the prohibitions on the use of force, genocide,[95] slavery, and

91 Statute of the International Court of Justice, art. 59.

92 Rosenne, *supra* note 8, at 311.

93 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. (July 8) (declaration of J. Bedjaoui, ¶ 13).

94 Sinclair, *supra* note 10, at 215; also Meron, *supra* note 85, at 4.

95 *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, 1993 I.C.J. (Sept. 13) (separate opinion of J. Lauterpacht, at 440) ; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugosla-*

racial discrimination.[96] Those were the examples of obligations *erga omnes* given by the ICJ in the *Barcelona Traction* case.[97] The Human Rights Committee offered as examples the prohibitions of torture and of arbitrary deprivation of life.[98] Other rules have been characterized as rules of *jus cogens*, such as the principle of self-determination.[99] 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.[100] 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."[101]

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?[102] Although the presence of such clauses is not decisive, they introduce some uncertainty as to the status of those rules.[103] 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. 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.[104]

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via), Preliminary Objections, 1996 I.C.J. 595 (July 11) (dissenting opinion of J. Kreca, ¶ 101).

96 Ian Brownlie, Principles of Public International Law 512-515 (4th ed., 1990); Reuter, *supra* note 11, at 143.

97 *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain) (New Application)*, 1970 I.C.J. 3, 32 (Feb. 5).

98 General Comment No. 24, *supra* note 36, ¶ 8.

99 Héctor Gros Espiell, *Self-Determination and Jus Cogens*, *in* UN Law/Fundamental Rights: Two Topics in International Law 167, 171 (Antonio Cassese ed., 1979).

100 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 16 (June 21) (declaration of J. Bedjaoui, ¶ 21; dissenting opinion of J. Weeramantry ¶ 10; dissenting opinion of J. Koroma, at 286-287).

101 *Id.*, ¶ 79.

102 Sinclair, *supra* note 10, at 217.

103 *Id.*, at 223.

104 *See e.g.*, Art. 158 of Geneva Convention IV.

The concept of *jus cogens* has only a limited immediate practical importance for the validity of treaties.[105] It is very unlikely that States would publicly conclude a treaty that is in violation of *jus cogens*.[106] So far, despite the support of the concept in doctrine and statements, it has found little application in State practice.[107] 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.[108] 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 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."[109]

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

105 Meron, *supra* note 85, at 14.

106 E. Jiménez de Aréchaga, 52 Annuaire IDI, t. 1, 378 (1967), *quoted in* Rosenne, *supra* note 8, at 287-288.

107 Sinclair, *supra* note 10, at 209 and 215.

108 Meron, *supra* note 57, at 197-198.

109 Reuter, *supra* note 11, at 146.

> 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.[110]

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[.]"[111] It has also influenced the development of international criminal law, regulation of weapons, and international environmental protection. Even such a skeptical 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."[112]

Application of *jus cogens* in particular cases continues to prove 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.

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110 Cassese, *supra* note 58, at 169.

111 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, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996).

112 Sinclair, *supra* note 10, at 215.

D. Termination of Treaties

I. Withdrawal and Denunciation

In its Advisory Opinion on Namibia (1971),[113] the ICJ recognized the customary law nature of the Vienna Convention's provisions on termination of treaties.[114] 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 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[.]"[115] 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.[116]

The U.N. Secretariat then drafted an aide-memoire 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."[117] 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.[118]

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113 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), 1971 I.C.J. 16, at 55, ¶ 122 (June 21).

114 *Id.*, at 47.

115 Notification by the Democratic People's Republic of Korea, 23 August 1997, U.N. Doc. C.N.467.1997.Treaties-10 (1997).

116 *Id.*

117 Aide Memoire: Denunciation of the ICCPR by the Democratic People's Republic of Korea, 23 September 1997, Annex, ¶ 4, U.N. Doc. C.N.467.1997.Treaties-10 (1997).

118 *Id.*, ¶ 7.

Although many human rights instruments provide for a right of 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."[119] Its earlier withdrawal notwithstanding, in March 2000, North Korea submitted its second report to the Human Rights Committee under Article 40 of the Covenant.[120]

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."[121] 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.[122]

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 Convention 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

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119 *Id.*, ¶ 8.

120 *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, ¶ 12.

121 General Comment No. 26 (1997), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.5 (2001), p. 162, at ¶ 3-5.

122 *Id.*, at ¶ 4. See discussion in Buergenthal, *supra* note 36, at 360-62. 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 note 58.

> 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*.[123]

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."[124] 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."[125] 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 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.[126] 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 ex-

123 Reuter, *supra* note 11, at 197-198 (emphasis in original).

124 *Id.*, at 200.

125 Simma, *supra* note 2, at 209-10.

126 Meron, Human Rights and Humanitarian Norms as Customary Law 241-242 (1991). On breach of treaty, *see generally* Shabtai Rosenne, Breach of Treaty (1985).

tensions can be thought of, depending on whether the legal basis of this provision is seen as conventional or as founded on a peremptory rule."[127]

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 provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. 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.[128]

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 defense 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)[129] – 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

127 Reuter, *supra* note 11, at 201.

128 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), 1971 I.C.J. 16, at 55 (June 21).

129 Vienna Convention on Succession of States in Respect to Treaties, opened for signature 23 August 1978, not in force, U.N. Doc. A/CONF.80/31 and Corr.2 (1978), 17 I.L.M. 1480 (1978) [hereinafter Vienna Convention on State Succession].

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.[130] Article 12 recognizes treaties creating objective regimes, which may, as Sinclair observes, have certain effects *erga omnes*.[131] These would 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.[132] 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.[133]

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[.]"[134] It, however, recognizes a "clean slate" rule for "newly independent States", *i.e.*, ex-colonial territories:[135] 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.[136] 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

130 Menno Kamminga, *State Succession in Respect of Human Rights Treaties*, 7 Eur. J. Int'l L. 469, 473 (1996).

131 Sinclair, *supra* note 10, at 104.

132 Detlev F. Vagts, *State Succession: The Codifiers' View*, 33 Va. J. Int'l L. 275, 289 (1993).

133 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 Y.B. Int'l L. Comm'n 204 (1974).

134 Vienna Convention on State Succession (1978), *supra* note 129, art. 34.

135 *Id.*, art. 19.

136 Vagts, *supra* note 132, at 283.

should make a declaration of succession to multilateral treaties, but considered that States parties should be able to oppose such a declaration.[137]

Others have regarded the distinction between colonies and non-colonies as a reasonable compromise, assuring both continuity and equity.[138] 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.[139]

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."[140] 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."[141] This category of treaties would include codification conventions (*e.g.* law of treaties, diplomatic relations) and law-making treaties, such as human rights conventions.[142] 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 declaration of confirmation made by the Government of the successor State.[143]

The ICTY Appeals Chamber agreed in the *Celebiči* 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 multi-

137 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).

138 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).

139 1 Restatement (Third) of the Foreign Relations Law of the United States § 210 (1987).

140 Oscar Schachter, *State Succession: The Once and Future Law*, 33 Va. J. Int'l L. 253, 259 (1993).

141 *Id.*, at 259.

142 Vagts, *supra* note 132, at 289-290.

143 Status of International Covenants on Human Rights: Succession of States in Respect of International Human Rights Treaties: Report of the Secretary-General, U.N. ESCOR Commission on Human Rights, 51st Sess., U.N. Doc. E/CN.4/1995/80, ¶ 10 (1994).

lateral 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.[144] The Appeals Chamber reaffirmed this decision in the recent judgment in the case of Kordić and Čerkez.[145]

Detlev Vagts makes a powerful argument in favor 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.[146] 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.[147] With regard to such issues, although the law is unsettled, the United States prefers to presume continuity in the treaty relations.[148] 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.[149]

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 U.S.S.R. 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[150] has been followed. As regards universal treaties, the practice of the successor States has been inconclusive.[151] As a general rule, successor States of the Soviet Union (except the Russian Federation) have acceded – not succeeded – to general multilateral conventions such

144 *Prosecutor* v. *Delalić and others*, Case IT-96-21-A, Appeals Chamber, Judgement, 20 February 2001, ¶ 111.

145 Case IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004.

146 Vagts, *supra* note 132, at 290.

147 *Id.*, at 292-293.

148 Williamson and Osborn, *supra* note 138, at 263 (1993).

149 *Id.*, at 265-266.

150 Rein Mullerson, *New Developments in the Former USSR and Yugoslavia*, 33 Va. J. Int'l L. 299, 317 (1993).

151 *Id.*, at 318.

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.[152]

Arguments in favor 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.[153] 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.[154] At the time of the succession, the United Kingdom, but not China, was a party to the two Covenants. 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."[155] 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."[156] 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

152 Kamminga, *supra* note 130, at 475-480.

153 Mullerson, *supra* note 150, at 319; Kamminga, *supra* note 130, at 472-473; *contra* Craven, *The* Genocide *Case, the Law of Treaties and State Succession*, 68 Brit. Y.B. Int'l L. 127, 157-158 (1997).

154 Vienna Convention on State Succession, *supra* note 129, art. 15.

155 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 I.L.M. 1366 (1984). Relevant provisions are quoted in Nihal Jayawickrama, *Human Rights in Hong Kong: The Continued Applicability of the International Covenants*, 25 Hong Kong L.J. 171 (1995).

156 Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland – Hong Kong, U.N. Doc. CCPR/C/79/Add.69, para. 4 (1996).

transfers of sovereignty.[157] 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.[158] 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."[159] 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."[160]

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.[161] 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."[162]

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.[163]

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

157 Kamminga, *supra* note 130, at 481.

158 *Id.*, at 482.

159 UN Doc. CCPR/C/HKSAR/99/1, ¶ 2 (1999).

160 See also the *Concluding Observations of the Human Rights Committee*, China (Hong Kong), UN Doc. CCPR/C/79/Add. 17 (4 November 1999).

161 Jayawickrama, *supra* note 155, at 176-177.

162 *Id.*, at 177.

163 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Preliminary Objections, 1996 I.C.J. 595 (July 11) (separate opinion of J. Weeramantry, at (v)).

> 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.[164]

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 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.[165]

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 favor 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.[166]

It has been suggested that arms control agreements could be regarded as dispositive treaties.[167] Neutralization and demilitarization agreements are a traditional category of obligations considered to devolve with territory. But only a few mod-

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164 *Id.*, at (vii).

165 *Id.*, Separate opinion of J. Shahabuddeen, at (ii-iii).

166 Mullerson, *supra* note 150, 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).

167 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).

ern arms control agreements, 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[168] and arrangements for quantitative limitations on certain types of armaments became subjects of negotiation.[169]

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 First World War, 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."[170] 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.[171] 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 the negotiations. If not, the reservation, like the signature to which it is attached, is null and void.[172]

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:

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168 Treaty on the Non-Proliferation of Nuclear Weapons, 1st July 1968, 21 U.S.T. 483, 729 U.N.T.S. 161, *revised*.

169 Bunn and Rhinelander, *supra* note 166, at 348.

170 Sinclair, *supra* note 10, at 54-55.

171 *Id.*, at 56.

172 Report of the Committee of Experts for the Progressive Codification of International Law, 8 League of Nations O.J. 69 (1927).

(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.[173]

Similarly, the Havana Convention on Treaties adopted by the International Conference of American States (1928) also followed a system departing from unanimity.[174]

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[.]"[175] 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.[176] As noted by James Brierly, the first ILC Rapporteur 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."[177] Second, "the desirability of the widest possible application of multilateral conventions."[178]

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

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173 Sinclair, *supra* note 10, at 57; also Rosenne, *supra* note 8, at 426-427.

174 Havana Convention on Treaties, art. 6, adopted at the Sixth International Conference of American States (1928), *reprinted in Conventions on Public International Law Adoptee by the Sixth International American Conference*, 22 AM. J. INT'L. 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.

175 Sinclair, *supra* note 10, at 56.

176 Reuter, *supra* note 11, at 78-79.

177 Reservations to Multilateral Conventions, Report by Mr. J.L. Brierly, Special Rapporteur, ¶ 11, U.N. Doc. A/CN.4/41, *in* 2 Y.B. 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, ¶ 16, U.N. Doc. A/CN.4/470 (1995).

178 *Id.*, ¶ 12.

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:

> The object and [humanitarian and civilizing] purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must take, individually and from its own standpoint, of the admissibility of any reservation.
>
> Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes.[179]

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.'"[180]

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

179 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 Rep. 15, at 24 (1951).

180 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).

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.[181]

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 favoring a minority view, that of the Eastern bloc countries.[182] 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 any of them may be deemed to impair its objects and purpose.[183]

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.[184]

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

181 Meron, *supra* note 126, at 11-12.

182 Reuter, *supra* note 11, at 79; Sinclair, *supra* note 10, at 58.

183 *Reservations to Multilateral Conventions*, *in* Report of the International Law Commission covering the Work of Its Third Session, 16 May-27 July 1951, ¶ 24, U.N. Doc. A/1858, in 2 Y.B. Int'l L. Comm'n 125, 128 (1951).

184 Catherine Logan Piper, *Reservations to Multilateral Treaties: The Goal of Universality*, 71 Iowa L. REV. 295, 313 (1985) (internal citations omitted).

des conventions multilaterales l'application du principe du consentement unanime."[185]

Following the opinion of the Court (1951) and the ILC Report (1951), the General Assembly adopted a resolution in the nature of a compromise[186] "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.[187]

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,"[188] 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." [189] 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 accom-

185 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).

186 Rosenne, *supra* note 8, at 430.

187 G.A. Res. 598(VI), U.N. GAOR Sixth Committee, 360th mtg., items 49(a)-50 (1952).

188 First Report on the Law and Practice Relating to Reservations to Treaties, *supra* note 177, ¶.22 ; *also* Rosenne, *supra* note 8, at 431.

189 Oscar Schachter, *The Question of Treaty Reservations at the 1959 General Assembly*, 54 Am. J. Int'l L. 372, 379 (1960).

panied by a reservation or reservations not agreed to by all other parties to the treaty."[190] 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.[191]

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.[192]

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.[193] 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).[194] The system

190 Law of Treaties, Report by Mr. H. Lauterpacht, Special Rapporteur, Draft art. 9, U.N. Doc. A/CN.4/63 (1953), *in* Y.B. Int'l L. Comm'n 90, 91 (1953); *quoted in* First Report on the Law and Practice Relating to Reservations to Treaties, *supra* note 177, ¶ 25.

191 *Id.*, at 124.

192 *Id.*, at 125; *quoted in* First Report on the Law and Practice Relating to Reservations to Treaties, *supra* note 177, ¶ 26.

193 First Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, art. 1(f), 17, and 19, U.N. Doc. A/CN.4/144, *in* 2 Y.B. Int'l L. Comm'n 27, 60-68 (1962); Sinclair, *supra* note 10, at 59.

194 First Report on the Law and Practice Relating to Reservations to Treaties, *supra* note 177, ¶ 43.

proposed by Waldock was substantially modified by the Commission in its details but the underlying general principle was adopted:

> [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.[195]

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."[196] 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 modeled on the Vienna Convention (1969).[197] 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."[198] 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.[199] Special rules are provided for treaties between a limited number of participants and treaties establishing international organizations.[200] The dynamics 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,

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195 Report of the International Law Commission covering the Work of Its Fourteenth Session, 24 April-29 June 1962, U.N. Doc. A/5209, *in* 2 Y.B. Int'l L. Comm'n 157, 180 (1962).

196 Second Report on Reservations to Treaties, *supra* note 1, ¶ 166.

197 First Report on the Law and Practice Relating to Reservations to Treaties, *supra* note 177, ¶ 61.

198 Sinclair, *supra* note 10, at 13-14.

199 Reuter, *supra* note 11, at 82-83.

200 Vienna Convention, *supra* note 5, art. 20 (2) and (3).

> [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.[201]

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."[202]

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[203] and that clauses prohibiting reservations are relatively rare in human rights and disarmament treaties, although they are more common in environmental treaties.[204] Imbert has noted the great diversity in reservation clauses in human rights treaties, even in treaties having related objects.[205] For Pellet, treaty practice indicates that the appropriateness of reservations to normative treaties is not necessarily excluded, and that "the question cannot be objective and depends far more on political ... preferences than on legal technicalities[.]"[206]

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 ...[207]

A diametrically opposite view was expressed by Judge De Meyer in the *Belilos* case before the European Court of Human Rights:

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201 *Id.*, art. 21.

202 Simma, *supra* note 2, at 181. *Also* Schabas, *supra* note 66, at 65 and Second Report on Reservations to Treaties, *supra* note 1, ¶ 154.

203 Second Report on Reservations to Treaties, *supra* note 1, ¶ 123.

204 *Id.*, ¶ 124 and accompanying footnotes.

205 Imbert, *supra* note 185, 193-196.

206 Second Report on Reservations to Treaties, *supra* note 1, ¶ 113.

207 *Id.*, ¶ 142.

> 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. It is difficult to see how reservations can be accepted in respect of provisions recognising rights of this kind. It may even be thought that such reservations, and the provisions permitting them, are incompatible with the *ius cogens* and therefore null and void, unless they relate only to arrangements for implementation, without impairing the actual substance of the rights in question.[208]

Supporters of the applicability of the Vienna regime to human rights and humanitarian treaties, including the United Kingdom,[209] France,[210] and of course Pellet,[211] have emphasized that its regime was modeled 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[212] 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;
>
> ... 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[.][213]

While recognizing the ambiguity of the provisions of the 1969 and 1986 Vienna Conventions on validity of reservations,[214] Pellet suggested that there was a pre-

208 *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988) (concurring opinion of Judge De Meyer, para. 2).

209 Report of the Human Rights Committee (1995), *supra* note 37, at (vi).

210 Report of the Human Rights Committee, Vol. I, U.N. GAOR, 51st Sess., Supp. No. 40, Annex VI, ¶ 11, U.N. Doc. A/51/40 (1997).

211 Second Report on Reservations to Treaties, *supra* note 1, ¶ 166.

212 *Id.*, ¶ 176.

213 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, U.N. GAOR, 52nd Sess., Supp. No. 10, at 126, ¶¶ 2-3, U.N. Doc. A/52/10, (1997).

214 First Report on the Law and Practice Relating to Reservations to Treaties, *supra* note 177, ¶ 103.

sumption in favor of permissibility of reservations.[215] 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[216]

Supporting the Human Rights Committee,[217] 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."[218] 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."[219] 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 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.[220]

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 Reserva-*

215 *Id.*, ¶ 106.

216 General Comment No. 24, supra note 36, ¶ 17.

217 Simma, *supra* note 2, at 182.

218 Rosalyn Higgins, *The United Nations: Still a Force for Peace*, 52 Modern L.R. 12 (1989), *quoted in* Simma, *supra* note 2, at 182.

219 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).

220 Vienna Convention, *supra* note 5, art. 19.

tions to the Genocide Convention case of 1951."[221] 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.[222]

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?"[223] 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" 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.[224]

In its observations on the Human Rights Committee's General Comment No. 24, the United Kingdom appeared to support the "permissibility school."[225] (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."[226]).

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

221 General Comment No. 24, *supra* note 36, ¶ 6 and note 2.

222 Second Report on Reservations to Treaties, *supra* note 1, ¶ 138.

223 First Report on the Law and Practice Relating to Reservations to Treaties, *supra* note 177, ¶ 100.

224 Derek W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 Brit. Y.B. Int'l L. 67, 88 (1976-1977); *quoted in* First Report on the Law and Practice Relating to Reservations, *supra* note 177, ¶ 101.

225 Report of the Human Rights Committee (1995), *supra* note 37, at (ix).

226 First Report on the Law and Practice Relating to Reservations to Treaties, *supra* note 177, ¶ 102, *also* ¶ 115.

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 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,[227] 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 favor.[228]

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."[229] 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.[230]

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 international law unless it can establish a justification precluding wrongfulness, such as force ma-

227 North Sea Continental Shelf Cases *(F.R.G. v. Den.; F. R.G. v. Neth.)*, 1969 I.C.J. 3 (Feb. 20).

228 *Id.*, at 38-39.

229 *Id.*, at 39.

230 *Id.*

jeure, state of necessity or self-defense. 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.[231] 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 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 U.N. 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

231 Richard Baxter, *Treaties and Custom*, *in* 129 Recueil des Cours 51 (Hague Academy of International Law 1970-I).

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 U.S. reservations to the Political Covenant, the Human Rights Committee insisted in its observations on the U.S.'s 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."[232] 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. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be.[233]

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 U.S. reservations.[234] 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, moreo-

232 Report of the Human Rights Committee (1995), *supra* note 37, ¶ 279.

233 General Comment No. 24, *supra* note 36, ¶ 8.

234 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) (Accessed on 1 Aug. 1999) <http://www.un.org/Depts/Treaty>.

> ver, wholly unsupported by and is in fact contrary to international law… 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.[235]

The United Kingdom also disputed the Committee's view that reservations to customary law are excluded because the Covenants object is to benefit individuals.[236] 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.[237] I believe that these objections have a rational basis. While it is widely accepted that reservations to peremptory norms are now allowed, this is not the case of the entirety of customary law.

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. [238] 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."[239] Pellet agreed with the principle that "peremptory provisions in treaties cannot be the subject of reservations."[240] Other writers have asserted that a reservation to a norm of *jus cogens* would be illegal. [241] The overlap between peremptory norms and those deemed to be non-derogable

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235 Report of the Human Rights Committee (1995), *supra* note 37, at (iii).

236 *Id.*, at (vii-viii).

237 Report of the Human Rights Committee (1997), *supra* note 210, at (i).

238 Report of the International Law Commission on the Work of its Forty-ninth Session, *supra* note 213, ¶ 106.

239 General Comment No. 24, *supra* note 36, ¶ 8.

240 Second Report on Reservations to Treaties, *supra* note 1, ¶ 142.

241 Schabas, *supra* note 66, at 50.

may provide a *prima facie* test of compatibility, as suggested by the Human Rights Committee.[242]

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."[243] Guatemala had formulated a reservation to Article 4(4) of the American Convention, a provision that prohibits the infliction of capital punishment for political offenses or 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."[244] 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.[245]

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 U.S. reservations to Article 6(5), [246] and Article 7, of the Political Covenant.[247] Most of the objectors referred to Article 4(2), which lists Article 6 as describing non-derogable rights. Germany stated, for example, that

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242 General Comment No. 24, *supra* note 36, ¶ 10.

243 Advisory Opinion on Restrictions to the Death Penalty (Arts 4(2) and 4(4) of the American Convention of Human Rights), Inter-Am. Ct. H.R. (ser. A) No.3, ¶ 61, OC-3/83 (1983).

244 *Id.*

245 Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 Am. J. Int'l L. 22, 25 (1985) (internal citations omitted).

246 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* note 234.

247 *Id.*, at Denmark, Finland, Germany, Italy, the Netherlands, Norway, Portugal, Spain, Sweden.

> [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.[248]

c) Severability

Judge Hersch Lauterpacht discussed the question of severability in his separate opinions in the *Norwegian Loans*[249] and *Interhandel*[250] 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.[251] In the *Interhandel* case, Lauterpacht concluded that the U.S. 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.[252]

There has been considerable discussion of severability v. 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.[253]
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:

> The Government of the Kingdom of the Netherlands declares that it considers the reservations made by Albania, Algeria, Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Morocco, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics in respect of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature at Paris on 9 December 1948, to be incompatible with the object and purpose of the Convention. The Government of the Kingdom of the

248 *Id.*, at Germany.
249 *Norwegian Loans Case (France v. Norway)*, 1957 I.C.J. 9 (July 6).
250 *Interhandel Case (Switzerland v. United States)*, 1959 I.C.J. 6 (March 21).
251 *Norwegian Loans Case*, 1957 I.C.J. at 55-59.
252 *Interhandel Case*, 1959 I.C.J. at 117.
253 Schabas, *supra* note 66, at 71.

> Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention.[254]

Another approach deems "the illegal reservation to be ineffective," but considers the reserving State "bound by the instrument as a whole, including the reserved provision." [255] 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.[256] 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."[257]

Belilos was followed by *Chrysostomos et al. v. Turkey.*[258] 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.[259] The Commission considered the relevant provisions of the Convention and its

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254 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) (accessed on 1st August 1999) <http://www.un.org/Depts/Treaty>.

255 Schabas, *supra* note 66, at 71.

256 *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., ¶ 15, U.N. Doc. CEDAW/C/1997/4 (1996).

257 *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (Ser. A) ¶ 60 (1988). [A-35] 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 me 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. H. R. (Ser. A.), Concurring Opinion of Judge Matscher, ¶ 60 (1995).

258 *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).

259 *Id.*, at 233-236, and 243.

"object and purpose" and then 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.[260] It dismissed any analogy with declarations under Article 36, paragraph 3 of the ICJ Statute. 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. Declarations under this clause create mere reciprocal agreements between Contracting States.[261]

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):

> [w]here 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.[262]

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[.]"[263] 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.[264] 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 withdrawal 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 September 24, 1999 the Court issued two judgments: one in the *Ivcher-Bronstein* case,[265] and the other in

260 *Id.*, at 241-242.

261 *Id.*, at 242.

262 *Id.*, at 249.

263 *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser A.) ¶ 89 (1995).

264 Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 Berkeley J. Int'l L. 277, 304 (1999).

265 Case of Ivcher-Bronstein (Competence), Inter-American Court of Human Rights, Judgment of 24 September 24, 1999, paras. 40-41, available at < http://corteidh-oea.nu.or.cr/ci/PUBLICAC/SERIE C/C 54 ESP.HTM> (Spanish).

the *Constitutional Tribunal* case.[266] 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.[267]

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.[268]

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"[269] 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 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.[270]

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 (Article 36(2)) of the ICJ Statute.[271] 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

266 Constitutional Tribunal Case, Inter-American Court of Human Rights, Judgment of 24 September 24, 1999, available at <http://corteidh-oea.nu.or.cr/ci/PUBLICAC/SERIE_C/C_55_ESP.HTM> (Spanish).

267 Case of Ivcher-Bronstein (Competence), ¶ 32-34.

268 *Id.*, ¶ 35-39.

269 *Id.*, ¶ 40.

270 *Id.*, ¶ 40-42.

271 *Id.*, ¶ 47-49.

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.[272]

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.[273]

The United States objected asserting that "this conclusion is … completely at odds with established legal practice and principles."[274]

France[275] and the United Kingdom[276] also opposed the Committee's severability doctrine. advanced a similar objection. Simma has observed that although the 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.[277] Yet, the European system of human rights protection, based on a binding adjudicatory system, encroaches more significantly on States' sovereignty.[278] 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.[279]

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 (Article 20 (1) (a)) or of the treaty as a whole (Article 20(4)(b)). He maintained that "consensuality ... is the very essence of any treaty commitment,"[280] 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:

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272 Karen C. Sokol, *Case note: Ivcher Bronstein and Constitutional Tribunal*, 95 A.J.I.L. 178, 182-184 (2001).

273 General Comment No. 24, *supra* note 36, ¶ 18.

274 Report of the Human Rights Committee (1995), *supra* note 37, at (v).

275 Report of the Human Rights Committee (1997), *supra* note 210, at (iii).

276 Report of the Human Rights Committee (1995), *supra* note 37, at (x).

277 Simma, *supra* note 219, at 671.

278 Baylis, *supra* note 264, at 303.

279 Simma, supra note 219, at 666-668.

280 Second Report on Reservations to Treaties, *supra* note 1, ¶ 228.

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.[281]

Thus, "[the State] alone must determine whether the impermissible reservation that it attached to the expression of its consent to be bound constituted an essential element of that consent."[282] 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.[283] Pellet, however, favors a third solution: permitting the State to modify its reservation to make it compatible with the object and purpose of the treaty.[284]

Under the Vienna Convention, States may make a reservation "when signing, ratifying, accepting, approving or acceding to a treaty."[285] Some construe that provision to exclude any possibility of subsequent modification.[286] 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."[287] Judge Valticos advocated this solution in his partly dissenting opinion in the *Chorherr* case before the European Court:

> ... if, several years after it has been made (when the Convention was ratified), a reservation is found to be contrary to the rules laid down in Article 64 and is therefore held to be null and void, can it be replaced by another reservation which is more consistent with that Article? In principle that should not be possible because a reservation may be made only at the moment of ratification. That would, however, be unreasonable, because the government concerned has been informed of the non-validity of their reservation only several years after the ratification. The government in question

281 *Id.*, ¶ 231.

282 *Id.*, ¶ 243.

283 *Id.*, ¶ 244.

284 *Id.*, ¶¶ 247-251.

285 Vienna Convention, *supra* note 5, art. 19.

286 Schabas, *supra* note 66, at 76.

287 Second Report on Reservations to Treaties, *supra* note 1, ¶ 249.

> should therefore have the opportunity to rectify the situation and to submit a valid reservation within a reasonable time and on the basis of their former reservation.[288]

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."[289] 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."[290]

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.[291] 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.[292]

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

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288 *Chorherr v. Austria*, 266-B Eur. Ct. H.R. (ser. A) at 42 (1993) (partly dissenting opinion of J. Valticos).

289 Schabas, *supra* note 66, at 77. *See* Reservations and Declarations to the Convention for the Protection of Human Rights and Fundamental Freedoms: Switzerland (accessed on 1st August 1999) <http://www.coe.fr/tablconv/reservdecl/dr5e.htm>.

290 Giorgio Gaja, *Unruly Treaty Reservations*, International Law at the Time of Its Codification: Essays in Honour of Roberto Ago 307, 312 (1987).

291 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. L. Q. 479, 487 (1999).

292 Reservations, Declarations, Notifications and Objections Relating to the Optional Protocol to the International Covenant on Civil and Political Rights: Trinidad and Tobago, Guyana, *supra* note 234.

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."[293] 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.[294] The Committee rejected that contention and considered the communication 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."[295] 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.[296]

IV. Reservations to Remedies and Procedural Provisions, and Competence of Human Rights Bodies to Assess Admissibility of Reservations

Human right monitoring bodies were initially hesitant to comment on the legality of certain reservations when examining States' reports.[297] The Treaty Section of the Office of Legal Affairs of the United Nations Secretariat issued a legal opinion at the third session of CEDAW in which it indicated that neither the Committee nor the Secretary-General, as depositary of the treaty, had the power to determine the compatibility of reservations.[298] Nonetheless, the chairpersons of monitoring

293 General Comment No. 24, *supra* note 36, ¶ 13.

294 *Rawle Kennedy* v. *Trinidad and Tobago*, Communication No. 845/1999, UN Doc. CCPR/C/67/D/845/1999, reprinted in 21 H.R.L.J. 18 (2000).

295 General Comment No. 24, *supra* note 36, ¶ 13.

296 *Rawle Kennedy* v. *Trinidad and Tobago*, *supra* note 294, ¶ 6.7.

297 Schabas, *supra* note 66, at 70; Second Report on Reservations to Treaties, *supra* note 1, ¶ 194.

298 Report of the Committee on the Elimination of Discrimination Against Women, U.N. GAOR, 39th Sess., Supp. No. 45, vol. II, Annex III, U.N. Doc. A/39/45 (1984).

bodies recommended in 1994 "that treaty bodies state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law."[299] Over time, many human rights bodies have asserted competence to evaluate the admissibility of reservations.

The coordination between the inter-State reservation/objection mechanism and the control by monitoring bodies is an issue specific to human rights treaties since such bodies are seldom found in other fields of international law. However, the position of such bodies may have an important influence on general international law when construing and applying the general reservations regime, such as the determination of incompatible reservations and the legal effects of invalid reservations.

The Human Rights Committee considered unacceptable reservations to "guarantees [that] provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose." Reservations to Articles 2(2) and 40 which concern internal implementation and international reporting, respectively, thus would not be legal. It added that "a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty."[300]

This triggered a strong objection from the United States:

> This would be a rather significant departure from the Covenant scheme, which does not impose on States Parties an obligation to give effect to the Committee's interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenants. The drafters of the Covenant could have given the Committee this role but deliberately chose not to do so.[301]

The ICJ's Advisory Opinion on the Genocide Convention suggests that at least some reservations to procedures and remedies are acceptable. In that case, the Court held that a reservation to Article IX of the Genocide Convention, which provides for the submission of disputes to the I.C.J., was compatible with the object and purpose of the Convention.[302] The United Kingdom and the Netherlands "appear[ed however] to consider reservations to Article 9 to be incompatible with the Genocide Convention, and they have formulated objections on a number of occasions in this respect."[303]

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299 Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights, U.N. GAOR, 49th Sess., Agenda Item 100(a), ¶ 30, U.N. Doc. A/49/537 (1994).

300 General Comment No. 24 , *supra* note 36, ¶ 11.

301 Report of the Human Rights Committee (1995), *supra* note 37, at (i).

302 Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28).

303 Schabas, *supra*, at 66. *See* Reservations, Declarations, Notifications and Objections Relating to the Convention on the Prevention and Punishment of the Crime of Geno-

The case of Yugoslavia against the United States[304] confirms that reservations to Article IX of the Genocide Convention are allowed. The United States argued, on the basis of the Advisory Opinion on Reservations to the Genocide Convention (1951), that reservations to the Convention are permitted and that

> … the United States' reservation to Article IX is not contrary to the Convention's object and purpose. The possibility of recourse to this Court for settlement of disputes is not central to the overall system of the Convention, which has as its essential elements the definition of the crime of genocide and the creation of obligations to try and punish those responsible for genocide.[305]

The United States referred to the practice of States, mentioning that fourteen other States had made some form of reservation to Article IX. The Court agreed with the U.S. position. It found that the Convention does not prohibit reservations, that Yugoslavia did not object to the U.S. reservation to Article IX, and that "the reservation had the effect of excluding that Article from the provisions of the Convention in force between the parties."[306] Accordingly, Article IX could not constitute a basis of jurisdiction in this dispute.

Some limited reservations to the competence of the Human Rights Committee have been deemed acceptable by the Committee. These include reservations that limit the competence of the Committee *ratione temporis*, those that deny the competence of the Committee when the case has already been submitted to the European Convention monitoring bodies, and reservations on inter-State petitions that impose conditions of reciprocity.

The United States ratification of the Political Covenant and the reservations it attached may have prompted the Human Rights Committee to address the question of reservations directly.[307] In its General Comment No. 24, the Committee concluded that in the case of human rights treaties, the general regime of the Vienna Convention was inappropriate and that

> [i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions.[308]

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cide: United Kingdom, Netherlands, *supra* note 225.

304 Legality of the Use of Force (Yugo. v. U.S.), Request for Indication of Provisional Measures, 1999 ICJ Rep. 124 (Order of June 2) [hereinafter Order of June 2, 1999].

305 Legality of the Use of Force (Yugo. v. U.S.), Oral Pleadings, Verbatim Record, ¶¶ 2.17 (11 May 1999).

306 Order of June 2, 1999, *supra* note 304, ¶ 24.

307 Schabas, *supra* note 66, at 41, note 7.

308 Committee on Human Rights, General Comment No. 24, *supra* note 36, para. 18.

The United States objected, arguing that the Committee seemed "to reject the established rules of interpretation of treaties as set forth in the Vienna Convention on the Law of Treaties and in customary law:"

> the Committee appears to dispense with the established procedures for determining the permissibility of reservations and to divest States Parties of any role in determining the meaning of the Covenant ... .
> The Committee's position, while interesting, runs contrary to the Covenant scheme and international law. [309]

In the U.S. Senate, a bill presented by Senator Helms stated that

> [t]he purpose and effect of General Comment No. 24 is to seek to nullify as a matter of international law the reservations, understandings, declarations, and proviso contained in the Senate resolution of ratification, thereby purporting to impose legal obligations on the United States never accepted by the United States.[310]

The United Kingdom did not contest the competence of the Committee "to take a view of the status and effect of a reservation where this is required in order to permit the Committee to carry out its substantive functions under the Covenant," but insisted that:

> (a) Even if it were the case ... that the law on reservations is inappropriate to address the problem of reservations to human rights treaties, this would not of itself give rise to a competence or power in the Committee except to the extent provided for in the Covenant; any new competence could only be created by amendment to the Covenant, and would then be exercisable on such terms as were laid down[.] [311]

The issue of reservations to human rights treaties has been a major preoccupation of monitoring human rights bodies and the legality of reservations has been examined in their contentious and advisory practice. Both the European and the Inter-American human rights organs have recognized their own competence to assess the validity of reservations. In the *Temeltasch* case, the European Commission of Human Rights asserted for the first time its competence to assess the validity of reservations made to the European Convention. [312] It found the Swiss "interpretative declaration" concerning Article 6 of the European Convention not in conformity with the Convention but held that the declaration had the legal ef-

309 Report of the Human Rights Committee, Annex VI, *supra* note 37, at (i) (1995).

310 Foreign Relations Revitalization Act of 1995, S. 1441, 104th Cong. § 314(a)(5) (1995).

311 Report of the Human Rights Committee (1995), *supra* note 37, at (viii-ix).

312 *Temeltasch v. Switzerland*, App. 9116/80, 31 Eur. Comm'n H.R. Dec. & Rep. 120, 144-145 (1983).

fect of a validly made reservation. The case was not referred to the Court, and the report of the Commission was approved by the Committee of Ministers. [313]

In the *Belilos* case, the European Court of Human Rights held that "the silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment."[314] In that case and in the *Weber*[315] case, the Court held the reservations to be invalid since they did not fulfill the requirement of Article 64(2) of the European Convention that a brief statement of the law not in conformity with the Convention be included in the reservation. In the *Loizidou* case, the Court emphasized the essential character of Articles 25 and 46 of the Convention:

> The Court observes that Articles 25 and 46 of the Convention are provisions which are essential to the effectiveness of the Convention system since they delineate the responsibility of the Commission and Court "to ensure the observance of the engagements undertaken by the High Contracting Parties" (Article 19), by determining their competence to examine complaints concerning alleged violations of the rights and freedoms set out in the Convention. In interpreting these key provisions it must have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms.[316]
>
> ... If, as contended by the respondent Government, substantive or territorial restrictions were permissible under these provisions, Contracting Parties would be free to subscribe to separate regimes of enforcement of Convention obligations depending on the scope of their acceptances. Such a system, which would enable States to qualify their consent under the optional clauses, would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (ordre public).[317]

Similarly, the Inter-American Court considered itself competent to assess the validity of Guatemala's reservation to Article 4 (right to life) of the American Convention, even though the reservation had not attracted any objections from other State Parties.[318]

While asserting that the general system of reservations established by the Vienna Convention had been adapted to the requirements of human rights treaties,

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313 Council of Europe, Committee of Ministers, Resolution DH (83) of 6 March 1983, 26 Y.B. Eur. Conv. H.R., Chap. IV, at 5 (1983).

314 *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A), ¶¶ 47-50 (1988).

315 *Weber v. Switzerland*, 177 Eur. Ct. H.R. (ser. A), ¶¶ 37-38 (1990).

316 *Loizidou v. Turkey*, Preliminary Objections, 310 Eur. Ct. H.R. (ser. A), ¶ 70 (1995).

317 *Id.*, ¶ 75.

318 Advisory Opinion on Restrictions to the Death Penalty (Arts 4(2) and 4(4) of the American Convention of Human Rights), Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 61, OC-3/83 (1983).

Pellet has recognized that the development of human rights monitoring mechanisms raises the issue of coordination between the two mechanisms of control, *i.e.*, acceptance and objection by other State parties, and control by monitoring bodies.[319]

While human rights treaties do not explicitly entrust the determination of the legality of reservations to a jurisdictional or quasi-jurisdictional body, Pellet agrees that "the mere fact that a treaty provides for the settlement of disputes connected with its implementation through a judicial or arbitral body, automatically empowers the latter to determine the admissibility of reservations or the validity of objections."[320] He comments that the assertion by the human rights treaty monitoring bodies of their competence to assess and state their view on the permissibility of reservations have created a situation which it would be difficult to alter, since the States concerned did not manifest a contrary *opinio juris*.[321] There is, therefore, an emerging common law supporting the competence of human rights bodies to assess the compatibility and the validity of reservations.

Echoing Pellet's conclusions,[322] the ILC has tentatively concluded that

> ... where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them; [323]

But this competence of human rights bodies, the ILC cautioned, is not unlimited. "[It] does not exclude or otherwise affect the traditional modalities of control by the contracting parties ... [and it cannot exceed] the powers given to them for the performance of their general monitoring role.[324]

319 Second Report on Reservations to Treaties, *supra* note 1, ¶ 179.

320 *Id.*, ¶ 186.

321 *Id.*, ¶ 210.

322 *Id.*, ¶¶ 193-215.

323 Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties including Human Rights Treaties, *supra* note 213, ¶ 5.

324 *Id.*, ¶¶ 6, 8.

Chapter 4: 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."[1] 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.[2]

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 internationale."[3]

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1 *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*ff*, UN Doc. A/56/10 (1998) [Hereinafter "Draft Articles (2001)"].

2 *Id*., Article 2.

3 Prosper Weil, *Le droit international en quête de son identité*, 237 Collected Courses 9, 339 (1992-VI).

In the law of diplomatic protection, the Vatellian theory that "[whoever] uses a citizen ill, indirectly offends the State"[4] 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*, offenses 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.[5] 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.[6] 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.[7] It is more persuasive, however, to justify the actions of a State seeking enforcement of an obligation *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.

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4 Emerich de Vattel, The Law of Nations, Bk. 2, sec. 71, 161 (J. Chitty ed. 1852).

5 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).

6 *Barcelona Traction Light and Power Company, Ltd. (Belgium v. Spain)* (Second Phase), International Court of Justice, Judgment of 5 February 1970, 1970 ICJ Rep. 3, at ¶¶ 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."

7 *See* Crawford (2000), *supra* note 5, 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.

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.[8] 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 humanitarian 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 labor 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

8 *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).

> international obligation towards another State involves some kind of 'injury' to that other State.[9]

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.[10] 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 responsabilité, 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.[11]

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."[12] 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.[13]

Graefrath noted that "it is the violation of the obligation and not the damage that entails the State's responsibility."[14] Treating conduct rather than resulting damage

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9 *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.

10 *See* Karl Zemanek, *The Legal Foundations of the International System*, 266 Collected Courses 11, 255 (1997).

11 Brigitte Stern, *La responsibilité dans la système international: Conclusions générales*, *in* La responsibilité dans le système International (Colloque du Mans) 319, 331 (1991).

12 *Report of the International Law Commission on the Work of its Fiftieth Session*, 53 UN GAOR, Supp. No. 10, ¶ 283, UN Doc. A/53/10 and Corr. 1 (1998).

13 *Id.*

14 Bernhard Graefrath, *Responsibility and Damages Caused: Relationship between Responsibility and Damages*, 185 Collected Courses 9, 37 (1984-II).

as the "decisive criterion" for determining responsibility promotes "the preventive function of international responsibility:"[15] "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."[16]

B. Circumstances Precluding Wrongfulness: Distress, Necessity, Consent

The ILC Draft Articles on State Responsibility list circumstances precluding wrongfulness for conduct inconsistent with international 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-defense (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."[17] 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.[18] 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.[19]

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

15 *Id.*, at 37.

16 *Id.*, at 38.

17 Draft Article 24 (2001), *supra* note 1.

18 *Report of the International Law Commission on the Work of its Fifty-third Session (2001)*, *supra* note 1, at 189-192.

19 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).

> The provisions of this Annex concerning dumping shall not apply in case of force majeure, due to stress of weather or any other cause, when the safety of human life or of a vessel or aircraft is threatened. [...].[20]

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.[21]

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.[22] 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.[23]

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 international obligation of lesser weight or urgency to another State.[24]

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20 Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992, Annex II, Article 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, Article IV, and the Convention on the Prevention of Marine Pollution by Dumping of Wastes, 29 December 1972, Article V, contain similar provisions.

21 *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.

22 *Rainbow Warrior (New Zealand v. France)*, 20 UNRIAA, 217, 254-255 (1990).

23 *Report of the International Law Commission on the Work of its Fifty-third Session (2001)*, *supra* note 1, at 192.

24 *Id.*, at 194.

To trigger the exception of necessity, the protection of the interests of individuals and populations, not just of the State apparatus, is central.[25] 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.[26]

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."[27]

State practice involving claims of necessity has chiefly concerned nonperformance 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."[28] 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."[29] The Commission 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."[30]

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).[31] The second was Article 221 of the U.N. Convention on the Law of the Sea, which reads:

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25 *See* Marina Spinedi, Personal communication on file with author.

26 *Report of the International Law Commission on the Work of its Fifty-third Session (2001)*, *supra* note 1, 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.

27 *Report of the International Law Commission on the Work of its Thirty-second Session*, *id*., Commentary of Article 33, para. (29), at 48.

28 *Id.*, para. (14), at 39.

29 *Id.*, para. (15), at 39.

30 *Id.*

31 *See* 1969 UN Juridical Yearbook 166 (1971).

> 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. [32]

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."[33] The Commission's commentary suggests that pleas of necessity for violating humanitarian law conventions may not be entertained.[34] 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:

> The purpose of the humanitarian law conventions was to subordinate, in some fields, the interests of a belligerent to a higher interest; States signing the Conventions undertook to accept that subordination and not to try to find pretexts for evading it. It would be absurd to invoke the idea of military necessity 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.[35]

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:[36] "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 politi-

32 UN Convention on the Law of the Sea, *supra* note 19, Art. 221.

33 Draft Article 25 (2001), *supra* note 1.

34 *See Report of the International Law Commission on the Work of its Fifty-third Session (2001)*, *supra* note 1, at 205-206.

35 *Report of the International Law Commission on the Work of its Thirty-second Session*, *supra* note 26, Commentary of Article 33, para. (28), at 46.

36 *Id.*, para. (37), at 50.

cal independence of another State."[37] 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."[38]

A third circumstance precluding wrongfulness for the breach of an international obligation is the consent of the State to which the obligation is owed.[39] 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.[40] The former ILC commentary states that

> 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.[41]

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."[42]

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37 *Id.*

38 *Id.* Also *Report of the International Law Commission on the Work of its Fifty-third Session (2001)*, *supra* note 1, at 207-208.

39 Draft Article 20 (2001), *supra* note 1. 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.*, ¶ 241.

40 *Id.*, ¶ 240.

41 *Report of the International Law Commission on the Work of its Thirty-first Session*, *supra* note 21, 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, ¶ 75. For a discussion of *jus cogens*, *see* Meron, Human Rights Law-Making in the United Nations 173-202 (1986).

42 *Report of the International Law Commission on the Work of its Fifty-third Session (2001)*, *supra* note 1, at 308.

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 (discussed also below in the sections on Choice of Remedies, and the Right to Take Countermeasures) 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 international 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 defense 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."[43]

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.[44] 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

43 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).

44 *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* note 19; 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).

concerns.[45] 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.[46]

Other treaties, however, cannot be adequately analyzed 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.[47] The notion of such integral obligations, first developed by Fitzmaurice, has been further elaborated by Crawford as rapporteur on State responsibility for the ILC.[48] Treaties such as disarmament agreements and the Nuclear Test Ban Treaty[49] 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.[50]

Some treaties create obligations that run in parallel between all State 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.[51] 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[.][52]
>
> ...

45 *See* United States Diplomatic and Consular Staff in Tehran *(United States v. Iran)*, International Court of Justice, Order of 15 December 1979, 1979 ICJ Rep. 7, 20, ¶ 40.

46 *Third Report on State Responsibility*, by James Crawford, Special Rapporteur, UN Doc. A/CN.4/507, at 46 (2000).

47 *See* Simma, *supra* note 43, 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 L.R. 273, 276. (1988).

48 *Third Report on State Responsibility*, by James Crawford, *supra* note 46, at 40 and nn. 175-78.

49 *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.

50 *See* de Hoogh, *supra* note 8, at 40-41.

51 *See* Sachariew, *supra* note 47, at 277.

52 Austria v. Italy, App. No.788/60, European Commission of Human Rights, Decision on admissibility of 11 January 1961, 4 Yb. Eur. Conv. H.R. 116, at 138 and 140 (1961).

> [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 Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.[53]

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,[54] which provides that the parties have the duty to "respect and ensure respect" for each Convention.[55] 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.[56]

Article 1 has been interpreted as providing standing for all State parties to the Conventions to challenge the violations of any State party.[57] This provision pre-

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53 *Id.*, at 140.

54 *See* Zemanek, *supra* note 10, at 256 note 876 (1997).

55 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.

56 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).

57 *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 & Henri Coursier eds., 1958). Common article 1 was invoked as authority to convene a conference of the state parties on measures to enforce the Fourth Geneva Convention in the Occupied Palestinian Territory. *See* GA Res. ES-10/3 (July 30, 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 Convention. *See* G.A. Res. ES-10/2 (May 5, 1997). *See also* G.A. Res. ES-10/4

cedes by some two decades the enunciation 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."[58] 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."[59] These principles, the Court added, were intended to be universal in scope.[60]

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.[61]

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

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(Nov. 19, 1997), Security Council Resolution 681 (1990) (Dec. 20, 1990). A Conference of High Contracting Parties to the Fourth Geneva Convention was held in Geneva in December 2001. See ICRC Statement (Dec. 5, 2001), available at <http://www.icrc.org/eng>. 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).

58 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, Advisory Opinion of 28 May 1951, 1951 ICJ Rep. 15, at 23.

59 *Id.*

60 *Id.*

61 Barcelona Traction Light and Power Company, Ltd., *supra* note 6, ¶¶ 33-34.

an obligation *erga omnes*; every State suffers an inherent or community type of injury. Two distinct but interrelated issues may be mentioned here. The first is the identification of norms which constitute *erga omnes* obligations. The second, and the heart of the matter, pertains to the implementation or enforcement of *erga omnes* obligations, i.e., *erga omnes* as secondary norms.

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.[62] 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."[63] 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.[64]

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.[65]

Indeed, the concept of obligations *erga omnes* dates back at least to Hugo Grotius' discussion in 1625 of humanitarian intervention,[66] and gained currency during the nineteenth century in the context of protecting minorities.[67] 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

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62 *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).

63 South West Africa *(Ethiopia and Liberia v. South Africa)*, Second Phase, International Court of Justice, Judgment of 18 July 1966, 1966 ICJ Rep. 6, ¶ 50.

64 *Id.*, ¶ 51.

65 Ragazzi, *supra* note 62, at 42.

66 Hugo Grotius, De Jure Belli ac Pacis, Bk. II, Ch. XXV, §§ 1, 2, Whewell's Trans. Vol. ii, 438-40 *cited in* Meron, Human Rights and Humanitarian Norms as Customary Law 188 (1989) [hereinafter Meron, Customary Law].

67 Meron, *id.* at 188-89.

humanitarian causes and sometimes provided procedures to secure respect for those interests.[68] Such interests included protection of minorities, labor 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."[69]

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*[70] or at least as *erga omnes*.[71] Discussing the case, Rosenne addresses the inability of legal method to deal with the enforcement of 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"[72]

Despite some initial skepticism, 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.[73] 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.[74]

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68 South West Africa Cases *(Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, 1962 ICJ Rep. 319, at 424-28 (separate opinion of Judge Jessup).

69 International Court of Justice, Judgment of 24 May 1980, 1980 ICJ Rep. 3, ¶ 92.

70 *See* United States Diplomatic and Consular Staff in Tehran *(United States v. Iran)*, *supra* note 45, at 20, ¶ 40.

71 *See* Simma, *supra* note 43, at 287, note 15.

72 Shabtai Rosenne, Breach of Treaty 110 (1985).

73 Ragazzi, *supra* note 62, 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).

74 Simma, *id.*, at 128-129.

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.[75] These two characteristics might serve to distinguish *erga omnes* obligations from treaty obligations *simpliciter*.[76] 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."[77] 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 international 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

75 Ragazzi, *supra* note 62, at 17.

76 *Id.*, at 200-203.

77 Simma, *supra* note 73, at 133.

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."[78] When an obligation *erga omnes*, in whose fulfillment 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."[79]

Still, some questions persist. Are "basic rights of the human person,"[80] 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 acceptance 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

78 [1976] 2 Y.B. Int'l L. Comm's (pt. 2) at 76, UN Doc. A/CN.4/SER.A/1976/Add.1 (Part 2) (1977).

79 *See id.* at 99.

80 *Barcelona Traction Light & Power Co., Ltd.*, *supra* note 6, ¶ 34.

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,[81] 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*."[82] 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.[83]

In the ILC, the concept of *erga omnes* has triggered an ambitious research and codification agenda centered 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 was not indispensable and the penalty was the consequence of the violation.[84]

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

81 *See* East Timor *(Portugal v. Australia)*, International Court of Justice, Judgment of 30 June 1995, 1995 ICJ Rep. 90, at 102, ¶ 29.

82 Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia-Herzegovina v. Yugoslavia)*, Preliminary Objections, International Court of Justice, Judgment of 11 July 1996, 1996 ICJ Rep. 616, ¶ 31.

83 *Id.*

84 *Report of the International Law Commission on the Work of its Fiftieth Session*, *supra* note 12, ¶ 305, UN Doc. A/53/10 and Corr. 1 (1998).

> l'Assemblée générale des Nations Unies en ce qui concerne les secours en cas de catastrophes naturelles.[85]

That resolution, 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."[86]

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, 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.[87]

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.[88] Article 19(3) provided that

> an international crime may result, *inter alia*, from

85 *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).

86 *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.

87 Meron, *Is International Law Moving Towards Criminalization?*, 9 Eur. J. Int'l L. 18 (1998).

88 [1976] 2 Y.B. Int'l L. Comm'n (pt 2) 73, UN Doc. E/CN.4/1976/Add. 1 (Part 2) (1977).

(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 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,[89] others have questioned both the evidence adduced by Ago and the practical utility of the concept of criminal responsibility of States.[90]

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

89 *Id.* at 120.

90 *See* Ian Brownlie, System of the Law of Nations: State Responsibility (Part I) 33 (1983).

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 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.'"[91] Others believed that there had been no significant practice supporting the concept of State crimes in international law.[92] The Commission remained divided over the issue and followed the suggestion of Special Rapporteur James Crawford to put aside Article 19.[93] 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.[94]

I agree with Georges Abi-Saab that the standing of third States to seek redress for international crimes underscores the gravity of international crimes; however, the fact remains that such third States already have such standing with respect to obligations *erga omnes*. The question, therefore, is whether the notion of international crimes by States adds anything significant to *erga omnes* and to peremptory norms. Ragazzi noted the influence of the provisions of the Vienna Convention on the Law of Treaties on the work of the ILC in the field of State responsibility. Draft Article 19, particularly the categorization of international crimes in Article 19(3), bears the imprint of *jus cogens*.[95] James Crawford found that "[j]udicial decisions since 1976 certainly support the idea that international law contains different kinds of norms, and it is not limited to the 'classical' idea of bilateral norms. On the other hand there is no support in those decisions for a distinct category of international crimes of States."[96] He added that the ILC had failed to elaborate a distinctive regime for such violations of international law, taking into account the seriousness of the violations implied in Article 19.[97] There was thus a real contrast between the development of significant procedural guarantees in provisions concerning countermeasures and the absence of such guarantees in the context of international crimes.[98]

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91 *Report of the International Law Commission on the Work of its Fiftieth Session, supra* note 12, ¶ 243.

92 *Id.*

93 *Id.*, ¶ 331.

94 *See generally* Meron, Customary Law, *supra* note 66, at 208-15.

95 Ragazzi, *supra* note 62, at 47.

96 *First Report on State Responsibility*, by James Crawford, Special Rapporteur, UN Doc. A/CN.4/490/Add.2, ¶ 63 (1998).

97 *Id.*, Add.1, ¶¶ 5, 82-86; Also, Zemanek, *supra* note 10, at 272-273.

98 *See id.*, Add.2, ¶ 43. On the need of such guarantees, *see id.*, Add.3, ¶ 81; *Report of the International Law Commission on the Work of its Fiftieth Session*, *supra* note 12, ¶¶ 309-312.

Gaja contributed to the understanding of the relationships among *erga omnes*, *jus cogens* and international crimes by describing them as a set of three overlapping, concentric circles. The narrow range of conduct constituting international crimes of States was entirely subsumed in the intermediate sphere of *jus cogens* norms, which were, in turn, encompassed by the broader field of obligations *erga omnes.* [99] All peremptory norms were constitutive of *erga omnes* obligations, but conversely, not all *erga omnes* obligations rose to peremptory norms. Similarly, not all breaches of *jus cogens* rose to the gravity of international crimes, though international crimes necessarily violated peremptory norms.[100]

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*.[101] Penal responsibility of States was rejected by the ICTY Appeals Chamber in the *Blaskić 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."[102] 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.[103]

"International crime" in Article 19 does not necessarily mean "criminal" conduct in the ordinary sense as applied to the penal responsibility of individuals in either domestic or international law. As Georges Abi-Saab has pointed out, the object of Article 19 was not to criminalize the comportment of States but "simply to attach graver consequences to violations constituting 'international crimes,' and to

99 *See* Giorgio 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 Marina Spinedi, 1989). See also Jochen Frowein, Völkerrecht-Menschenrechte – Verfassungsfragen Deuchtlands und Europa 183-87, 192-95 (2004), *Reactions by not Directly affected States to Breaches of Public International Law*, 248 Recueil des Cours 353 (1994-IV).

100 De Hoogh implies that only peremptory norms are constitutive of *erga omes* obligations. *See* de Hoogh, *supra* note 8, at 53-56.

101 *See First Report on State Responsibility*, *supra* note 96, Add.1, ¶ 52.

102 *See Prosecutor v. Blaskić*, 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, ¶ 25.

103 *See Velásquez Rodríguez v. Honduras*, Compensation, Inter-American Commission on Human Rights, Judgment of 21 July 1989, 1989 IACHR Rep. (Ser. C), No. 7, 52, ¶ 38.

emphasize that such violations cannot be reduced to a mere bilateral relationship between the victim and the perpetrator."[104] In their edition of *Oppenheim,* Jennings and Watts also speak of a special and more severe type of responsibility.[105]

The ILC's former draft articles did not provide for punitive damages or sanctions in case of international crimes.[106] However, draft Article 45 provided that satisfaction may include nominal damages and that "in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement," may be awarded, a provision which Zemanek censures as going beyond customary law.[107] Abi-Saab, however, argues that there is a difference of emphasis between the traditional approach to State responsibility for wrongful acts ("delicts") and responses to international crimes. The main purpose of the former is to re-establish the *status quo ante*. The accent is thus put on "injury" and reparation. The latter's purpose is the defense of "the normative integrity of the legal system itself against patterns of behavior which go against its most fundamental principles."[108] As such, the emphasis is placed on cessation and guarantees of non-repetition of violations. De Hoogh similarly observed that "the whole philosophy behind the theory of international crimes appears to be a shift to more law observance, and, in case the law is not observed, to more effective law enforcement."[109]

Crawford has adduced powerful arguments against the concept of international crimes of States: First, Article 19 suffered from imprecision. Providing merely that a crime "may result" from the acts enumerated in Article 19(3), Article 19 left unanswered the questions of when and whether even the breaches enumerated would constitute crimes. Moreover, the differentiation of "international crimes" from international delicts did not clarify the notions of standing or injury. Former draft Article 40(3) defined all States as "injured States" for purposes of international crimes. But States could be "injured States" also under general international treaties or general international law for the protection of human rights, regardless of the seriousness of the breach or the relative importance of the obligation (Article 40(2)(e)(iii)) and thus outside any penal context. Because the draft articles did not provide for punitive damages or fines, the specific consequences resulting from international crimes were minimal,[110] if any.

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104 Georges Abi-Saab, *The Concept of "International Crimes" and its Place in Contemporary International Law*, *in* International Crimes of State 141, 146 (Joseph H.H. Weiler, Antonio Cassese, Marina Spinedi, eds., 1989).

105 *See* Robert Jennings and Arthur Watts (eds.), Oppenheim's International Law 533 (9th ed. 1992).

106 See Former draft Articles 52 and 53. *See also First Report on State Responsibility*, by James Crawford, *supra* note 96, Add.1, ¶¶ 51and 84.

107 *See* Zemanek, *supra* note 10, at 270-271.

108 Abi-Saab, *supra* note 104, at 350.

109 de Hoogh, *supra* note 8, at 57.

110 *First Report on State Responsibility*, Add. 2, by James Crawford, supra note 96, at 4-6.

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".[111] 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.[112] Special Rapporteur Crawford had suggested a reference to "punitive damages" or to "damages reflecting the gravity of the breach."[113] This approach was finally rejected by the ILC for lack of agreement among its members, and the issue was left, in Article 41(3) 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.

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."[114] 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

111 Draft Articles 40 and 41, *supra* note 1.

112 *Third Report on State Responsibility*, Add. 4, *supra* note 46, at 23, ¶ 410.

113 *Id.* at 22-23.

114 Lori F. Damrosch, *Enforcing International Law through Non-forcible Measures*, 269 Collected Courses 1, 27 (1997). See also Laurence Boisson de Chazournes, Les contremesures dans les relations internationales économiques (1992).

violations of international law in the absence of a recognizable threat to international peace and security."[115] 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.[116]

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 Conventions. The establishment of the international court contemplated by the Genocide Convention[117] is only now being realized with the recent adoption of the more general Rome Statute for an International Criminal Court.[118] 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."[119] 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

115 Damrosch, *supra* note 114; *also* Linos-Alexandre Sicilianos, Les réactions décentralisées à l'illicite – Des contre-mesures à la légitime défense 174 (1990).

116 Damrosch, *supra* note 114, at 27.

117 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277.

118 Rome Statute of the International Criminal Court, July 17, 1998, UN. Doc. A/CONF.183/9*, *reprinted in* 37 ILM 999 (1998).

119 Christine Gray, Judicial Remedies in International Law 215 (1987).

Rights has emphasized the collective enforcement aspect of the system established by the European Convention.[120]

International environmental law has also been developing new practices to enforce obligations collectively.[121] For instance, Article 13 of the Bern Convention[122] 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.[123]

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.[124] An internationally wrongful act creates a new legal relationship between the perpetrating State and the injured State or States.[125] The elimination of damage as an element of State responsibility means that the infringement of a right alone suffices to establish State responsibility.[126] 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 [...]

120 Loizidou v. Turkey, Preliminary Objections, European Court of Human Rights, Judgment of 23 March 1995, 310 Eur. Ct. H.R. (Ser. A), ¶ 70 (1995).

121 *See* Simma, *supra* note 73, 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."

122 Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, in force 1 June 1982, Eur. T.S. No. 104, Article 18.

123 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).

124 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).

125 *See Sixth Report on the Content, Forms and Degrees of International Responsibility* by Willem Riphagen, Special Rapporteur, UN Doc. A/CN.4/389, ¶¶ 3-5; *reprinted in* [1985] 2(1) Yb. Int'l L. Comm'n 3, 15, ¶¶ 3-5.

126 *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 & Bruno Simma eds., 1987). *See also* Graefrath, *supra* note 14, at 34-37.

an internationally wrongful act of that State."[127] The infringement of a State's right transforms it into an "injured State."[128]

> [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.[129]

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.[130] 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

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127 Former draft Article 40. Former draft Article 40(2) elaborated on the basic definition of an injured state, identifying the states injured by an internationally wrongful act on the basis of the nature and form of the underlying obligation. The first four provisions of that article, (a)-(d), identify the states injured by the infringement of rights arising between parties to traditional bilateral agreements, arising for third states through bilateral agreements, or established through the binding proceedings of international tribunals or other international organizations.

> [...]
>
> 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[.]

128 Sachariew, *supra* note 47, at 274. *But see* de Hoogh, *supra* note 8, 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.")

129 Graefrath, *supra* note 14, at 47.

130 *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, ¶ 77, *reprinted in* [1983] 2 Yb.Int'l L. Comm'n 3, 14.

international community as "objectively injured".[131] Special Rapporteur Arangio-Ruiz however, was critical of such a distinction:

> 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..[132]

Former Draft Articles 40 (2)(e)-(f) and (3)[133] 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."[134] 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.[135] 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 "in-

131 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).

132 *Fourth Report on State Responsibility*, by Gaetano Arangio-Ruiz, Special Rapporteur, UN Doc. A/CN.4/444 and Add.1-3, ¶ 143, *reprinted in* [1992] 2 Yb. Int'l L. Comm'n 34, 46.

133
2. In particular, "injured State" means:
   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 favor;
      ii. the infringement of the right by the act of a State necessarily affects 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.

134 Simma, *supra* note 43, 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).

135 *See* Jonathan Charney, *Third State Remedies in International Law*, 10 Mich. J. Int'l L. 57, 81 (1989).

jured States."[136] 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."[137]

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 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.[138] 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,[139] 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.[140]

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:

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136 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).

137 *Fourth Report on the Content, Forms and Degrees of International Responsibility*, by Willem Riphagen, *supra* note 130, ¶ 73.

138 *Third Report on State Responsibility*, by James Crawford, *supra* note 46, 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 States, 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 (May 17, 2000).

139 *Third Report on State Responsibility*, *id.*, at 29.

140 Draft Articles (2001), *supra* note 1.

> although 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 as imported by the 'general principles of law' referred to in Article 38, paragraph 1 (c), of its Statute.[141]

The extent to which the Court reversed this position in *Barcelona Traction* is still controversial.[142] 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."[143] These statements may suggest that some basis in conventional law is needed to vindicate such rights.[144] 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.[145]

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."[146] In any event, for purposes of obligations *erga omnes*, the doctrine appears to have dropped the 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

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141 South West Africa *(Ethiopia and Liberia v. South Africa)*, Second Phase, *supra* note 63, ¶ 88.

142 *See* Ragazzi, *supra* note 62, at 211. *See also* Gray, *supra* note 119, at 214; Military and Paramilitary Activities in and against Nicaragua, Interim Measures, Order of 10 May 1984, Dissenting Opinion of J. Schwebel, 1984 ICJ Rep. 4, at 190.

143 *See Barcelona Traction Light and Power Company Ltd (Belgium v. Spain)*, *supra* note 6, ¶ 35.

144 *See* Oscar Schachter, International Law in Theory and Practice 209 (1991).

145 *First Report on State Responsibility*, Add.2, by James Crawford, *supra* note 96, ¶ 69; also de Hoogh, *supra* note 8, at 52-53.

146 *See* Restatement (Third) of the Foreign Relations Law of the United States, Sec. 703, Rep. Note 2 (1987).

the victims and without requiring that the complainant State have any specific interest in the matter. [147] 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.[148] 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.[149] 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."[150] 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.[151]

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 extent the Convention applies to areas beyond each State party's national jurisdiction.[152] 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

147 *See* Christian Dominicé, *The International Responsibility of States for Breach of Multilateral Obligations*, 10 Eur. J. Int'l L. 353, 355-356 (1999).

148 *See* Gray, *supra* note 119, at 211.

149 *See* Meron, Customary Law, *supra* note 66, at 193.

150 *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, Eur. T.S. No. 5, 213 UNTS 221, Article 33. (As revised by Protocol 11).

151 Convention on the Conservation of European Wildlife and Natural Habitats, supra note 122, Article 18.

152 *See* Lyster, *supra* note 123, at 145-149.

and other damaging conduct. These difficulties have prompted the development of "soft responsibility" procedures,[153] 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.[154] 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.[155] 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."[156] 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 ship) was also allowed to intervene. The Court held that States parties to a multilateral treaty – in this case the Treaty of Versailles (Article 386) – had standing to bring an action against a State in breach of its obligations, even though they had not suffered a specific injury.[157] 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."[158]

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."[159] 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

153 *See* Alexandre Kiss and Dinah Shelton, International Environmental Law 362 (1991).

154 *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).

155 *See* S.S. Wimbledon (France *et al.* v. Germany), Permanent Court of International Justice, Judgment of 17 August 1923, 1923 P.C.I.J. (Ser. A) No. 1, at 6 (Aug. 17).

156 *Id.* at 20.

157 Gray, supra note 119, at 211.

158 S.S. Wimbledon, *supra* note 155, at 20.

159 Ragazzi, *supra* note 62, at 24-25.

> … 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.[160]

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:[161] 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.[162]

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,[163] 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.

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160 *Id.* at 25.

161 *South West Africa (Ethiopia and Liberia v. South Africa)*, Preliminary Exceptions, International Court of Justice, Judgment of 21 December 1962, 1962 ICJ Rep. 319, at 343.

162 *South West Africa (Ethiopia and Liberia v. South Africa)*, Second Phase, *supra* note 63, at 32, ¶ 44.

163 *See* Gray, *supra* note 119, at 213.

> [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.[164]

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.[165] 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.[166]

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164 Schachter, *supra* note 150, at 144.

165 *See* Reparation for Injuries Suffered in the Service of the United Nations, International Court of Justice, Advisory Opinion of 11 April 1949, 1949 ICJ Rep. 174, at 177.

166 *East Timor (Portugal v. Australia)*, *supra* note 81, at 102, ¶ 29.
The Court took the same position in the more recent *Case Concerning Armed Activities on the Territory of the Congo:*

> Whereas it does not follow from the mere fact that rights and obligations *erga omnes* are at issue in a dispute that the Court has jurisdiction to adjudicate upon that dispute; whereas, as the Court has noted above…, it has jurisdiction in respect of States only to the extent that they have consented thereto; and whereas, when a compromissory clause in a treaty provides for the Court's jurisdiction, that jurisdiction exists on in respect of the parties to the treaty who are bound by that clause and within the limits set out in that clause …

(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.

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.

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."[167] 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.[168] Recognition of such legal interest could result in every State having a separate claim against the responsible State.[169] 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.[170] Special Rapporteur Riphagen contended that the commission of an international crime gave rise primarily to collective rights:[171]

> ... an individual State which is considered to be an injured State only by virtue of article 5(e) [Article 40(3) of the 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.[172]

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,[173] the *Barcelona Traction*

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167 *Barcelona Traction Light and Power Company Ltd (Belgium v. Spain)*, *supra* note 6, at para. 33.

168 *See* Gaja, *supra* note 99, at 152.

169 *Id.*

170 *See Third Report on State Responsibility*, by Roberto Ago, Special Rapporteur, UN Doc. A/CN.4/246, ¶ 41, *reprinted in* [1971] 2(1) Yb.Int'l L. Comm'n 199, 210.

171 *See Sixth Report on the Content, Forms and Degrees of International Responsibility,* by W. Riphagen, *supra* note 125, at 13, Commentary to Article 14.

172 *Id.*, Commentary to Article 14, para. (10).

173 *See e.g.* Max Gounelle, *Quelques remarques sur la notion de 'crime international' et sur l'évolution de la responsabilité internationale de l'État*, in Le droit international:

case can be 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 États") would, in reality, deprive the *erga omnes* principle of much of its potential practical utility.[174] 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...."[175] Grotius was thus ready to accept as lawful the intervention by one State on behalf of gravely persecuted citizens of another.[176]

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 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.[177]

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

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Unité et diversité. Mélanges offerts à Paul Reuter 315, 322 (1981).

174 *See* Gaja, *supra* note 99, at 152.

175 2 Hugo Grotius, De Jure Belli ac Pacis, Libri Tres bk. II, ch. XX, pt. XL(1) (Of Punishments) (Carnegie ed., F. Kelsey trans. 1925). Kelsey translated the 1646 edition rather than the first, 1625 edition of Grotius's work. For further discussion, *see* Meron, *Common Rights of Mankind in Gentili, Grotius and Suárez*, 85 AJIL 110 (1991).

176 *See id.* Ch. XXV, at pt. 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, ¶ 99, *reprinted in* [1982] 2 Yb. Int'l L. Comm'n 22.

177 Elihu Root, *The Outlook for International Law*, 10 AJIL 1, 8-9 (1916).

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,[178] 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").[179] 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.[180]

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 tribunal.[181] 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.[182]

Diplomatic protests, public condemnation of illegal behavior 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.[183] 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.[184] Nevertheless, the broad acceptance of the

178 *See* Grigorig I. Tunkin, Droit international public: Problèmes théoriques 223 (1965).

179 *See* Charney, *supra* note 135, at 95-96.

180 *See* Dominicé, *supra* note 147, at 360-361 (emphasizing the "quantitative" connotation of the term "substantial breach").

181 *See* Abi-Saab, *supra* note 104, at 149.

182 *See* Sachariew, *supra* note 47, at 278.

183 *See* Lea Brilmayer, *International Remedies*, 14 Yale J. Int'l L. 579, 588 (1989); *See also* Charney, *supra* note 135, at 60.

184 *See generally*, Charney, *id.*

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."[185] 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.[186]

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 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."[187] 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.[188]

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

185 *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).

186 *See* 63(2) Yearbook of the Institute of International Law 243 (1989).

187 *Fourth Report on State Responsibility*, by Gaetano Arangio-Ruiz, *supra* note 132, ¶ 144.

188 *See* Meron, Customary Law, *supra* note 66, at 205.

case of *erga omnes* obligations, an (indirectly) injured State would have a right to claim reparation, as distinct from a right to claim cessation.[189]

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 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.[190] 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.[191]

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.[192]

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189 *See First Report on State Responsibility supra* note 96, ¶ 24.

190 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* note 5, at 31.

191 Rosenne, *supra* note 72, at 118.

192 *Report of the International Law Commission on the Work of its Fiftieth Session*, *supra* note 12, ¶ 324.

In his third report, Crawford criticized former draft Article 40's treatment of all injured States in the same way.[193] (The Article 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[194] and suggested that Article 40(2) "fails to follow the logic of article 60(2) of the Vienna Convention."[195] 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.[196]

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

(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.[197]

193 *Supra*, note 46.
194 *Id.* ¶ 40.
195 *Id.* ¶ 93.
196 *Id.* ¶ 88.
197 Draft Articles (2001), *supra* note 1.

The second report of Giorgio Gaja (August 2004), presented to the Institute of International Law at its Krakow session (August 2005), contains a clear and comprehensive statement of contemporary concepts of obligations and rights *erga omnes*. It formed the basis of a resolution on Obligations and Rights *Erga Omnes* in International Law adopted by the Institute on August 27, 2005. An obligation *erga omnes* is defined as an obligation under general international law a state owes to the international community, in view of their common values and concern for compliance. A breach of the obligation enables all states to take action. An obligation *erga omnes* can also be an obligation under a multilateral treaty that a state party to the treaty owes to all the other parties, in view of their common values and concern for compliance. These are thus obligations *omnes partes contractantes.* Article 2 provides that any state not specially affected may claim from the responsible state cessation of the internationally wrongful act as well as reparation in the interest of the state, entity or individual specially affected by the breach. Article 3 provides that in the event of a jurisdictional link between a violating state and a state to which the obligation is owed, the latter state has standing to bring a claim to the International Court of Justice or other judicial institution in relation to a dispute concerning compliance with the obligation. Since insistence on a collective response would in practice render compliance illusory, the resolution is useful in making it clear that obligation *erga omnes* is one owed to every state individually, and that every such state – provided there is a jurisdictional basis – can bring a claim in the ICJ. This is a matter on which the doctrine was not entirely clear. Although consent to the jurisdiction of international courts is required, even states not specifically affected are thus able to bring claims against the wrongful state.

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."[198] 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.[199]

198 *Report of the International Law Commission on the Work of its Thirty-first Session*, *supra* note 21, Commentary of Article 30, para. (3), at 116.

199 Draft Articles (2001), *supra* note 1.

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.[200] 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* obligations. 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.[201] Special Rapporteur Ago thus wrote:

> It is understandable that a community such as the international community, in seeking a more structured organization, even if only an incipient "institutionalization", should have turned in another direction, namely 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.[202]

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.[203] However, fears that the recognition in international law of obligations *erga omnes* and of a right akin to *action popularis* might be abused

200 Dominicé, *supra* note 147, at 363.

201 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. Y.I.L., 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).

202 *Eighth Report on State Responsibility*, by Roberto Ago, *supra* note 41, at Commentary on Draft Article 29, at 43, para. 91. *See also* Commentary of Draft Article 30, at para. 12.

203 Schachter, *supra* note 144, at 212.

by States to initiate politically motivated steps against other States have not been borne out by the post-*Barcelona Traction* experience.[204]

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, 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.[205]

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.* 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.

In his already mentioned report to the Institute of International Law, Giorgio Gaja supports countermeasures by any state to which an obligation *erga omnes* is owed. Article 5c of the Resolution adopted by the Institute on August 26, 2005 states that any such state is entitled to take non-forcible countermeasures under conditions analogous to those applying to a state specially affected by the breach. Third-party countermeasures are potentially a robust means of promoting compliance with basic principles of international law and fundamental human rights. The resolution of the Institute is thus to be welcomed.

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.[206]

Simma adds human rights to this list: "there appears to emerge a general recognition that at least "consistent patterns of gross and reliably attested violations of

204 *See* Meron, Customary Law, *supra* note 66, at 200.

205 Draft Articles (2001), *supra* note 1. See also Edith Brown-Weiss, *Invoking State Responsibility in the Twenty-first Century*, 96 AJIL 798, 804-05 (2002); David J. Bederman, *Counterintuiting Countermeasures*, *id*. at 817.

206 Akehurst, *supra* note 201, at 15.

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."[207] The Institute of International Law in 1989 resolved that "States, 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,"[208] 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."[209] 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 U.S 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.[210]

This statement may, however, have been influenced by the fact that U.S. 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.[211]

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207 Simma, *supra* note 43, at 312 para. 1.

208 *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).

209 *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* note 46, at 20.

210 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14, ¶ 249.

211 United States Diplomatic and Consular Staff in Tehran, *supra* note 45, at 40, ¶¶ 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.[212] 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."[213] Henkin is another prominent critic of this approach.[214]

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 suggests any intention "to eliminate the ordinary legal consequences of international undertakings and the ordinary remedies for their violations."[215] 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 remedies and remedies outside the treaty.[216]

Some State practice, especially in the early 1980s, suggests that any State may resort to countermeasures where an *erga omnes* obligation has been breached.[217] Examples include international responses to the Soviet invasion of Afghanistan,

212 *See* de Hoogh, *supra* note 8, at 254-255.

213 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).

214 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.

215 Henkin, *id.* at 31.

216 Meron, Customary Law, *supra* note 66, at 231. Section 703(1) of the Restatement (Third), *supra* note 152, 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."

217 Sicilianos, *supra* note 115, 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

the declaration of martial law in Poland, the taking of the American embassy in Tehran, and the Argentine invasion of the Falkland Islands.[218]

The Soviet intervention in Afghanistan in 1979 was firmly condemned by the international community.[219] 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.[220] The reactions of other Western States were weak.[221] Rousseau has suggested that this timid response was driven by economic considerations rather than by concern that countermeasures would violate international law.[222]

Certain European, Japanese, Canadian and Australian reactions to the hostage taking at the US Embassy in Teheran 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, en date du 10 janvier 1980.[223]

This declaration was made through the "political cooperation" process between member States, so that the sanctions were not compulsory. France and the United Kingdom suspended some contracts concluded after the hostage-taking.[224]

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.[225] 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

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saving clauses of the GATT. No other State has followed the United States, but none protested against the measure.

218 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 example 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* note 46, at 14-15.

219 *See* Charles Rousseau, *Chronique des faits internationaux*, 84 Revue générale de droit international public 826, 840-846 (1980).

220 Sicilianos, *supra* note 115, at 158.

221 Rousseau, *supra* note 219, at 837.

222 Sicilianos, *supra* note 115, at 158.

223 *Quoted in* Rousseau, *supra* note 219, at 882.

224 *Id.* at 885-888.

225 Sicilianos, *supra* note 115, at 161-162.

resort to such countermeasures and expressed doubts concerning their efficacy.[226] 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.[227]

Western States resorted to economic counter-measures 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.[228] Several OAS members criticized the measures as breaching GATT obligations.[229] According to several resolutions adopted by the OAS Economic and Social Council, these measures were contrary to the OAS Charter.[230] 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 labor 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.[231] 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.[232] Although most of the measures taken were measures of retortion, States not willing to join these measures explained their nonparticipation 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 20th century. The *Naulilaa* arbitration tribunal enunciated three main conditions: a prior violation of international law, a demand for redress, and

226 P. Mauroy, French Prime Minister; *quoted in* Charles Rousseau, *Chronique des faits internationaux*, 86 Revue générale de droit international public 601, 607 (1982).

227 Sicilianos, *supra* note 115, at 164.

228 Charles Rousseau, *supra* note 219, at 232, 748.

229 Sicilianos, *supra* note 115, at 163, note 341.

230 *See* Acedevo, *The U.S. Measures Against Argentina Resulting from the Malvinas Conflict,* 78 AJIL 323, 338 *ff* (1984).

231 Sicilianos, *supra* note 115, at 167.

232 Pierre-Marie Dupuy, *Observations sur la pratique récente des 'sanctions' de l'illicite*, 87 Revue générale de droit international public 505, 542 (1983).

proportionality.[233] These conditions were recently reaffirmed by the ICJ in the *Gabcíkovo-Nagymaros* case.[234]

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 seeking and, indeed appear to seek, cessation of the wrongful conduct and/or reparation in a broad sense and/or guarantees of non-repetition.[235]

Compensatory objectives are based on the principle of reciprocity and aim at restoring the equality between the parties or the *status quo ante.*[236] Measures of strict reciprocity, *i.e.* the non-performance of the reciprocal duty to the non-performed obligation, *inadimplenti non est adimplendum*,[237] are usually not considered countermeasures. They are not necessarily unlawful *per se*.[238]

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.[239] 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

233 Affaire de la responsabilité 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.

234 *Case concerning the Gabcíkovo-Nagymaros project (Hungary/Slovakia)*, International Court of Justice, Judgment of 25 September 1997, 1997 ICJ Rep. ¶¶ 82-88.

235 *Fourth Report on State Responsibility*, by Gaetano Arangio-Ruiz, *supra* note 132, ¶ 3.

236 Sicilianos, *supra* note 115, at 65.

237 See the excellent discussion by James Crawford in his Second Report on State Responsibility, *supra* note 39, at 41-49.

238 *See generally* Elisabeth Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures 50 (1984).

239 *Second Report on State Responsibility*, Addendum, by James Crawford, *supra* note 39, ¶ 327.

independently of performance by the others]"[240] 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 recognised that in no case could one breach of the Convention serve as an excuse for another [241]

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.[242]

The objectives of countermeasures may not go beyond coercion intended to compel the performance of an obligation.[243] 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.[244] Penal measures are associated with the idea of *imperium*, and, according to Zoller, imply an inequality between the parties,[245] and are contrary to the principle of the sovereign equality.[246] Nevertheless, in reality unilateral measures against a State, especially by a strong State against a weak one, may have some punitive effects.[247] 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.[248] He concluded, however, that:

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240 *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* note 39, ¶ 320.

241 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Counterclaims, International Court of Justice, Order of 17 December 1997, 1997 ICJ Rep. 243, at 258, ¶ 35.

242 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).

243 *See for example* Omer Yousif Elagab, The Legality of Non-forcible Counter-measures in International Law 50 *ff* (1988) *See also* Zoller, *supra* note 238, at 55 *ff.*

244 *Fourth Report on State Responsibility*, by Gaetano Arangio-Ruiz, *supra* note 132, ¶¶ 3-4.

245 Zoller, *supra* note 238, at 59.

246 *Id.*

247 Gounelle, *supra* note 173, at 317-318.

248 *Fourth Report on State Responsibility*, by Gaetano Arangio-Ruiz, *supra* note 138, ¶ 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

> 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.[249]

Countermeasures to *erga omnes* violations are supposed to be on behalf of the collective interest of the international community. 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.[250] 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.[251]

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.[252] 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."[253] 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."[254]

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

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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 ¶ 4, note 7.

249 *Id.*

250 *See* Dupuy, *supra* note 232, at 515.

251 *First Report on State Responsibility*, Add.3, by James Crawford, *supra* note 96, ¶ 84, note 113.

252 *See* Geneva Convention I, *supra* note 55, Art. 46. *See also* Geneva Convention II, *supra* note 55, Art. 47; *See also* Geneva Convention III, *supra* note 55, Art. 13; *See also* Geneva Convention IV, *supra* note 55, 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 Dec. 12, 1977, Arts. 51-56, 1125 UNTS 3.

253 de Hoogh, *supra* note 8, at 260.

254 *Third Report on State Responsibility*, submitted by Gaetano Arangio-Ruiz, Special Rapporteur, UN Doc. A/CN.4/440 and Add.1, ¶ 103, reprinted in [1991]2 YB.INT'L L.COMM'N 1.

applicables dans les rapports d'Etat à Etat."[255] 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."[256]

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;[257]

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.[258]

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."[259]

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.[260]

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255 Affaire de la responsabilité l'Allemagne à raison des dommages causés dans les colonies portugaises du Sud de l'Afrique, *supra* note 233, at 1026.

256 38 Annuaire de l'Institut de droit international 708 (1934).

257 Article 50, Draft Articles (2001), *supra* note 1.

258 Damrosch, *supra* note 114, at 60.

259 *Id.* at 61.

260 *Third Report on State Responsibility*, by Gaetano Arangio-Ruiz, *supra* note 254, ¶ 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."[261] 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."[262] 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."[263] 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.[264]

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.[265]

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 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 [...][266]

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261 *Fourth Report on State Responsibility*, by Gaetano Arangio-Ruiz, *supra* note 132, ¶ 82.

262 *Id.*

263 *Id.*

264 *Third Report on State Responsibility*, by Gaetano Arangio-Ruiz, *supra* note 254, ¶ 104.

265 Geneva Convention IV, *supra* note 55.

266 Resolution 1998/11, Commission on Human Rights, Report of the Fifty-fourth Session, ECOSOC Official Records, Supp. No. 3, at 62 (1998).

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."[267] 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."[268]

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."[269] 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.[270]

Some State practice confirms that humanitarian concerns limit 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."[271] 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 popula-

267 *Id.*

268 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, ¶¶ 1 and 3 (1999).

269 *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).

270 63(I) Yearbook of the Institute of International Law 362 (1989).

271 *Quoted in Fourth Report on State Responsibility*, by Gaetano Arangio-Ruiz, *supra* note 132, ¶ 79. The freezing of Argentine assets in the UK 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.*

tion, not only for vulnerable groups.[272] 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.[273]

There was disagreement in the ILC as to whether negotiations had 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 cooperates in good faith in a binding third – party dispute settlement mechanism. Such cooperation 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.

272 Security Council Resolution 687 (1991) of 3 April 1991, ¶ 20, excludes medicine, health supplies, foodstuffs, and materials and supplies for essential civilian needs from the scope of sanctions against Iraq.

273 Draft Articles (2001), *supra* note 1.

This requirement is, however, without prejudice to the taking of urgent interim measures required to preserve the rights of the injured State.[274]

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 favorably 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.[275] 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.[276]

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.[277] 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

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274 For a critique of the former Draft Article 48 (now redrafted as Article52) 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. J.I.L. 20-53 (1994).

275 *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).

276 *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.

277 *See Report of the International Law Commission on the Work of its Fiftieth Session*, *supra* note 12, at 77, ¶ 84.

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.[278]

The first report on Diplomatic Protection by the ILC's present special rapporteur, John Dugard,[279] 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,[280] but that there is no individual right to diplomatic protection.[281] 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."[282] In the *La Grand* 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."[283]

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.[284] Human rights have thus not superseded diplomatic protection.[285] Moreover, for those who believe that a third State should not intervene in violations of human rights except where such violations are systematic and

278 *Id.* at 77-79.

279 *First report on Diplomatic Protection by Special Rapporteur John Dugard*, UN Doc. A/CN.4/506 (2000).

280 *Id.* at ¶ 8.

281 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.* ¶ 87.

282 *Id.* at ¶ 8.

283 *La Grand Case (Germany v. United States)*, I.C.J. Reports 2001, at 466, Judgment of 27 June 2001, ¶ 77.

284 *First report on Diplomatic Protection by Special Rapporteur John Dugard, supra* note 279, ¶ 22.

285 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

widespread, the possibility of intervention by the national State is not limited by such constraints.[286] The national State may also extend diplomatic protection for rights as yet unrecognized by human rights treaties. Article 17 of the text of the draft articles as approved by the Commission on first reading on May 28, 2004, provides that the articles are without prejudice to the rights of States, natural persons or other entities to resort to actions or procedures under international law other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.[287] This article is intended to make it clear that diplomatic protection, investment treaties and human rights treaties are all mechanisms designed to protect persons and are not in competition with each other.[288] Another important provision is Article 8, which allows a state to exercise diplomatic protection in respect of a stateless person who at the time of the injury and at the date of the presentation of the claim is lawfully and habitually resident in that state.[289]

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 when he was detained in Turkey,[290]

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.[291]

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 April 5 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 oc-

these mechanisms are not intended to replace the right of diplomatic protection. *Id.* at ¶ 27.

286 *Id.* at ¶ 60.

287 UN Doc. A/CN.4/L647 (2004).

288 John Dugard, Fifth Report on Diplomatic Protection paras. 37-43, UN Doc. A/CN4/538 (2004).

289 UN Doc. A/CN.4/L. 647.

290 *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).

291 *Id.* at 34-35.

currence 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.[292] Similarly, in the *Selmouni* case, both the Netherlands and the Commission brought the case before the Court.[293]

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.[294] 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.[295] 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.[296] 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 origins of the Declaration constitute

> demonstrative evidence that the international law governing the treatment of aliens is alive and well at the United Nations. [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.[297]

292 *See Soering v. United Kingdom*, ECHR Reports, série A, vol. 161.

293 *See Selmouni v. France*, European Court of Human Rights, Judgment of 28 July 1999, 1999-V Eur. C.H.R., available at <http://www.echr.coe.int/eng/Judgments.htm>.

294 *See* Lillich, *supra* note 275, at 21-22.

295 *See* International Provisions for the Protecting the Human Rights of Non-Citizens, UN Doc. E/CN.4/Sub.2/392/Rev.1 *at 53* (1980).

296 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 6AOR (Supp. No. 53) at 252 (1986).

297 Lillich, *supra* note 275, at 23.

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 law of human rights and the customary law concerning responsibility of States for injury to aliens."[298]

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.[299]

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 Center for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) established in 1965 under the auspices of the World Bank.[300] Under the ICSID Convention, the Center 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 Center *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[301] 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,

298 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).

299 *Id.* at 550.

300 *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. *See About ICSID*, available online at <http://www.worldbank.org/icsid/>.

301 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. *See About ICSID*, available online at <http://www.worldbank.org/icsid/>.

whether or not parties to the dispute, are required to recognize and enforce the arbitral awards issued by the Center.[302]

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.

302 *Id.*

Chapter 5: 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.[1] Effective control was not seen as requiring democratic consent.[2]

Since the early 19th 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),[3] and the recognition of States spawned by the Austro-Hungarian empire after the First World War (upon

1 Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 Int'l & Comp. L.Q. 545, 546 (1999). These criteria are derived from the 1933 Montevideo Convention on the Rights and Duties of States, 165 L.N.T.S. 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).

2 *See* Murphy, *supra* note 1, 48 Int'l & Comp. L.Q., at 547.

3 Christian Hillgruber, *The Admission of New States to the International Community*, 9 Eur. J. Int'l L. 491, 507 (1998).

a guarantee of minority rights as a condition for admission to the League of Nations).[4]

After the Second World War, while most human rights instruments did not address democratic legitimacy, they nonetheless provided important benchmarks for recognition of new States.[5] The nearly universal non-recognition of Southern Rhodesia offers a case in point.[6] 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).[7]

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."[8] 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.[9]

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."[10] For instance, Nagorno-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:

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4 Murphy, *supra* note 1, at 549-551.

5 *Id.*, at 552.

6 Hillgruber, *supra* note 3, at 494-495.

7 Murphy, *supra* note 1, at 553.

8 *Id.*, at 558.

9 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 I.L.M. 1486-1487 (1992).

10 *Id.*, at 547.

> 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.[11]

Nevertheless, the EC Guidelines had a significant resonance, were frequently cited by diplomats, politicians and writers and, therefore, "might well have informed international practice."[12]

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. Its 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.[13] Although it found that Croatia had not satisfied the EC criteria, in particular as regards protection of minorities,[14] 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.[15] 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 considerations of general international law, including human rights law,"[16] going beyond previous standards on minority protection.[17]

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."[18] Following a referendum (March 1, 1992), Bosnia-Herzegovina was recognized by the EC (April 6, 1992).

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11 Murphy, *supra* note 1, at 559.

12 Grant, *supra* note 1, at 443.

13 Conference on Yugoslavia, Arbitration Commission Opinion No. 7, 11 January 1992, *reprinted in* 31 I.L.M. 1512 (1992), and Opinion No. 6, 11 January 1992, reprinted *in* 31 I.L.M. 1507 (1992). See also Opinions 1-5, reprinted in *id*. at 1494-1507.

14 Conference on Yugoslavia, Arbitration Commission Opinion No. 5, 11 January 1992, *reprinted in* 31 I.L.M. 1503 (1992).

15 Conference on Yugoslavia, Arbitration Commission Opinion No. 4, 11 January 1992, *reprinted in* 31 I.L.M. 1501 (1992).

16 Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 Am. J. Int'l L. 569, 593 (1992), *quoted* in Murphy, *supra* note 1, at 563.

17 Hillgruber, *supra* note 3, at 501.

18 Murphy, *supra* note 1, at 563.

After an examination of State practice on recognition in the 1990's, 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.[19]

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 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,[20] 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."[21] 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.[22]

> 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

19 *Id.*, at 566.

20 1948 I.C.J Rep., at 56 and 63 (May 28).

21 Charter of the United Nations, Article 4 (1).

22 *See generally* Konrad Ginther, in The Charter of the United Nations: A Commentary 158 (Bruno Simma ed., 1995).

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 abide by and to promote Human rights and fundamental freedoms, pluralist democracy and justice.[23] 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 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 (November 1, 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.[24]

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.[25]

Reports and resolutions of the Parliamentary Assembly pertaining to applicant States demonstrate that democracy and the rule of law are factors in the

23 Charter of Paris for a New Europe (1990).

24 Meron, *Democracy and the Rule of Law*, 153 World Affairs 23 (1990).

25 Statute of the Council of Europe, Article 3.

admission process.[26] 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 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.[27]

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 fulfill the conditions for membership laid down in Articles 3 and 4 of the Statute, it also presented arguments in favor 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.[28]

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."[29] The Declaration of Quebec City adopted by the Summit of the Americas on April 22, 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 Hemi-

26 *See* Meron and Jeremy S. Sloan, *Democracy, Rule of Law and Admission to the Council of Europe*, 26 Israel Y.b. Hum. Rts. 137, 144-147 (1997).

27 *Id*., at 147-148.

28 *Id*., at 151-154.

29 Charter of the Organization of American States, as amended, Article 9; *See generally*, Henry J. Steiner, *Political Participation as a Human Right*, 1 Harv. Y.b. Hum. Int'l L. 77 (1988).

sphere constitutes an insurmountable obstacle to the participation of that State's government in the Summit of the Americas process."[30]

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.[31] Greece rejoined the Council under the Karamanlis government in 1974.[32]

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,[33] 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.[34]

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 20th 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.[35] 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.

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30 AmericasCanada.org: Final Declarations – Declaration of Quebec City, *available at* <http://www.americascanada.org/eventsummit/declarations/menu-e.asp>.

31 Jack Donnelly, International Human Rights 71 (1998).

32 Francis G. Jacobs & Robin C.A. White, The European Convention On Human Rights 51-52 (2nd ed. 1996).

33 Treaty on European Union, as amended, Articles 6 and 7 (ex Articles F and F.1).

34 Gaetano Pentassuglia, *The EU and the Protection of Minorities: The Case of Eastern Europe*, 12 Eur. J. Int'l L. 3-5 (2001).

35 Murphy, *supra* note 1, at 569.

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.[36] "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."[37] To improve their prospects for speedy recognition, groups that overthrow an un-democratic government often commit themselves to democracy and human rights.[38]

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[39] and, after the US intervention on the ground, was restored to power. However, this case is more the exception than the rule.[40] 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,[41] as in the case of Pakistan.[42]

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."[43] 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

36 *Id.*, at 566-567.

37 *Id.*, at 572.

38 *Id.*, at 573-574.

39 *Id.*, at 545.

40 *Id.*, at 578.

41 *Id.*, at 574-575.

42 *See* Ilias Bantekas and Zahid F. Ebrahim, *International Law Implications from the 1999 Pakistani Coup d'etat*, ASIL Insight (November 1999).

43 Robert Y. Jennings, *The Role of the International Court of Justice*, 68 Brit. Y.B. Int'l L. 56, 58 (1997); *An International Lawyer Takes Stock*, 39 Int'l & Comp. L.Q. 513, 522 (1990).

not to the individual but to the State of his nationality."[44] "Today, the law of human rights has a primary judicial assumption that individuals can and do enjoy 'rights' directly from international law."[45] 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,[46] 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.[47] 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*[48] is now universally accepted. The European Communities have acquired a legal personality that in some matters even replaces that of its member States.[49] 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 *Oppenheims'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.[50] 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.[51]

Although, in general, treaties impose obligations on States to grant certain rights to individuals through their municipal laws,[52] individual rights under international law are not always solely derivative. Lauterpacht recognized that States may,

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44 Jennings, *supra* note 43, at 39 Int'l & Comp. L.Q. 522.

45 Jennings, *supra* note 43, at 68 Brit. Y.B. Int'l L. 58.

46 Jennings, *supra* note 43, at 39 Int'l & Comp. L.Q. 522 (*citing* Reparation for Injuries Case), 1949 I.C.J. 174.

47 Jennings, *supra* note 43 at 68 Brit. Y.B. Int'l L. 58.

48 Jennings, *supra* note 43, at 39 Int'l & Comp. L.Q. 522.

49 Oppenheim's International Law 20 (9th ed., R. Jennings & A. Watts eds., 1992).

50 Oppenheim's International Law 637 (8th ed., H. Lauterpacht ed. 1955).

51 *Id.*

52 *Id.*, at 637-638.

and occasionally do, confer directly on individuals international rights that can be enforced by individuals in their own names before certain international tribunals.[53] 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:[54]

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 enforceability 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.[55]

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.[56] 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.[57] 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."[58]

Both editions recognize that individuals may be held directly responsible under international law not only for such classic offenses as slave trading or piracy, but also for violations of the laws of war and crimes against humanity.[59] The 9th

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53 *Id.*, at 638.

54 *Id.*, at 639, 20-21 (footnotes omitted) (emphasis added).

55 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).

56 Oppenheim's International Law (9th ed.), *supra* note 49, at 846-847.

57 *Id.*, at 847-848.

58 *Id.*, at 848-849 (emphasis added).

59 Oppenheim's International Law (8th ed.), *supra* note 50, at 20-21, 341-342; Oppenheim's International Law (9th ed.), *supra* note 49, at 505-508; Aldrich, *Individuals as Subjects of International Humanitarian Law*, in Theory and Practice of International

edition reflects the developments that have been taking place in the field of international criminal law since the early 1950's 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."[60] 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.[61]

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.[62] To the extent that international law acts on individuals per se, they become subjects of international law.[63] The 9th edition also notes that other non-State actors such as NGOs and private corporations may have certain attributes of international personality.[64] 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.[65] In her model of international law as a "decision-making process," she argues that:

> there are a variety of participants, making claims across State lines, with the object of maximizing various values [...] in this model, 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.[66]

Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski 851 (Jerzy Makarczyk ed. 1996).

60 Oppenheim's International Law (9th ed.), *supra* note 49, at 506.

61 Oppenheim's International Law (8th ed.), *supra* note 50, at 641.

62 Oppenheim's International Law (9th ed.), *supra* note 49, at 850.

63 *Id.* Oppenheim's International Law (8th ed.), *supra* note 50, at 17.

64 Oppenheim's International Law (9th ed.), *supra* note 49, at 21-22.

65 Higgins, *supra* note 55, at 49-50.

66 *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."

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.[67] 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.[68]

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."[69] 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.[70] In a report on diplomatic 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."[71]

67 *Id*., at 52-54.

68 Rosalyn Higgins, *The Reformation in International Law*, *in* Law, Society and Economy: Centenary Essays For The London School Of Economic s And Political Science 207, 212-13 (Richard Rawlings ed., 1997).

69 Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 Recueil des Cours 150 (1999).

70 Stephan Hobe, *Individuals and Groups as Global Actors: The Denationalization of International Transactions*, *in* Non-State Actors as New Subjects of International Law 115, 121-26 Verőffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel, Band 125, at 115-35 (Rainer Hofmann ed. 1999). See also Anne-Marie Slaughter, *An International Constitutional Moment*, 43 Harv. Int'l L. J. 1, 13 (2002) (who speaks of the "individualization of international law.").

71 John Dugard, *First Report on Diplomatic Protection*, UN Doc. A/CN.4/506, paras. 23-24 (2000).

II. Individual Access to International Organs and Institutions

a) Trade Organizations Dispute Settlement Mechanisms

i) The World Trade Organization (WTO)

The WTO[72] dispute settlement mechanism is the successor to the dispute settlement mechanism embodied in Articles XXII and XXIII of the GATT (1947).[73] 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.[74] As in GATT, access to the WTO's dispute settlement mechanism is limited to Member States.[75] 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 settlement procedures.[76] Private parties may thus be the actual movers behind some of the cases.[77]

Often raised in the context of transparency of the Organization, NGOs' participation in the WTO dispute settlement proceedings has been a contentious issue.[78] 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."[79] However, a panel must give notice to a Member before it seeks information from any individual or body within the Member's jurisdiction.[80] Although Article 13 speaks of a panel's right to seek information, the Appellate Body accept-

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72 Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, April 15, 1994 ("Uruguay Round Final Act"), Agreement Establishing the World Trade Organization, 33 I.L.M. 1125, 1144.

73 General Agreement on Tariffs and Trade, signed on October 30, 1947, 55 U.N.T.S. 187 (1950).

74 Uruguay Round Final Act. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, 33 I.L.M. 1125, 1227 (1994).

75 Under the Rules and Procedures, Members begin with consultations, Art. 4, 33 I.L.M. at 1228-29. 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 1236-37.

76 Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 Nw. J. Int'l L. & Bus. 398, 468 (1996/97).

77 *Transcript of Discussion Following Presentation by Kenneth W. Abbott*, 1992 Colum. Bus. L. Rev. 151, 161 (1992).

78 Dukgeun Ahn, *Environmental Disputes in the GATT/WTO: Before and After US-Shrimp Case*, 20 Mich. J. Int'l L. 819, 841 (1999).

79 Rules and Procedures, Art. 13(1), 33 I.L.M. at 1234.

80 *Id.*

ed 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.[81] 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."[82] 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*."[83] 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.[84]

Such decisions demonstrate some "responsiveness of the WTO to global demands."[85] 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"[86]

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.[87] 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.[88] Critics invoke the lack of accountability of NGOs and

81 Ahn, *supra* note 78, at 839.

82 WTO, WT/DS58/R, para. 7.8, *cited in* Ahn, *supra* note 78, at 840.

83 WTO, WT/DS58/AB/R, paras. 106 and 108, *cited in* Ahn, *supra* note 78, at 841 (emphasis added).

84 WTO Doc. WT/DS138/AB/R, para. 42 (May 10, 2000), cited by Philippe Sands in *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. 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, 239-43 (2002). See generally Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AJIL 611 (1994).

85 Ahn, *supra* note 78, at 843.

86 WTO, WT/L/162 (July 23, 1996), *cited in* Ahn, *supra* note 78, at 842.

87 John O. McGinnis and Mark L. Movsesian, *Commentary: The World Trade Constitution*, 114 Harv. L. Rev. 511, at 569-70 (2000).

88 *Id.*, at 570-71.

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[89] provides, in addition to a general dispute settlement mechanism,[90] two specific mechanisms: one for disputes between a Party and an investor from another Party,[91] and one for disputes related to anti-dumping and countervailing duties between Parties.[92] NAFTA's side agreements on environmental cooperation (NAAEC)[93] and on labor cooperation (NAALC)[94] 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.[95]

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.[96] 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.[97]

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

89 North American Free Trade Agreement, done at Washington on December 8 and 17, at Ottawa on December 11 and 17, and at Mexico City on December 14 and 17, 1992, *reprinted in* 32 I.L.M. 605 (1993).

90 NAFTA, Chapter 20, Section B.

91 NAFTA, Chapter 11, Section B.

92 NAFTA, Chapter 19.

93 32 I.L.M. 1480 (1993).

94 32 I.L.M. 1499 (1993).

95 NAFTA, Article 2022 (1).

96 NAFTA, Articles 1116 and 1117.

97 NAFTA, Article 1120.

to compensate for expropriation). "NAFTA does not ... allow investors to seek international arbitration for mere contractual breaches."[98]

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 countervailing duties have been highly controversial in international trade law and policy.[99] 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 bi-national 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."[100] 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 bi-national panel review."[101] The panel is convened at the request of an involved Party.[102] 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.[103] The proceedings are usually terminated if the private interested parties reach an agreement.[104]

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98 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 1st 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).

99 Andreas F. Lowenfeld, *Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal*, 24 N.Y.U. J. Int'l L. & Pol. 269, 270-271 (1991).

100 Alexandra Maravel, *Constructing Democracy in the North American Free Trade Area*, 16 J. Int'l L & Bus. 331, 345, n. 44 (1996).

101 NAFTA, Article 1904(1). This section of NAFTA is largely similar to Chapter 19 of the Canada-United States Free Trade Agreement, done at Ottawa, December 22, 1987, and January 2, 1988 and at Washington, D.C. and Palm Springs, December 23, 1987, and January 2, 1988, *reprinted in* 27 I.L.M. 281 (1988).

102 NAFTA, Article 1904 (2).

103 NAFTA, Article1904 (7).

104 *See* for instance David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 Tex. Int'l L.J. 163, 176-78 (1997) (discussing cases which were ter-

Andreas Lowenfeld has observed that, at the time of the adoption of the U.S.-Canada FTA, the extent of private party participation allowed under Chapter 19 procedure was "unique in institutions of dispute settlement between nation-States."[105] After years of 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."[106]

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."[107] 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."[108] 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.[109]

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minated prior to a decision on the merits either by mutual consent or at the request of the complainant).

105 Lowenfeld, *supra* note 99, at 271.

106 *Id.*, at 335.

107 NAAEC, Sept.14, 1993 (Canada, Mexico, United States), 32 ILM 1480 (1993), Article 14 (1).

108 NAAEC, *supra* note 107, Article 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.

109 Department of the Planet Earth and 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. The submissions and the Secretariat's determinations

Another possible avenue open to citizens and NGOs' is the implementation 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.[110] In preparing the report, the Commission may draw on a wide range of sources, including non-governmental ones.[111]

Under the North American Agreement on Labor Cooperation as well, private parties may trigger an enforcement mechanism of the agreement. The National Administration Offices[112] (NAOs) may receive "public communications on labor law matters arising in the territory of another Party."[113] The NAO "review[s] such matters, as appropriate, in accordance with domestic procedures."[114] If the matter is not resolved, any consulting party may request that an Evaluation Committee of Experts be formed.[115] 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."[116] In preparing its final report, the Committee of Experts may invite written submissions from the public.[117]

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

> [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 inter-

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may be found on the site of the Commission, *available at* <http://www.cec.org/citizen>.

110 NAAEC, *supra* note 107, Article 13 (1).

111 NAAEC, *supra* note 107, Article 13 (1).

112 Sept. 14, 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.

113 NAALC, *supra note* 112, Article 16(3).

114 *Id.*

115 NAALC, *supra* note 112, Article 23 (1).

116 NAALC, *supra* note 112, Article 23 (2).

117 NAALC, *supra* note 112, Article 24 (1)(d).

> pretation 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.[118]

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.[119] 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.[120] 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.[121] ICSID has no jurisdiction over a dispute between a Contracting State and a natural person who is a national of that State.[122] 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.[123] As Broches has emphasized,

> 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.[124]

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

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118 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).

119 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force October 14, 1966, 575 U.N.T.S. 159.

120 CSID, Article 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).

121 CSID, Article 25 (1 and 2); *See also* Broches, *supra* note 98, at 202.

122 CSID, Article 25(2)(a).

123 Dolzer, *supra* note 120, at 144; Leben, *supra* note 118, at 305.

124 Broches, *supra* note 98, at 198.

must consent to submit a particular dispute to the Centre.[125] Consent is "not merely … a formal requirement … but an essential characteristic of the entire system of the Convention."[126] 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.[127] Once both parties to the dispute have given consent (in writing) to ICSID arbitration, no party may unilaterally withdraw its consent.[128] 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."[129]

An important limitation on the investor's options is that contracting States waive their right to diplomatic protection:[130] 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."[131] The host State is thus shielded from an international claim by the home State. The home State may, however, undertake informal exchanges for the sole purpose of facilitating a settlement.[132]

Under the Convention, the arbitration tribunals are to apply "such rules of law as may be agreed by the parties."[133] 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."[134] 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."[135] Charles Leben has discerned "a movement towards international law by several ICSID tribunals."[136] 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."[137] A

125 Dolzer, *supra* note 120, at 145.

126 Broches, *supra* note 98, at 199; *also* Dolzer, *supra* note 120, at 145.

127 Broches, *supra* note 98, at 200-201; Dolzer, *supra* note 120, at 145.

128 CSID, Article 25(1); Broches, *supra* note 98, at 201.

129 Broches, *supra* note 98, at 200.

130 Dolzer, *supra* note 120, at 145.

131 CSID, Article 27(1).

132 CSID, Article 27(2).

133 CSID, Article 42(1).

134 CSID, Article 42(1).

135 Broches, *supra* note 98, at 181.

136 Leben, *supra* note 118, at 303.

137 NAFTA, Article 1131 (1).

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.[138]

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.[139] Some commentators have denied that public international law, as a legal order, applies to such contracts.[140] 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."[141] Charles Leben suggests that through international arbitration and modern investment law, private persons … have acquired a limited international personality:

> 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.[142]

c) World Bank Inspection Panel

The World Bank Inspection Panel was established by resolutions of the World Bank and the International Development Association (IDA).[143] 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.[144]

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138 Energy Charter Treaty, *reprinted in* 34 I.L.M. 382 (1995), Article 26(6).

139 *See* Leben, *supra* note 118, at 300-301.

140 *See* Leben, *id*., at 301-302.

141 Georges R. Delaume, *State Contracts and Transnational Arbitration*, 75 Am. J. Int'l L. 784, 786 (1981). *See also* Leben, *supra* note 118, at 305.

142 Leben, *supra* note 118, at 305.

143 IBRD Resolution No. 93-10 (1993), Resolution IDA 93-6 (1993), *reprinted in* 34 I.L.M. 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).

144 Resolution No. 93-10, *id.*, at para. 12.

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.[145]

The Inspection Panel was envisioned as an addition to the already existing oversight and quality control mechanisms applied by the World Bank to its projects.[146] 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.[147] 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.[148] The Panel's establishment reflects the heightened sensitivity of the Bank to human rights concerns.[149]

The Inspection Panel is innovative and may set a precedent for other bodies.[150] 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."[151]

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.[152] Commenting on the

145 Resolution No. 93-10, *id.*, at paras. 20-23.

146 Ibrahim F.I. Shihata, The World Bank Inspection Panel 14-21 (1994).

147 *Id.*, at 38.

148 *Id.*, at 118-122.

149 Thomas M. Franck, The Empowered Self: Law And Society In The Age of Individualism 218-219 (1999).

150 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.

151 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* note 146, at 120-121 (1994).

152 Shihata, *supra* note 146, at 93-94.

exclusion of complainants outside the borrowing countries, Shihata wrote that "the Panel is thus not a forum for an *actio popularis*."[153]

Another important limitation is that the panel only examines World Bank behavior under the Bank's internal procedures. It does not go into the conformity of those procedures with general international law. This limitation was inspired by the fear that a broader inquiry would entangle the Bank in areas clearly outside its mandate.[154]

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."[155] 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.[156] Under the Panel's Operating Procedures, supplemental information from the general public may be submitted to the Panel.[157]

d) International Tribunals

The possibility of individual access to international tribunals had already been recognized early in the 20th 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 …[158]

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 Nations Convention on the Law of the Sea (UNCLOS).[159] Article 287 of UNCLOS provides that State Parties may

153 *Id.*, at 95.

154 *Id.*, at 96.

155 Bissell, *supra* note 151, at 742.

156 *Id.*, at 743.

157 Operating Procedures of the Inspection Panel, Articles 50 and 51.

158 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, Article II (Clive Parry ed., 1980).

159 United Nations Convention on the Law of the Sea, opened for signature December 10, 1982, *reprinted in* United Nations, Official Text of the United Nations Convention

chose 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.[160] 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."[161] 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.[162] Entities other than States may not access (for contentious cases) the International Court of Justice, which by its Statute is clearly limited to States.[163] 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.[164] For the purposes of the Convention, references to "State parties" include those entities.[165] Thus, while Article 20(1) of the Statute of the ITLOS provides that the Tribunal "shall be open to State Parties,"[166] non-State entities which are parties to the Convention have access to the Tribunal.[167]

Part XI of the Convention creates a special dispute settlement mechanism for disputes concerning the exploration and exploitation of the deep sea-bed. The Sea-Bed Disputes Chamber (SBDC) is a separate chamber within the ITLOS with its own jurisdiction.[168] 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

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on the Law of the Sea with Annexes and Index, UN Sales No. E.83.V.5 (1983).

160 UNCLOS, Article 287(1); see also *id.*, Annex VIII, Art. 1 (listing the categories of dispute for a special arbitral tribunal).

161 UNCLOS, Article 287(1).

162 UNCLOS, Article 287(3) and (5).

163 Statute of the International Court of Justice, Article 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).

164 UNCLOS, Arts. 305-307.

165 UNCLOS, Article 1(2).

166 UNCLOS, Annex VI, Article 20(1).

167 5 United Nations Convention on the Law of the Sea 1982: A Commentary 374-375 (Myron H. Nordquist ed., 1989).

168 UN Convention on the Law of the Sea, Articles 187-188; Statute of ITLOS, Articles 14, 35-40; J.G. Merrills, International Dispute Settlement 173 (2nd ed. 1991).

has incurred liability.[169] 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.[170] 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."[171] 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."[172] 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.[173] The 1994 Agreement Relating to the Implementation of Part XI does not affect the structure of the Part XI dispute settlement mechanisms.[174]

Unlike in the ICSID, the sponsoring State is not completely excluded from proceedings involving natural or juridical persons. In the case of disputes involving such persons, the sponsoring State is to be notified and has the right to participate in the proceedings.[175] 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 honored, the respondent State may arrange to be represented by a juridical person of its own nationality.[176] 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."[177]

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 ves-

169 UNCLOS, Article 187.

170 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 Non-parties*, *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).

171 UNCLOS, Annex VI, Article 20(2).

172 5 United Nations Convention on the Law of the Sea 1982: A Commentary, *supra* note 167, at 374-375; *see also* Merrills, *supra* note 168, at 172.

173 UNCLOS, Article 187(c)(i), *referred to in* Article 188 (2).

174 Noyes, *supra* note 170, at 222.

175 UNCLOS, Article 190(1).

176 UNCLOS, Article 190(2).

177 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).

sel.[178] 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,"[179] 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.[180] 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.[181] The first application for prompt release[182] was made on behalf of Saint Vincent and the Grenadines and was accompanied by the appropriate authorization.[183]

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.[184] Since August 1993, all cases filed by natural or legal persons against the Community must be brought first to the Court of First Instance.[185] The Court of Justice acts as an appellate court[186] and retains original jurisdiction over preliminary rulings.[187]

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.[188] Although staff cases are a very specialized area of the EC law, they "have a special human interest and importance, since they are

178 UNCLOS, Article 292(2).

179 5 United Nations Convention on the Law of the Sea 1982: A Commentary, *supra* note 167, at 67.

180 *Id.*, at 70.

181 Rules of the Tribunal, International Tribunal for the Law of the Sea, *available at* <http://www.un.org/Depts/los/rules_e.htm>, Art. 110(3).

182 Bernard H. Oxman, *The M/V "Saiga" (Saint Vincent and the Grenadines v. Guinea), ITLOS Case No. 1* <http://www.un.org/Depts/los/judg_1htm>. *International Tribunal for the Law of the Sea, December 4, 1997*, 92 Am. J. Int'l L. 278 (1998).

183 *Id.*, at 278 n. 2.

184 *See* L. Neville Brown and Tom Kennedy, The Court of Justice of the European Communities 179 (4th ed., 1994). *See generally* Paul Craig & Gráinne de Búrca, EU Law (2003).

185 *Id.,* at 75-76.

186 *Id.*, at 70.

187 Treaty Establishing the European Community, signed March 25, 1957, as amended, Article 225 (ex Article 168a).

188 EC Treaty, Article 236 (ex Article 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 Article 168a), Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Community.

virtually the only cases where a private individual (as distinct from a legal person) goes directly to the Court."[189]

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.[190] But standing requirements are stringent.[191] A contested decision must be of "direct and individual concern" to the person instituting the proceeding.[192] Typically, such cases implicate decisions of the Commission in the field of competition law and anti-dumping regulations of the Council.[193] The ECJ has declined to broaden the *locus standi* to include other fields such as environmental protection.[194]

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.[195] 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.[196]

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.[197] Such actions are no longer dependent on a prior ruling on annulment.[198] 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."[199] Few complaints have

189 Brown and Kennedy, *supra* note 184, at 181.

190 EC Treaty, Article 230 (ex Article 173).

191 Brown and Kennedy, *supra* note 184, 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).

192 EC Treaty, Article 230 (ex Article 173).

193 Brown and Kennedy, *supra* note 184, at 134-135.

194 *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.

195 Albors-Llorens, *supra* note 191, at 16.

196 EC Treaty, Article 232 (ex Article 175). Albors-Llorens, *supra* note 191, at 213.

197 EC Treaty, Articles 235 and 288 (ex Articles 178 and 215).

198 *Aktien-Zuckerfabrik Schöppenstedt v. Council*, Case 5/71, 1971 (Part II) ECR 975, 983; Albors-Llorens, *supra* note 191, at 205.

199 *Aktien-Zuckerfabrik Schöppenstedt*, *supra* note 198, at 984; Albors-Llorens *supra* note 191, at 205.

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."[200]

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,"[201] *i.e.*, 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.[202] 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]."[203] The decision to refer is made by the national court alone; the Court of Justice must accept a reference from a national court.[204] 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.[205]

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: [206]

> 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

200 Albors-Llorens, *supra* note 191, at 206.

201 EC Treaty, Article 234 (ex Article 177).

202 EC Treaty, Article 234 (ex Article 177); Brown and Kennedy, *supra* note 184, at 213-215.

203 EC Treaty, Article 234 (ex Article 177).

204 Costa v. ENEL, Case 6/64, 1964 ECR 585, 592-593; Brown and Kennedy, *supra* note 184, at 202.

205 Brown and Kennedy, *supra* note 184, at 193-94.

206 Albors-Llorens, *supra* note 191, at 177-78.

possibly have challenged by means of a direct action before the European Court, owing to their lack of *locus standi*.[207]

The Charter of Fundamental Rights of the European Union (2002) provides for important civil, political, as well as social and labor rights. Addressed to the institutions and bodies of the Union, it concerns member States only in the context of implementation of Union law (Article 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 (Article 42), access to an ombudsman (Article 43), and the right to petition the Parliament (Article 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-19th 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.[208] 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.[209] It has jurisdiction over claims of nationals of the United States against Iran and the claims of nationals of Iran against the United States.[210] 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 persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty percent

207 *Id.*, at 186.

208 *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.

209 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).

210 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 January 19, 1981, *reprinted in* 1 Iran-United States Claims Tribunal Reports 9 (1983) ("Claims Settlement Declaration"), Article II(1).

or more of its capital stock."[211] The Tribunal also has jurisdiction over "official claims of the United States and Iran against each other arising out of contractual arrangements between them,"[212] and over "any dispute as to the interpretation or performance of any provision of that Declaration."[213] But it does not have jurisdiction over claims brought by either Iran or the United States against a national of the other State.[214]

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.[215] Most of the small claims were settled by a lump-sum payment in 1990.[216]

Nationality requirements are imposed not on the claimants but on the claims.[217] 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 January 19, 1981 (the date the settlement agreement entered into force).[218] 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).[219]

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.[220] Because of this requirement, commentators are split as to whether a claim is owned by the individuals themselves or by the States 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."[221] Moreover, the exhaustion of local remedies, a

211 Claims Settlement Declaration, *id.*, Article VII(1).

212 Claims Settlement Declaration, *id.*, Article II(2).

213 Claims Settlement Declaration, *id.*, Article II(3).

214 George H. Aldrich, The Jurisprudence of the Iran-United States Claims Tribunal 80 (1996).

215 Brower, *supra* note 209, at 19.

216 *Id.*, at 20.

217 Aldrich, *supra* note 214, at 45.

218 Claims Settlement Declaration, *supra* note 211, Article VII(2).

219 Aldrich, *supra* note 214, at 45.

220 Claims Settlement Declaration, *supra* note 210, Article III(3).

221 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, April 6, 1984, *reprinted in* 5 Iran-U.S. Claims Tribunal Reports 251, 261 (1984 -I).

classic requirement for diplomatic protection, is not applicable to claims of nationals.[222] 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.[223] 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."[224] He rightly argues that diplomatic protection certainly played a role in the settlement of small claims by a lump-sum payment in May 1990.[225]

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.[226] The Commission consists of a Secretariat, a Governing Council, and Commissioners.[227] Rather than acting as a tribunal or a court, the Commission is a "political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims."[228]

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.[229] International organizations may submit claims only on their own behalf.[230] A government may submit claims on behalf of its nationals, residents in its territories, and corporations and other entities organized under

222 Caron, *id.*, at 133-34.

223 *Id.*, at 134-35.

224 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).

225 *Id.*, at 59.

226 Security Council Resolution 687 (Apr. 8, 1991), UN Doc. S/RES/687, paras.16, 18, and 19. *See* also Resolution 692 (May 20, 1991), UN Doc. S/RES/0692.

227 *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).

228 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).

229 Provisional Rules for Claims Procedure, UN Doc. S/AC.26/1992/10, Annex ("Provisional Rules"), Article 5(1).

230 Provisional Rules for Claims Procedure, *id.*, Article 5(1)(d).

its laws.[231] 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.[232] 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.[233] For some commentators, this fact "underscores ... that the Commission is not a form of traditional diplomatic protection."[234] 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."[235] 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.[236] John Crook suggested that the effect of Article 5(2) is "truly novel" because "an instrumentality of the United Nations is acting to empower stateless and other disadvantaged persons to make international claims."[237]

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.[238] 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.[239]

For "urgent claims,"[240] the provisional rules direct panels to make their determinations based on materials submitted to them. No oral proceedings are

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231 Provisional Rules for Claims Procedure, *id.*, Article 5(1)(a) and (b).

232 John R. Crook, *The United Nations Compensation Commission – A New Structure to Enforce State Responsibility*, 87 Am. J. Int'l L. 144, 149 (1993).

233 Provisional Rules for Claims Procedure, *supra* note 229, Article 5(3).

234 Crook, *supra* note 232, at 151.

235 Provisional Rules for Claims Procedure, *supra* note 229, Article 5(2).

236 Carlos Alzamora, *The UN Compensation Commission: An Overview*, *in* The United Nations Compensation Commission: Thirteenth Sokol Colloquium, 3, 7 (Richard B. Lillich ed., 1995).

237 Crook, *supra* note 232, at 150.

238 Provisional Rules for Claims Procedure, *supra* note 229, Article 14.

239 Provisional Rules for Claims Procedure, *id.*, Articles 33-40(1). Article 40(1).

240 "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* note 236, at 6.

held, unless a panel determines that special circumstances so warrant.[241] For "[u]nusually large or complex claims,"[242] 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."[243]

In contrast to the US-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."[244] The majority of individual claims were given priority through an accelerated procedure while larger claims were processed afterwards.[245]

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)[246] and eventually were integrated in the proceedings.[247] The European system was first significantly modified by Protocol 9, which allowed individuals direct access to the Court (since superseded by Protocol 11).[248] Protocol 11, which entered into force in 1998, completely reformed the European system. Under this Protocol, individuals, non-governmental organizations and groups of

241 Provisional Rules for Claims Procedure, *supra* note 229, Article 37(c).

242 *See* Provisional Rules for Claims Procedure, *id.*, Article 38 (d).

243 *Id.*

244 Robert C. O'Brien, *The Challenge of Verifying Corporate and Government Claims at the United Nations Compensation Commission,* 31 Cornell Int'l L. J. 1, 3 (1998); *See also* Alzamora, *supra* note 236 at 6; Brower, *supra* note 209, at 20-21.

245 See *Status of Claims*, *available at* <http://www.unog.ch/uncc/status.htm>; *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).

246 Sands, *supra* note 84, at 546.

247 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).

248 Eur. T.S. No 140.

individuals are allowed to submit applications directly to the Court.[249] 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."[250] In 1996, judges of the Court began asking questions directed to the representatives of the victims, whose briefs were presented to the Court.[251] 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."[252] 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,[253] 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.[254] In

249 European Convention on Human Rights, Article 34. See also Thomas Buergenthal, Dinah Shelton & David P. Stewart, International Human Rights in a Nutshell 149-68 (3rd ed. 2002).

250 Cançado Trindade, *supra* note 247, at 21.

251 *Id.*, at 23.

252 Rules of Procedures of the Inter-American Court of Human Rights, Article 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* note 247, at 23, n.82. Regarding the 2002 rules, see Thomas Buergenthal et al. *supra* note 249, at 258.

253 Ex Article 25.

254 Martin A. Olz, *Non-Governmental Organizations in Regional Human Rights Systems*, 28 Colum. Hum. Rts. L. Rev. 307, 346 (1997) [A-83]; Asociación de Aviadores de la República, Mata et al. v. Spain, App. No. 10733/84, 41 Eur. Comm'n H. R. 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.) [A-84]; Norris and Nat'l Gay Fed'n v. Ireland, App. No. 10581.83, 44 Eur. Comm'n H. R. 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).

that regard, the entry into force of Protocol 11, which allows direct access to the Court, did not alter the situation.[255] Under the new Article 34 of the Convention:

> The Court may receive applications from any person, 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.[256]

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.[257]

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.[258]

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.[259]

Non-governmental organizations may, however, appear before the European Court as *amici curiae.* Under Article 36(2) of the amended Convention, which is modeled on an innovation made in the former Rules of Court in 1983,[260] the President may invite "any person concerned who is not the applicant to submit written comments or take part in hearings.[261]

The African system of protection empowers the Commission to allow individuals and organizations to bring complaints to the African Commission on

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255 *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 I.L.M. 943, 955 (1994).

256 European Convention on Human Rights, Article 34.

257 American Convention on Human Rights, Article 44.

258 *See* Cançado Trindade, *supra* note 247.

259 Nowicki, *supra* note 254, at 291.

260 Rule 37(2) of the 1983 Rules of the Court.

261 Olz, *supra* note 254, at 347; *see also* Explanatory Report, *supra* note 255, 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* note 254, at 297.

Human and Peoples' Rights.[262] 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.[263] 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.[264]

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."[265] 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.[266]

Individuals have standing to bring complaints against States that have accepted the necessary treaties before the U.N. Human Rights Committee,[267] the Committee on the Elimination of Racial Discrimination,[268] and the Committee Against Torture.[269] Individuals also have the right to bring complaints under the new Optional Protocol to the Women's Convention.[270]

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262 Revised Rules of Procedure of the African Commission on Human and Peoples' Rights, Rules 103-04; Articles 55-56 of the African Charter on Human and Peoples' Rights.

263 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Articles 5(3) and 34 (6), *reprinted in* 6 African Yearbook of International Law 419 (1998).

264 Protocol to the African Charter, *supra* note 263, Article 5(1).

265 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Strasbourg, 9 November 1995, Eur. T.S. No. 158, Article 1.

266 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, *id*., Articles 1-8.

267 Optional Protocol to the Political Covenant, GA Resolution 2200A(XXI), 21 UN GOAR Suppl. No. 16, at 59, U.N. Doc. A/6316 (1966), Article 1.

268 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), Article 14.

269 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), Article 21.

270 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 December 22, 2000, Article 2.

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.[271] It held that Canada had violated Article 27 through "recent developments [that] threaten the way of life and culture of the Lubicon Lake Band ... ."[272]

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 ... ."[273] The Torture Convention provides explicitly that the Committee may receive communications "from or on behalf of individuals."[274] 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."[275]

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.[276] 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

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271 *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).

272 Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, *id.*, para. 33.

273 Rules of Procedure of the Committee on the Elimination of Racial Discrimination, Rule 91(b).

274 Torture Convention, *supra* note 269, Article 22(1); Rules of Procedure of the Committee Against Torture, Rule 107.

275 Optional Protocol to the Women's Convention, *supra* note 270, Article 2.

276 Economic and Social Council Resolution 1503 (XLVIII), UN ESCOR, 48th Sess., Suppl. No. 1A, at 8 (UN Doc. E/4832/Add.1 (1970).

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."[277] 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.[278]

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.[279] Of course, efforts by NGO to influence the development and enforcement of the international law are not entirely new. They were involved in campaigns against slavery and the traffic in women and children from the mid-19th century. Recently, NGO's 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.[280] 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.[281] 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

277 Resolution 1503, *id*., para. 1.

278 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).

279 Theo van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy,* 20 Cal. W. Int'l. L. J. 207, 221 (1989-90); Ermacora, *supra* note 278, at 173.

280 Sands, *supra* note 84, at 547-548.

281 UN Charter, Article 71.

> the aims and principles of the United Nations Charter and the Statute of the Council of Europe;[282]

But sensitive political issues such as peace and security were retained in the exclusive domain of inter-State cooperation.[283] The playing field of NGOs has nevertheless been considerably expanded since,[284] and they have been gaining influence also in the field of peace and security.[285]

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, parliaments and governments and mobilizing public opinion, they have been monitoring and reporting on human rights violations.[286] They have performed an important role in providing data to human rights bodies, a development acknowledged and encouraged by such bodies.[287] 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 shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.[288]

NGO's have been active "intervenors in human rights procedures."[289] They have successfully mobilized governments to seek, through the competent organs, advisory opinions of the International Court of Justice.[290]

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"[291]

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282 European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, Strasbourg, 24 April 1986, Eur. T.S. No. 24, Preamble.

283 Van Boven, *supra* note 279, 208.

284 Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 Colum. J. Transnat'l L. 7, 13 (1997).

285 Report of the Secretary General on the Work of the Organization, UN Doc. A/44/1, § VII (1989), *quoted in* Van Boven, *supra* note 279, at 208.

286 Van Boven, *supra* note 279, at 207; Ermacora, *supra* note 278, at 173.

287 Report of the Human Rights Committee, UN GAOR, 49th Sess., Suppl. No. 40, at 84-85, para. 437, UN Doc. A/49/40 (1994).

288 ICC Statute, Article 15(2).

289 Higgins, *in The Reformation in International Law*, *supra* note 68, at 214.

290 *Id.*, at 215.

291 *Id.*, at 215.

and have provided the initial impetus for the adoption of new instruments.[292] 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[293] and the UN Convention on the Rights of the Child.[294] 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 Prevention of Torture, the European Cultural Convention and the European Charter for Regional or Minority Languages.[295]

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.[296] 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.[297]

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

292 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).

293 MacDermot, Bulletin of Human Rights 90/1, at 44.

294 Van Boven, *supra* note 279, at 218.

295 See *Europe through its Associations*, *available at* http://www.coe.fr./ong/ngo.htm (visited on March 24, 2000); European Convention on the Legal Status of Migrant Workers, Strasbourg, 24 November 1977, Eur. T.S. No. 93; European Convention for the Prevention of Torture or Inhuman and Degrading Treatment or Punishment, Strasbourg, 26 November 1987, Eur. T.S. No. 126; the European Cultural Convention, Paris, 19 December 1954, Eur. T.S. No. 18; and the European Charter for Regional or Minority Languages, Strasbourg, 5 November 1992, Eur. T.S. No. 148.

296 Van Boven, *supra* note 279, 218-219.

297 *Id.*

Emergency (1984) and the Declaration of Principles of International Law on Mass Expulsion (1986).[298]

NGOs are effective vehicles for expressing concerns that are not adequately represented by States.[299] 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.[300]

The increasing involvement of NGOs in international law can be seen as a democratization of its formation process: What was previously 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 NGO's 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 NGO's. International organizations have expanded the diversity of actors in treaty-making, benefitting NGO's and other interest groups."[301]

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.[302] 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.[303] 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.[304]

Oscar Schachter has warned that "[t]he widespread approbation of civil society associations ... tends to obscure their diversity and conflicting ends," and argued

298 *Id.*, at 219-220.

299 Hobe, *supra* note 70, at 130-31.

300 Ermacora, *supra* note 278, at 174.

301 *Id.*

302 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).

303 *Id.*, at 36-37.

304 *Id.*, at 36.

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 analysis to resolve such conflicts on the basis of public principles of justice and the common good."[305]

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.[306] 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.[307]

Also within the framework of the Council of Europe, a system of consultative relationships with NGO's 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.[308]

Cooperation 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 cooperation 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 cooperate with the Council.[309]

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305 Schachter, *supra* note 284, at 14.

306 ECOSOC Resolution 1996/31, para. 37(f).

307 ECOSOC Resolution 1996/31, para. 20.

308 Council of Europe, Committee of Ministers Resolution (93) 38, paras.2, 4 and 5.

309 See *Europe through its Associations*, *supra* note 295.

IV. Indigenous Peoples

With the development of an indigenous peoples' movement and the multiplication of indigenous peoples' organizations,[310] 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."[311] 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.[312]

Indigenous rights have been framed in different conceptual structures: human rights and non-discrimination claims, minority claims,[313] self-determination claims, historic sovereignty claims, and claims as indigenous peoples (*sui generis*).[314] While the human rights approach has often been the preferred way to address indigenous issues, some commentators, and particularly Benedict Kingsbury, 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.[315] In terms of human rights, the most important application

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310 Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, 92 Am. J. Int'l L. 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).

311 Kingsbury, *supra* note 310, at 419.

312 *Id.*, at 437.

313 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. T.S. 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).

314 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).

315 *Id.*, at 205.

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.[316]

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."[317] 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.[318]

The ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, by contrast, (1989) illustrates the more recent trend to grant ethnically distinct groups a degree of political and economic autonomy within existing State boundaries.[319] The Convention recognizes "the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."[320]

There is no accepted definition of "indigenous peoples."[321] 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 ...

316 *Id.*, at 214.

317 Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, *supra* note 314, at (229).

318 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.

319 Hitchcock, *supra* note 310, at 11.

320 Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, in force 5 September 1991, III International Labor Conventions and Recommendations 324 (International Labor Organization, 1996), *reprinted in* 28 I.L.M. 1382 (1989), Preamble.

321 Hitchcock, *supra* note 310, at 2.

> 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 engage in economic activities that range from shifting agriculture in or near forests to wage labor or even small-scale market-oriented activities. Indigenous peoples 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.[322]

Despite the continuing controversy regarding the definitions of indigenous peoples,[323]

> [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 and politically unorganized to transnational sources of ideas, information, support, legitimacy and money.[324]

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."[325] 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."[326] A similar provision is found in the 1989 ILO Convention No. 169.[327]

Benedict Kingsbury has warned that, in contrast to NGO's, whose membership for the most part is based on voluntarism and individual choice, the membership of indigenous groups may depend on "birth, and

322 World Bank, Operational Directive on Indigenous Peoples, OD 4.20, September 1991, paras 3-5.

323 Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, *supra* note 310, 416-417.

324 *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.

325 Kingsbury, *supra* note 310, at 440-441.

326 Proposed American Declaration on the Rights of Indigenous Peoples, Doc. OEA/Ser/L/V/.II.95, Doc. 6, Article 1(2) (1997).

327 Article 1 (2).

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." [328]

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[329]

> [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.[330]

The Council includes two categories of participants: Members (States) and Permanent Participants.[331]

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.[332] 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.[333] 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.[334]

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*.[335] Subjects of internation-

328 Benedict Kingsbury, "*The Democratic Accountability of Non-Governmental Organizations*, 3 Chic. J. Int'l L. 183, 187 (2002).

329 Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden and the United States.

330 Joint Communiqué and Declaration on the Establishment of the Arctic Council, 19 September 1996, para. 1 (a), *reprinted in* 35 I.L.M. 1386.

331 *Id.*, para. 2.

332 Louis Henkin, International Law: Politics, Values and Functions 26-28 (1990).

333 David J. Bederman, International Law Frameworks 78 (2001).

334 P.C.I.J., Ser. B, No. 15, at 17.

335 1949 I.C.J., at 178-80.

al 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.[336]

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 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." [337] 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."[338]

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 developments result from

336 Oppenheim's International Law (9th ed.), *supra* note 49, at 16.

337 Bederman, *supra* note 333, at 50.

338 *Id*. at 77-78.

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.[339] 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. [340]

He concludes that States continue to "have the authority to determine who else may participate"[341] 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, NGO's 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 to participate in the formation of customary law.[342] I am doubtful about the coherence and the practicality of such proposals. Opposition centers on the argument that NGOs tend not to be "open, transparent, and accountable"[343] and that it is difficult to ascertain what is

339 Prosper Weil, Le Droit International en Quête de son Identité 118-22 (1992).

340 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).

341 *Id*. at 255.

342 Isabelle Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 Va. J. Int'l L. 211, 221 1991).

343 Julie Mertus, *Considering Nonstate Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application*, 32 N.Y.U. J. Int'l L. & Pol. 537, 561(2000).

the NGO practice and consensus.[344] 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.

344 *Id.*, at 562; Anne-Marie Slaughter, "The Role of NGOs in International Law-Making," International Law and International Relations, Hague Academy of International Law, *Recueil des cours*, Vol. 285 (2000), 97-100.

Chapter 6: 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. 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."[1] Since the end of the 19th Century that doctrine "lays down verifiable conditions for ascertaining and validating legal prescriptions."[2] 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.[3]

However, as our discussion will show, "an inductive factual positive science of international law may be characterized more as a myth than as reality."[4]

Given the multitude of treaties addressing all areas of human activity, the continuing importance of custom merits an explanation. 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,

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1 Oscar Schachter, International Law in Theory and Practice 35 (1991).

2 Schachter, *supra* note 1, at 35.

3 Schachter, *supra* note 1, at 36.

4 Schachter, *supra* note 1, at 37.

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,[5] 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,[6] 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 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

5 *Military and Paramilitary Activities in and against Nicaragua (Nicar. V. US)* Merits, 1986 ICJ Rep. 14, 113-14 (Judgement of 27 June).

6 Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 31(3)*(b)*, 1155 UNTS 331.

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".[7] 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 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."[8] 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.[9] The political and moral importance of claims that a norm constitutes customary law has proved important in international disputes and in codification conferences.

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7 1986 ICJ Rep. at 95 (Judgement of 27 June), *supra* note 5.

8 *Id.* at para. 178.

9 On the so-called Baxter paradox, and its limitations, see Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 50-53 (1989).

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 offenses stated in the Statutes may be *ex post facto.* I discuss this question in the chapter on Criminalization of Violations of International Humanitarian Law.

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.[10] Since the 1970's 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.[11]

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."[12] Flauss observed that human rights law contributes to the "*deconventionnalisation*" of international law.[13] 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

10 Prosper Weil, *Le droit international en quête de son identité*, 237 Recueil des cours 9, 160 (1992-VI).

11 *Id. at* 161.

12 Abi-Saab, *Cours général de droit international public*, 207 Collected Courses 9, 119 (1987-VII).

13 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.[14] 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."[15] The dominant view is that both "real" and "verbal" acts are relevant State practice for the process of formation of customary law,[16] as are acts of denial and concealment of conduct proscribed by the law.[17]

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."[18] The Committee considered as verbal acts the adoption of resolutions containing statements about customary law by international organizations, particular the General Assembly.[19] Zemanek suggests that repertories of State practice cover "both manifestations of *opinio juris* and State practice in the orthodox sense."[20]

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."[21] In contrast, Oppenheim insists that

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14 *See* Michael Byers, *Custom, Power and the Power of Rules*, 40-41, 133-136 (1999).

15 Wolfke, *Treaties and Custom: Aspects of Interrelation*, *in* Essays on the Law of Treaties 31, 33 (J. Klabbers and R. Lefeber eds., 1998).

16 Byers, *supra* note 14, at 134 (1999); Mendelson, *The Formation of Customary International Law*, 272 Collected Courses 159, 204-207 (1998).

17 D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 Vanderbilt J. Transnat'l L. 459, 466, *quoted in* Byers, *supra* note 14, 168.

18 *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).

19 *Id.* at 10.

20 Zemanek, *Unilateral Legal Acts Revisited*, *in* International Law: Theory and Practice. Essay in Honour of Eric Suy 209, 212 (Karel Wellens ed., 1998).

21 Mendelson, *The Formation of Customary International Law*, *supra* note 16, at 204.

> The practice of States in this context embraces not only 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.[22]

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.[23] 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 behavior and statements.[24] 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.

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.[25] 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.[26] The ILC also refers to treaties, national and international decisions, national legislation, diplomatic correspondence and opinions of national legal advisers.[27]

Prior to the Universal Declaration of Human Rights, except for minority and labor rights, human rights were left outside international law. Only law based

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22 Oppenheim's International Law 26 (Robert Jennings and Arthur Watts eds., 9th ed., 1992).

23 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.

24 *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 (Oct. 2, 1995), reprinted in 35 ILM 32(1996), see *id*. 238-44.

25 Byers, *supra* note 14 at 134-135. He cites the Asylum Case, 1950 ICJ Rep. 265, 277; Rights of Nationals of the United States of America in Morocco Case, 1952 ICJ Rep. 176, 200; and Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14.

26 Meron, *supra* note 9, at 113.

27 Byers, *supra* note 14, at 135.

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.[28] 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.[29]

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 favor the creation and the influence of human rights and humanitarian norms. The Inter-American Commission on Human Rights and the UN Committee on Human Rights[30] 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."[31] He speaks of no less than "un recentrage humaniste du droit international, déjà présent dans le cadre du droit conventionnel".[32]

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.[33] The identification of customary rules in the context of non-international armed conflicts was also one of the main objectives of the ICRC Study.[34] 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*

28 Flauss, *supra* note 13, at 28.

29 D'Amato, *Trashing Customary International Law*, 81 AJIL 101, 104 (1987).

30 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).

31 Flauss, *supra* note 13, at 40.

32 Flauss, *supra* note 13, 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).

33 Meron, *supra* note 24, at 244.

34 Henckaerts, *supra* note 23, at 660-668.

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".[35]

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 United States.[36] American scholars' support for customary human rights law has been criticized for being "au service d'une diffusion des valeurs constitutionnelles américaines."[37] 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.[38] Yet during the Carter Administration, the US 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.[39]

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.[40] 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.[41]

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35 Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, para. 34 (3 May 1993).

36 Flauss, *supra* note 13, at 29-30. *Also* Simma & Alston, The Sources of Human Rights Law: Custom, *jus cogens* and General Principles, 12 Australian Year Book of International Law 85-87 (1992). 85-87.

37 Flauss, *supra* note 13, at 30.

38 Flauss, *supra* note 13, at 30. *Also* Simma & Alston, *supra* 36, at 94-95.

39 *See* Schachter, *Les aspects juridiques de la politique américaine en matière de droits de l'homme*, Annuaire Français de droit international 53, 62-67.

40 Flauss, *supra* note 13, at 40, (who lists some authors supporting such an approach). A*lso* Simma & Alston, *supra* note 36, at 84-85.

41 Flauss, *supra* note 13, at 40.

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 their nationals. In that sense, one can find scant State practice accompanied by *opinio juris*."[42] Schachter therefore proposes "to look for 'practice' and *opinio juris* mainly in the international forums where human rights issues are discussed, debated and adopted.[43] Validating the traditional method, he insists that resolutions' "weight as evidence of custom cannot be assessed without considering actual practice."[44]

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.[45] 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.[46]

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.[47] They assert that the range of norms subject to such a scrutiny

> [...] 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.[48]

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42 Schachter, *supra* note 1, at 338; *Also* Henkin, *International Law: Politics, Values and Functions*, 216 Collected Courses 13, 224 (1989-IV).

43 Schachter, *supra* note 1, at 336.

44 Schachter, *supra* note 1, at 336.

45 Flauss, *supra* note 13, at 41-42. Meron, *supra* note 9, at 79-92.

46 Simma & Alston, *supra* note 36 at 89-90; *also* Flauss, *supra* note 13, at 42.

47 Simma & Alston, *supra* note 36, at 98-99.

48 Simma & Alston, *supra* note 36, at 99.

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.[49]

Simma and Alston would therefore 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.[50] 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 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.[51]

The classic view has been that State practice is transformed into customary law by the addition of *opinio juris*.[52] Recent trends often reverse the process: following the expression of an *opinio juris*, practice is invoked to confirm *opinio juris*.[53] In fields involving fundamental values of the international community, the tendency towards acquiescence by third States in the developing norms and the

49 Simma, *International Human Rights and General International Law*, *in* IV(2) Collected Courses of the Academy of European Law 155, 222 (1993).

50 Abi-Saab, *Reflexions on the Contemporary Processes of Developing International Law*, Ninth Gilberto Amado Memorial Lecture, delivered at the International Law Commission on June 20, 1985, at 18.

51 *The Objective Element in Customary Law*, *supra* note 18, at 2.

52 Weil, *supra* note 10, at 172-173; Abi-Saab, *supra* note 12, at 171.

53 Abi-Saab, *supra* note 50, at 13.

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 judgement of the International Military Tribunal in the *Trial of Major War Criminals,*[54] the judgement in *United States v. von Leeb* ("*The High Command Case*"),[55] and the decision of the International Court of Justice in the *Nicaragua* Case[56] – 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.[57] 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 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.[58] 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.[59] In the *Nicaragua* case, the Court

54 Trial of German Major War Criminals, 1946, cmd. 6964, Misc. No. 12, at 65.

55 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law no. 10, at 462, 533-35 (1948).

56 Military and Paramilitary Activities in and against Nicaragua, *supra* note 5, at 14, 114, paras. 218-20.

57 For a discussion of antecedents to Nicaragua, see Meron, *supra* note 9, at 37-41.

58 Weil, *supra* note 10, at 173.

59 Weil, *supra* note 10, at 174, referring to Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States), International Court of Justice (Cham-

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."[60] 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,"[61] 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*.[62] In its advisory opinion on the use of nuclear weapons, the ICJ has, however, recognized the role of practice of deterrence.[63]

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.[64]

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.[65]

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*.[66] He finds this development consistent with the renaissance of custom, one that is democratic

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ber), Judgment of 12 October 1984, 1984 ICJ Rep. 246, para. 193; Military and Paramilitary Activities in and against Nicaragua, *supra* note 5, at para. 212.

60 Military and Paramilitary Activities in and against Nicaragua, *supra* note 5, para. 183.

61 Id., para. 184.

62 Charney, *Remarks* in *Disentangling Treaty and Customary Law*, 81 Procs ASIL 159, 160 (1987); D'Amato, *supra* note 29, at 102.

63 *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 226, at para. 73.

64 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.

65 Abi-Saab, *supra* note 50, at 13.

66 Abi-Saab, *supra* note 50, at 3-4.

and reflects the *desiderata* of the international community.[67] 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.[68] 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]."[69]

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.[70] 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'.[71]

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.[72] 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".[73] 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.[74] Kirgis' "sliding scale" reflects a similar approach:

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67 Abi-Saab, *supra* note 12, at 173.

68 Abi-Saab, *supra* note 12, at 177.

69 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).

70 Meron, *supra* note 9, at 113; Tomuschat, obligations arising for States without their will, 241 Requeil des cours 198 (1993).

71 Koskenniemi, *The Pull of Mainstream*, 88 Michigan L.R. 1946-1947 (1990), *quoted in* Byers, *supra* note 14, 162.

72 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).

73 Tomuschat, *supra* note 70, 259.

74 Tomuschat, *supra* note 70, 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.[75]

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."[76] Byers advocates including common interest in the calculus for the formation of customary law.[77]

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.[78] 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."[79] 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."[80]

Distillation of customary rules from treaties enhances the importance 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.[81] This role has been particularly important in areas such as human rights and environmental law.[82]

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75 Kirgis, *Custom on a Sliding Scale*, 81 AJIL 146, 149 (1987).

76 Henkin, *supra* note 42, at 60, 216.

77 Byers, *supra* note 14, at 163-164.

78 Oppenheim's International Law *supra* note 22, at 30.

79 *North Sea Continental Shelf Cases* (W. Germany/Denmark, W. Germany/Netherlands), International Court of Justice, Judgment of 20 February 1969, 1969 ICJ Rep. 3, 43, at para. 74.

80 Oppenheim's International Law *supra* note 22, at 30.

81 Kahn, nuclear weapons and the rule of law, 31 Int'l L.§ Pol. 349, at 370 (1990).

82 *Id.*

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.[83] 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. [84]

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.[85]

I agree that statements which States make to justify or deny 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.[86] 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." There is a danger, therefore, that excluding violations which do not openly challenge the continued validity of the norm from acts counted as practice, as in the 2005 ICRC Study of Customary

83 *The Objective Element in Customary Law*, *supra note 18*, at 11; Oppenheim's International Law *supra* note 22, at 29; Mendelson, *supra* note 16, at 213-214.

84 Military and Paramilitary Activities in and against Nicaragua, *supra* note 5, at para. 185.

85 Military and Paramilitary Activities in and against Nicaragua, *supra* at note 5, at para. 198.

86 Meron, *supra* note 9, at 59-60.

International Humanitarian Law,[87] may distort the real situation and give too sanguine a view of the state of compliance with the norms.

Schachter suggested that in the balancing of "verbal rationalizations" as against "actual conduct", the "normativity" of the rule (e.g., against aggression) should be taken into account:

> The rules against aggression and self-defence are not just another set of international rules. They have a 'higher normativity', a recognized claim to compliance that is different from the body of international law rules. 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.[88]

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.[89] 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 responsibility, diplomatic privileges. In these areas, pertinent changes in State conduct usually create expectations of future behavior that modify the *opinio juris* on applicable law.[90]

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

87 Jean-Marie Henckaerts and Louise Doswald Beck, 1 Customary International Humanitarian Law xxxvii-viii (2005).

88 Schachter, *Entangled Treaty and Custom*, *supra* note 72, at 734.

89 Schachter, *id.*

90 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).

> 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*.[91]

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.[92]

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.[93]

This method was followed by an ICTY Trial Chamber in ascertaining the customary status of the prohibition of torture in time of armed conflict. Resonating with *Nicaragua*, the Tribunal emphasizes the wide-spread acceptance of treaty provisions and denials by States of violations.[94]

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.[95] 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.[96]

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.[97] The use of domestic legislation to establish that a right to environment was recognized under international law has thus been questioned on the

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91 Rosalyn Higgins, Problems & Process: International Law and How We Use It 22 (1994).

92 *See* Flauss, *supra* note 13, at 42. *Also* Simma & Alston, *supra* note 36, at 97.

93 Byers, *supra* note 14, at 148.

94 *Prosecutor v. Furundžija*, ICTY (Trial Chamber), Judgment of 10 December 1998, para. 138.

95 Simma & Alston, *supra* note 36, at 102-105.

96 Flauss, *supra* note 13, at 45.

97 *The Role of State Practice, supra* note 64, at 111.

ground that mechanisms of enforcement of those constitutional provisions are often lacking.[98]

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."[99] 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, 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.[100] There is ... a body of State practice in support of the principle, though it is not as copious as one might at first expect."[101] The persistent objector exception appears to have been endorsed by the ICJ in the Asylum case and in the Anglo-Norwegian Fisheries case.[102]

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 ob-

98 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* note 1, at 336, on "window-dressing" in the domain of human rights.

99 *The Role of State Practice*, *supra* note 64, at 111-112.

100 Among those who recognize the rule: Oppenheim's International Law *supra* note 22, at 29, Rousseau (1970), Verzijl (1968), Brownlie (1990), Tunkin, Villiger (1985), Wolfke (1974), Danilenko (1993), Mendelson, *supra* note 16, 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* note 70, at 284-290. See references in *The Objective Element in Customary Law*, *supra* note 18, at 13-14, footnotes 34 and 35.

101 *The Objective Element*, *supra* note 18, at 14; *also* Mendelson, *supra* note 16, at 234-238.

102 Asylum Case, International Court of Justice, 1950 ICJ Rep. 265, 277-278; Anglo-Norwegian Fisheries Case (United Kingdom v. Norway), International Court of Justice, Judgment of 18 December 1951, 1951 ICJ Rep. 116, 131. See Mendelson, *supra* note 16, at 228-233.

jectors may eventually yield under pressure from other States.[103] 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.[104] An example is the USSR opposition to the doctrine of restrictive State immunity.[105] While 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 twelve miles territorial sea.[106] Persistent objections thus tend not to be maintained for indefinite periods of time.[107] 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."[108] 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.[109]

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."[110] 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*,[111] Tomuschat thus writes that:

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103 *The Objective Element*, *supra* note 18, at 14; Mendelson, *supra* note 16, at 234; Ragazzi, note 100, at 64-65.

104 Byers, *supra* note 14, at 103-104.

105 Mendelson, *supra* note 16, 235.

106 Byers, *supra* note 14, 104. Mendelson, *supra* note 16, 236.

107 Byers, *supra* note 14, 181.

108 Abi-Saab, *supra* note 12, at 181.

109 Byers, *supra* note 14, at 181.

110 Henkin, *supra* note 42, at 59; *also* Abi-Saab, *supra* note 12, at 180.

111 Mendelson, *supra* note 16, at 235; Byers, *supra* 14, at 186; *see* Ragazzi, *supra* note 99, at 67, footnote 96, for other references.

> It is [...] widely accepted that … the words 'recognized by the international community of States as a whole' are meant to 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.[112]

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*.[113] However, it remains to be seen whether big powers will be ready not to insist on their occasional claims to be excluded from a rule because of their persistent objections

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*:

> Since the United States has protested the norm, it would not be applicable to the United States should it be held to exist. 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*.[114]

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."[115] 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.[116] 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

112 Tomuschat, *supra* note 70, at 307.

113 Mendelson, *supra* note 16, at 235; Byers, *supra* note 14, at 183; Ragazzi, *supra* note 99, at 71-72.

114 *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.

115 *Fisheries Case*, ICJ Pleadings, II, at 426-427.

116 *See also* Mendelson, *supra* note 16, at 243-244.

on States not parties to the agreement."[117] 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.[118]

Other writers maintain that treaties cannot be regarded as relevant practice for the purpose of customary law.[119] Wolfke, for example, wrote that "a treaty *per se* is [...]not any element of practice."[120] He nonetheless attributed to treaties an important "extra-judicial effect" on the formation of customary law, the mobilization of international opinion.[121] 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.[122]

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.[123]

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.[124] 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."[125] 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. If confirmed that humanitarian treaties demonstrate practice and *opinio juris* for custom formation:

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117 Schachter, *supra* note 72, at 718.

118 Schachter, *supra* note 72, at 722.

119 For instance, Charney, *Remarks* in *Disentangling Treaty and Customary Law*, 81 PROC. ASIL 159, 160, 163 (1987). *See* Byers, *supra* note 14, at 167-170 for a discussion of some scholarly views.

120 Wolfke, *supra* note 15, at 33.

121 Wolfke, *supra* note 15, at 33.

122 Byers, *supra* note 14, 169.

123 Oppenheim's International Law *supra* note 22, at 28 and 33.

124 Abi-Saab, *supra* note 50, at 18; Meron, *supra* note 9, at 37-41.

125 Flauss, *supra* note 13, at 28.

> 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.[126]

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."[127] 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 is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed."[128]

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 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.[129]

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."[130]

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126 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 63, at para. 82.

127 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).

128 *North Sea Continental Shelf Cases*, *supra* note 79, at para. 71.

129 Id., para. 73.

130 Schachter, *supra* note 72, at 725.

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 U.N. 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.[131]

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 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.[132]

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"[133] both in discussion of specific themes and of non party States.[134] 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*.[135]

131 Meron, *supra* note 9, at 25-29, 50-52.

132 Continental Shelf (Libyan Arab Jamahiriya/Malta), International Court of Justice, Judgment of 3 June 1985, 1985 ICJ Rep. 13, 30 [A-38]. *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, 1984 ICJ Rep. 246, 294.

133 Tomuschat, *supra* note 70, at 260.

134 Tomuschat, *supra* note 70, at 260.

135 Tomuschat, *supra* note 70, at 260.

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 treaties as evidence of customary rules.[136] 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."[137] 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.[138]

He suggests that this would be the case when a treaty limits party's right to inquire into another party's observance or when remedies are not available.[139]

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.[140]

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136 For instance, Mendelson, *Remarks* in *Disentangling Treaty and Customary Law*, 81 Procs ASIL 160, 162-163 (1987).

137 Weisburd, *Customary International Law: The Problem of Treaties*, 21 Vanderbilt J. Transnat'l L. 1, 29 (1988).

138 *Id.*, 25

139 *Id.*

140 Schachter, *Remarks* in *Disentangling Treaty and Customary Law*, 81 Procs ASIL 158, 159 (1987).

The Geneva Conventions are a prime example of treaties accepted as reflecting customary principles, without, in most cases, any inquiry 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 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."[141] Although references to the debates, reports, or drafts of the Commission or its rapporteurs have been criticized[142] – as evidence of customary law – the influence of the work of the ILC on the development of customary law is clear.[143]

> 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.[144]

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.[145]

The relevance for custom formation of practice of States parties merits additional comments.[146] I agree with those who attribute significance to the question how widely a particular treaty has been ratified. Important questions include (1)

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141 *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/F 97.V.4, 1997).

142 Weil, *supra* note 10, at 175-176.

143 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.

144 *Introduction: The Achievement of the International Law Commission*, *supra* note 141, at 11-12.

145 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.

146 Meron, *supra* note 9, at 50-53.

the normative values stated in the treaty; and (2) the behavior of States parties.[147] Acts by State 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.[148]

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 behavior 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 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

147 Regarding the importance of the behavior of non-party states with regard to the norms stated in a convention, see Meron, *id*.

148 Cheng, *Custom: The Future of General State Practice in a Divided World,* in The Structure and Process of International Law 513, 532-3 (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.

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: [149]

> 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.[150]

Even so, these principles have rarely been referred to by the ICJ, which prefers to speak of principles of customary or general international law.[151] 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.[152]

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 princi-

149 Oppenheim's International Law, *supra* note 22, at 37.

150 International Status of South West Africa, International Court of Justice, Advisory Opinion, 1950 ICJ Rep., at 148; cited in Schachter, *supra* note 1, at 52 (1991).

151 Oppenheim's International Law, *supra* note 22, at 37-38.

152 Schachter, *supra* note 1, at 51.

ples may have more of a potential "for the emergent international law concerned with the individuals, business companies, environmental dangers and shared resources."[153] 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.[154] 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.[155]

It is disappointing that even in the field of administration of justice 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.[156]

The "unforeseen potential" of general principles of law in the field of human rights,[157] 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."[158] In numerous cases, the Court has accepted and reaffirmed the applicability of human rights principles. A classic pronouncement is found in the Wachauf case:

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153 Schachter, *supra* note 1, at 53 (1991). *Also* Oppenheim's International Law, *supra* note 22, at 39.

154 Schachter, *supra* note 1, at 55.

155 Schachter, *supra* note 1, at 55.

156 Meron, *supra* note 9, at 88.

157 Tomuschat, *supra* note 70, at 315.

158 Morin, *L'état de droit: Émergence d'un principe du droit international*, 254 Collected Courses 9, 237 (1995).

> 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.[159]

The Court has also drawn on the European Convention on Human Rights.[160] Going beyond the main objective of the European Communities – economic integration -[161] the European Union's human rights policy accepted the triptych: democracy/rule of law/human rights[162].

A different perspective of Article 38(1)(c) focuses on principles 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. [163]

Weil contrasts the general principles of law common to civilized nations mentioned in Article 38 with such "general principles of international law."[164] 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."[165]

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

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159 *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).

160 Leben , *supra* note 159, at 89.

161 Morin, *supra* note 158, at 239.

162 Leben, *supra* note 159, at 93-94.

163 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.

164 Weil, *supra* note 10, at 149.

165 Weil, *supra* note 10, at 150-151.

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.""[166] A prominent advocate of such an approach, Abi-Saab, regards a universal treaty as a medium of "general international law", distinct from customary law.[167] He considers "general international law" as comprising rules 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.[168]

He derives the authority of a universal treaty from *opinio juris* and legal expectations independently of practice.[169] 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 Jimenez de Arechaga 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.[170]

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166 *The Objective Element*, *supra* note 18, at 10.

167 Abi-Saab, *supra* note 12, at 210.

168 *Id.*

169 *Id.* at 210-211.

170 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* Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 Collected Courses 1, 11-34 (1978-I).

These developments can be seen, as Jennings suggests, as "a necessary symptom of progress, whether or not they fit nicely with what the textbooks say."[171]

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.[172]

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:[173]

> [...] 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.[174]

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."[175]

International organizations contribute to the formation of international law also by providing a forum for collective action by States and through preparation of law-making or codification treaties.[176]

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171 Jennings, *An International Lawyer Takes Stock*, 39 Int'l & Comp. L.Q. 513, 519 (1990).

172 Oppenheim's International Law *supra* note 22, at 31.

173 Oppenheim's International Law, *supra* note 22, at 45.

174 Oppenheim's International Law, *supra* note 22, at 46-47.

175 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).

176 Oppenheim's International Law, *supra* note 22, at 47-50 (Robert Jennings and Arthur Watts eds., 9th ed., 1992).

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".[177] 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 U.N. General Assembly (except with regard to the budget and internal rules), are not legally binding but their language may provide important indications. The range of scholarly opinion on legal consequences of resolutions concerned with general international law varies widely.[178]

Higgins surveys the entire spectrum of scholarly views, from writers who are deeply skeptical 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.[179] Other supporters of "binding" resolutions regard them as an authoritative interpretation of the Charter's Human Rights provision.[180]

Skeptics argue that votes in favor 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 rule. Her inquiry 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.[181]

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177 Byers, *supra* note 14, 41.

178 Rosalyn Higgins, *supra* note 91, at 26.

179 Rosalyn Higgins, *supra* note 91, 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. Castaneda.

180 For a discussion and criticism of this method, see Meron, *supra note 9, at* 82-84.

181 Rosalyn Higgins, *supra* note 91, at 28.

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."[182] I agree. Because of the values involved and political factors, the classical theory of acquiescence plays an important role here.[183]

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.[184]

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

182 Abi-Saab, *supra* note 50, at 13, *supra* note 12, at 172-173.

183 Meron, *supra* note 9, at 89.

184 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 63, at para. 70.

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".[185] "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 Charter of Paris for a New Europe[186], 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.[187]

II. Role of NGOs

Although NGO's are discussed also in my chapter on Subjects of International Law, our discussion of sources cannot be complete without acknowledging the role of NGO's 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.[188] Van Boven suggested that economic, social and human rights matters were regarded as warranting "some degree of non-government involvement,"[189] while political issues such as peace and security were to be the exclusive domain of inter-State cooperation.[190] This dichotomy is now largely out-of-date, with the role of NGO's being recognized also in matters pertaining to international peace and security, international trade, sustainable development, environment and globalization.[191] NGO's 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:

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185 Orrego Vicuña, *Major Complexities in Contemporary International Law Making*, *supra* note 170, at 8.

186 Charter of Paris for a New Europe, 21 November 1990, CSCE Document, at 7.

187 Morin, *supra* note 158, at 247.

188 UN Charter, Article 71.

189 Van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy*, 20 Calif. W. Int'l L.J. 207, 208 (1989-1990).

190 Van Boven, *supra* note 189, at 208.

191 Report of the Secretary General on the Work of the Organization, UN Doc. A/44/1, § VII (1989), *quoted in* Van Boven, *supra* note 189, at 208.

> 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 take into account the will of various democratic, antiwar and antinuclear movements.[192]

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,"[193] NGOs have been "working in and around" the development of conventional law.[194] 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.[195]

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 NGO's, 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."[196] 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.[197]

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 cooperation "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 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

192 Mullerson, *New Thinking by Soviet Scholars: Sources of International Law: New Tendencies in Soviet Thinking*, 83 AJIL 494, 512 (1989).

193 Van Boven, *supra* note 189, at 212.

194 Kahn, *supra* note 81, at 369.

195 *Id.*

196 Van Boven, *supra* note 189, at 220-221.

197 Van Boven, *supra* note 189, at 218-219.

> 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.[198]

While NGO's 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"[199] 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*.[200]

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 Article 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 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.[201]

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

198 Van Boven, *supra* note 189, 224.

199 A. McNair, The Law of Treaties 217 (1961).

200 Meron, *On a Hierarchy of International Human Rights*, 80 AJIL 1, 4 (1986).

201 Meron, Human Rights Law – Making in the United Nations 190 (1986).

dictum that "basic human rights of the person"[202] create obligations *erga omnes*.[203] 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."[204] 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*.[205]

The concept of *jus cogens* has been widely accepted as a moral, ethical and rhetorical notion, but has rarely been applied in actual practice.[206] 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), 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,*[207] but separate and dissenting opinions have referred to it.[208] 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 9April1949 in the Corfu Channel case (I.C.J. Reports 1949, p.22), that the Hague and Geneva Conventions

202 *Barcelona Traction Light and Power Company, Ltd. (Belgium v. Spain)*, 1970 ICJ Rep.4, 32.

203 Meron, *supra* note 200.

204 [1976] 2(2) Yb. Int'l L. Comm'n 99, UN Doc. A/CN.4/Ser. A/1976/Add.1 (pt.2). For a detailed discussion, see Meron, *supra* note 9, at 184-89.

205 See also Zemanek, *New Trends In The Enforcement of Erga Omnes Obligations,* 4 Max Planck Y.B. UN Law 2 (2000).

206 Byers, *supra* note 14, at 184, Tomuschat, *supra* 70, at 306-307; Dinah Shelton*, Righting Wrongs: Reparations In The Articles On State Responsibility,* 96 AJIL 833, 843 (2002).

207 For instance, Military and Paramilitary Activities in and against Nicaragua, *supra* note 5, para. 190. *See* Christenson, Jus Cogens*: Guarding Interests Fundamental to International Society*, 28 Va. J. Int'l L. 585, 607-608 (1988).

208 *See references in* Ragazzi, *supra* note 100, at 46, footnote 12.

> 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.[209]

Condorelli suggests that the Court's "terminological innovation", – intrangressible principles – are associated with, but not identical to *jus cogens*.[210] 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.[211] 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 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 practiced as a matter of State policy.[212]

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*."[213] Such rules are based not only on law, but as Fitzmaurice noted, on "considerations of morals and of international good order."[214] 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's references to *jus strictum*.[215]

Beyond the classic examples of norms prohibiting aggression, piracy, genocide, and slavery, identification of *jus cogens* norms has been difficult.[216] In its Articles and Commentary on the Law of Treaties, the ILC has prudently refrained

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209 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 64, at para. 79.

210 Condorelli, *supra* note 69, at 234-235.

211 Flauss, *supra* note 13, at 47.

212 Meron, *supra* note 200, at 191-192.

213 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.

214 Ragazzi, *supra* note 100, 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.

215 Meron, *supra* note 200, at 190.

216 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* note 14, at 186.

from suggesting a catalogue of peremptory rules.[217] 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."[218] 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.[219]

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*.[220] 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.[221] 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.[222]

Sur agrees:

> For a very long time I believed 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 entirely certain that that was the intention of the authors of the Vienna Convention. I won-

217 Meron, *supra* note 200, at 191.

218 Ragazzi, *supra* note 100, at 50.

219 Verhoeven, *supra* note 216, at 196.

220 Ragazzi, *supra* note 100, at 53-54.

221 *The Role of State Practice, supra* note 64, at 122-126; Simma & Alston, *supra* note 36, at 104-105; Simma *supra* note 49, at 225-226.

222 Tomuschat, *supra* note 70, at 307.

> der 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.[223]

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. [224]

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.[225]

The ILC Commentary on Article 50 (Article 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[226] was contemplated. The application of the doctrine of *jus cogens* to unilateral acts is widely, but not unanimously, accepted.[227]

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223 Sur, *Discussion*, *in* Change and Stability in International Law-Making 128 (Antonio Cassese and Joseph H.H. Weiler eds., 1988).

224 Ragazzi, *supra* note 100, at 58.

225 Weil, *supra* note 10, at 281.

226 Draft Articles on the Law of Treaties, *supra* note 213, at 248.

227 Christenson, *supra* note 207, at 611-613. See also, Verhoeven, *supra* note 216, at 206, applying the doctrine to reservations.

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.[228]

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.[229] 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.[230]

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 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."[231]

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."[232] Thus, for example, amnesty for acts of torture would give rise to State responsibility and would not be accorded international legal recognition.

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228 Meron, *supra* note 200, at 196-197.

229 Gaja, Jus Cogens *beyond the Vienna Convention*, 172 Collected Courses 271, 296-297 (1981-III).

230 H. Mosler, The International Society as a Legal Community 18 (1980).

231 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, International Court of Justice, Judgment of 24 May 1980, 1980 ICJ Rep. 3, 41.

232 *Prosecutor v. Furundžija*, ICTY Trial Chamber, Judgement of 10 December 1998, at para. 155.

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.[233] 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.[234]

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.[235]

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 acts constituting violations of *jus cogens*.[236] 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.[237]

F. Revival of Customary Humanitarian Law

In March 2005, the International Committee of the Red Cross (ICRC) released a report identifying, on the basis of empirical data concerning state practice and opinion gathered from nearly fifty countries plus nearly forty recent armed conflicts, those principles of international humanitarian law enjoying the status of

233 On nullity, see Meron, *supra* note 200, at 199-200.

234 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.

235 Opinion No. 1 of the Conference on Yugoslavia Arbitration Commission, *reprinted in* 31 ILM 1488, 1495, para. 1 (1992).

236 *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).

237 *Siderman de Blake v. Argentina*, 965 F.2d 699, 103 ILR 454 (1992). *Also Princz v. Federal Republic of Germany*, 26 F3d 1166, U.S.App. D.C. 102. See the dissenting opinion by Judge Wald in Princz v. Germany, 26F3d 1179 (1962) ("Germany waived its sovereign immunity by violating the *jus cogens* norms of international law condemning enslavement and genocide.")

customary law.[238] An observer might ask whether this ambitious and unprecedented effort is not a bit anachronistic. In an era in which international legal principles are increasingly codified in multilateral conventions, the overall importance of customary law has arguably eroded.[239] Moreover, where customary law *is* applied today, the methods used to determine its content are increasingly relaxed, particularly with respect to the establishment of state practice. The modern approach to customary law, it is said, relies principally on loosely defined *opinio juris* and/or inference from the widespread ratification of treaties or support for resolutions and other "soft law" instruments, and is thus more flexible and open to the relatively rapid acceptance of new norms.[240] The ICRC's approach, in contrast, is traditional in form, although open to a wide variety of manifestations in practice.

In my view, the ICRC's project is in fact highly relevant today. Extensive scholarship addresses various aspects of modern debates over the identification, application, and legal force of customary norms, and my discussion here will not attempt to be all-encompassing. I shall limit myself to the observation that at least in the field of humanitarian law, customary law is thriving and continues to depend in significant measure on the traditional assessment of both state practice and *opinio juris*. In particular, international criminal tribunals – especially the International Criminal Tribunal for the Former Yugoslavia (ICTY) – have developed a rich jurisprudence elucidating customary principles of humanitarian law. The approach taken by these tribunals is necessarily rigorous and, in a sense, conservative. Criminal courts are bound to respect the principle of *nullum crimen sine lege*: a defendant may only be convicted on the basis of legal rules that were clearly established at the time of the offense. If a criminal conviction for violating uncodified customary law is to be reconciled with this principle – and I argue that it can be – it must be through the use of clear and well-established methods for identifying customary law. The legality principle is thus a restraint on the tribunals' ability to be "progressive" in their contributions to the development of customary humanitarian law. The term "conservative" here suggests a reluctance for an overly broad or rapid expansion of customary law offenses, and

238 *See* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 2005 Int'l Rev. of the Red Cross 175 (providing an overview of the study's purpose, methodology, and findings).

239 *See also, e.g.,* Samuel Estreicher, *Rethinking the Binding Effect of Customary International Law*, 44 VA. J. Int'l L. 5, 14-15 (2003); N.C.H. Dunbar, *The Myth of Customary International Law*, 1983 Austl. Y.B. Int'l L. 1 (1983).

240 *See, e.g.*, Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 Am. J. Int'l L. 757, 758-59 (2001); Restatement (Third) of Foreign Relations, § 102 reporter's note 2. This development has been criticized by some. *See, e.g.*, J. Patrick Kelly, *The Twilight of Customary International Law*, 40 Va. J. Int'l L. 449 (2000) (criticizing customary international law in part on the basis of the lack of serious, inductive assessment of state practice and *opinio juris*).

thus a guarantee of due process and human rights of the accused. In this section, adapted from a lecture I gave at the launch of the ICRC's report, I explore the ways in which the *nullum crimen sine lege* principle has affected the application of customary humanitarian law by the criminal tribunals.

I. Modern Customary Law as Applied by Non-Criminal Tribunals

For the sake of comparison, I shall begin by looking at some of the ways in which customary international law is identified and applied today in other international bodies that are not constrained by the *nullum crimen sine lege* principle. I note first that customary law is certainly very much alive in those institutions, although it no longer is the dominant source of international law. Without a doubt, the transformation of a number of classically customary branches of international law – concerning, *e.g.*, the interpretation of treaties, diplomatic and consular immunities, and the law of the sea – into widely ratified and respected conventions makes customary law less central to the international legal obligations of states than it once was.

Nonetheless, a number of aspects of international law have so far resisted codification through generally applicable treaties, and international tribunals have accordingly relied on custom in resolving disputes in these areas. This includes, for instance, the Iran-United States Claims Tribunal's approach to the international law of takings[241] and the jurisprudence of ICSID arbitrations.[242] In addition, the law of state responsibility, so central to practically every major international dispute, also remains uncodified,[243] as do the law of sovereign, non-diplomatic immunity,[244] the law pertaining to extraterritorial application of national law, and the law of diplomatic protection.[245] Likewise, where one or more parties

241 *See* George Aldrich, The Jurisprudence of the Iran-United States Claims Tribunal 218 (1996).

242 *See, e.g.*, Antonio R. Parra, *Applicable Substantive Law in ISCID Arbitrations Initiated Under Investment Treaties*, *available at* <http://www.idlo.int/texts/%5C%5CIDLI%5C%5Cmis5850.pdf>.

243 The ILC's Articles on Responsibility of States for Internationally Wrongful Acts, adopted under the leadership of James Crawford, will no doubt inform disputes concerning state responsibility, but resort to primary sources will still be necessary. Adopted by the International Law Commission at its 53d session (2001), UN GAOR, 56th sess., Supp. No. 10, at 43, UN DOC A/56/10 (2001).

244 Detlev F. Vagts, *International Relations Looks at Customary Law: A Traditionalist Defense*, 15 Eur. J. Int'l L. 1031, 1036 (2004). I note that there has been an effort to codify the law of sovereign immunity in the U.N. Convention on Jurisdictional Immunities of States and their Property, opened for signature on January 17, 2005. However, as the treaty is not yet in effect and ratification prospects are uncertain, customary law remains for now the governing law.

245 The International Law Commission approved (May 28, 2004) on the first reading the draft articles proposed by John Dugard. See Fifth Report on Diplomatic Protection, UN Doc. A/CN.4/538 (2004).

to a dispute have not ratified the relevant international instruments, customary law governs. Thus, for instance, the Eritrea-Ethiopia Claims Commission treats customary humanitarian law as the most significant legal component of the parties' relationship, because Eritrea had not ratified the Geneva Conventions until after many of the events litigated.[246]

Even the regional human rights courts, which principally apply their own constituent instruments, occasionally invoke customary law.[247] Consider, for example, the invocation by the Inter-American Court of Human Rights of the law of state responsibility in *Velásquez Rodriguez*,[248] and its use of customary rules pertaining to reparation in the case of *Garrido and Baigorria*.[249] The European Court likewise invoked the customary rules on imputability in the cases of *Assanidze*[250] and *Ilasçu*.[251] In *Al-Adsani*, that Court considered the prohibition of torture under customary law and as a *jus cogens* rule.[252] Notably absent from many of these cases is a detailed discussion of the evidence that traditionally has supported the establishment of the relevant rules as customary law – that is, the evidence of the practices and legal opinions of a large number of states.

It bears noting at the outset of this discussion that my objective in this section is only descriptive. I will leave aside debates, developed extensively elsewhere, as to whether the "modern" approach to discerning customary international law is likely to strengthen the ability of the international legal system to respond effectively to contemporary problems, or may instead undercut its credibility, authority, and determinacy.[253] I note only that in addition to these concerns, the ICJ must weigh other factors in determining its approach – for instance, the practical difficulties involved in presentation of large bodies of evidence concerning state practice to a bench made up of at least fifteen judges and governed by quite formal procedures and evidentiary rules. The existence of the ICRC study may make

246 *See* Partial Award of Eritrea's Civilian Claims, Eritrea-Ethiopia Claims Comm., December 17, 2004, reported at 44 ILM 601, at paras. 28, 30 (2005).

247 Theodor Meron, The Implications of the European Convention on Human Rights for the Development of Public International Law, CAHDI, Council of Europe (2000); Lucius Caflisch and Antõnio A. Cançado Trindade, Les Conventions Américaine et Européenne des Droits de l'Homme et le Droit International Général, 1 Revue Général de Droit International Publique 5 (2004).

248 *Velásquez Rodriguez v. Honduras*, case 7920, Inter-Am. Ct.H.R. (ser. C), No. 4, at paras. 164-165, 172 (1988).

249 *Garrido and Baigorria v. Argentina*, Inter-Am. Ct. H.R. (ser. C), No. 39, at paras. 40, 68-74 (1998).

250 *Assanidze v. Georgia* App. No. 71503/01, Eur. Ct. H.R., at paras. 144 – 150 (April 8, 2004).

251 *Ilaşcu v. Moldova*, App. No. 48787/99, Eur. Ct. H.R., at paras. 441-442, 455-464 (July 8, 2004).

252 *Al-Adsani v. United Kingdom*, App. No. 35763/97, Eur. Ct. H.R., at paras. 30, 60 (Nov. 21, 2001).

253 *See supra* note 240.

this task easier in cases concerning international humanitarian law, and it is possible that we will see in such cases a return to a more traditional methodology.

The International Court of Justice (ICJ) articulated the textbook methodology for identifying customary law more than 35 years ago in its seminal *Continental Shelf* cases.[254] Yet other bodies can hardly be blamed for failing to apply this approach, as the ICJ's modern cases also do not tend to follow it. The ICJ recognized in the *Nicaragua* case that such treaties do not wholly supplant customary norms, which continue to exist independently.[255] Yet where a treaty exists in a particular area of law, even where it does not bind the parties to the dispute in question, the ICJ has tended to treat the text of the treaty as a distillation of the customary rule, thus eschewing examination of primary materials establishing state practice and *opinio juris*.

The *Nicaragua* case (1986) is an example. In that case, the Court held that common articles 1 and 3 of the Geneva Conventions constitute general principles of humanitarian law that are binding on the United States – in other words, that they are customary law.[256] In doing so, the Court made a major contribution to the vitality of humanitarian law. What is remarkable about the *Nicaragua* case, though, is the complete failure to inquire whether *opinio juris* and practice support the crystallization of common Articles 1 and 3 into customary law. In any event, the impact of *Nicaragua* on the subsequent development of the law was such that the customary law character of Articles 1 and 3, and practically of the entire corpus of the Geneva Conventions, is now taken for granted and virtually never questioned.[257] The same is true, under the influence of the Nuremberg Tribunals, of the Hague Convention No. IV of 1907.[258] From these developments, one can discern perhaps the outlines of an informal *stare decisis* principle, as courts and governments rely on precedent rather than repeatedly engaging in detailed analysis of the customary status of the same principles. Practice thus appears to give judicial decisions a greater weight than that accorded by Article 38 of the ICJ Statute. In a different context, the Additional Protocol I to the Geneva Con-

254 *North Sea Continental Shelf Cases (F.R.G. v. Denmark; F.R.G. v. Neth.)*, 1969 I.C.J. 3, at paras. 73-81 (Feb. 29).

255 *See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, at para. 177 (June 27).

256 *Id*. at paras. 218-220 (June 27).

257 For instance, the Eritrea-Ethopia Claims Commission has treated the Geneva Conventions as presumptively reflective of customary international law, thus placing the burden of proof on the party claiming that any given provision was *not* customary law. Eritrea-Ethiopia Claims Commission, Partial Award (Dec. 17, 2004), Award at B.2. 441 ILM 601, 626 (2005).

258 Theodor Meron, *The Geneva Conventions as Customary Law,* 81 AJIL 348, 360 (1987); Theodor Meron, *Human Rights and Humanitarian Law as Customary Law supra* note 9, at 25-62.

ventions is also generally viewed as being in broad conformity with customary international law.[259]

On other important findings, such as the customary rules governing the use of force,[260] right of self-defense,[261] and the principle of non-intervention,[262] the Court in the *Nicaragua* case resorted to the terminology of customary law. But for its findings of practice and *opinio juris*, it relied primarily on the Charter of the United Nations, treaties, and declarations rather than on proof of actual practice.

Decisions in the years since *Nicaragua* have followed a similarly relaxed approach to the identification of evidence supporting the establishment of customary international norms. For instance, in the case of the *Democratic Republic of the Congo v. Belgium* (2002), the ICJ held that customary law provided no exceptions to the rules granting immunity to incumbent ministers of foreign affairs.[263] In support of this conclusion, it stated that it had carefully considered state practice, national legislation and court decisions.[264] Still, it did not give any examples of the practice considered, allowing ad hoc Judge Van den Wyngaert to complain, in her dissent, that in the brevity of its reasoning, the Court did not demonstrate the existence of practice and *opinio juris*.[265] Similar examples can readily be found in the case law.[266]

In calling attention to this trend, I do not mean to argue that the Court's holdings as to the content of customary law have been unfounded. To the contrary, at least one aspect of this more relaxed approach has been quite salutary. In *Nicaragua*, the Court substantially strengthened customary law by downplaying

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259 Theodor Meron, *Human Rights and Humanitarian Law as Customary Law*, *supra* note 9, at 25-62.

260 *Nicaragua*, *supra* note 5, at paras. 187-93.

261 *Id*. at paras. 194-201.

262 *Id*. at paras. 202-209.

263 *The Arrest Warrant of 11 April 2000* (D.R.C. v. Belgium) 2002 I.C.J. 3, at para. 52 (Feb. 14).

264 *Id*. at para. 58.

265 *Id*. dissenting opinion of Judge Van den Wyngaert, at para. 12. *See also* the Joint Separate Opinion of Judges Higgins, Kooijman and Buergenthal.

266 *See*, *e.g.*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) 43 I.L.M. 1009 (July 9, 2004) (applying several customary international law principles); see also Declaration of Judge Buergenthal, para. 7 (concerning the failure to address certain facts or evidence); *Oil Platforms* (Iran v. U.S.) 2003 I.C.J. 803, at para. 42 (Nov. 6) (holding, on the basis of a perfunctory assessment of both custom and evidence, that customary law requires that the right of self-defense be limited by the requirements of necessity and proportionality); see also the Separate Opinion by Judge Buergenthal, especially paras. 33-46 (discussing defective fact-finding process); *Legality of the Threat of Nuclear Weapons* (Advisory Opinion) 1996 I.C.J. 226, at para. 79 (July 8) (declaring the fundamental rules of international humanitarian law to be "intransgressible principles of international customary law").

the normative significance of contrary practice. State conduct inconsistent with a norm was to be treated as a breach of the rule, rather than the recognition of a new rule. And if a state defends its inconsistent conduct by appealing to exceptions and justifications contained in the rule itself, the significance of such a statement was to confirm, not to weaken, the rule.[267] This development was essential, in my view, to the effectiveness of customary law. Given the frequency of violations, without an approach acknowledging the reality of contrary practice and articulating a method of dealing with it, it might be virtually impossible to identify many norms of customary international law, for there is virtually no norm that every nation consistently obeys – and, in any event, to reduce customary law to a mere description of completely universal practices would be to strip it of its force as law. Nevertheless, I note that a balance must be struck, as there is a point at which contrary practice reaches such a critical mass that the norm in question cannot be said to be customary.

II. The ICTY's Conservative Approach to Customary Law

In contrast to the trend described in the previous section, international criminal tribunals have taken an essentially conservative and traditional approach to the identification and application of customary international law principles. This is not to say that customary law has played an insignificant role in the tribunals' law. To the contrary, at least in the case of the ICTY, customary humanitarian law is central to its authority to punish. Both the centrality of customary law and the ICTY's rigorous approach to establishing it are the result of the Tribunal's obligation, as a criminal court, to respect the fundamental principle of *nullum crimen sine lege*.

To elaborate, although the Tribunal's jurisdiction is defined by a specific Statute adopted by the Security Council, it has been recognized from the beginning of its operation that its authority is circumscribed by customary law. The Statute was not yet in effect when some of the relevant crimes were committed, and such acts can only be punished as international crimes if they were so categorized at the time they were committed. Yet there was a lack of certainty that all the relevant nations were party to treaties that definitively outline the relevant criminal prohibitions. Accordingly, in his report accompanying the adoption of the Statute, the Secretary General noted that "the application of the principle of *nullum crimen sine lege* requires that the international tribunal 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."[268]

It might fairly be asked whether a conviction for violating uncodified customary law can ever meet the *nullem crimen* (or legality) standard. After all, codi-

267 Nicaragua, *supra* note 5, at para. 186.

268 Report of The Secretary-General Pursuant To Paragraph 2 of Security Council Resolution 808 (1993), at para 34, Presented 3 May 1993 (S/25704).

fication of criminal prohibitions is the modern norm in domestic systems, even in common law countries – in the United States, for example, there are no common law crimes, and in the United Kingdom there are few. Nonetheless, in my view the legality principle does not bar such a conviction. It bears noting that application of the principle always involves some element of legal fiction. It is certainly no less realistic to expect a would-be offender to be aware of, and conform his behavior to, well-established principles of the law of nations than to expect him to learn the details of a long, arcane, and often-changing criminal code. Thus, in my view, customary law can provide a safe basis for a conviction, but only if genuine care is taken in determining that the legal principle was sufficiently firmly established as custom at the time of the offense so that the offender could have identified the rule he was expected to obey.

This, in a nutshell, has been the approach of the ICTY. In effect, the Tribunal's chambers have superimposed on the Statute the test whether each of the crimes within the Tribunal's jurisdiction reflect customary law. This requirement has been applied not only to crimes specifically listed as grave breaches of the Geneva Conventions as well as genocide and crimes against humanity, but also to violations of the laws and customs of war, which are mentioned non-exhaustively in Article 3 of the Statute. Specifically, and with rigor that increased over the years, the chambers have engaged in a serious search for state practice and *opinio juris*. Inherent in the requirement that criminal prohibitions be clearly established is the notion that a tribunal's methodology in identifying those prohibitions must be predictable, and it must not be vague. Predictability is of course also important in non-criminal areas of the law,[269] but in criminal courts, wherein deprivation of liberty is at stake, there is less freedom than there may be in other institutions to push the legal envelope when it comes to the recognition of customary norms.

It bears noting at the outset that laborious inquiry into the question whether a particular legal principle enjoyed the status of customary international law at a particular time is not *always* required by the *nullem crimen* principle with respect to *every* crime with which an accused is charged in an international criminal tribunal. Rather, it is only required where the unlawfulness of the conduct in question at the time would not have been clear absent an applicable customary international law rule. The ICTY Appeals Chamber has correctly recognized that the point of the legality principle is to protect persons from later prosecution for acts that they reasonably believed to be *lawful* – a belief that cannot be reasonable if the acts in question are obviously barred by domestic law. In the *Čelebici* case, the Appeals Chamber thus affirmed the Trial Chamber's holding that:

269 *See Serbia and Montenegro v. Italy (Case Concerning Legality of Use of Force)*, Joint Declaration of Vice President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal, and Eleraby, I.C.J., 15 December 2004, at para. 3 (stating that in discerning principles of law, the I.C.J. "must ensure consistency with its own past case law in order to provide predictability" and that "[c]onsistency is the essence of judicial reasoning").

> It is undeniable that acts such as murder, torture, rape, and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. ... It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.[270]

Likewise, the Appeals Chamber's recent decision in the *Kordić and Čerkez* case holds that where conduct is criminalized by an applicable treaty to which all the relevant states were clearly party, this may itself satisfy the legality principle, making recourse to customary law unnecessary.[271] The Trial Chamber's judgement in the *Galić's* case raises a related issue. The indictment against General Stanislav Galić charged him with conduct violating the laws or customs of war, relying not on customary law but on treaty law, namely the Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of War.[272] While prior Trial Chamber decisions referred to customary international law to determine whether the crimes charged complied with the *nullum crimen* principle, the *Galić* judgement refrained from deciding whether the pertinent provision of Protocol I is declaratory of customary law and relied exclusively on treaty law.[273] This judgement has been appealed.

Many of the Tribunal's cases, however, involve conduct of less obvious criminality – to take one example, omissions that support liability under a command responsibility theory – and, notwithstanding the approach taken in the *Kordić and Čerkez* case, the above-mentioned report of the Secretary-General makes clear that it will not always be possible to look to treaties to resolve the matter. In such cases, the relevant customary law must be ascertained, and fair notice to the would-be offender, sufficient to satisfy the *nullum crimen* principle, might be sought through either of two related approaches. The first might be characterized as "methodological conservatism" – that is, the use of only firmly established, traditional methods for identifying the applicable customary norms. Because the requirement that custom be established through widespread (but not perfectly consistent) state practice supported by *opinio juris* has been long established in international law – even if there is no *inherent* reason that such a requirement is compelled by the legality principle – a methodologically conservative approach would presumably require a showing that these criteria were satisfied at the time of the offense in order to support any particular rule's status as customary law. Alternatively, if it could be established that any other method for identifying custom

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270 *Prosecutor v. Delalić et al.*, Judgement, ICTY App. Chamber, at para. 179, Case No. IT-96-21-A, (Feb. 20, 2001).

271 *Prosecutor v. Kordić and Čerkez*, Judgement, ICTY App. Chamber, at paras. 44-46, Case No. IT-95-14/2-A (Dec. 17, 2004).

272 *Prosecutor v. Galić,* Indictment, at para. 5, Case No. IT-98-29-I, (March 26, 1999).

273 *Prosecutor v. Galić*, Judgment, ICTY Trial Chamber, Case No. IT-98-29-T, (Dec. 5, 2003).

had become so widely accepted at the time of the offense that its use by a later tribunal was foreseeable, then such a method might be used. In either event, the question is whether the offender could, at the time of the offense, reasonably be expected to realize that his conduct conflicted with customary international law.

A second approach might be referred to as "outcome conservatism," pursuant to which doubts regarding the customary status of any particular legal principle are resolved in favor of the defendant (*in dubio pro reo*). This is simply another way of stating the requirement that criminal prohibitions be *clear* in their scope and application. Such an approach would not necessarily tie the tribunal to any particular methodology. Although the traditional showing of state practice and *opinio juris* is likely to be the easiest way to show that a particular prohibition was clearly established, it might also be possible to point to other factors. For instance, the existence and widespread recognition of legal precedent identifying a particular rule as customary – such as the ICJ's holding concerning the customary status of common articles 1 and 3 of the Geneva Conventions – might be sufficient, for the purposes of the legality principle, to establish the rule with the necessary clarity, such that a putative offender can be expected to conform his conduct to it.

The ICTY has blended these two approaches, and has done so in a way that, I believe, respects the fundamental principle of *nullum crimen*. It has emphasized the core requirements of state practice and *opinio juris*, and has several times held that a particular legal rule that the Prosecution sought to enforce was not sufficiently supported by state practice or *opinio juris* to qualify as customary law. Sometimes, to be sure, the Tribunal has recognized a principle as customary law without articulating the specific evidence of state practice and *opinio juris* supporting this finding. But when it has done so, it has had in my view very strong reasons for believing that the customary principle was clearly established at the time of the crime. Notably, these cases have typically involved principles that are grounded in provisions of the Geneva Conventions that are nearly universally accepted as customary law, and/or "general principles" of law that have been well recognized since the time of the Nuremburg proceedings, discussed further in the next section.

An example illustrating the Tribunal's approach is the interlocutory appeal in *Prosecutor v. Hadžihasanović*.[274] The Appeals Chamber in *Hadžihasanović* was confronted with two issues. The first was whether there was a basis in customary international law for applying the doctrine of command responsibility to a conflict that was internal, not international, in character. On that question the five-member panel unanimously agreed, concluding that customary law at all times relevant to the conflict made clear that some war crimes can be committed by a member of an organized military force in the course of an internal armed conflict, and that the doctrine of command responsibility applies to such crimes.[275]

274 *Prosecutor v. Hadžihasanović*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY App. Chamber, Case No. IT-01-47-AR72, (July 16, 2003).

275 *Id*. at para. 31.

In reaching this conclusion, the Appeals Chamber specifically noted that "to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting *opinio juris*."[276] Citing decisions of the ICJ, including the *Nicaragua* case as well as the *Corfu Channel* case from 1949, it held that common article 3 of the Geneva Conventions had "long been accepted as having customary status," and held that the logic of that article was fully applicable to internal conflicts.[277] For further elucidation of the command responsibility principle, the *Hadžihasanović* Appeals Chamber turned to Additional Protocols 1 and 2 to the Geneva Conventions, the Regulations Respecting the Laws and Customs of War annexed to the Fourth Hague Convention of 1907, and the "authoritative[]" ICRC Commentary on the Geneva Conventions.[278] In light of these numerous and strong indicia of general acceptance among states of customary law's application of the command responsibility principle to internal conflict, the Appeals Chamber found that it was not necessary to demonstrate that most states had passed domestic legislation codifying this principle.[279]

Notably, although the Appeals Chamber found that it was not necessary for it to set forth anew the evidence supporting findings of state practice and *opinio juris* with regard to this point of law, citing the U.S. Supreme Court case of In re *Yamashita*,[280] it specifically affirmed the findings of the Trial Chamber to this effect.[281] The Trial Chamber's findings had encompassed, for instance, the history of the confirmation of the Nuremberg principles by the General Assembly, the inclusion of command responsibility principles in the military manuals of, for instance, the former Yugoslavia, the United States, the United Kingdom, and Germany; and the history surrounding the adoption of the Geneva Conventions' additional protocols in the 1970s, including the statements of several national delegates.[282] The Appeals Chamber also followed its own case law that had set forth evidence supporting the customary status of the command responsibility doctrine, discussed further below. Particularly when this evidence is taken together with the codification of the command responsibility principle and with the Appeals Chamber's reasoning concerning that principle's necessary implications, the Appeals Chamber's approach seems clearly consistent with its duty to uphold the legality principle.

The second issue in *Hadžihasanović* proved more contentious. At issue was whether a superior could be held responsible for acts that were committed before

276 *Id.* at para. 12.

277 *Id.* at para. 13.

278 *Id.* at paras. 14-15.

279 *Id.* at para. 17.

280 327 U.S. 1, 14-15 (1946).

281 *Hadžihasanović*, *supra* note 274, at para. 27.

282 *See Prosecutor v. Hadžihasanović*, Decision on Joint Challenge to Jurisdiction, ICTY Trial Chamber, Case No. IT-01-47-PT, at paras. 67-93 (Nov. 12 2002).

he became the superior of the persons who committed the offenses. The indictment had alleged that a co-defendant, Amir Kubura, assumed his position as acting commander of a brigade of the Bosnian Army on 1 April 2003.[283] It charged Kubura with criminal responsibility for crimes that were, for the most part, committed by the troops of that brigade more than two months before he took command, including killings and wanton destruction and plunder of property in Dusina.[284]

The Appeals Chamber began its analysis by examining customary law as it was in force at the time the crimes were committed. The Chamber could find no state practice and no *opinio juris* to sustain the proposition that a commander could be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over the subordinate.[285] In fact, the Chamber found evidence militating *against* the existence of such a rule in Article 28 of the Rome Statute of the International Criminal Court, Article 86(2) of Additional Protocol I to the Geneva Conventions, and in the *Kuntze* case before the Nuremberg Military Tribunals.[286] The Appeals Chamber observed that it was required to rely not 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 committed.[287] Moreover, an expansive reading of criminal texts violates the principle of legality, which the Appeals Chamber found was widely recognized as a peremptory norm of international law, and which in any event was essential to the protection of the human rights of the accused.[288] In case of doubt, the Appeals Chamber thus found that criminal responsibility cannot be found to exist.

Two judges (Hunt and Shahabuddeen) dissented. In the views of both dissenting judges, the fact that no case could be found that directly answered the question at issue[289] did not answer the question whether the conduct in question was prohibited by customary law. Rather, as Judge Hunt argued, the proper approach was to consider the general principle that was found in customary law (in this case, the principle of command responsibility) and to ask whether the purpose and logic of that principle required its application to the facts now presented

283 *Prosecutor v. Hadžihasanović*, Third Amended Indictment, ICTY Trial Chamber, at para. 6, Case No. IT-01-47-PT, (Sep. 26, 2003).

284 *Id*. at paras. 39, 40, 44, 45.

285 *Hadžihasanović*, *supra* note 274, at para. 45.

286 *Id.* at paras. 46-48, 50.

287 *Id*. at para. 51.

288 *Id.* at para. 55. It is not necessary to discuss here the question whether the principle of legality constitutes a *jus cogens* norm.

289 *Hadžihasanović*, *supra* note 274, Partial Dissenting Opinion of Judge Shahabuddeen, at para. 2.

to the Tribunal.[290] Judge Shahabuddeen contended that "crimes could fall between two stools" if they were "committed very shortly before the assumption of duty of the new commander" – an anomaly at odds with the "idea that the power to punish should always be capable of being exercised."[291] He concluded that these "consequences collide with the object and purpose of the relevant provisions of Protocol I."[292] Central to both dissenters' analysis were the purposes behind the treaties regarded as codifying the relevant customary principles.

I read Judge Shahabuddeen's policy objection as a proposition characteristic of the common law in its early development, when the criminal law was essentially judge-made law. Today, as noted above, criminal law is almost exclusively statutory. Thus, in neither the United States or the United Kingdom is the proposition that "the power to punish should always be capable of being exercised" as such any longer valid; to the contrary, it may only be exercised if there is a specific basis for the punishment set forth in a statute – or, in the context of the Tribunal, in clearly established customary law. More generally, in my view the looser, more progressive approach to the analysis of customary international law embraced by the dissents – one that would affirmatively engage the criminal tribunal in the *development* of customary law, rather than simply in its application – cannot be reconciled with the legality principle. It is of course true that, as the dissents validly observe, it cannot be expected that state practice and *opinio juris* will have comprehensively addressed every possible factual scenario; to some extent, a criminal tribunal must inevitably adapt the established principles to the facts before it. Indeed, the majority in *Hadžhihasinović* (Presiding Judge Meron, and Judges Pocar and Gűney) expressly so recognized.[293] But before extending a principle to a new scenario not contemplated by previous custom, a criminal court should be very certain, in my view, of what result that principle would require. Here it could not be said that the result was clear; to the contrary, there was a perfectly reasonable distinction – that a commander cannot fairly be held responsible for crimes not occurring on his watch – that could explain the fact that, apparently, no commander had ever been held responsible under those circumstances.[294]

It should be noted that, in a recent article, Judge Shahabuddeen has argued eloquently that the principle of *nullum crimen sine lege* does not prohibit inter-

290 *Hadžihasanović*, *supra* note 274, Separate and Partially Dissenting Opinion of Judge David Hunt.

291 *Hadžihasanović*, *supra* note 274, Partial and Dissenting Opinion of Judge Shahabuddeen, at para. 14.

292 *Id*. at para. 15.

293 *See Hadžihasanović*, *supra* note 274, at para. 12 (holding that "where a principle can be shown to have been so established [as custom], it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle").

294 For a criticism of the *Hadihasanović* dissent along somewhat similar lines, see Christopher Greenwood, *Command Responsibility and the* Hadžihasanović *Decision*, 2 J. Int'l Crim. J. 598 (2004).

national criminal tribunals from engaging in the progressive development of the law – that is, from interpreting the law in a way that tends to expand over time the range of conduct that is criminalized.[295] My view is consistent with his in certain core respects. Both of us agree that criminal tribunals may properly apply the principles established in customary law to new factual circumstances, and may thereby contribute to the elucidation and development of those principles; and both of us agree that such tribunals may not cross the line to the creation of new criminal prohibitions to be retroactively applied. My perspective differs from that of my colleague as to where that line should be drawn.

Judge Shahabuddeen contends that it is sufficient, to justify subsequent criminal punishment, that the "very essence" of the act in question have been forbidden under the law at the time – even, it seems, if the actual act of the defendant would not in fact have been forbidden. In support of his position he cites a European Court of Human Rights case, *C.R. v. United Kingdom*,[296] that upheld the conviction of a husband for raping his wife, on the basis that the "essence of the offence", i.e. rape, had been clearly criminal – deeming it unnecessary to determine the validity of the defendant's contention that under the applicable law at the time of the rape a marital privilege recognized by the courts would have made such a conviction impossible. The Court also pointed to the "essentially debasing character of rape", from which Judge Shahabuddeen infers that the "gravity of the act charged" can also merit subsequent prosecution for an act not criminal at the time of its commission. In the British case which was the subject of the complaint to Strasbourg, Lord Chief Justice Lane in the Court of Appeal said that "the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with the victim."[297] Thus, Judge Shahabuddeen argues, through a process of judicial interpretation and evolution, the marital immunity exception was recognized as removed at the time of the trial, but not beforehand. In these circumstances, the European Court dismissed the complaint of violation of the principle of legality, stating that at the time of the act of attempted rape, the absence of immunity became a reasonably foreseeable development of the law.[298] The question is how far to push the idea that the subsequent development of the law is consistent with the essence of the offense and its foreseability. I do not disagree with Judge Shahabuddeen's reliance on *C.R. v. United Kingdom*. But I see a difference between removing a personal immunity for liability for an obviously criminal act and extrapolating from it a theory of evolution and thus ex post facto application of criminal liability for acts which were not unlawful at the time of their commision. Moreover, there is also a difference between what Judge Shahabuddeen would have the Tribunal do and the more limited role conferred on the European Court and thus in determining whether

295 *See* Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. Int'l Crim. Just. 1007 (2004).

296 Judgment of Nov. 22, 1995, A.335-C, at para. 34.

297 *Id*. at para. 39. See R.v.R. [1991] 93 Crim. App. R.1, 8.

298 *Id.* at para. 41.

the British court's decision was permissible under the European Convention. In the latter case, deference to the national court is an important consideration that is lacking in the ICTY context.

Judge Shahabuddeen also relies on an ICTY interlocutory decision, in which the Appeals Chamber stated that the principle of legality "does not prevent [the] court from interpreting and clarifying the elements of a particular crime,"[299] nor preclude the progressive development of the law.[300] I would not read too much into the reference to progressive development, given the limitation immediately imposed by the Chamber: "But [this fundamental principle] does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification."[301] Perhaps this is as far as we can take this controversy. Customary law evolves through interpretation and application. Here the science of the law blends with the judicial culture of caution and restraint.

Hadžihasanović is by no means the only case in which the ICTY has grappled with the application of the legality principle. In the *Prosecutor v. Aleksovski*, for example, the accused argued that a previous decision could not be used as a statement of the governing customary law, since that decision was made after the alleged commission of the crimes, and thus could not meet the requirements of the principle of legality.[302] In its judgement of 24 March 2000, the ICTY Appeals Chamber distinguished the interpretation and clarification of customary law, which is permissible, from the creation of new law, which would violate the *ex post facto* prohibition.[303] As the Appeals Chamber explained, the *nullum crimen* principle "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."[304]

In the *Čelebići* case, the Appeals Chamber applied the principles previously developed in *Tadić* and *Aleksovski*,[305] affirming the general applicability of command responsibility theories to internal conflicts, but refusing to hold that a defendant could be liable under a such a theory if he had no reason to know of the criminal conduct in question; as to the latter point, the Appeals Chamber cited examples of contrary state practice and *opinio juris* that could not be reconciled

299 The Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72, at para. 38 (citing *Prosecutor v. Aleksovski*, Judgement, ICTY App. Chamber, at para. 122-127, Case No. IT-95-14/1-A, (March 24, 2000); *Delalić* Appeals Judgement, *supra* note 270, at para. 173.).

300 *Id.* at para. 38.

301 *Id.*

302 *Aleksovski*, *supra* note 299, at para. 123.

303 *Id.* at para. 126.

304 *Id.* at para. 127.

305 *Delalić* Appeals Judgement, *supra* note 270, at paras. 158-173.

with the rule the Prosecution sought.[306] The Trial Chamber in the *Vasiljević* case followed suit.[307] Indeed, venturing further, the *Vasiljević* Trial Chamber confirmed that the prohibition on the creation of new offenses extends even to offenses stated in the Statute, if they were not recognized by customary law at the time the alleged crime was committed or if they were not defined with sufficient clarity so as to be foreseeable.[308] The Trial Chamber therefore held in *Vasiljević* that although common Article 3 of the Geneva Conventions mentions the term "violence to life and person" as a prohibited act, and although the Appeals Chamber had earlier held that customary international law imposed criminal liability for all serious violations of common Article 3, the Trial Chamber could not convict the Accused of "violence to life and person" because this crime was not recognized or defined with sufficient clarity by customary international law.[309] The Trial Chamber therefore acquitted the Accused of that charge.[310] Similarly, in the interlocutory appeal in the case of *Milan Milutonović and others*, the Appeals Chamber clarified that the Tribunal's *ratione materiae* jurisdiction is determined both by the Statute and by customary international law.[311]

Other cases, beyond those turning specifically on the *nullem crimen* principle, further illustrate the comparatively rigorous approach the Tribunal has taken to the discernment of customary law. For instance, in one of its earliest decisions, concerning an interlocutory appeal in the *Tadić* case, the Appeals Chamber offered an important methodological observation: because accurate information concerning the conduct of troops on the field of battle is largely inaccessible, conclusions about state practice in the area of humanitarian law must necessarily be based on such sources as "official pronouncements of States, military manuals and judicial decisions."[312] It then reviewed evidence of state practice and *opinio juris* concerning the application of customary humanitarian law to internal conflicts. This sweeping review included, but was not limited to, statements of the Spanish and British governments with regard to the status of combatants in the Spanish Civil War, written instructions given by Mao to the Chinese "people's liberation army", a 1964 statement by the Prime Minister of the Democratic Republic of the Congo with regard to its civil war, the agreement of parties to the 1967 conflict in Yemen, Nigerian, German, New Zealand, and U.S. military manuals

306 *Id.* at paras. 228-241.

307 *Prosecutor v. Vasiljević*, ICTY Trial Chamber, at paras. 196, 201, Case No. IT-98-32-T, (Nov. 29, 2002).

308 *Id*. at para. 201.

309 *Id*. at para. 203.

310 *Id*. at para. 204.

311 *See e.g., Prosecutor v. Milutonović*, Reasons for Decision dismissing interlocutory appeal concerning jurisdiction over the territory of Kosovo, ICTY App. Chamber, Case No. IT-99-37-AR-72.2, (June 8, 2004).

312 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY App. Chamber, at para. 99, Case No. IT-94-1-AR72, (October 2, 1995).

and prosecutions, a statement of the rebel army in El Salvador, ICRC principles concerning internal conflicts and the record of state compliance with them, statements on behalf of the then-twelve members of the European Union with regard to the Liberian conflict and Iraqi human rights abuses, U.S. diplomatic and Defense Department statements, British government publications, a consensus view expressed by various representatives of the international community on the illegality of the domestic use of chemical weapons, the criminal codes of the former Yugoslavia and Belgium, and the adoption of various General Assembly and Security Council resolutions.[313] Holding that these various sources provided strong evidence of international custom, the Appeals Chamber found it appropriate to exercise jurisdiction over crimes emerging from internal conflicts.[314]

More broadly, the Tribunal's case law has discerned and discussed a number of substantive principles of customary law on the basis of careful analysis consistent with the legality principle. For instance, in the context of crimes against humanity, the Tribunal's jurisprudence has broached the nexus of such crimes to armed conflict;[315] the distinction between the concepts of "attack" and "armed conflict";[316] the requirement of discriminatory intent;[317] the elements of the crime, such as the existence of a plan or policy;[318] the relevance of personal motives;[319]

313 *Id.* at paras. 96-125.

314 *Id.* at para. 137.

315 *See Prosecutor v. Šešelj*, Decision on the Interlocutory Appeal Concerning Jurisdiction, ICTY App. Chamber, at para. 5, Case No. IT-03-67-AR72.1 (Aug. 31, 2004) (noting, citing previous decisions, that customary international law does not require that crimes against humanity be committed in an armed conflict, but that this requirement was instead imposed by the ICTY Statute).

316 *See Prosecutor v. Kunarac*, Judgment, ICTY App. Chamber, at para. 86, Case. No. IT-96-23&23/1-A (June 12, 2002) (finding that under customary law, an "attack" can precede, outlast, or continue during an "armed conflict," but need not itself be part of an armed conflict).

317 *See, e.g., Prosecutor v. Tadić,* Judgment, ICTY App. Chamber, at paras. 287-292, Case No. IT-94-1-A (July 15, 1999) (finding that customary international law does not require that discriminatory or persecutory intent be established for all crimes against humanity); *Prosecutor v. Kupreskić*, Judgement, ICTY Trial Chamber, at para. 558, Case No. IT-95-16 (Jan. 14, 2000) (following *Tadić* and holding that discriminatory intent is only required with regard to the category of "persecutions" under Article 5(h)).

318 *See, e.g., Kunarac*, *supra* note 316, at para. 98 & fn. 114 (holding, based on the "overwhelming[]" consensus of relevant state practice – including judicial precedents in Canada, Australia, Israel, Kosovo, and the Nuremburg tribunal as well as reports of the Secretary-General and the International Law Commission – that crimes against humanity need not be undertaken pursuant to a policy or plan.)

319 *See Tadić* Appeal Judgement, *supra* note 317, at paras. 255-270 (holding, based principally on an evaluation of case law from various countries pertaining to the Holocaust, that under customary law, "purely personal motives do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated").

and the *actus reus* of the crime of persecution.[320] Additionally, the Tribunal has clarified the customary law of genocide and the question of genocidal intent,[321] in particular in relation to such forms of criminal responsibility as aiding and abetting and complicity.[322] It has elaborated on various aspects of the Hague law, including for instance the rule of distinction.[323] The Tribunal has elaborated on the definition and the customary law nature of the crimes of torture and rape.[324] It has clarified customary aspects of general principles of criminal law, such as the defences of duress.[325] It has clarified the immunity of the ICRC to disclosure as a matter of customary law,[326] and has addressed customary rules regarding state sovereignty, such as the issuance of subpoenas to state officials,[327] the examination of documents raising national security concerns,[328] arrest, abduction, and international transfer.[329] And in addition to command responsibility, the ICTY

320 *Prosecutor v. Blaskić*, Judgement, ICTY App. Chamber, at paras. 143, 147-49, 152, and 156-59, Case No. IT-95-14-A (July 29, 2004) (finding, *inter alia*, that an inherent right to life as well as prohibitions against pillage, deportation, and forcible transfer have customary international law status).

321 *Prosecutor v. Krstić*, Judgement, ICTY App. Chamber, at para. 25, Case No. IT-98-33-A (Apr. 19, 2004) (finding that, according to customary international law, the Trial Chamber was correct to limit the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group).

322 *Id*. at paras. 135-144.

323 *Blaskić*, *supra* note 320, at paras. 109-116.

324 *See Kunarac*, *supra* note 316, at paras. 145-48 (addressing the extent to which the Torture Convention reflects customary international law).

325 *See, e.g., Prosecutor v. Erdemović*, ICTY App. Chamber, Joint Separate opinion of Judge McDonald and Judge Vohrah, at para. 55, Case No. IT-96-22-A (Oct. 7, 1997) (finding that customary international law does not establish whether duress is a defence to a charge of killing innocent human beings).

326 *Prosecutor v. Simić, Ex Parte* Confidential Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ICTY Trial Chamber, at para. 74, Case No. IT-95-9-PT (July 27, 1999) (holding that, under customary law, no question of a balance of interest arises between a confidentiality interest and a claim to non-disclosure of the Information).

327 *Prosecutor v. Blaskić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, ICTY App. Chamber, at paras. 38-60, Case No. IT-95-14-108bis (Oct. 29, 1997) (finding that, under customary law, state officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act, and that subpoenas therefore cannot be issued to state officials acting in their official capacity).

328 *Id*. at paras. 61-66 (concluding that the drafters of Article 29 departed from international customary law in regards to national security concerns because to grant States a blanket ability to withhold documents for national security reasons would undermine the essential purpose of the International Tribunal).

329 *Prosecutor v. Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, ICTY App. Chamber, at paras. 20-24, Case No. IT-94-2-AR73, (June 5, 2003)

has addressed the scope of individual liability under customary humanitarian law for participation in a joint criminal enterprise[330] and for the crimes of accomplices.[331]

In some cases, of course, the Tribunal's assessments of the evidence supporting the relevant customary international law principles have been comparatively brief; in most of these, it has relied on its own precedents instead of revisiting the same issues repetitively, an approach that can hardly be faulted. Still, critics may allege that the Tribunal has not uniformly hewed to the strictest methodological conservatism, but has sometimes relied to some extent on proxies – such as the long-standing recognition of a principle's customary status by the ICJ – in place of the comprehensive detailing of state practice. As noted above, I believe its approach has nonetheless been generally consistent with the legality principle, for it has relied appropriately on authoritative sources and rules that are foreseeable to potential offenders, and thus avoided crossing the line from recognition of existing customary law to the creation of new law. Moreover, a more relaxed approach to the identification of relevant customary norms may be justified where the norm in question does not concern the substantive scope of the criminal prohibition, or of the defendant's liability, and thus does not directly implicate the *nullum crimen* principle.

Still, tribunals are inevitably constrained in their approaches by their resources, the evidence before them, and the arguments put to them by the parties, and some will no doubt criticize the assessments of customary law present in some of the Tribunal's cases. And as a general matter, the greater the confidence that the Tribunal can build in the rigor of its methods, the more effective it will be in building respect for the rule of law. In this regard, the availability of the ICRC report (discussed further in part IV) as a resource is a very positive development, for it should help to facilitate the continued and expanded inclusion in the Tribunal's judgements of serious and detailed discussions of the evidence supporting the recognition of rules of customary humanitarian law.

III. Approaches of Other International Criminal Tribunals

Like the ICTY, other international criminal tribunals are also bound by the principle of *nullum crimen sine lege*. Indeed, this principle has been much discussed

(examining domestic case law and concluding that in cases involving universally condemned offenses like genocide and war crimes, jurisdiction should not be set aside even if there were irregularities in the manner in which the accused was brought before the Tribunal).

330 *See generally* Stephen Powles, *Joint Criminal Enterprise*, 2 J. Int'l Crim. Just. 606 (2004); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 77 (2005).

331 *See Tadić*, *supra* note 317, at para. 220 (holding that the notion of common design as a form of accomplice liability is firmly established in customary international law).

with respect to the Nuremberg tribunals. Customary law was essential to the Nuremberg tribunals' ability to convict Nazi war criminals: the Geneva POW Convention of 1929 was not applicable on the Eastern Front, and the Hague Convention No. IV was challenged on the ground that the situation of the belligerents did not conform with its *si omnes* clause, as not all the belligerents were party.[332] Moreover, the Nuremberg tribunals were faced with the problem that the applicable provisions of the Geneva and Hague Conventions defining the relevant substantive proscriptions did not expressly *criminalize* their violation.[333] In light of this fact, there was some question as to whether, for the purposes of the legality principle, offenders had been sufficiently on notice that their conduct entailed criminal liability. The International Military Tribunal described the Nuremberg Charter as both the exercise of the sovereign power of the victorious countries and as "the expression of international law existing at the time of its creation."[334] In dismissing the challenge based on the principle of legality, the IMT noted that the law of war was to be found not only in treaties, but in the customs and practices of states and the general principles of justice.[335]

Addressing this question, the Military Tribunal under Control Council Law No. 10 similarly explained:

> It 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.[336]

Some criticized the Nuremberg tribunals for this relatively loose approach to the legality principle, which looked not just to treaties or customary law defined in the traditional sense, but also to the notion of "general principles" of law common to civilized nations.[337] And to be sure, the Nuremberg tribunal did not provide a very satisfactory explanation as to how aspects of the 1929 Geneva POW Convention and the 1907 Hague Convention No. IV so quickly metamorphosed into

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332 *See* Theodor Meron, *Human Rights and Humanitarian Law as Customary Law*, *supra* note 9, at 41-62.

333 *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. 554, 564 (1995) [hereinafter Meron, *International Criminalization*].

334 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 Nov. 1945- 1 Oct. 1946, at 218 (1947).

335 *Id*. at 221.

336 *United States v. List*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council law No. 10, at 759, 1239.

337 *See* Jescheck, *The General Principles of International Criminal Law Set out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. Int'l Crim. Justice 38, 40-42 (2004).

customary norms.[338] Nonetheless, in my view, the tribunals' general approach was under the circumstances appropriate.[339] The crimes with which the Nuremberg defendants were charged – including murder, torture, and enslavement, carried out on an enormous scale – were so clearly criminal under every domestic legal system in the world that it could hardly be said that the prospect of criminal liability for them was unpredictable. Ultimately, the *nullum crimen* principle turns on fairness to the defendant, and it cannot in my view be said that the Nuremburg war crimes proceedings compromised that fairness.

It should be made clear that the criticism of Nuremberg for violating the legality principle was directed primarily to crimes against peace, and secondarily to crimes against humanity. Its war crimes jurisdiction triggered few dissents. Customary law provided an answer only for the latter; treaties and general principles for the first; crimes against humanity were lumped largely with war crimes, but given a restrictive reading to require them to have been committed in execution of or in connection with any crime within the jurisdiction of the Tribunal and thus limited to those committed from the beginning of the war.[340] One thing is clear, however. Nuremberg Tribunals rooted the principle of legality not only in custom, but also in treaties and general principles of criminal law.

As noted above, the ICTY has likewise declined to engage in an overly formalistic assessment of custom in instances where the criminality of conduct is obvious (or, to use the Nuremberg terminology, where it is clearly established under the relevant "general principles" of law). In its seminal interlocutory decision on jurisdiction in the *Tadić* case, the ICTY Appeals Chamber stated that to be subject to prosecution by the Tribunal as a violation of laws and customs of war, an offense must violate either customary law or a treaty that was unquestionably binding on the parties at the time of the alleged offense.[341] Nuremberg, of course, provides a precedent for the principle of legality to be satisfied by reference to treaties that were in force at the time of the offense. However, in the case of the ICTY, such reliance on treaties must be reconciled with the statement in the Secretary-General's 1993 report that the Tribunal should apply rules of international humanitarian law which are beyond any doubt a part of customary law. The *Tadić* panel found that the purpose of this statement was merely to avoid a conflict with the *nullum crimen* principle where a party to the conflict was not a party to a treaty; the statement therefore does not exclude reliance on treaties where there is

338 Theodor Meron, Human Rights and Humanitarian Norms as Customary Law, *supra* note 9, at 37-41.

339 *See* Meron, *International Criminalization*, *supra* note 333 at 564-67 (arguing that the Nuremberg precedent illustrates the legitimacy of international criminal justice for the Rwandan genocide).

340 *Id*. at 254.

341 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, at paras. 94, 143, Case No. IT-94-1-AR72, (Oct. 2, 1995).

no potential conflict.[342] If the principle of legality can thus be satisfied by grounding a prosecution in a treaty binding the parties, why has the ICTY not made treaty law the principal foundation of its approach to *ratione materiae* jurisdiction, preferring instead to rely on customary principles (especially since treaties have the added advantage of satisfying the principle of specificity[343])? I can only speculate. One reason obviously was to follow as closely as possible the language of the Secretary-General's report. Another may have been to avoid doubts as to succession to treaties, their continuing binding character and reservations, and the scope and validity of *ad hoc* agreements between the belligerents. Reliance on customary law provides additional comfort because of the generality of that law. Moreover, the treaties typically applied by the ICTY were wholly or largely customary.

The legality principle likewise governs the other international criminal tribunals operating today, including the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone, and the International Criminal Court (ICC). In the case of the ICTR, however, that principle has a less restrictive effect because of the less significant role of international custom in that Tribunal's law. Since the conflict in Rwanda was non-international in character, and since (as the Secretary-General noted when the ICTR Statute was adopted) Rwanda had been party to the relevant international humanitarian law treaties, which were a part of the law of the land in Rwanda, it is not generally necessary to consider whether a violation of the ICTR Statute was also a violation of customary law at the time of the offense; it is enough that the treaties were violated.[344] There has therefore been no obvious need for the ICTR, in its treatment of these provisions, to examine their customary law underpinnings. The Tribunal's contribution to the clarification of customary law has accordingly been modest, although the Trial Chambers have occasionally discussed the customary status of various principles of law.[345]

The Special Court for Sierra Leone, although it has not yet rendered judgements on the merits, has in its decisions on preliminary motions frequently invoked customary humanitarian law, and its Appeals Chamber has held that the *nullum crimen* principle must be applied by reference to customary law.[346] It may be too early to discern a clear methodological approach to the identification of custom in the Appeals Chamber's decisions. In finding that common Article 3 of the Geneva Conventions enjoyed customary status and applied to both internal

342 *Id*. at 143. See Report of the secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), at para. 34.

343 Jescheck, *supra* note 337, at 41.

344 Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), U.N. SCOR, at paras. 11-12, U.N. Doc. S/1995/134 (Feb. 13 1995).

345 *See, e.g.*, *Prosecutor v. Akayesu*, Judgement, ICTR Trial Chamber, at paras. 610, 617, Case No. ICTR-96-4-T (Sep. 2, 1998) (addressing the customary status of Article 4(2) of Additional Protocol II to the Geneva Conventions).

346 *See Prosecutor v. Kallon*, Decision on Constitutionality and Lack of Jurisdiction, SCSL Appeals Chamber, at para 41, Case No. SCSL-2004-15-AR72(E) (Mar. 13, 2004).

and international armed conflicts, it relied on the decisions of the ICJ and the ICTY.[347] In finding that customary law precluded the granting of immunity from prosecution based on the Lomé Agreement, it relied, *inter alia*, on a discussion of ICTY precedent and a Security Council resolution.[348] In concluding that international law did not contain a peremptory norm providing immunity from criminal prosecution to a head of state, it cited a variety of sources, including the statutes of the various international criminal tribunals, General Assembly resolutions, the recent ICJ decision in the *Yerodia* case, and a British domestic court decision.[349] And in finding that customary law supported the criminalization of child recruitment, it relied on the widespread ratification of several treaties as evidence of state practice.[350] As the Special Court continues to confront issues of customary law, including in future decisions on the merits, a clearer picture of its methodology may emerge.

In contrast to those of the ad hoc tribunals, the ICC Statute more closely resembles a civil law code and is meant to be applied as such. Unlike pleadings in the ICTY, the gravamen of future pleadings in the ICC will be the interpretation of the Statute, not its customary law underpinnings. Nevertheless, Article 21 of the Statute, which concerns applicable law, opens the door wide to such additional sources of international law as "the principles and rules of international law, including the established principles of the law of armed conflict," as well as "general principles of law derived by the Court from national laws of legal systems of the world".[351] If the Court decides to take advantage of this article in defining the scope of criminal liability, it should be guided by the legality principle and should, in my view, adopt the cautious approach to the interpretation of custom for which I have argued here.

Moreover, in some situations, the ICC may be forced to address and apply customary law. First, in the case of a referral of a situation to the Court by the Security Council acting under Chapter VII and in accordance with Article 13(b)

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347 *See Prosecutor v. Fofana*, Decision on Preliminary Motion on lack of Jurisdiction Materiae: Nature of the Armed Conflict, SCSL Appeals Chamber, at paras. 21-24, Case No. SCSL-2004-14-AR72(E) (May 25, 2004).

348 *See Prosecutor v. Kondewa*, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lome Accord, SCSL Appeals Chamber at paras. 52, 57, Case No. SCSL-2004-14-AR72(E) (May 25, 2004); Prosecutor v. Gbao, Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, SCSL Appeals Chamber, at paras. 6-10, Case No. SCSL-2004-15-AR72(E) (May 25, 2004).

349 *See Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, SCSL Appeals Chamber, at paras. 43 – 53, Case No. SCSL-2003-01-I (May 31, 2004).

350 *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), SCSL Appeals Chamber, at paras. 18- 24, Case No. SCSL-2004-14-AR72(E) (May 31, 2004).

351 Arts. 21-22, Rome Statute of the International Criminal Court (July 1, 2002), 2187 UNTS 3.

of the Statute – as, for instance, with the Darfur atrocities – a defendant might argue that he is subjected to ex post facto legislation, because the provision under which he is accused is not declaratory of customary law. The success of such an argument would turn on whether the accused understood – or reasonably should have understood – that the act of which he is accused constituted an offense at the time of its commission. In such a case, the Court will have a rare opportunity to clarify the customary law status of the particular provisions.

Concluding Observations

The ICRC project I have mentioned above, which for the most part returns to a traditional approach as far as the identification of customary international law principles is concerned, will be a significant aid to international criminal tribunals in exercising their functions consistent with the legality principle. The ICRC undertook this enormously complicated but essential project for two main reasons.[352] One reason was to identify the customary rules of international humanitarian law that govern in conflicts in which one or more of the parties have not acceded to one or both of the additional protocols to the Geneva Conventions. The second reason – and, as I see it, the principal driving force behind the project – was the desire to remedy the scarcity of rules applicable to non-international armed conflicts because of a limited number of governing treaties.[353] Such non-international conflicts are, as we all know, unfortunately frequent and brutal. Moreover, as I have sought to demonstrate, the ICRC study will serve as a guide for the application of customary international humanitarian law by international criminal tribunals.

Experts from the ICRC, governments and academia combined their efforts to make the study a reality. They established a generous but credible list of acts, both physical and verbal, which can be considered state practice for the purposes of the study. But what makes this study unique is the seriousness and the breadth of the method employed for the identification of practice. In addition to research in the ICRC archives of nearly forty recent armed conflicts, as well as a study of international sources including those in the United Nations and regional and other international organizations, the study commissioned national research projects in nearly fifty countries, with the task of identifying national practice in international humanitarian law. This has never been done before. No restatement of international law has even tried to obtain such rich collections of empirical data. It is not surprising, therefore, that two of the three volumes of the study, and the biggest volumes at that, contain collections and analysis of national practice. As a result, we are likely to be able to start utilizing a far more credible, more in-

352 *See* Henckaerts, *supra* note 238.

353 Theodor Meron, *Towards a Humanitarian Declaration on Internal Strife,* 78 AJIL 859 (1984); Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument,* 77 AJIL 589 (1983).

ductive method of ascertaining customary rules, binding on all states, with most rules applicable both to international and domestic conflicts.

The ICRC study departed from the traditional approach in the *Continental Shelf* Cases – and from the famous "paradox" entailed in that approach, described by Richard Baxter[354] – by taking into account for the purpose of establishing customary international law the practice of states that are party to an applicable governing treaty, in addition to the practice of non-party states.[355] In the case of the Geneva Conventions, for which ratification is universal, and even in the case of treaties such as the Protocols additional to those Conventions, for which ratification is very widespread, it is hard to see the alternative; a consideration only of the practice of non-parties would be either meaningless or at least non-representative of state practice generally.[356] The study considered the existence of widely ratified treaties to be itself evidence of a norm's acceptance as customary international law – as the ICJ has recognized since the *Continental Shelf* cases – but did not treat the presence of such a treaty as definitive, considering it only in the context of state practice.

The study's general comprehensiveness and rigor does not mean that its ascertainment of practice and, even more, its formulation of black-letter rules will not be challenged in any particular case. But there is no question that the study will be the starting point of all future discussions on customary rules of humanitarian law for a long time to come. Over time, the study may well have the sort of crystallizing effect that *Nicaragua*'s holding regarding the customary law character of common articles 1 and 3 of the Geneva Conventions has had. And the study is certain to enter the practice of courts and tribunals, especially in so far as statements of practice are concerned.

Indeed, the ICRC Study has already been invoked in the ICTY's jurisprudence. The ICTY Appeals Chamber cited the study in an interlocutory decision of March 11, 2005, in the case of the *Prosecutor v. Hadzihasanović*, in support of the Trial Court's conclusions that the prohibition of wanton destruction of cities, plunder of public or private property, and destruction of institutions dedicated to religion, and more broadly, the prohibition of attacks on civilian objects, were customary norms, the violation of which entails the individual criminal responsibility of the violators.[357] These norms, derived from conventional, largely Hague

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354 Baxter explained that as the number of states that have ratified the treaty increases, much greater weight is placed, in the discernment of custom, on the practices of those relatively few states that have not ratified. *See* R. Baxter, *Treaties and Custom*, 129 Receuil des Cours 64 (1970). For discussion of the Baxter paradox, see Theodor Meron, *supra* note 9, at 50-51. For methods of deriving customary law evidence from the position of state parties, see *id*. at 51-57.

355 *See* Henckaerts, *supra* note 238, at 184.

356 *Id.*

357 *Prosecutor v. Hadžihasanović*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 *bis* Motions for Acquittal, ICTY App. Chamber, Case No. IT-01-47-AR73.3, (March 11, 2005).

law, for international armed conflicts, especially in the context of the law of occupation, became, through customary law, applicable to non-international armed conflicts as well. Although the relevant principles were articulated already in the Tribunal's earlier decisions by trial chambers in 1999 (*Kordić and Čerkez*),[358] and *Strugar* (2002),[359] and by the Appeals Chamber in an interlocutory appeal decision in *Strugar* (2002),[360] the 2005 interlocutory appeal drew support for these principles from the ICRC study. In what may be symptomatic of future practice, the Appeals Chamber cited indications of practice demonstrated by the study, rather than the black letter rule that the study's authors reached in conclusion. This approach is, in my view, a salutary one.

The traditional approach taken by the ICRC might, I suspect, be appreciated by many of the critics of the less formal approach that has been more in vogue in recent decades. Even advocates of the modern approach will, however, see the great utility of this study as a resource, for even as a diverse array of sources are embraced, the careful assessment of state practice and *opinio juris* will always have an important role to play in the development and application of customary law. In particular, as I have argued here, such evidence will be especially useful to international criminal tribunals, which are in my view compelled by the legality principle to take a relatively cautious approach to the ascertainment of customary principles. Some critics of the ICRC study might however argue that while traditional in methodology, the study was too progressive in the interpretation of the practice and thus in the black letter rules. The task of elucidating the rules was left largely to the study of two editors, since the experts committee that had guided the study was unfortunately disbanded. It will be interesting to see whether the black letter rules assume in due course an influence equivalent to that of the volumes on practice. I believe the ICTY's jurisprudence has been faithful to the principle of cautiousness in the ascertainment of customary rules, but the accuracy and reasoning of the Tribunal's assessments can only be strengthened by the availability of this new wealth of information. Perhaps such studies could be usefully undertaken in other areas of international law, provided that one could find for them the level of institutional support, the credibility and funding as that provided by the ICRC.

358 *Prosecutor v. Kordić and Čerkez*, Decision on Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdiction Reach of Articles 2 and 3, ICTY Trial Chamber, at paras. 15-31, Case No. IT-95-14/2-PT, (March 2, 1999).

359 *Prosecutor v. Strugar*, Decision on Defence Preliminary Motion Challenging Jurisdiction, ICTY Trial Chamber, at para. 17, Case No. IT-01-42-PT, (June 7, 2002).

360 *Prosecutor v. Strugar*, Decision on Interlocutory Appeal, ICTY App. Chamber, at paras. 9-14, Case No. IT-01-42-AR72, (November 22, 2002).

Chapter 7: International Courts*

Available space inevitably compels making difficult choices. In this chapter I shall consider only the International Court of Justice (ICJ) and the European Court of Human Rights (ECHR).

A. The International Court of Justice

If initially the ICJ has not been a central player in the human rights and humanitarian law field, over the years its judgements have made an ever more important contribution to both. Few human rights treaties have a *compromis* clause referring cases to the Court, and other mechanisms are in place to adjudicate breaches of these treaties.[1] States could bring human rights cases to the Court under other treaties conferring jurisdiction, but they generally have not done so. Of course, only States have standing before the Court in contentious proceedings. As Judge Jennings has observed, "this position reflects the position in general international law in 1922 when the Statute of the Permanent Court of International Justice was first drawn, and when international law was simply a law between States, and when the idea that individuals or any entities other than State might become persons in international law was almost unthinkable. This provision has remained unchanged since then although today it is in important senses a juridical anachronism."[2]

If, at first sight, the contributions of the Court seem to have been rather sporadic, they nonetheless have addressed some fundamental issues of human rights

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* The International Criminal Court and *ad hoc* Tribunals are considered in the chapter on the Criminalization of Violations of International Humanitarian Law.

1 Rosalyn Higgins, *The International Court of Justice and Human Rights*, *in* International Law: Theory and Practice: Essays in Honour of Eric Suy 691,693-694 (Karel Wellens ed., 1998). Article IX of the Genocide Convention and Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination provide for the compulsory jurisdiction of the ICJ for disputes regarding the interpretation and application of those Conventions.

2 Robert Y. Jennings, *The Role of the International Court of Justice*, 68 B.Y.B.I.L. 55, 58 (1997).

law and its relationships with general international law. The ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), have made some important contributions on such issues as minorities' rights, rights of aliens and diplomatic protection, self-determination, human rights as a matter of international concern and scope of domestic jurisdiction, international personality, elementary considerations of humanity, and *erga omnes* obligations.

The PCIJ embraced human rights concerns early on by finding that "the very object of an international agreement may be the adoption of some definite rules creating individual rights and obligations,"[3] a finding that at the time was "in effect an extraordinary pronouncement."[4] Paraphrasing Hersch Lauterpacht, Stephen Schwebel commented that "the Court ignored the postulated insurmountable barrier between the individual and international law and denied the exclusiveness of States as the beneficiaries of international rights – holdings fundamental to the modern international law of human rights."[5] The ICJ recognized the principle that entities other than States may have rights and obligations under international law as early as 1949,[6] holding, in its advisory opinion on *Reparations for Injuries Suffered in the Service of the United Nations*, that international organizations had legal personality under international law.[7] The ICJ developed the idea of non-States as rights bearers under international law in its advisory opinion on the *International Status of South West Africa*, in which it held that Article 80 of the UN Charter safeguarded "not only the rights of States, but also the rights of the peoples of mandated territories,"[8] in this case safeguarding a right of petition. Thus "individuals [were] treated by the Court as invested by an international instrument with an international right, in this case with a procedural right protective of certain fundamental human rights (such as freedom from slavery and forced labor)."[9] As Judge Higgins has observed, the Permanent Court of International Justice, in its role as arbiter and interpreter of the Minority Treaties concluded in the wake of the First World War, created some precur-

3 Jurisdiction of the Courts of Danzig, Permanent Court of International Justice, Advisory Opinion of 3 March 1928, [1928] PCIJ, Series B, No. 15, at 17-18.

4 Hersch Lauterpacht, The Development of International Law by the International Court 174 (1958), *quoted in* Stephen M.Schwebel, *The Treatment of Human Rights and Aliens in the International Court of Justice*, *in* Fifty Years of The International Court of Justice: Essays in Honour of Sir Robert Jennings 327 (Vaughan Lowe and Malgosia Fitzmaurice eds., 1996).

5 Stephen M. Schwebel, *Human Rights in the World Court*, 24 Vanderbilt J. Transnat'l L. 945, 956 (1991).

6 *Id.* at 332.

7 *Reparations for Injuries Suffered in the Service of the United Nations*, International Court of Justice, Advisory Opinion of 11 April 1949, 1949 ICJ Rep. 174, 178.

8 *International Status of South West Africa*, International Court of Justice, Advisory Opinion of 11 July 1950, 1950 ICJ Rep. 128, 133-134.

9 Schwebel, *supra* note 4, at 331.

sors of modern human rights law.[10] In 1923, the PCIJ, applying a test of equality of treatment in fact, held that a law, which on its face appeared neutral, violated the rights of German settlers in Poland under the Minorities Treaty.[11] That Treaty required Poland to assure "full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion." and mandated that "Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as other Polish nationals."[12] As noted by Stephen Schwebel, the decision of the Court focused on discrimination in fact, not only discrimination in law, holding that such discrimination was a violation of treaty provisions,[13] and that "civil rights" included property rights.[14]

The concept of equality of treatment in fact, and its relationship with discrimination and differential treatment, was further elaborated in the 1935 advisory opinion on *Minority Schools in Albania*. The Court stated that equality and suitable means for the preservation of cultural peculiarities

> are indeed closely inter-locked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.[15]
>
> ...
>
> Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.
>
> It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situations and requirements are different, would result in inequality in fact; treatment of this description would run counter to [Albania's international obligations][16]

10 Higgins, *supra* note 1, at 691-692.

11 Certain Questions relating to Settlers of German Origin, Permanent Court of International Justice, Advisory Opinion of 10 September 1923, [1923] PCIJ, Series B, No. 6.

12 *Quoted in* Higgins, *supra* note 1, at 692.

13 Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion of 4 February 1932, [1932] PCIJ, Series A/B, No. 44, at 28.

14 Schwebel, *supra* note 5, at 950.

15 Minority Schools in Albania, Permanent Court of International Justice, Advisory Opinion of 6 April 1935, [1935] PCIJ, Series A/B, No. 64, at 17.

16 Minority Schools in Albania, *supra* note 15, at 19.

Such findings have a resonance with the notion familiar today from debates over "affirmative action" programs that differential treatment may be necessary to ensure equality in fact.[17] The Human Rights Committee has thus insisted that "[t]he enjoyment of rights and freedoms on an equal footing [...] does not mean identical treatment in every instance:"[18]

> [P]ositive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.[19]

In the *Upper Silesia Case*, construing the Minorities Treaty, the Permanent Court held that minorities could be identified by taking into account both the facts and the intention of minority members, and not self-identification alone.[20] While the identification of minorities and of their members is still fraught with difficulties, the Permanent Court had already established the principle that it was not for the State to decide whether an individual was a minority member or not.[21] The Human Rights Committee General Comment on minority rights agreed: "[t]he existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria."[22]

Minority rights under the Minority Treaties were limited to minorities protected under the specific treaties concluded with the redrawing of frontiers following the disintegration of the Austro-Hungarian and Ottoman empires. They did not rise to a principle of general international law applicable to all national minorities.[23] Nonetheless, "[t]he jurisprudence of the Permanent Court showed a

17 Higgins, *supra* note 1, at 693; Schwebel *supra* note 4, at 328.

18 Human Rights Committee, Thirty-seventh Session, General Comment 18: Non-discrimination, para. 8; *also* para. 10 on "affirmative action."

19 Human Rights Committee, Fiftieth Session, General Comment 23: The rights of minorities (Article 27), para. 6.2 (1994).

20 Rights of Minorities in Upper Silesia (Minority Schools), Permanent Court of International Justice, Advisory Opinion of April 26, 1928, PCIJ Rep., Series A, No. 15, at 32-35.

21 Higgins, *supra* note 1, at 692.

22 Human Rights Committee, Fiftieth Session, General Comment 23: The rights of minorities (Article 27), para. 5.2, *in fine* (1994).

23 Higgins, *supra* note 1, at 691.

profound insight into what was necessary for the protection of national minorities and its findings continued ideas that have had a lasting importance in human rights law."[24]

Apart from issues pertaining to minorities, the PCIJ considered questions of treatment of aliens and their property, and the law of diplomatic protection.[25] In the *Mavrommatis Palestine Concessions* case it made a pronouncement of the classic State-centered law of diplomatic protection: "By taking up the case of one of its subjects and by resorting to diplomatic protection or international judicial proceedings on its behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law."[26] This classic line continued through cases such as *Chorzów,*[27] *Interhandel,* and *Electronica Sicula*.[28] *Barcelona Traction*[29] breaks new ground (discussed further below and in the Chapter on State responsibility)).

The ICJ has made additional contributions to the principle of exhaustion of domestic remedies and the nature of diplomatic protection. Of particular importance for the law of diplomatic protection and principles governing exhaustion of local remedies is the *La Grand Case* (Germany v. United States of America) (1991).[30] The Court agreed with Germany that Article 36(1) of the Vienna Convention on Consular Relations, concerning consular access and notification for detained nationals, "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person."[31] It thus rejected the U.S. claim that "rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance."[32] The Court decided not to consider the additional argument by Germany that those individual rights assumed the character of human rights.[33]

The Court has rarely dealt with substantive aspects of specific human rights, partly for the simple reason that most human rights treaties set up their own specific mechanisms for their interpretation and enforcement and partly because

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24 Higgins, *supra* note 1, at 691-692.

25 Schwebel, *supra* note 4, at 328.

26 The Mavrommatis Palestine Concessions, PCIJ, Series A, No. 2, at 12.

27 Factory at Chórzow, PCIJ, Series A, No. 17.

28 *See* Interhandel case, 1957 ICJ Rep. 2, 27; Electronica Sicula SpA (ELSI), 1979 ICJ Rep. 42-44.

29 *Barcelona Traction, Light, and Power Company (Second Application) (Belgium v. Spain)*, International Court of Justice, Judgment of 5 February 1970, 1970 ICJ Rep. 3, 44-45.

30 Judgement of 27 June 2001, 2001 ICJ Rep. 466.

31 *Id. at para.* 77.

32 *Id*. at para. 76.

33 *Id.* at para. 78.

States have been reluctant to invest the political capital necessary for bringing human rights issues to the ICJ under other treaties. Referring to the UN Charter human rights clauses, the Court held in the *Namibia Advisory Opinion* that "[t]o establish

> and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights [constitutes] a flagrant violation of the purposes and principles of the Charter of the United Nations ."[34]

Commentators have suggested that the statement of the Court in the *Namibia Advisory Opinion* supports the view that the Charter imposes obligations in the realm of human rights and that "[t]he Charter provisions are therefore not just hortatory and programmatic."[35] This view gains additional support from the *United States Diplomatic and Consular Staff in Tehran* Case, where the Court held that: "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".[36]

As far back as 1923, the PCIJ established that the question whether a matter was solely subject to domestic jurisdiction was "an essentially relative question; it depends upon the development of international relations."[37] Applied to human rights, this finding suggests that "[o]nce a State has undertaken obligations towards another State, or toward the international community, in a specified sphere of human rights, it may no longer maintain, *vis-à-vis* the other State or the international community, that matters in that sphere are exclusively or essentially within its domestic jurisdiction and outside the range of international concern."[38]

The ICJ has made an important contribution to the narrowing down of the scope of domestic jurisdiction. In the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the ICJ was called upon by the General Assembly to give an advisory opinion on the dispute settlement procedure of these treaties. The dispute related to alleged violations of the obligation to "take all measures necessary to secure to all persons under [their] jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and funda-

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34 Legal Consequences for States of the Continued Presence of South Africa in Namibia, (South West Africa), Notwithstanding Security Council Resolution 276 (1970), 1971 ICJ Rep. 16, at para. 131.

35 Nigel S Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 I.C.L.Q. 321, 324 (1989).

36 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, International Court of Justice, Judgment of 24 May 1980, 1980 ICJ Rep. 3, par. 91.

37 National Decrees Issued in Tunis and Morocco, Permanent Court of International Justice, Advisory Opinion of 7 February 1923, [1923] PCIJ, Series B, No. 4, at 24.

38 Schwebel (1991), *supra* note 5, at 957.

mental freedoms, including freedom of expression, of press and publications, of religious worship, of political opinion and of public meetings."[39] It was argued that the General Assembly's request for an advisory opinion was *ultra vires* because, in dealing with human rights in these States, the Assembly was intervening in matters essentially within the domestic jurisdiction of States, and because both the Assembly and the Court were bound to observe Article 2(7) of the UN Charter. Noting that the Assembly grounded its request in Article 55 of the Charter, the ICJ stated that "[t]he interpretation of the terms of a treaty could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law which, by its very nature, lies within the competence of the Court."[40] Schwebel observed that, if the finding of the Court was applied to the UN Charter's human rights clauses, it would "appear to follow that any question of the breach of these treaty obligations ... equally would not be matters essentially within the jurisdiction of a State,"[41] adding that "[t]he importance of that conclusion to the contemporary international law of human rights is fundamental in view of the fact ... that the Court was later to hold that these Charter provisions do give rise to international obligations."[42]

In the *Asylum Case,* the Court held that "[i]n principle ... asylum cannot be opposed to the operation of justice," but added that "[a]n exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take against its political opponents."[43] In its advisory opinion on *Reservations to the Genocide Convention*, the Court stated that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."[44] Although from a contemporary point of view, this statement does not seem particularly bold, it should be remembered that the opinion was rendered only two and a half years after the adoption of the Convention, and that the Convention departed from the model of the Nuremberg Charter and Judgment by omitting any nexus with an armed conflict.[45] "[T]he opinion [thus] represented a first breach by the Court of the doctrine of domestic jurisdiction."[46]

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39 Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, International Court of Justice, Advisory Opinion of 30 March 1950, 1950 ICJ Rep. 65, 73.

40 *Id.*, 70-71; Meron, Human Rights and Humanitarian Norms as Customary Law 106 (1989).

41 Schwebel (1996), *supra* note 4, at 333.

42 *Id.*

43 *Asylum Case (Colombia v. Peru)*, International Court of Justice, Judgment of 20 November 1950, 1950 ICJ Rep. 266, 284.

44 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, Advisory Opinion of 28 May 1951, 1951 ICJ Rep. 15, at 23.

45 Rodley, *supra* note 35, at 322.

46 Rodley, *supra* note 35, at 322.

In stating that in the Genocide Convention, States did not have "any interests of their own; they merely have, one and all, a common interest,"[47] the Court anticipated the later *dicta* on obligations *erga omnes*[48] and recognized the normative or objective character of certain types of treaties. Obligations *erga omnes* were, of course, recognized in the *Barcelona Traction Case,* where the Court 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*."[49] The concept of erga *omnes* obligations has implications also for the scope of States' exclusive jurisdiction, for "it follows that, when a State protests that another is violating the basic human rights of the latter' own citizens, the former State is not intervening in the latter's internal affairs; it rather is seeking to vindicate international obligations which run towards it as well as all other States."[50]

I turn to the ICJ's consideration of genocide. The ICJ addressed genocide in several cases. In the *Reservations to the Genocide Convention Advisory Opinion,* the Court eloquently stated that the origins of the Convention, which was a major response to Nazi atrocities, revealed that the United Nations intended to punish genocide as a crime under international law, because it

> [s]hocks the conscience of mankind and results in great losses to humanity, and is contrary to moral law and to the spirit and aims of the United nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligations.[51]

The question of genocide was briefly discussed by the Court in its *Advisory Opinion on the use of Nuclear Weapons* in response to some States which had argued that the use of nuclear weapons would amount to genocide.[52] The Court clarified that

47 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 44, at 23.

48 Schwebel, *supra* note 4, at 331.

49 *Barcelona Traction Light and Power Company, Ltd.*, *supra* note 29, para 33.

50 Schwebel, *supra* note 4, at 337.

51 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 44, at 23.

52 John Burroughs, The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice 116 (1998).

> the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such …[53]

Judges Weeramantry and Koroma dissented, opining that intent could be inferred given the foreseeable consequences of the use of nuclear weapons.[54] In the more recent *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* the Court wrote that "the rights and obligations enshrined in the Convention are rights and obligations erga omnes."[55] Thus, the Court's temporal jurisdiction was not limited to the period from which Bosnia and the FRY were both bound by the Convention. In this case, however, the Court did not address the question whether there was automatic succession to human rights treaties. Instead it relied on the succession of the Federal Republic of Yugoslavia to the Former Socialist Republic of Yugoslavia and the retrospective application of the jurisdictional clause.[56]

When the Court first examined the concept of self-determination, it was still viewed by many as a political question.[57] In the *Namibia* Advisory Opinion, the Court, interpreting the Covenant of the League of Nations and the Mandate for South West Africa, emphasized the centrality of the principle of self determination in the UN Charter and its passage into customary law through the general practice of States and of the United Nations, as reflected in such documents as General Assembly Resolution 1514 (XV) (1961).[58] In its Advisory Opinion on *Western Sahara*, the Court described that principle as a right of people[59] "to determine their future political status by their own freely expressed will."[60] In the *East Timor Case*, the Court agreed that:

> 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

53 *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion of 8 July 1996, 1996 ICJ Rep., para. 26.

54 Legality of the Threat or Use of Nuclear Weapons, *supra* note 53, Dissenting Opinion of J. Weeramantry; Dissenting Opinion of J. Koroma.

55 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Preliminary Objections, International Court of Justice, Judgment of 11 July 1996, 1996 ICJ Rep. 616, para. 31.

56 Higgins, *supra* note 1, at 696-697.

57 Higgins, *supra* note 1, at 694.

58 Legal Consequences for States of the Continued Presence of South Africa in Namibia, *supra* note 34, paras. 51-54.

59 Western Sahara, International Court of Justice, Advisory Opinion of 16 October 1975, 1975 ICJ Rep. 12, 31-33.

60 Western Sahara, *supra* note 59, at 36.

> the United Nations Charter and in the jurisprudence of the Court; it is one of the essential principles of contemporary international law.[61]

Despite the wide recognition of the concept of *erga omnes* obligations, the enforcement of human rights through international courts is still in its infancy. For one thing, rules governing jurisdiction and nationality still slow down progress. The *Nottebohm Case* shows the limitations that the law of diplomatic protection may present for the enforcement of individual rights. In that case, the Court insisted on a "genuine link" between the individual and the State espousing the claim.[62] "The principle [of genuine link] may have the result that no State is in a position to maintain a claim on behalf of an individual, a result which forecloses the realization of that individual's human rights."[63] In the *Barcelona Traction* case the Court referred to the continuing vitality of nationality even in the context of the protection of human rights:

> on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought…[64]

In the *South West Africa Cases*,[65] an inter-State claim, the ICJ required the showing of specific interest. In the *East Timor* case, the Court insisted that the *erga omnes* nature of an obligation did not dispense with the need of consent to jurisdiction:

> the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.[66]

The Court took the same position in the more recent *Case Concerning Armed Activities on the Territory of the Congo.* "Whereas it does not follow from the mere fact that rights and obligations *erga omnes* are at issue in a dispute that the

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61 *Case concerning East Timor (Portugal v. Australia)*, International Court of Justice, Judgment of 30 June 1995, 1995 ICJ Rep. 90, para. 29.

62 *Nottebohm Case (Liechtenstein v. Guatemala)* (Second Phase), International Court of Justice, Judgement of 6 April 1955, 1955 ICJ Rep. 4, 26.

63 Schwebel (1996), *supra* note 4, at 338.

64 *Barcelona Traction Case*, *supra* note 29, para. 91.

65 *South West Africa Cases (Ethiopia and Liberia v. South Africa)* (Second Phase), International Court of Justice, Judgment of 18 July 1966, 1966 ICJ Rep. 4, para. 88.

66 *Case concerning East Timor (Portugal v. Australia)*, *supra* note 61, para. 29.

Court has jurisdiction to adjudicate upon that dispute; whereas, as the Court has noted above …, it has jurisdiction in respect of States only to the extent that they have consented thereto; and whereas, when a compromissory clause in a treaty provides for the Court's jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are bound by that clause and within the limits set out in that clause…"[67] 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* in the practice of international tribunals.

In Military *and Paramilitary Activities in and Against Nicaragua*, the Court held that, while 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 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*."[68] It observed 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."[69] Schwebel has suggested that this holding may clash with the *erga omnes* character of human rights obligations.[70] Others have criticized it as symptomatic of the restrictive approach by the Court to questions of standing.[71] The Court also held that the use of force was not an appropriate method to monitor or ensure respect for human rights. The Court took a more positive attitude to humanitarian assistance, without, however, approving of crossing frontiers without the consent of the territorial State: "There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross."[72]

In the *Corfu Channel Case*, its first contentious case, the Court held that Albania's obligation to notify international shipping of mines in its territorial waters was based on "certain general and well-recognized principles, namely: el-

67 (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.

68 Military and Paramilitary Activities in and against Nicaragua, *supra* note 68, at para. 267.

69 Military and Paramilitary Activities in and Against Nicaragua, (Nicar. v. USA) Merits, 1586 ICJ Rep 14/Judgement of 27 June), para. 268.

70 Schwebel (1996), *supra* note 4, at 340.

71 Fernando R. Téson, *Le peuple, c'est moi! The World Court and Human Rights*, 81 AJIL 173 (1987).

72 Military and Paramilitary Activities in and against Nicaragua, *supra* note 68, at para. 242.

ementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime communications; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the right of other States."[73] Building on this decision, in the *Military and Paramilitary Activities in and Against Nicaragua Case,* the Court stated:

> If a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No.VIII of 1907.[74]

The Court confirmed that "the conduct of the United States may be judged according to the fundamental general principles of humanitarian law."[75] It held that Common Articles 1 and 3 of the Geneva Conventions were part of customary law. The guarantees of Common Article 3 "constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the court in 1949 called 'elementary considerations of humanity'."[76] At the time of the decision, the customary character of these provisions was still questioned, as indicated by Judges Ago and Jennings in their separate or dissenting opinions.

The Nuclear Weapons Advisory Opinion provided the ICJ with the opportunity to address in greater detail humanitarian law principles. The Court identified these "cardinal principles" of humanitarian law: the principle of distinction and immunity of civilians, and the prohibition of unnecessary suffering to combatants[77]. And it confirmed their customary law character: "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."[78]

Human rights concerns have also been addressed in the Court's jurisprudence on provisional measures. The requirement that the measures sought be coterminous with the principal claim has prevented ordering measures that would have pursued a more general protection of human rights in cases where human

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73 *Corfu Channel Case*, International Court of Justice, Judgment of 9 April 1949, 1949 ICJ Rep. 4, 22.

74 Military and Paramilitary Activities in and Against Nicaragua, *supra* note 68, at para. 215.

75 See also Meron, *supra* note 40, at 108-10.

76 Military and Paramilitary Activities in and against Nicaragua, *supra* note 68, at para. 218.

77 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 53, at para. 78.

78 *Id.*, para. 79.

rights were not the object of the dispute.[79] In *United States Diplomatic and Consular Staff in Tehran*,[80] the Court, while ordering interim measures designed to protect the right of the parties, *i.e.*, the rights flowing from the Convention on Diplomatic Relations and the Convention on Consular Relations, referred also to human rights concerns. The United States had sought measures for "the protection of its nationals to life, [and]..liberty," and "the right to have its nationals protected and secure."[81] In its "considerations" the Court referred to the "continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm."[82] It thus made the connection between harm to the individuals concerned and obligations owed by Iran to the United States under the Vienna Conventions.[83] In the case of the *Military and Paramilitary Activities in and against Nicaragua*, where Nicaragua asked the Court to order interim measures to support "the rights of Nicaraguan citizens [on the territory of Nicaragua] to life, liberty and security,"[84] the measures ordered by the Court used "the language of inter-State disputes."[85]

Human rights were considered by a chamber of the Court in the case of the *Frontier Dispute (Burkina Faso/Mali)*. The chamber found that the facts "exposed the persons and property in the disputed area to serious risks of irreparable damage."[86] Higgins has contended that the risk of irreparable harm to persons and property should provide an adequate basis for provisional measures.[87]

In the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, the Court ordered interim measures against Yugoslavia on the basis of the Genocide Convention, but declined to order measures on the basis of other humanitarian law instruments. Interim measures were thus available only for the rights that were the subject of the dispute and within the Court's jurisdiction.[88]

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79 Rosalyn Higgins, *Interim Measures for the Protection of Human Rights*, 36 Colum. J. Transnat'l L. 91, 95 (1997).

80 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Provisional Measures, Order of 15 December 1979, [1979] ICJ Rep. 7.

81 *Id.*, at 19.

82 *Id.*, at 20, para. 42.

83 Higgins (1998), *supra* note 1, at 698.

84 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Provisional Measures, International Court of Justice, Order of 10 May 1984, [1984] ICJ Rep. 169, 182.

85 Higgins (1998), *supra* note 1, at 699.

86 *Frontier Dispute Case (Burkina Faso/Mali)*, Provisional Measures, International Court of Justice, Order of 10 January 1986, [1986] ICJ Rep. 3, 10.

87 Higgins (1998), *supra* note 1, at 699.

88 *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Monte-*

In the *Land and Maritime Boundary Case between Cameroon and Nigeria,* the Court showed sensitivity to human rights, and, in particular to civilian casualties.[89] Higgins suggests that the Court has thus recognized that "[d]isputes about boundaries are not just about lines on the ground but about the safety and protection of peoples who live there."[90] Although hesitating to take into account rights of individuals when not the subject of a dispute, "the evolving jurisprudence on provisional measures shows a growing tendency to recognize the human realities behind disputes of States."[91] The *La Grand* Case fits this trend. However haltingly, the Court has paid increasing attention to human rights, especially the rights to life and physical security.

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.[92]

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."[93] 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

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negro)), Provisional Measures, Order of 8 April 1993, [1993] ICJ Rep. 3, 19, para. 34; Order of 13 September 1993 [1993] ICJ Rep. 325.

89 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Provisional Measures, Order of 15 March 1996, [1996] ICJ Rep. 13, para 38 (I).

90 Higgins (1998), *supra* note 1, at 701.

91 Higgins (1997), *supra* note 79, at 108.

92 *Nuclear Weapons Advisory Opinion, supra* note 53, at 240.

93 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).

> 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.[94]

The Court has thus interpreted Article 6 of the Covenant in light of principles of international law applicable in armed conflict. Such interpretation is of course supported by Article 31(3)(c) of the Vienna Convention on the Law of Treaties. In the Advisory Opinion of July 9, 2004, on Legal Consequences of the Construction of the Wall in the Occupied Palestian Territory, the Court, citing its *lex specialis* statement in *Nuclear Weapons*, held, more generally, that except for derogations of the kind stated in Article 4 of the International Covenant on Civil and Political Rights, "the protection offered by human rights conventions does not cease in case of armed conflict,"[95] and that both humanitarian and human rights law were applicable in Occupied Territories.[96] Through a process of interpretation of the Geneva Conventions and human rights conventions, and particularly the International Covenant on Civil and Political Rights, the court found that both the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, as well as the Convention on the Rights of the Child were applicable to the occupied territories, alongside the Geneva Convention and the Hague Convention No. IV.[97]

Also in the *Wall* case (2004),[98] the Court invoked customary law to find Israel in breach with regard to a whole range of issues. It did so without much substantive inquiry into practice and *opinio juris*. It found that under customary law as reflected in Article 42 of the Regulations annexed to the Hague Convention No. IV, Israel had the status of an occupying power;[99] that the Hague Convention had become part of customary law;[100] that the rule of inadmissibility of the acquisition of territory by force was customary;[101] that Israel did not meet the customary law standards of necessity which would have precluded the wrongfulness of the wall's construction;[102] that Israel violated certain *erga omnes* obligations, such as the right to self-determination of the Palestinian people and a number of humanitarian rules, which constitute inviolable rules of humanitarian law;[103] and that Israel had, under customary law, the obligation to make reparation for the damage

94 *Supra* note 53.

95 Para. 106, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) 43 I.L.M. 1009 (July 9, 2004).

96 Para. 114.

97 Paras. 89-114.

98 *Supra* note 95.

99 *Id*. at para. 78.

100 *Id*. at para. 89.

101 *Id*. at para. 117.

102 *Id*. at para. 140.

103 *Id*. at paras. 155-57.

caused.[104] As already noted that the Court stated that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of derogations of the kind found under Article 4 of the International Covenant on Civil and Political Rights,[105] and that the humanitarian law applied as *lex specialis*.[106]

B. The European Court of Human Rights

As the first international convention on human rights, and the one with the most advanced mechanisms of judicial resolution of individual and inter-State complaints, it is natural that the Convention for the Protection of Human Rights and Fundamental Freedoms,[107] and the case law generated by the European Human Rights Commission (no longer in existence since the entry into effect of Protocol 11) and the European Court of Human Rights, should have an important impact on the development of public international law, an impact reaching beyond the field of human rights and the geographical parameters of the Council of Europe. Nevertheless, because of the doctrine emphasizing the distinctiveness of international human rights (virtual elimination of reciprocity, contraction of domestic jurisdiction, and operation of the law not between theoretically equal sovereign entities, but between governments – subject to duties – and individuals benefiting from rights, all that mostly within the nation State), the significance for general public international law of the normative system developed in Strasbourg cannot be taken for granted. It merits discussion and comment.

My discussion will be limited to the ECHR. Accordingly, it will not address other regional human rights courts nor the impact on public international law of other European conventions. The ECHR has had a profound influence on the decisions of the Court of Justice of the European Communities, the Maastricht Treaty, the inclusion of human rights clauses in the economic and development agreements with States not members of the European Union and the recognition of the constitutional traditions common to the member States as general principles of community law and thus as fundamental rights enforceable before the Court of Justice.[108] The ECHR has had a major impact on the development by the European Communities and the OSCE of what Professor Charles Leben has called the "triad of human rights/democracy/rule of law."[109] Beyond Europe, the

104 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, *supra* note 98, at para. 152.

105 *Id*. at para. 106.

106 *Id.*

107 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, Eur. T.S. No. 5, 213 UNTS 221.

108 *See e.g., Wachauf v. Germany*, Court of Justice of the European Communities, Case 5/88, [1989] ECR 2609.

109 Charles Leben, *Is there a European Approach to Human Rights?, in* The EU and Human Rights 69, 93 (Philip Alston ed. 1999).

ECHR has also had a major influence on other regional human rights systems, especially the jurisprudence of the American Court of Human Rights, as well as on the universal human rights system.

Of course, the European Court applies primarily its constitutive instrument, the European Convention. But increasingly it resorts to general international law and thus its case law exercises influence on the general law. The important study by Lucius Caflisch and Antônio Cançado Trindade demonstrates how much the European Court applies general international law, especially the law of treaties and the law of state responsibility.[110] In the case of *Mamatkulov and Abdurasulovic v. Turkey*, the European Court of Human Rights examined the character of interim measures by reference to general principles of international law, drawing in particular on the practice of other international courts. Applying a dynamic and evolutive approach, and in the light of general principles of international law, the law of treaties and international case-law, the Court related the interpretation of the scope of interim measures to the context of the pertinent proceedings. It concluded that any state party addressee of interim measures must comply with them to avoid irreparable harm being caused to the victim of the alleged violation.[111] In the judgement of 4 February 2005 in the case of *Mamatkulov and Askarov v. Turkey*, the Court held that whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending, and that preservation of rights of the parties represents an essential objective of interim measures in international law.[112] By failing to comply with the interim measures indicated, Turkey was found to be in breach of its obligations under the Convention.[113] In the case of *Bosphorus Hava Yollari Turizm v. Ireland* (Judgement of June 30 2005), the Court considered the lawfulness of the impoundment of a Turkish plane by Ireland in the execution of an EC regulation adopted in pursuance of a Chapter VII Security Council Resolution. The Court found that the impoundment was not an exercise of discretion by Ireland, and constituted compliance with its international legal obligations. The European Convention had to be interpreted in light of international law rules applicable in relations between the contracting parties, including the principle *pacta sunt servanda*. Such compliance constitutes a legitimate general interest objective within the meaning of Protocol I to the Convention. Given that the protection of fundamental rights of individuals by the EC law was equivalent to the system of

110 Lucius Caflisch and Antônio Cançado Trindade, Les Conventions Americaine et Europeene des Droits de l'homme at le Droit International Général, Revue Générale de Droit International Public 5 (2004). In the case of *Al-Adsani v. the United Kingdom*, Application No. 35763/97, Judgement of 21 Nov. 2001, the European Court considered that the prohibition of torture constituted *jus cogens,* but the majority found that this finding did not affect the existing immunity of states from civil claims.

111 Judgement of 6 February 2003, at para. 110.

112 Para. 124.

113 *Id*. at para. 128.

the Convention, Ireland did not violate the Convention by implementing its legal obligations flowing from its membership of the EC.

I. Character of the Convention for the Protection of Human Rights and Fundamental Freedoms

Strasbourg institutions have articulated the theory of the objective character of the Convention, emphasizing its normativity and the departure from the reciprocity underlying the law of treaties in general. Thus, in the case of Austria *v. Italy*, the European Commission of Human Rights stated "the 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 infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves."[114] In *France et al. v. Turkey,*[115] the Commission thus stated that

> the general principle of reciprocity in international law and the rule in Article 21, para. 1 of the Vienna Convention on the Law of Treaties, concerning bilateral obligations under a multilateral treaties do not apply to the obligations under the European Convention, which 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 Contracting parties than to create subjective and reciprocal rights for the High Contracting Parties themselves" (Austria v. Italy, Yearbook 4, 116, at page 140)." [116]

In the *Loizidou* case, the Court emphasized the "special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms"[117] It emphasized the need not to "diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)."[118]

Although these characterizations were designed for the Convention only, they may, in the long run, influence the interpretation and application of other normative and multilateral treaties which implicate common values rather than just the interests of the individual State parties. Possible candidates for such a

114 Decision of the Commission as to Admissibility of Application No. 788/60 lodged by the Government of the Federal Republic of Austria against the Government of the Republic of Italy, 4 Yb. Eur. Conv. H.R. 116, 140 (1961).

115 *France, Norway, Denmark, Sweden, Netherlands v. Turkey, European Commission of Human Rights*, Appl. No. 9940-9944/82 (joined), Decision on admissibility of 6 December 1983, 35 Eur. Comm'n Dec. & Rep. 143 (1984).

116 *Id.*, at 169, para. 39.

117 *Case of Loizidou v. Turkey* (Preliminary Objections), European Court of Human Rights, Judgment of 23 March 1995, 310 Eur. Ct. H.R. Rep. (Ser. A), para. 70 (1995).

118 *Id.*, para. 75.

development include treaties concerning the environment and arms control. The jurisprudence of the European Court of Human Rights may thus contribute to filling the void left by the Vienna Convention on the Law of Treaties;[119] which hardly dealt with the special problems raised by multilateral normative treaties. This Strasbourg jurisprudence will continue to drive the movement of international law from its State-centered focus to an orientation towards individuals.

II. Reservations

Much has been written about the Strasbourg jurisprudence on reservations to the ECHR. Because of the ample literature, my discussion will be brief. This jurisprudence draws on the special character of the Convention and turns essentially on the application of Article 57 (former Article 64) and only secondarily on the more general criterion of compatibility with the object and purpose of the Convention derived from the Vienna Convention on the Law of Treaties. As Pierre-Henri Imbert has noted, there is no equivalent at the universal level to the Strasbourg institutions, and Article 57 enabled the Court (except with regard to the reservations by Turkey), to avoid addressing the incompatibility criteria of the Vienna Convention.[120] Imbert acknowledged the fact that the Strasbourg jurisprudence had more of an impact on the work of the Human Rights Committee established under the International Covenant on Civil and Political Rights[121] (CCPR) than on the practice of States belonging to the Council of Europe. This jurisprudence emphasizes the requirement of specificity,[122] which Åkemark regards as a reflection of a regional customary law,[123] the exclusion of reservations which may render the Convention ineffective and the severability of inadmissible reservations. Inadmissible reservations would thus be excluded, while maintaining the validity of the reserving State's consent to the Convention (see, in particular, the *Belilos* and *Loizidou Cases.)*[124]

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119 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).

120 CAHDI, Group of Specialists on Reservations to International Treaties, 2nd meeting, Paris, Sept. 1998, Statement by Pierre-Henri Imbert.

121 International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A, 19 December 1966, *in force* 23 March 1976, 21 UN GAOR (Suppl. No. 16), at 53, UN Doc. A/6316 (1967).

122 A reservation to a particular provision of the Convention has to indicate conflict with a provision of national law. Åkermark, *Reservations: Breaking New Ground in the Council of Europe*, 24 Eur. L. Rev. 499, 503 (1999).

123 Åkermark, *Reservations Clauses in Treaties Concluded within the Council of Europe*, 48 I.C.L.Q. 479, 493 (1999).

124 *Belilos Case* (Switzerland), European Court of Human Rights, Judgment of 29 April 1988, 132 Eur. Ct. H.R. Rep. (ser. A) (1988); Case of Loizidou v. Turkey, *supra* note 117.

The European jurisprudence has had an important impact on the universal system of human rights, as exemplified by General Comment No. 24 of the Human Rights Committee (discussed in the chapter on treaties), and on the jurisprudence of the Inter-American Court of Human Rights. Although provisions similar to Article 57 (former Article 64) can be found in many Council of Europe treaties, I note the conclusion of Åkermark that that jurisprudence does not appear to have been supported by the majority of the members of the Council of Europe,[125] at any rate outside of the ECHR (the decisions of the Court are of course binding on the State parties before the Court). Moreover, two members of the Council of Europe, France and the United Kingdom, have dissented from General Comment No. 24,[126] especially questioning the competence of the Committee to decide on invalidity and separability.[127]

Outside the Council of Europe, the United States has questioned the legal foundation of the Committee's approach.[128] The Pellet reports and the recent work of the International Law Commission (ILC) demonstrate resistance to the Strasbourg jurisprudence and to General Comment No. 24 as a paradigm for the law of treaties in general. They reflect a preference for the maintenance of the reservations system established by the Vienna Convention on the Law of Treaties. Time will tell whether the Strasbourg jurisprudence on reservations will have an impact, and how much of an impact, on other normative multilateral conventions. Although, so far, that impact outside human rights treaties has been insignificant, in the long run the assertive stand taken by the Strasbourg institutions may prove useful in tempering the *laissez-faire* of the Vienna Convention's system.

III. Interpretation of Treaties

Sir Ian Sinclair observed that human rights bodies, in particular the European institutions, have put emphasis on the "object and purpose" of human rights treaties to such an extent that they sometimes overrode the "ordinary meaning" of the text or ignored such evidence of the parties' intention as found in the *travaux préparatoires*.[129] Sinclair gave as an example the *Golder* case, in which the Court read into Article 6 of the Convention not only procedural safeguards in legal pro-

125 Åkermark, *supra* note 123, 504-507.

126 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.

127 Report of the Human Rights Committee, Vol. I, 50 UN GAOR (Supp. No. 40), UN Doc. A/50/40, Annex VI, (1995) (UK); 51 UN GAOR (Supp. No. 40), UN Doc. A/51/40, Annex VI (1996) (France).

128 Report of the Human Rights Committee, Vol. I, 50 UN GAOR (Supp. No. 40), UN Doc. A/50/40, Annex VI, (1995).

129 Ian Sinclair, The Vienna Convention on the Law of Treaties 133 (2nd ed., 1984).

ceedings, but also a right of access to courts.[130] This approach of the Court to the interpretation of the Convention has been criticized by Judge Fitzmaurice.

> … 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. Such a view moreover overlooks the patent fact that, even in the case of constitutions proper, and even allowing for certain permissible interpretational differences of treatment between treaties and constitutions… there are rules of interpretation applicable to constitutions, and these rules have in large measure a character closely analogous to those of treaty interpretation.[131]

In contrast, Jonathan Charney noted that "to the extent that these Courts may have adopted a teleological approach, it seems to be 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."[132] Bruno Simma pointed out that another principle of interpretation has been developed by the European Court of Human Rights, *i.e.*, that the Convention must be interpreted in "in the light of present day conditions."[133]

The need to interpret treaties in light of human rights concerns, as developed by the European Court of Human Rights, has influenced the jurisprudence of the European Court of Justice on fundamental rights as a part of the general principles of law. Those fundamental rights are derived from the national constitutions of member States and from treaties to which they are parties. In the *Nold* case,[134] the European Court of Justice, after referring to the "constitutional traditions common to the Member States," noted that "[i]nternational treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed

130 *Golder Case* (United Kingdom), European Court of Human Rights, Judgment of 21 February 1975, 18 Eur. Ct. H.R. Rep. (Ser. A) (1975).

131 National Union of Belgian Police Case (Belgium), European Court of Human Rights, Judgment of 27 October 1975, 19 Eur. Ct. H.R. Rep. (Ser. A), Dissenting Opinion of J. Fitzmaurice, para. 9 (1975); *See also* dissenting opinion in Golder Case, *supra* note 130.

132 Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 Collected Courses 101, 188 (1998); *also* Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AJIL 1, 18-20 (1985).

133 Simma, *International Human Rights and General International Law*, IV(2) Collected Courses of the Academy of European Law 155, 185 (1993), citing the Court in the Tyrer Case (United Kingdom), European Court of Human Rights, Judgment of 25 April 1978, 26 Eur. Ct. H.R. Rep. (Ser. A), at 15-16 (1978).

134 *Nold, Kohlen-und Baustoffgroßhandlung v. Commission of the European Communities*, Court of Justice of the European Communities, Case 4/73, [1974] ECR 491, 507, para. 13.

within the framework of Community Law."[135] The Court took note of the ECHR and, in particular of the First Additional Protocol, which protects the right of property.[136]

IV. State Sovereignty, Consent to the Convention and Admission to the Council of Europe

Although it is not uncommon for international organizations to insist that various commitments be made by the applicant States as a condition for admission to membership, the Council of Europe has gone further. As discussed in greater detail in the chapter on subjects, before the Parliamentary Assembly (PA) recommends that the Committee of Ministers (CM) invite an applicant State to become a member of the Council, the PA must satisfy itself that such applicant State has met the conditions of Article 3 of the Statute of the Council, accepts the principle of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and is willing to collaborate sincerely and effectively in the realization of the aims of the Council. In essence, accession to the Council presupposes that an applicant State has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and human rights. The PA further requires that an applicant State accepts and ratifies the Convention and a number of additional protocols, including Protocol 6 and 13 prohibiting capital punishment. All this amounts to a robust and innovative use of admission to the Council of Europe as a tool to compel States to comply with the Strasbourg system of human rights and to ratify several human rights treaties. It establishes a model that may yet be followed by other organizations.[137]

V. Protection of the Environment

Before turning to the ECHR's jurisprudence on environment protection, a brief introduction to the law of environment might be useful. Under the pressure of public opinion, there has been considerable growth of normative texts both in international human rights and environmental law. Both corpora of law comprise numerous treaties and instruments, adopted at both the global and regional levels, with various scopes of application and covering the multiple facets of human rights and environmental protection. This parallel evolution has stimulated reciprocal influences and has had a significant impact on the interpretation of general international law. My special focus is to examine the vitality and scope of the influence that human rights and community interests have had on the shaping of environmental norms.

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135 *Id.*

136 First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952, in force 18 May 1954, Eur. T.S. No. 9.

137 *See* Meron & Sloan, *Democracy, Rule of Law and Admission to the Council of Europe*, 26 Israel Y.B. Human Rights 137 (1997).

International environmental law is mainly concerned with inter-State relations. Individuals rights and interests have often been given little consideration. From a human rights perspective, the relationship between human rights and environmental protection has principally been envisioned in several ways. One has been the formulation and recognition of an individual substantive right to a satisfactory, decent, healthy environment. Another approach has been to consider the conservation and improvement of environmental quality as a way to satisfy human rights.[138] A third has been focused on procedural rights, which have played an important role in this context.[139]

It is largely under the influence of the concept of human rights and the emergence of the concept of obligations *erga omnes* that international law has been moving towards multilateral approaches in many areas. Some multilateral conventions represent broad statements of community values and incorporate obligations that go beyond the traditional reciprocal obligations. The notion of community interests resonates through international environmental law.

a) A Right to a Healthy Environment

The Stockholm Declaration refrained from proclaiming a "right to a healthy environment." States have similarly been reluctant to recognize such a right in subsequent texts. Pointing away from human rights, the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992 ["UNCED"] seems even to have played down the role of human rights in the development of environmental law.[140] The Declaration on Environment and Development (1992) ["Rio Declaration"] and Agenda 21 contain very few references to human rights. Principle I of the Rio Declaration merely asserts that "[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[141] Developing countries wished to give

138 Merrills, *Environmental Protection and Human Rights: Conceptual Aspects, in* Human Rights Approaches to Environmental Protection 25, 39-40 (Alan E. Boyle and Michael R. Anderson eds, 1996); Cançado Trindade, *The Contribution of Interntional Human Rights to Environmental Protection, with Special Reference to Global Environmental Change, in* Environmental Change and International Law: New Challenges and Dimensions 244, 271 (Edith Brown-Weiss ed., 1992).

139 Kiss, *Le droit à la conservation de l'environnement*, 2(12) Revue Universelle des Droits de l'Homme 445, 447-448 (1990).

140 Malgosia Fitzmaurice, *Environmental Protection and the International Court of Justice*, *in* Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings 293, 304-305 (V. Lowe and M. Fitzmaurice eds., 1996); Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, *in* Human Rights Approaches to Environmental Protection 43 (Alan E. Boyle and Michael R. Anderson eds., 1996); Marc Pallemaerts, *La Conférence de Rio: Grandeur ou décadence du droit international de l'environnement*, 28 Revue Belge de Droit International 175, 192-195 (1995).

141 Declaration on Environment and Development, Rio de Janeiro, 13 June 1992, Principle I, *in* Report of the United Nations Conference on Environment and Development,

priority to development over environmental considerations,[142] while developed countries wished to avoid expensive constraints for their economies. At Rio, the United States did not revive its proposal to a right to a safe environment, which it had suggested in Stockholm.[143] A Draft Charter on Environmental Rights and Obligations originally drafted by experts of the U.N. Economic Commission for Europe (ECE) was not submitted because of the opposition of the United States and the United Kingdom.[144] Still, preparatory works for UNCED had made extensive reference to human rights. The set of legal principles proposed by the Experts Group of the World Commission on Environment and Development provided that "[a]ll human beings have the fundamental right to an environment adequate for their health and well-being."[145] Texts adopted after the Rio Declaration followed the same approach.[146] The Vienna Declaration adopted by the World Conference on Human Rights (1993) includes only tenuous references to the environment and those appear in the context of the right to development.[147] There has

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U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (1992), *reprinted in* 31 I.L.M. 874 (1992). In 1990 the General Assembly adopted a resolution on the "[n]eed to ensure a healthy environment for the well-being of individuals" which recognized that all individuals were entitled to live in an environment adequate for their health and well-being; and call[ed] upon Member States and intergovernmental and non-governmental organizations to enhance their efforts towards ensuring a better and healthier environment.

G.A. Res. 45/94, U.N. GAOR, 45th Sess., Supp. No.49, at 178, U.N. Doc. A/RES/45/94 (1990).

142 Dinah Shelton, *What Happened in Rio to Human Rights?* 3 Yb. Int'l Envtl. L. 75, 89 (1992).

143 At Stockholm, the U.S. had proposed:

> Every human being has a right to a healthful environment and safe environment, including air, water and earth, and to food and other material necessities, all of which should be sufficiently free of contamination and other elements which detract from the health or well-being of man.

U.N. Doc. A/CONF.48/PC/WG.1/CRP.4, at 65 (1971), *quoted in* Shelton, *supra* note 142, at 76-77.

144 Pallemaerts, *supra* note 140, at 195-196.

145 World Commission on Environment and Development, Our Common Future 348 (1987).

146 *See for instance*, Declaration of Santiago, Second Summit of the Americas, 19 April 1998, para. 20, *reprinted in* 37 I.L.M. 947 (1998).

147 It states that:

> The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. The World Conference on Human Rights recognizes that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone. [...]

Vienna Declaration and Programme of Action, World Conference on Human Rights, 14-25 June 1993, Part I, ¶ 11, U.N. Doc. A/CONF.157/23 (1993).

thus been a trend away from the recognition of a right to a healthy environment on the international level since the Stockholm Conference.[148]

None of the principal human rights treaties, whether universal or regional,[149] provided for a distinct individual "right to a healthy environment" at the time of their adoption. Indeed, it appears from the *travaux préparatoires* of the U.N. Covenants and the European Convention for the Protection of Human Rights and Fundamental Freedoms that such a right was not envisioned.[150] The African Charter on Human and Peoples' Rights, adopted in 1982, contains the so-called "third-generation" rights, including the right to development, the right to peace and the right to environment. Article 24 of the African Charter states that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development."[151] The relationship between the right to environment and development remained unclear and no indication was given as to what was meant by "a general satisfactory environment".[152] However human rights provisions frequently suffer from vagueness which is often corrected by further instruments, the work and jurisprudence of supervising bodies and State practice. The African Commission of Human Rights has not yet come up with a comprehensive interpretation of Article 24. The Commission has inquired about "[t]he principal legislation and other measures taken to fulfill the intentions of the Article regarding prohibition

148 There is a growing trend to refer to environmental protection in national constitutions but those provisions tend to be formulated as policy objectives for State authorities rather than as enforceable individual rights. *See* Human Rights and the Environment: Second Progress Report Prepared by Mrs Fatma Zhora Ksentini, Special Rapporteur, ¶¶ 10-27, U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., U.N. Doc. E/CN.4/Sub.2/1993/7 (1993).
Similarly, the Charter of Fundamental Rights of the European Union (2000) adopted in Nice recognizes the protection of the environment as a policy objective for the EU institutions and governments. Charter of Fundamental Rights of the European Union, Article 37, 2000 O.J. C 364/1.

149 International Covenant on Economic, Social and Cultural Rights, U.N. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967); International Covenant on Civil and Political Rights, U.N. G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 53, U.N. Doc. A/6316 (1967); American Convention on Human Rights, San Jose, 22 November 1969, OAS Official Records OAE/ser.k/XVI/1.1, Doc. 65, rev. 1, corr.2, *reprinted in* 9 I.L.M. 673 (1970); Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Eur. T.S. No. 5, 213 U.N.T.S. 221; European Social Charter, Turin, 18 October 1961, Eur. T.S. No. 35, 529 U.N.T.S. 89; African Charter on Human Rights and People's Rights, Banjul, 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), *reprinted in* 21 I.L.M. 58 (1982).

150 Paula M. Pevato, *A Right to Environment in International Law: Current Status and Future Outlook*, 8 R.E.C.I.E.L. 309, 313 (1999).

151 African Charter, *supra* note 149, art. 24.

152 Robin R. Churchill, *Environmental Rights in Existing Human Rights Treaties*, *in* Human Rights Approaches to Environmental Protection 89, 106 (Alan E. Boyle and Michael R. Anderson eds., 1996).

of pollution and efforts to prevent international dumping of toxic wastes or other wastes from industrialized countries. Scientific and efficient methods utilized for effective disposal of locally produced wastes." [153] The question of dumping toxic wastes in Africa was, of course, at the forefront of the international environmental agenda at the end of the 1980's,[154] but the Commission's approach was criticized as narrow and unduly anthropocentric, as no reference was made to the conservation of species or habitats.[155]

Within the Council of Europe, proposals to include a right to environment in the European Social Charter have not been accepted.[156] A human rights instrument that recognizes a human right to a healthy environment is the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ["Protocol of San Salvador"]. Its Article 11 provides that "[e]veryone shall have the right to live in a healthy environment and to have access to basic public services. The State Parties shall promote the protection, preservation, and improvement of the environment."[157] The Protocol does not define "healthy environment," nor does it indicate measures contemplated for "the promotion of the protection, preservation and improvement of the environment." Even though the Protocol's *travaux préparatoires* evince the parties' belief that the "concept of environment" was sufficiently established,[158] the Protocol embodies general policy objectives rather than a tangible, enforceable right. Its imple-

153 *Second Activity Report of the African Commission on Human and Peoples' Rights* (Section III, General Guidelines regarding the form and contents of reports to be submitted on the Peoples's Rights Articles 19 to 24 of the Charter), 14 June 1989, *reprinted in* 11(3/4) Hum. Rts. L.J. 390, 418 (1990).

154 The Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, Basel, 22 March 1989, U.N. Environment Programme, U.N. Doc. UNEP/IG.80/3, *reprinted in* 28 I.L.M. 657 (1989) was adopted in 1989, followed by the Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Bamako, 29 January 1991, *reprinted in* 30 I.L.M. 773 (1991). The latter convention was concluded by African countries dissatisfied by the Basel Convention.

155 Churchill, *supra* note 152, at 106.

156 The Council of Europe Parliamentary Assembly adopted a recommendation for the preparation of a Charter on environmental rights and duties that would provide for a human right to "an environment [...] conducive to [...] good health, well being and full development of the human personality." However, the Council of Ministers took no action. *Recommendation 1130 (1990) on the Formulation of a European Charter and a European Convention on Environmental Protection and Sustainable Development*, 28 September 1990, Council of Europe, Parliamentary Assembly, Doc. AREC1130.1403-28/9/90-27-E, *reprinted in* 1 Yb. Int'l Envt. L. 484, 485 (1990).

157 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, San Salvador, 17 November 1988, art. 11, OAS T.S. No. 69, *reprinted in* 28 I.L.M. 156 (1989).

158 Cançado Trindade, *supra* note 138, at 289.

mentation is furthermore dependent on the availability of resources.[159] Because the Protocol's monitoring and enforcement mechanisms are weak and economic conditions throughout much of Latin America are unsatisfactory, the Protocol might not be an effective tool for the protection of the environment. However it re-affirms that the improvement of the quality of the environment is an important aspect of the promotion of human rights.

b) Environmental Quality and the Protection of Existing Human Rights.

If the recognition of a distinct human right to environment remains controversial, there has been a growing recognition in international human rights case law that environmental factors are to be taken into account in the interpretation of traditional human rights. This has been particularly apparent in the case law of the European Court of Human Rights (and, before the reform, through Protocol 11) of the European Commission of Human Rights.

i) Respect of Private Life, Home and Property

The right to respect for one's private life and home is protected under the CCPR, the ECHR and the ACHR.[160] Most environment-related complaints under the European Convention alleged infringements of this right to one's private life and home by various forms of pollution. In the *Arrondelle* and *Baggs* cases, for example, the applicants alleged that the intensity, duration and frequency of the aircraft and traffic noise had badly affected their health. As the cases were settled by friendly settlements, including *ex gratia* payments, no decision was issued on the merits.[161] In the *Powell* and *Rayner* cases, which involved noise pollution in the vicinity of an airport,[162] the Commission held the complaints under Article 8 (right to respect for private and family life) to be manifestly ill-founded. In *Powell,* the noise was of such a magnitude as to amount to an interference with the right to private life and in *Rayner*, the Commission held that the interference was justified under Article 8(2), because of the economic well-being of the country.[163] However, the Commission found that there had been a violation of Article 13

159 Churchill, *supra* note 152, at 100.

160 Article 17/CCPR, Article 8/ECHR, Article 11/ACHR.

161 *Arrondelle v. United Kingdom*, App. No. 7889/77, Eur. Comm'n H.R., 23 Yb. Eur. Conv. H.R. 166 (1980); Report of 13 May 1982, 25 Yb. Eur. Conv. H.R. 235 (1982); Baggs v. United Kingdom, App. No. 9310/81, 44 Eur. Comm'n H.R. Dec. & Rep. 13 (1985); Report of 8 July 1987, 52 Eur. Comm'n H.R. Dec. &. Rep. 29 (1987).

162 The original application was first lodged with the Commission by the Federation of Heathrow Anti-Noise Groups. The Commission rejected the Federation's complaint, but the application was continued by three applicants. One claim was settled by a friendly settlement (Baggs, *supra* note 142). The cases of Powell and Rayner were held admissible under Article 13 of the Convention but inadmissible for the rest.

163 *Powell and Rayner v. United Kingdom*, App. No. 9310/81, Report of 16 October 1985, Eur. Comm'n H.R., ¶ 38, *reproduced in* 172 Eur. Ct. H.R. Reports (ser. A), Annex (1990).

(right to a remedy for violations of the Convention) in relation to Rayner's claim under Article 8,[164] and the case was referred to the Court.

To examine the complaint under Article 13 (right to an effective remedy), the Court had to consider whether the applicants had an arguable claim that their rights under Article 8 had been breached. The Court ruled that there had been interference with the private sphere of both applicants since "[i]n each case, albeit to a greatly differing degrees, the quality of the applicant's life and the scope of enjoying the amenities of his home [had] been adversely affected by the noise generated by aircraft using Heathrow airport."[165]

However, the Court found that the interferences were justified under Article 8(2). It took the view that it was neither for itself nor for the Commission to substitute their own assessment of the optimal policy for those of the authorities. In such a field as air traffic regulations, States enjoyed a wide margin of reference. The Court emphasized that some measures had been introduced to control aircraft noise progressively after consultation with persons and interest groups concerned; that international standards, developments in technology and the varying levels of disturbance had been taken into account; and that successive governments had concluded that problems caused by aircraft noise were better dealt with through regulatory measures than through court settlements. The margin of appreciation of the British Government had, thus, not been exceeded. The Court thus balanced individual and community interests. It examined in particular how the decision was reached, and whether the process allowed taking into account individual interests.[166]

In another case, the applicant alleged that the erection of a nuclear power station near her house had transformed the rural surroundings into an industrial environment with several negative consequences: alteration of the natural site, noise pollution, industrial light during the night, a microclimate modification, and loss of value of the property.[167] The applicant had obtained only partial satisfaction from French administrative courts. The French *Conseil d'État* had found that the applicant had not suffered a special injury but that the operator of the station was liable for noise nuisance. On the applicability of Article 8, the European Commission observed that noise nuisance of a considerable level could both affect the physical well-being of an individual, and prevent her from enjoying the amenities of her home. The State had a duty not only to refrain from direct interference but also to prevent interference by individuals.[168] It held, however, that the interference was justified because the operation of a nuclear power station was

164 *Id.,* at ¶¶ 55-61.

165 *Powell and Rayner v. United Kingdom*, 172 Eur. Ct. H.R. (ser. A), ¶ 40 (1990).

166 Richard Desgagné, *Integrating Environmental Values into the European Convention on Human Rights*, 89 Am. J. Int'l L. 263, 276 (1995).

167 *S. v. France*, App. No. 13728/88, Eur. Comm'n H.R., Decision of 17 May 1990, *reprinted in* 3 Revue Universelle des Droits de l'Homme 236 (1991) (in French only).

168 *Id.*, at 237.

in the interest of the economic well-being of the country and that compensation had been paid.

In the *López Ostra* case, the Commission and the Court found, for the first time, a breach of the Convention as a consequence of environmental harm. The applicant complained that she had been unable to obtain relief under Spanish law for noxious emissions from a water purification and waste treatment station constructed near her home. She claimed that the passive attitude of Spanish authorities with regard to the smells, noise, and polluting fumes caused by the plant constituted a violation of Articles 3 (prohibition of torture or inhuman or degrading treatment or punishment) and 8 of the Convention.[169] On the relationship between the right to private and family life and environmental degradation, the Court stated: "Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however seriously endangering their health."[170]

In earlier case-law, the Court had taken the view that Article 8 not only protects private life against arbitrary interferences by public authorities, but also imposes on the State a duty to take appropriate measures to ensure respect for residents' private lives.[171] Although in the *Lopez Ostra* case, the interference was not directly attributable to public authorities, the Court focused on a positive duty approach, by examining whether the authorities took the measures necessary for protecting the applicant's right. It found that after the initial relocation of the inhabitants from the neighborhood, the municipality had failed to take such measures. The Court criticized the behavior of public authorities for resisting the decisions of lower tribunals, which had ordered the closing down of the station.

In *Guerra v. Italy*, the applicants complained that the failure of the authorities to inform the public about the hazards and the procedure to be followed in the event of a major accident infringed their right to freedom of information. The Court found that by failing to provide essential information that would have enabled the applicants to assess the risks they and their families might run, the State had not fulfilled its obligation to secure the applicants' right to respect for their private and family life (Article 8).[172]

In so far as of the right to property is concerned, the European Commission has taken the view that there is a breach of Article 1 of Protocol I[173] where pollution and other environmental degradation result in a substantial uncompensated

169 The Commission found a breach of Article 8 only. López Ostra v. Spain, 313C Eur. Ct. H.R. Reports (ser. A), ¶31 (1994).

170 *Id.*, ¶ 51.

171 *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser.A), ¶ 31 (1979); Airey c. Ireland, 32 Eur. Ct. H.R. (ser. A), ¶ 33 (1979); X. and Y. v. Netherlands, 91 Eur. Ct. H.R. (ser. A), ¶ 23 (1985).

172 *Guerra v. Italy*, Eur. Ct. H.R. Rep. Judg. & Dec. (1998-I), ¶ 60.

173 First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952, Eur. T.S. No. 9.

fall in the value of the property.[174] Environmental degradation that merely impairs the enjoyment of property has, however, not been regarded as a breach. As the Commission stated in *Rayner* "[t]his provision does not, in principle, guarantee a right to the peaceful enjoyment of possessions in a pleasant environment."[175]

In Strasbourg institutions' case law, the legitimacy of the aim pursued by the impugned measures has seldom been questioned by the Commission or the Court. Terms such as "the economic well-being of the country" are regarded as wide enough to protect most economic or industrial activities. The Court has recognized the need for a fair balance between the economic well-being of the community and individual interests. But the Court has not given much guidance as to how to strike a balance. Moreover, it has recognized that governmental policies and regulations to ensure an adequate level of environmental protection may legitimately impinge on such protected rights as respect for one's private life and property.[176] Recognizing that environmental protection is a legitimate aim advancing the general interest, in the *Fredin* case, the European Court also accepted that considerable latitude is left to States in the field of environmental protection "the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question."[177]

ii) The Right to Life

The right to life, recognized in all major human rights conventions,[178] has been mostly interpreted as the right not to be arbitrarily deprived of one's life.[179] Capital punishment, of course, is outlawed for parties to Protocol 6 to the Convention and to the 2nd Optional Protocol to the Political Covenant aiming at the abolition of the death penalty. That the protection of the right to life involves positive obligations has emerged from the case law of the European Convention of Human Rights.[180] In *L.C.B. v. United Kingdom*, the applicant, who had suffered from leukemia since childhood, complained of the failure of the State to warn and advise her parents of the risks entailed by the alleged exposure of her father to

174 Stefan Weber, *Environmental Information and the European Convention on Human Rights*, 12(5) Hum. Rts. L.J. 177, 181 (1991).

175 *Powell and Rayner v. United Kingdom*, App. No. 9310/81, Appendix III, 47 Eur. Comm'n H.R. Dec. &. Rep. 5, 14 (1986).

176 Cases cited in Desgagné, *supra* note 166, at 280-282.

177 *Fredin v. Sweden*, 192 Eur. Ct. H.R. (ser. A), ¶ 51 (1991).

178 ICCPR, *supra* note 149, art. 6; ECHR, *supra* note 149, art. 2; ACHR, *supra* note 149, art. 4; African Charter, *supra* note 149, art. 4.

179 Yoram Dinstein, The Right to Life, Physical Integrity, and Liberty, *in* The International Bill of Rights: The Covenant on Civil and Political Rights 114, 115 (Louis Henkin ed., 1981).

180 Churchill, *supra* note 152, at 91.

radiation at Christmas Island at the time of the United Kingdom's nuclear tests. The Court construed Article 2 of the European Convention as

> enjoin[ing] the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction."[181] The Court viewed its task as "to determine whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk.[182]

Some complaints invoking the right to life in relation to environmental concerns have been submitted to U.N. human rights bodies. Most involve nuclear issues. Before the Human Rights Committee, citizens of Port Hope (Ontario) alleged that a large quantity of nuclear wastes stored in their locality constituted a violation of Article 6 of the Political Covenant. The petition was rejected because local remedies had not been exhausted, but the Committee observed that the communication raised serious issues regarding the duty of State parties to protect the right to life.[183] Human rights bodies have generally dismissed as ill-founded complaints where applicants were not personally exposed to an imminent danger, and thus could not be considered as especially affected victims. In *E.W. et al. v. The Netherlands*, the applicants alleged that the deployment of cruise missiles fitted with nuclear warheads on Netherlands territory violated their rights under Article 6 of the Political Covenant. The Human Rights Committee decided that the communication was inadmissible, since

> the preparations for deployment of cruise missiles ... and the continuing deployment of other nuclear weapons in the Netherlands did not, at the relevant period of time, place the authors in the position to claim to be victims whose right to life was then violated or under imminent prospect of violation.[184]

The European Court and Commission have similarly dismissed complaints as ill-founded where applicants were not personally exposed to an imminent danger.[185]

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181 *L.C.B. v. United Kingdom*, Eur. Ct. H.R. Rep. Judg. & Dec. (1998-III), ¶ 36.

182 *Id.*

183 *E.H.P. v. Canada*, Communication No. 67/1980, Human Rights Committee, 17th Sess., U.N. Doc. CCPR/C/OP/2 (1990), *reprinted in* 2 Selected Decisions of the H.R. Committee Under the Optional Protocol 20 (1990).

184 *E.W. et al. v. The Netherlands*, Communication No. 429/1990, Human Rights Committee, 47th Sess., at ¶ 6.4, U.N. Doc. CCPR/C/47/D/429/1990 (1993).

185 For an early example of the Commission's treatment of this issue, *see Dr. S. v. Federal Republic of Germany*, App. No. 715/60, Eur. Comm'n H. R., Decision of 5 August 1960, unpublished. In this complaint brought before the European Commission in the 1960's, the applicant alleged that nuclear tests, the installation of launching pads for nuclear weapons, storage of nuclear materials and the dumping at sea of nuclear wastes by the Federal Republic of Germany were endangering human lives. The Commission declared the

In *Balmer-Schafroth v. Switzerland*, the applicants alleged violations of Article 6 of the European Convention (right to a fair trial) and Article 13 (right to an effective remedy) for not being allowed to challenge a decision of the Swiss Federal Council to permit the extension of the operating license of a nuclear power station. The Government challenged the applicability of Article 6 on the ground that the complaint did not concern "civil rights and obligations." The Court considered that the right on which the applicants relied was "the right to have their physical integrity adequately protected from the risks entailed by the use of nuclear energy," a right recognized by Swiss law. However, it held that Article 6 was not applicable since the applicants had not

> establish[ed] a direct link between the operating conditions of the power station [...] and their right to protection of their physical integrity, as they [had] failed to show that the operation of the [...] power station exposed them personally to a danger that was not only serious but also specific and above all, imminent.[186]

That judgment (adopted by a vote of twelve to eight) was, however, strongly criticized for failing to take into account developments in international environmental law. Judge Pettiti, thus wrote for the dissenting judges:

> The majority appear to have ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle and the principle of conservation of the common heritage. United Nations Resolution no. 840 of 3 November 1985 on the abuse of power was adopted as part of the same concern. Where the protection of persons in the context of the environment and installations posing a threat to human safety is concerned, all States must adhere to those principles.
> [...]
> The Court's assessment of the tenuousness of the connection and of the absence of imminent danger is, in my opinion, unfounded. Does the local population first have to be irradiated before being entitled to exercise a remedy?[187]

iii) Right to Information and Participation in Decision-Making

All general human rights treaties provide for freedom of expression. Article 10 of the European Convention includes "the right to receive and impart information

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complaint ill-founded in the absence of violation of any of the guaranteed rights (Article 2). *See* J.E.S. Fawcett, The Application of the European Convention on Human Rights 37 (1987); Maguelonne Déjeant-Pons, *L'insertion du droit de l'homme à l'environnement dans les systèmes régionaux de protection des droits de l'homme*, 2 Revue Universelle des Droits de l'Homme 461, 464 (1991); Churchill, *supra* note 152, at 91.

186 *Balmer-Schafroth v. Switzerland*, Eur. Ct. H.R. Rep. Judg. & Dec. (1997-IV), ¶ 40.

187 *Id.*

and ideas without interference by public authority and regardless of frontiers."[188] Respect for the right to receive information has been construed by the European Court as "basically prohibi[ting] a Government from restricting a person from receiving information that others wish or may be willing to impart to him"[189] and not as a positive obligation of public authorities to provide the information they hold. The right to environmental information may, however, involve the right to life, the freedom of expression and the right to respect for one's private life. As noted above, in the *Guerra* case, the applicants alleged that the failure of the authorities to inform the public about the hazards and the procedure to be followed in the event of a major accident at a nearby chemical factory infringed their right to freedom of information. The Court reaffirmed that freedom of information did not impose any positive information obligations on State authorities,[190] but concluded that State authorities had failed to secure the applicants' right to respect for their private and family life by not providing essential information that would have enabled them to assess the risks of living in a town particularly exposed to danger in the event of an industrial accident.[191] In another case, the Court also held that. "Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information."[192] In this case, the applicants complained that they had been denied access to the records compiled in relation to the radiation levels and the medical treatment they had received following experimental nuclear explosions at Christmas Islands carried out by the British Government in the 1950's. However, no violation of Article 8 was found since the applicants had not availed themselves of an existing procedure to request from the competent authorities the production of the documents in question.

These cases suggest that the Court has been moving towards the recognition of a right to environmental information based on Article 8 of the Convention. A State would thus have the duty to provide or disseminate information it holds when this information is likely to contribute to the protection of guaranteed rights. The Court did not go as far as to impose a duty to collect information that might be relevant.[193]

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188 ECHR, *supra* note 149, art. 10.

189 *Leander v. Sweden*, 116 Eur. Ct. H.R. Reports (ser. A) at 29 (1987). *Gaskin v. United Kingdom*, 160 Eur. Ct. H.R. Reports (ser. A) at 21 (1989).

190 *Guerra v. Italy*, *supra* note 172, ¶ 53.

191 *Id.*, ¶ 60.

192 *McGinley and Egan v. United Kingdom*, Eur. Ct. H.R. Rep. Judg. & Dec. (1998-III), ¶ 101.

193 Sandrine Maljean-Dubois, *La Convention européenne des droits de l'homme et le droit à l'information en matière d'environnement: A propos de l'arrêt rendu par la CEDH le*

iv) Access to Remedies

Human rights instruments require access to remedies. Article 6 of the European Convention provides that there must be "a fair and public hearing within a reasonable time by an independent and impartial tribunal" in the determination of a person's "civil rights and obligations."[194] This provision has been construed by the Court as guaranteeing access to a tribunal for the determination of one's private rights and obligations. Article 6 may thus be invoked to challenge actions by States and public authorities where an environmental issue can be framed in terms of "civil rights and obligations". For instance, in the *Zander* case, the applicants owned a property adjacent to land on which a company was storing and treating household and industrial wastes. The company applied to a licensing board for a renewal of its permit and an authorization to expand its activities. The applicants argued before the board that since the new activities entailed additional risks of water contamination, the renewed permit should impose on the company an obligation to supply drinking water free of charge in case of pollution. The board granted the permit but rejected the applicants' request. The applicants alleged a violation of Article 6, since no judicial review of the board's decision could be obtained. The Court found that the applicants could invoke Article 6 since they "could arguably maintain that they were entitled under Swedish law to protection against the water in their well being polluted as a result of [the company]'s activities on the dump."[195] Since the decision of the licensing board could not have been reviewed by a tribunal, a violation of Article 6 was found.

Article 6 may also be invoked where environmental measures bear on "civil rights and obligations". In *De Geouffre de la Pradelle v. France*, a part of the applicant's land had been designated as an area of outstanding beauty, thereby restricting its use. An application to the French *Conseil d'Etat for* judicial review of the decree was held inadmissible, since the two-month period allowed by the law for challenging such decrees had expired. The applicant alleged before the European Court of Human Rights that the pertinent law was unduly vague. The Court decided that "[a]ll in all, the system was [...] not sufficiently coherent and clear. Having regard to the circumstances of the case as a whole, the Court finds that the applicant did not have a practical, effective right of access to the *Conseil d'État*."[196] Most cases raising environmental issues have involved judicial review of administrative acts. Where no judicial review is provided, as in *Denev v. Swe-*

19 février 1998 en l'affaire Anna Maria Guerra et 39 autres c. Italie, 4 Revue Générale de Droit International Public 995, 1015-1017 (1998).

194 ECHR, *supra* note 149, art. 6.

195 *Zander v. Sweden*, 279B Eur. Ct. H.R. (ser. A), ¶ 24 (1993).

196 *De Geouffre de la Pradelle v. France*, 235B Eur. Ct. H.R. (ser. A), ¶ 35 (1992).

den,[197] *Benthem v. Netherlands*,[198] and *Fredin v. Sweden*,[199] violations of Article 6 have been found.

v) Indigenous Rights

Indigenous rights have sometimes been blended with traditional human rights. The European Commission has admitted that the life style of an indigenous community could be considered as an element of one's "private life." In an application against Norway, two Norwegian Lapps asserted that the erection of a hydroelectric plant and the submersion of a part of the valley in which they lived constituted a violation of Article 8. The Commission stated that:

> under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead as being "private life," "family life," or "home."
>
> …
>
> [T]he consequences, arising for the applicants from the construction of the hydroelectric plant, constitute[d] an interference with their private life, as members of a minority, who move their herds and deers around a considerable distance.[200]

The Commission found, however, that as only a small amount of land would be flooded, the measure was justified by the economic well-being of the country.

To conclude this discussion of environment let me say that the tremendous growth in treaties, declarations, procedures and mechanisms for the protection of the environment has not yet resulted in a consensus on a new generic right to a healthy environment. While human rights have produced an impressive corpus of substantive norms, environmental law has focused on procedures and mechanisms. That the quality of the environment is an important aspect for the enjoyment of human rights has gained acceptance since the Stockholm Declaration. Human rights bodies, notably the European Court of Human Rights, have factored in environmental protection in their interpretation of human rights provisions. Where environmental degradation has reached a threshold that affects some individuals or a defined group of individuals, it can be invoked under such rights as the right to life, to privacy or to property.

Although human rights law contains some positive obligations, most human rights obligations – especially in civil and political rights – are obligations of public authorities to refrain from certain conduct. In the case of positive obligations, States are allowed a wider margin of appreciation, involving balancing of differ-

197 *Denev v. Sweden*, App. No. 12570/86, 59 Eur. Comm'n H.R. Dec. &. Rep. 127 (1989).

198 *Benthem v. Netherlands*, 97 Eur. Ct. H.R. (ser. A) (1985).

199 *Fredin v. Sweden*, 192 Eur. Ct. H.R. (ser. A) (1991); *also* Skärby v. Sweden, 180B Eur. Ct. H.R. (ser. A) (1990); Oerlemans v. The Netherlands, 219 Eur. Ct. H.R. (ser. A) (1990).

200 *G. and E. v. Norway*, App. Nos. 9278/81 and 9415/81, 35 Eur. Comm'n H.R. Dec. &. Rep. 30, at 35-36 (1984).

ent values and interests. The discourse on environmental rights has been shifting from the possible recognition of a substantive right to a healthy environment to procedural rights, rights that may allow the different interests to be voiced in the formulation and implementation of environmental law.

Human rights law relies only marginally on reciprocity. International environmental law is based on the need for cooperative action to tackle problems that affect States on the regional plane or the entire international community. As such, it is closer to traditional international law, the law of cooperation. Here reciprocity still has its role to play, but it is a broader, multilateral reciprocity, reflecting collective interests.

Human rights law focuses on governmental behavior towards individuals, and only secondarily on individual behavior. In contrast, the central aim of environmental law is to affect and constrain private behavior. Duties imposed by environmental law fall not only on States, but also on non-State actors. Indeed, the ultimate objective of minimizing environmental harm can only be attained by changes in the behavior of private actors. Governmental actions are only a part of the equation.

Still, by interfering in the relationships between a State and its nationals and in domestic policies, international environmental law is intrusive on domestic jurisdiction. In this respect, the influence of human rights law on international environmental law is important. Human rights law has challenged absolute sovereignty. Environmental law has had a similar role. Central to these developments is the emphasis on the broader interests of the international community. Kiss and Shelton note that States' obligations in regard of the environment

> correspond to the functions which States must fulfill in serving the common interest of humanity. When they are added to the obligations arising from other recognized subjects of the common interest, such as human rights and humanitarian law, the center of the international society shifts from the individual interest and sovereign rights of each of its members to collective concerns and corresponding State functions.[201]

The focus of environmental law on inter-State cooperation and on the regulation of private behavior is reflected in the discourse on whether there has already emerged a generic right to a healthy environment. Inter-State environmental cooperation is primarily a political process, which aims at reconciling competing interests and policies that affect the interests and behavior of private actors. Where in the field of human rights there is a tension between the interests of individuals and those of the State, in the environmental field the range of competing interests is more diversified. An examination of the human rights case law shows that human rights litigation "presents limited opportunities to foster the protection of the environment in general. Environmental-protection has an important public facet that cannot be translated into an individual perspective and involves social

201 Alexandre Kiss and Dinah Shelton, International Environmental Law 19 (1991).

choices that cannot be dealt with piecemeal."[202] Even such litigation has been limited primarily to the European Court of Human Rights.

The need to reconcile diverging public and private interests is reflected in the increased participation of NGOs. As pointed out by Sands, "States can no longer claim to be the sole holders of the right to participate in the international legal order and its processes, having been joined by a new range of actors."[203] In the field of human rights, the broader participation of the NGOs has led the way to more citizen involvement in the promotion of new instruments and monitoring. The role of NGOs in the environmental field is more diversified, as are the different interests of their constituencies. Environmental-protection NGOs may clash with business NGOs in trying to influence treaty negotiations.[204]

VI. State Responsibility: Erga Omnes *Obligations*

The ECHR 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."[205] Standing to submit claims against any other party to the Convention is not dependent on any special interest or nexus with the victim. The Convention thus anticipated the principle of *erga omnes* obligations stated by the International Court of Justice in the *Barcelona Traction* case.[206] Of course, while the ECHR recognizes the principle of obligations *erga omnes contractantes*, the *Barcelona Traction* case contemplated such obligations under general international law.[207]

The ECHR may also have influenced environmental treaties. The Bern Convention thus provides that "any dispute between Contracting Parties concerning the interpretation or application of this Convention which has not been settled on the basis of the provisions of the preceding paragraph or by negotiation between the parties concerned shall, unless the said parties agree otherwise, be submitted, at the request of one of them, to arbitration [...]." [208] As obligations under the Convention concern national measures for the conservation of wild flora, wild fauna and natural habitats, a State party would probably not be required to have suffered a specific injury to challenge another Party's performance.

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202 Desgagné, *supra* note 166, at 294.

203 Philippe Sands, *Introduction to* Greening International Law, at xxv (Philippe Sands ed., 1993), *quoted in* Raustiala, *infra* note 204, at 567.

204 Kal Raustiala, *The Participatory Revolution in International Environmental Law*, 21 Harvard Envtl. L. Rev. 537, at 558. (1997).

205 Article 33 (former Article 46).

206 *Barcelona Traction, Light, and Power Company (Second Application) (Belgium v. Spain)*, International Court of Justice, Judgment of 5 February 1970, [1970] ICJ Rep. 3, at 33.

207 Meron, Human Rights and Humanitarian Norms as Customary Law 190-196 (1989).

208 Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, in force 1 June 1982, Eur. T.S. No. 104, Article 18.

VII. State Responsibility: Diplomatic Protection

Human rights pertaining to remedies against violating States and to the responsibility of the State to ensure human rights of all persons subject to its jurisdiction, and especially Article 33 (former Article 46) of the ECHR, are having an impact on the traditional law of diplomatic protection. There is a trend to present as human rights issues claims which in the past would have been presented as issues of diplomatic protection of citizens abroad.

This development may well be illustrated by the application presented by Denmark against Turkey for alleged violations of the ECHR "on behalf" of a Danish national. Denmark's application includes both elements of diplomatic protection – infringements by a foreign State of the rights of one of its nationals – and elements more characteristic of human rights – violations of the Convention. Denmark requested the European Court of Human Rights to examine both the treatment of its citizen and whether the interrogation techniques applied to him were used in Turkey as a widespread practice.[209] The Danish application thus challenges not only the treatment of an alien, but also the treatment by the foreign State of its own nationals.

VIII. Responsibility and Territoriality

The ECHR and its jurisprudence have had an effect on the territorial scope of responsibility of States under international law. The protection provided by the CCPR, the ECHR and the ACHR extends to persons "within the territory of a State or subject to its jurisdiction" (CCPR), to persons "within the jurisdiction of" of a State (ECHR) or to persons "subject to the jurisdiction" of the State (ACHR).[210] In the *Soering* case, the European Court stated that "Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.[...]."[211] Nevertheless, the Court held that the decision to extradite a fugitive may engage the responsibility of a contracting State under the Convention where there exist substantial grounds for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The Court added:

209 *Denmark v. Turkey* (Preliminary Objections), European Court of Human Rights (First Section), Appl. No. 34382/97, Decision as to admissibility of 8 June 1999. (The decision is available at <http://www.echr.coe.int/hudoc/>).

210 *See* Meron, *Extraterritoriality of Human Rights Treaties*, 89 AJIL 78 (1995).

211 *Soering Case* (United Kingdom), European Court of Human Rights, Judgment of 26 June 1989, 161 Eur. Ct. H.R. Rep. (Ser. A), para. 86 (1989).

> In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. [...] Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. [...] In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.[212]

Thus, Article 1 is pertinent to the application of extradition agreements concluded by the parties to the ECHR. Another aspect of the interpretation and application of Article 1 of the Convention, and one which has influenced the work of the Human Rights Committee, has been to construe the word "jurisdiction" as extending to areas outside of a State's national territory where that State's authorities exercise power over people there present.[213] This has implications for international humanitarian law as well.

Thus, the Commission 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 labor, destruction of property, forced expatriation and separation of families in the context of occupation.[214] In another case, the Commission reiterated that:

> the authorized agents of the State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.[215]

Françoise Hampson thus commented that "[i]t is the nexus between the person affected, whatever his nationality, and the perpetrator of the alleged violation

212 *Id.*, para. 87. The same principles were applied in cases of expulsion, *Case of Cruz Varas and Others v. Sweden*, Judgment of 20 March 1991, 201 Eur. Ct. H.R. Rep. (Ser. A) (1991); Case of Vilvarajah and Others v. the United Kingdom, Judgment of 30 October 1991, 215 Eur. Ct. H.R. Rep. (Ser. A) (1991); *Case of Chahal v. the United Kingdom*, Judgment of 15 November 1996, V Reports Judg. & Dec. (1998).

213 Meron, *supra* note 210, 79-81 (1995).

214 *Cyprus v. Turkey*, European Commission on Human Rights, Appl. No. 6780/74 and 6950/75, Report of 10 July 1976, 2 Eur. Comm'n Dec. & Rep. 1254 E.H.R.R. 482 (1975).

215 *W. v. Ireland*, European Commission on Human Rights, Appl. No. 9360/81, Decision on admissibility of 28 February 1983, 32 Eur. Comm'n Dec. & Rep. 211, 215 (1983); *also Cyprus v. Turkey*, *supra* note 214, at 136.

which engages the possible responsibility of the State and not the place where the action takes place."[216]

In a case also related to the attribution of responsibility for acts committed in the northern part of Cyprus, *Loizidou* v. *Turkey*, the Commission held that "Authorized agents of a State, including armed forces, not only remain under its jurisdiction when abroad but also bring any other persons 'within the jurisdiction' of that State to the extent that they exercise authority over such persons."[217] It then distinguished between acts imputable to Turkey and those imputable to the Northern Cyprus authorities by reference to a criterion of "actual control." In that same context, the Court 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.[218]

Similarly, in the case of *Cyprus* v. *Turkey* (Judgment of 10 May 2001), the Court confirmed its *Loizidou* decision and held that the acts complained of fell within the jurisdiction of *Turkey* within the meaning of Article 1 of the Convention and therefore entailed Turkey's responsibility under the Convention.[219] Similarly, in the case of *Issa and others* v. *Turkey* (Decision of 30 May, 2000), the Court found admissible complaints arising from alleged violations of the Convention by the Turkish armed forces during a short incursion into northern Iraq (March 19-April 16, 1995).

However, a few months later, in its 2001 decision on admissibility of the NATO bombing case (*Banković Case*),[220] the ECHR resisted a further pushing of the envelope of jurisdiction. The question in this case, whether the civilian victims of the NATO bombing of a Belgrade television station could sue the NATO governments that were parties to the European Convention before the ECHR, turned on the construction of the word "jurisdiction" in Article 1 of the Convention. The defendant governments disputed the admissibility of the case, contend-

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216 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).

217 *Chrysostomos and Papachrysostomou v. Turkey*, European Commission on Human Rights, Appl. No. 15299/89 and 15300/89, Report of 8 July 1993, 86 Eur. Comm'n Dec. & Rep. 4, at paras. 96 and 170. The Council of Ministers agreed with the report of the Commission: Resolution DH (95) 245 of 19 October 1995.

218 *Loizidou v. Turkey*, *supra* note 117, para. 62.

219 Grand Chamber Decision (Application no. 25781/94), at 93.

220 Grand Chamber Decision as to the Admissibility of Application no. 52207/99 by Bancovic and others against Belgium and others.

ing that the application was incompatible *ratione personae* with the provisions of the Convention because the applicants did not fall within the jurisdiction of the respondent States within the meaning of Article 1 of the Convention. They denied the applicants' argument that they had control of the airspace over Belgrade and argued, that in any event, such control could not be equated with the territorial control of the nature and extent considered in the decisions concerning northern Cyprus, which involved the exercise of effective control or of legal authority. They considered the applicants' comparisons with the *Soering Case* to be fundamentally flawed. At the time the impugned decision was about to be taken in respect of Soering's extradition, he was detained on the territory of the respondent State, a situation constituting a classic exercise of authority over an individual to whom the State was obliged to secure the full range of Convention rights.

The Court rejected the relevance of its case law pertaining to situations where the extradition or expulsion of a person by a Contracting State may engage the responsibility of that State under the Convention (the above-cited *Soering Case,* at § 91, *Cruz Varas* and *Others* v. *Sweden,* judgment of 20 March 1991, Series A no. 201, §§ 69 and 70, and the *Vilvarajah and Others* v. *United Kingdom,* judgment, of 30 October 1991, Series A no. 215, § 103). Liability in such cases is incurred by an action of the respondent State concerning a person on its territory and clearly within its jurisdiction. Such cases do not concern the actual exercise of a State's competence or jurisdiction abroad. The Court concluded:

> In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[221]

> In short, the Convention is a multilateral treaty operating, subject to Article 56 of the Convention[222], in an essentially regional context and notably in the legal space *(espace juridique)* of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap in human rights' protection has so far been relied on by the Court in favor of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.[223]

221 Id., at para. 71.

222 Article 56 § 1 enables a Contracting State to declare that the Convention shall extend to all or any of the territories for whose international relations that State is responsible.

223 Id., at para. 80.

> The Court is not therefore persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question.[224]

The Court thus refused to extend its expansive interpretation of jurisdiction to the exercise of airpower over foreign territory. Indeed, to view the plaintiffs' claims as involving violations of human rights appears counterintuitive. The legality and the consequences of air power over foreign territory is best left to the *lex specialis* of international humanitarian law.

*IX. State Responsibility for Non-Governmental Acts and Imputability (***Drittwirkung***)*

Human rights have had an impact on the responsibility of a State for unauthorized acts of its officials and, in some circumstances, even for acts committed by non-governmental agencies or individuals in the country. This may be important for the law of State responsibility also in matters not involving human rights. There are increasing departures from the classic paradigm whereby States are responsible only for conduct attributable to them, that is, mainly the conduct of State agencies.[225]

Although contemporary human rights law focuses on the duty of governments to respect the human rights of individuals, human rights violations committed by one private person against another (*e.g.* deprivation of life and liberty or the perpetration of acts of egregious discrimination) cannot be placed outside the ambit of human rights law if that law is ever to gain significant effectiveness. This is true also of some other rights and obligations under international law. In our era, many activities are carried out by non-State entities. Making them comply with applicable rules of international law may be essential. The ICJ acknowledged this reality when, in a different context, it deplored "[t]he frequency with which at the present time the principles of international law ... are set at naught by individuals or groups of individuals ..."[226] Because the purpose of human rights law is to protect human dignity, and because some essential human rights are often breached by private persons, the obligation of States to observe and ensure respect for human rights and to prevent violations cannot be confined to restrictions upon governmental powers but must extend to the prevention of some pri-

224 Id. at para. 82.

225 *See generally* Meron, Human Rights and Humanitarian Norms as Customary Law 155-171 (1989).

226 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, International Court of Justice, Judgment of 24 May 1980, 1980 ICJ Rep. 4, 42.

vate "interferences" with human rights,[227] through prevention, punishment and, where appropriate, providing the victim with effective civil remedies against the responsible private actor.

Human rights obligations stated in international humanitarian and human rights instruments increasingly extend to private individuals and to private action. In some areas of international law, such as that governing labor rights and conditions of work, the relevant international labour conventions routinely regulate relations between private employees and employers. The prohibitions of slavery and genocide apply, of course, also to private persons and groups. So does the prohibition of hostage-taking.

Together with the Human Rights Committee and the Inter-American human rights institutions, Strasbourg institutions applying Article 1 of the ECHR have helped to establish the duty of States to ensure compliance by private persons with some of the Convention's norms, or, at a minimum, to adopt measures "against private interference with enjoyment of the rights..."[228] That Article provides that the "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

In the *Young, James and Webster Case (Closed Shop Case)* (1981),[229] the Court, applying Articles 1 and 11 (which guarantee the rights of peaceful assembly and freedom of association, including the right to form and to join trade unions), found that Article 11 had been violated. It stated that:

> [a]lthough the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis. Accordingly, there is no call to examine

227 Forde, *Non-Governmental Interferences with Human Rights*, 56 Brit. Yb. Int'l L. 253 (1985). Note particularly the discussion of the practice of the European Commission of Human Rights and the European Court of Human Rights with respect to non-governmental interference with human rights. *Id.*, at 271-8. *See* Andrew Clapham, Human Rights in the Private Sphere 0178-244 (1993); Andrew Clapham, *Revisiting Human Rights in the Private Sphere: Using the European Convention on Human Rights to Protect the Right of Access to the Civil Courts*, in Craig Scott (ed.), Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation 513 (2001).

228 Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, *in* The International Bill of Rights: The Covenant on Civil and Political Rights 72, 77-78 (Louis Henkin ed. 1981); Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 Am. U. L. Rev. 1, 31-32 (1982); Sperduti, *Responsibility of States for Activities of Private Law Persons*, *in* [Installment] 10 Encyclopedia of Public International Law 373, 375 (R. Bernhardt ed. 1987).

229 European Court of Human Rights, Judgment of 13 August 1981, 44 Eur. Ct. H.R. Rep. (Ser. A) (1981); 62 Int'l L Rep. 359 (1982).

> whether, as the applicants argued, the State might also be responsible on the ground that it should be regarded as employer or that British Rail was under its control.[230]

In the *National Union of Belgian Police Case*,[231] the Commission interpreted Article 11 by taking into account UN human rights instruments and ILO Conventions Nos. 87 and 98. It concluded that the latter Conventions reflect widely accepted labor law standards which are elaborated and clarified by the competent organs of the ILO. As a corpus of special rules binding also on European States, they should not be ignored in the interpretation of Article 11 (freedom of assembly and association), particularly if the European Convention is to keep pace with the rules of international labor law and if it is to remain in harmony with the concepts used in international labor law and practice.[232] On this broad international law basis, the Commission concluded that freedom of association stated in Article 11 "may be legitimately extended to cover State responsibility in the sphere of labor management relations".[233]

The Commission followed the same approach in *Swedish Engine Drivers' Union* Case.[234] Taking into account once more UN human rights instruments and the ILO Conventions, the Commission rejected the assertion that Article 11 provided protection only against governmental interference. On the contrary, the Article was "designed to protect unions against all kinds of interference, including interference by employers".[235] Invoking the principle of effectiveness in treaty interpretation, the Commission concluded: "If it is the role of the Convention and the function of its interpretation to make the protection of individuals effective, the interpretation of Article 11 should be such as to provide, in conformity with international labor law, some protection against "private" interference." [236]

The Court addressed the duty of States to conform to the Convention by adopting legislative measures governing certain relations between private individuals. In the case of *X and Y v. The Netherlands*,[237] the applicant claimed that the right of both his daughter and himself to respect for their private life, guaranteed by Article 8 of the European Convention, had been infringed and that Article 8 required that parents must be able to have recourse to remedies in the event of their children being the victims of sexual abuse. Finding that Article 8 had in fact been breached, the Court stated:

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230 Id. para. 4962 Int'l L. Rep. 376-7 (1982).

231 Appl. No. 4464/70, 17 Eur. Ct. H.R. (Ser. B) (1976).

232 *Id*., at 51. See also *id*., at 49-51.

233 *Id.,* at 52.

234 Appl. No. 5614/72, 18 Eur. Ct. HR (Ser. B), at 42-46 (1977).

235 *Id.,* at 45.

236 *Id.,* at 46.

237 European Court of Human Rights, Judgment of 26 March 1985, 91 Eur. Ct. H.R. Rep. (Ser. A) (1985).

> The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. [...] These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.[238]

In *Osman* v. *United Kingdom*,[239] the European Court of Human Rights considered the alleged failure of public authorities to prevent an individual from deliberately killing the applicant's husband. While finding no violation of Article 2 (right to life), the Court established a standard for positive State obligations that was similar, in results if not in legal technique, to the jurisprudence of the Inter-American Court of Human Rights and the Human Rights Committee:

> The Court notes that the first sentence of Article 2 § 1[of the European Convention on Human Rights] enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction... It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.
>
> For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materializing.[240]

In contrast to the Inter-American jurisprudence, which emphasizes due diligence and classic principles of attribution and State responsibility, the Strasbourg institutions thus focus on the positive obligations of States to ensure an efficient application of the Convention.

To be sure, in the jurisprudence of the Inter-American Court of Human Rights the applicability of some human rights instruments to private actors does not imply that the conduct of private persons when not carried out in fact on

238 *Id.*, at 11.

239 *Osman* v. *United Kingdom*, App. No. 00023452/94, III Reports Judg. & Dec. (1998). (Judgment of Oct. 28 1998, European Court of Human Rights). (The decision is available at <http://www.echr.coe.int/hudoc/>).

240 *Id.,* at paras. 115, 116 (citations omitted).

behalf of a State is attributable to the State. Rather, the breach is generated by the fact that the State itself violates its obligation under international law by tolerating the occurrence of the prohibited acts.[241] Thus in the *Velásquez Rodríguez* case, the Inter-American Court of Human Rights stated that acts of public authority which are imputable to the State do not exhaust all the circumstances in which a State is obligated to prevent, investigate, and punish human rights violations, nor the cases in which the State itself might be responsible for violations.[242] A breach of human rights which is initially not imputable to a State, having been committed either by a private or by an unidentified person, can generate State responsibility because of the lack of due diligence to prevent the violation or to respond to it according to the requirements of the American Convention on Human Rights. The critical question, therefore, is whether the State has demonstrated lack of due diligence by allowing the act to take place either with its support or acquiescence or by not taking measures designed to prevent the act or to punish those responsible.

The extension of some human rights, such as the prohibition of discrimination on grounds of race or sex, to encompass private action is impelled by significant community values. This expansion inevitably generates tension with other human rights, such as the freedom of association and the right to privacy, and requires a careful balancing of these values. The alternative, limiting the reach of human rights to public life, would diminish their effectiveness and is thus clearly unacceptable.

The Strasbourg jurisprudence has implications going beyond human rights. In the present world, there is a need to control various types of conduct that do not directly involve the State and its apparatus. Strasbourg jurisprudence provides examples for addressing this need.

X. International Humanitarian Law: Application of the Principle of Proportionality and Limits to Collateral Damage

One of the most important principles of international humanitarian law is that of proportionality. Strasbourg institutions have derived the principle of proportionality from the ECHE, thus further enriching international humanitarian law. The ECHR is one of the rare human rights treaties with provisions on the use of force, establishing that the force used must not be more than absolutely necessary.[243] The principal provision on this subject, Article 2(2) of the ECHR, states that dep-

241 *See* [1975] 2 YB Int'l L. Comm'n 71. In its commentary on that Article, the ILC explains that "although the international responsibility of the State is sometimes held to exist in connexion with acts of private persons its sole basis is the internationally wrongful conduct of organs of the State in relation to the acts of the private person concerned." *Id.*, at 82.

242 *Velásquez Rodríguez Case* (Honduras), Inter-American Court of Human Rights, Judgment of 29 July 1988, [1988] Inter-Am.Ct.H.R. Rep. (Ser. C), No. 4, paras. 172-173.

243 Hampson, *supra* note 216, at 134.

rivation of life shall not be regarded as inflicted in derogation of that Article when it results from the use of force which is no more than absolutely necessary. This provision applies to the use of force by both the military and the police. Article 2(2) has influenced additional normative instruments, as for example, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Articles 9 and 10).[244]

The European Court of Human Rights addressed the issue of the planning and conduct of an operation carried out by security forces, in a case involving the killing of a civilian during an alleged armed clash between the Turkish army and the PKK in the vicinity of a village. The applicant, a sister of the victim, claimed that the clash had been an operation of retaliation against the village, while the Turkish Government asserted that it was an ambush operation conducted by the security forces and that the victim had not been killed by a bullet fired by the military side. The Court, following the assessment made by the Commission, found that it had not been proven that the applicant had been intentionally killed by the security forces. Nevertheless, emphasizing the principles of necessity, proportionality, and the duty to take sufficient precautions, it held Turkey responsible for a violation of Article 2:

> [T]he Court agrees with the Commission that the responsibility of the State is not confined to circumstances when there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.[245]

In the circumstances of the case, the Court found that it could reasonably be inferred that insufficient precautions had been taken to protect the lives of the civilian population.

In a case involving the killing of three IRA members in Gibraltar by members of the British Special Air Service (SAS), the Court has introduced a two-pronged test to determine the compatibility of the use of lethal force with the protection afforded to the right to life:

> [I]n determining whether the force used was compatible with Article 2, the Court must carefully scrutinize, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful

244 United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Sept. 7, 1990.

245 *Case of Ergi v. Turkey*, European Court of Human Rights, Judgment of 28 July 1998, IV Reports Judg. & Dec., at para. 79 (1998). *See generally*, Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, Int'l Rev. Red Cross, No. 324, 513, 516, (Sept. 1988).

> violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimize, to the greatest extent possible, recourse to lethal force.[246]

Applying the first test to the facts of the case, the Court considered that:

> the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.[247]

The Court found that the actions of the soldiers in themselves did not give rise to a violation of the Convention. It then turned to the second test, examining the circumstances of the control and planning of the operation. Here, the Court found against the government of the United Kingdom since it was "not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defense of persons from unlawful violence within the meaning of Article 2 para. 2 (a) of the Convention."[248]

The Court thus reversed the conclusion of the Commission, which had held that "the planning and execution of the operation by the authorities [did] not disclose any deliberate design or lack of proper care which might render the use of lethal force [...] disproportionate to the aim of defending other persons from unlawful violence."[249]

We have thus seen that the ECHR has had an impact not only on other regional human rights and universal human rights systems, but also on such different areas of general international law as principles of State responsibility, interpretation of treaties, and environmental protection. An area where such an influence has, at least so far, been limited to human rights systems is that of reservations to treaties.

246 *Case of McCann and Others v. United Kingdom*, European Court of Human Rights, Judgment of 5 January 1995, 324 Eur. Ct. H.R. Rep. (Ser. A), at para. 194 (1995).

247 *Id.,* at para. 200.

248 *Id.,* at para. 213.

249 *McCann and Others v. U.K.*, 21 Eur. Hum. Rts Rep. 97, para. 250 (1996).

Chapter 8: 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 his role in the promotion of human rights. The latter requires a modicum of pressure on governments and an adversarial approach.[1] 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."[2] This evolution conformed to the "system-wide" integration of human rights concerns that was urged by the Vienna Conference on Human Rights[3] and has been reflected in the work and outcome of such major world conferences as those held in the 1990's: the Cairo Conference on Population and Development, Copenhagen Conference on Social Development, Beijing Conference on Women, and Habitat II Conference.[4]

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

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1 *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 165-72 (1999).

2 Statement to the Commission on Human Rights, 9 April 1997, quoted in Clapham, *supra* note 1, at 167.

3 *See* Ernst Sucharipa & 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, 241-42 (1997)

4 *See id.* at 242.

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."[5] 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.[6] This realization eventually led to the creation of a distinct, independent, high-level official within the 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.[7] 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.[8] 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 ...[9]

The HCHR is to be guided by a vision of human rights which is universal rather than culturally relative.[10] Although the coordination 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, per-

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5 *See id.* at 247.

6 *See* Clapham, *supra* note 1, at 171-72.

7 *See id.* at 172.

8 *See id.* at 15-17.

9 G.A. Res. 141, U.N. GAOR, 48th Sess., 85th plen. mtg., at para. 4.

10 *See id.* at para. 3(b).

haps inevitably, because of the dependence of the HCHR on government support for field missions and technical assistance,[11] and the broader need to engage in negotiations and secure conditions for effective reporting.[12] 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.[13]

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,[14] modeled on the European Court of Human Rights, which might take over the functions of some of the present treaty bodies.

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.

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11 Helena Cook, *The Role of the High Commissioner for Human Rights: One Step Forward or Two Steps Back?*, 89 ASIL Proc. 235, 237-38 (1995).

12 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 cooperation, peacekeeping, and dispute settlement).

13 *See* Clapham, *supra* note 1, at 181, 199-200.

14 *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 212-13 (1986).

I. Approaches to Development Issues

a) Right to Development

There has been a growing recognition of the nexus between development and human rights.[15] 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."[16] 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."[17] 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.[18] 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 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.[19]

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

15 *See* Balakrishnan Rajagopal, *Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights*, 11 B.U. Int'l L.J. 81, 83-5 (1993).

16 *Id.* at 97.

17 David P. Forsythe, *The United Nations, Human Rights, and Development*, 19 Hum Rts. Q. 334, 335 (1997).

18 *See id.* 335-36.

19 Declaration on the Right to Development, G.A. Res. 925, U.N. GAOR, 41st Sess., 97th plen. mtg., Annex, Article 2.

> because people's participation in the decision-making processes which affect their lives is a basic tenet of development.[20]

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,"[21] with special focus on the participation of local community groups and non-governmental organizations, and such accompanying rights as freedom of association,[22] and became active in support of democratization, institution-building and the strengthening of legislative and judicial systems.[23]

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."[24] The concept of "sustainable development," whose primary objective was the protection of the environment,[25] has grown out of its ecological mold 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 and accountability.[26]

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."[27] The Declaration of the Summit of the Americas of Santa Cruz (1996) similarly reaffirmed that "[s]ustainable development requires that we strengthen and promote

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20 An Agenda for Development: Report by the Secretary-General, U.N. Doc. A/48/935, para. 120

21 Forsythe, *supra* note 3, at 338.

22 *See id.* at 344-46.

23 *See* Ernst Sucharipa & 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.

24 World Commission on Environment and Development, Our Common Future 43 (1987).

25 *See* Günther Handl, *The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development*, 92 AJIL 642, 642 (1998).

26 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, U.N. Doc. A/CONF.151/26 (Vol. III) (1992); see also G.A. Res. 191, U.N. GAOR, 47th Sess., 93rd plen. mtg., Supp. No. 49 (Vol. I), U.N. Doc. A/47/49 (1992).

27 Communiqué of the G-7 Summit (Halifax, 16-17 June 1995), at para. 24.

our democratic institutions and values."[28] 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 the betterment of the human condition, based on full participation by all.[29]

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.[30] 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,"[31] 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."[32]

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,[33] it took the view that its mandate was

28 Declaration of Santa Cruz de la Sierra, Summit of the Americas on Sustainable Development (Santa Cruz, 7-8 December 1996), at para. 3.

29 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, U.N. Doc. A/CONF.166/9 (1995) [hereinafter Copenhagen Declaration].

30 *See* Prohibition of Political Activities in the Bank's Work, Legal Opinion by the Senior Vice President & General Counsel, July 12, 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 573-74 (Vol. II 1995).

31 Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 Transnat'l L. & Contemp. Probs. 47, 49 (1996).

32 *Id.* at 50; see also Shihata, *supra* note 30, at 567-70 (1995).

33 *See* Copenhagen Declaration, *supra* note 29, ¶¶ 25-26.

restricted to the "economic aspects" of development.[34] It invoked its Articles of Agreement, which provide that

> [t]he Bank and its officers shall not interfere in the political 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.[35]

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.'"[36] 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"[37] It directs the Bank to "promote in the full range of its activities environmentally sound and sustainable development."[38] These provisions may have been more important in theory, however, than in the EBRD practice.[39]

Over the years, the World Bank has shown some flexibility in the interpretation of its mandate,[40] 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 fulfillment 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.[41] The Bank thus "began to fund development activities related to health, education, agriculture, and housing," later adding environmental, gender-related, and governance-enhancing

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34 *See* Bradlow, *supra* note 31, at 54-55; Ibrahim Shihata, Democracy and Development, 46 I.C.L.Q. 635, 635, 640 (1997).

35 Articles of Agreement of the International Bank for Reconstruction and Development, art. IV, § 10, Dec.27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134, amended Dec. 17, 1965, 16 U.S.T. 1942.

36 *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 I.L.J. 331, 346 (2000).

37 *Agreement Establishing the European Bank for Reconstruction and Development, Paris, May 29 1990*, reprinted in 29 I.L.M. 1077 (1990).

38 *Id.* ch. I, art. 2, § 1(vii).

39 *See* Handl, *supra* note 25, at 645-46, n.35.

40 *See* Shihata, *supra* note 34, at 639-40; Ciorciari, *supra* note 36, at 355-356; Pierre Klein, *Les institutions financières internationales et les droits de la personne*, 32 R.B.D.I. 97, 102-103 (1999).

41 *See* Ciorciari, *supra* note 36, at 338.

projects.[42] 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.[43]

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.[44] 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.[45] 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.[46] 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).[47] 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."[48]

The World Bank's general counsel outlined the limits of the Bank's participatory development policy, which, in his opinion, is 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 politi-

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42 Bradlow, *supra* note 31, at 56.

43 *Id.* at 59.

44 *See* Ciorciari, *supra* note 36, at 341-42.

45 *See* Handl, *supra* note 25, at 649-50.

46 *See* Bradlow, *supra* note 31, at 77. See *World Bank Revises Disclosure Policy*, World Bank News Release No. 2002/070/S (Sept. 7, 2001).

47 *See* Bradlow, *supra* note 31 at 76; Shihata, *supra* note 34, at 640; Klein, *supra*, note 40, at 108.

48 Bradlow, *supra* note 31, at 77.

> cal 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.[49]

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."[50] 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."[51]

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.[52] 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 are practicing sustainable good governance."[53] 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."[54] 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.[55]

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49 Prohibition of Political Activities in the Bank's Work, *supra* note 30, at 24.

50 Handl, *supra* note 25, at 650.

51 *Id.* at 650.

52 *See id.* at 651.

53 Bradlow, *supra* note 31, at 65-66.

54 Prohibition of Political Activities in the Bank's Work, *supra* note 30, at 29-30.

55 *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* note 31, at 87.

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.[56] Development banks have an affirmative duty to take reasonable steps to promote sustainable development.[57] 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."[58]

The World Bank has sought to distinguish between "economic factors" and "political factors," as its mandate prohibits taking the latter into consideration.[59] 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."[60] 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."[61]

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."[62] 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.[63] The IMF has thus had less influence than the World Bank on human rights policy of member States.[64] The IMF's programs are less wide-ranging than the Bank's and have a shorter time span. Moreover, the IMF's programs operate at a macro-level, which may be thought to be less relevant for human rights issues.[65]

Under its Articles of Agreement, the purposes of the IMF are to promote international monetary cooperation, to promote orderly and stable exchange

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56 *See* Handl, *supra* note 25, at 655-61.

57 *See id.* at 663-64.

58 *Id.*

59 *See* Shihata, *supra* note 30, at 574-76.

60 Ciorciari, *supra* note 36, at 353; also Klein, *supra*, note 40, at 102-103.

61 Bradlow, *supra* note 31, at 81.

62 Rajagopal, *supra* note 15, at 83.

63 *Id.*

64 *See* Bradlow, *supra* note 31, at 73.

65 *See id.* at 72.

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.[66] However, over the years, the IMF has been "transformed 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."[67]

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 programs to hold the institution accountable.[68]

B. Human Rights and the United Nations Practice under the Charter

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. Human Rights and Peacekeeping 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, thirteen operations were started. From 1988 until 1999, forty more have been launched.[69] 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

66 *See* Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. I, 60 Stat. 1401, 2 U.N.T.S. 39, amended July 28, 1969, 20 U.S.T. 2775, amended Apr. 1, 1978, 29 U.S.T. 2203.

67 Bradlow, *supra* note 31, at 66; see also Rajagopal, *supra* note 15, at 90-92.

68 *See* Bradlow, *supra* note 31, at 77-78.

69 *See* United Nations Peacekeeping Operations, available at <http://www.un.org/Depts/dpko/>.

rights is an integral part of peacemaking and peacekeeping."[70] 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."[71] 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.[72]

In this new environment, both the Security Council and the Secretary General have increasingly taken human rights into consideration in designing peacekeeping operations.[73] The first UN field mission entrusted with a specific human rights mandate was the UN Observer Mission in El Salvador (ONUSAL), established in 1991.[74] 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.[75] ONUSAL's activities were expanded by further agreements to include judicial reform, the formation of a national civilian police 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.[76] 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 programs, general oversight of human rights issues and investigation of specific cases.[77] 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

70 Theo van Boven, *The Security Council: The New Frontier*, 48 Int'l Comm'n of Jurists Rev. 12, 22 (1992).

71 Diego Garcia-Sayan, *Human Rights and Peace-keeping Operations*, 29 U. Rich. L. Rev. 41, 48 (1994).

72 U.N. GAOR, 54th Sess., 8th mtg. at 11, U.N. Doc. A/54/PV.8, at 11 (1999).

73 *See* van Boven, supra note 70, at 20.

74 The Mission was established by Security Council Resolution 693 (May 20, 1991).

75 *See* van Boven, supra note 70, at 20-21; Garcia-Sayan, supra note 71, at 51.

76 Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 Vand. J. Transnat'l L. 497, 526-27 (1994).

77 *See* van Boven, supra note 70, at 21.

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.[78]

In his Annual Report for 1999, the UN Secretary General observed that multidimensional peacekeeping was now the norm for the United Nations. Peacekeeping 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.[79]

Despite these developments, some commentators have insisted that human rights are not "yet seen as an essential element of peace-keeping"[80] 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.[81] The first HCHR emphasized the importance of human rights training for peacekeepers.[82] 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."[83] The promulgation by the Secretary-General, in 1999, of the long awaited principles and rules on the observance of international humanitarian law by peacekeepers, drafted in collaboration with the ICRC, were of particular importance.[84] These rules were designed to "ensure that the required standards [of

78 *See* Comprehensive Agreement on Human Rights, Mar. 29, 1994, Annex I, arts. I, IX, and X, U.N. Doc. A/48/928 (1994).

79 Report of the Secretary-General on the work of the Organization, U.N. GAOR, 54th Sess., Supp. No. 1, at 12, U.N. Doc. A/54/1 (1999).

80 Clapham, *supra* note 55, at 219.

81 *See* Gracia-Sayan, *supra* note 71, at 45; cf. Clapham, *supra* note 55, at 221-24.

82 *See* Jose Ayala-Lasso, *Making Human Rights a Reality in the Twenty-First Century*, 10 Emory Int'l L. Rev. 497, 506-07 (1996).

83 Extrajudicial, summary or arbitrary executions, U.N. Commission on Human Rights, Res. 1995/73, at para. 13 (1995).

84 *See* Observance by United Nations forces of international humanitarian law, Secretary-General's Bulletin, Aug. 6 1999, U.N. Doc. ST/SGB/1999/13 (1999).

humanitarian law] are observed."[85] 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.[86]

II. 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.

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.[87] 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."[88] The OAS Permanent Council and OAS Ministers of Foreign Affairs have censured Nicaragua, Haiti and Panama for violating these principles.[89] 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

85 Report of the Secretary-General on the work of the Organization, *supra* note 79, at 12.

86 *See* Barbara Crossette, *Advocates for Children Joining U.N. Peacekeeping Missions*, N.Y. Times, Feb. 18, 2000, at A8.

87 Charter of the Organization of the American States, art. 2, § b.

88 *Id.* at art. 3, § d.

89 *See* Thomas Franck, *The Emerging Right To Democratic Governance*, 86 AJIL 46, 65 (1992).

> mere rhetoric if unaccompanied by a precisely described set of characteristics that the elections are required to meet."[90]

The 2001 Third Summit of the Americas in Quebec and the Declaration of the Quebec City which it adopted, contain robust 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."[91] This provision was interpreted by the European Commission to require "the existence of a representative legislature, elected at reasonable intervals ... ."[92] 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.[93] It thus implies "subjective rights to vote and to stand for election,"[94] although they may be subjected 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*,

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90 *Bravo v. Mexico*, Case 10.956, Rep. No. 14/93, Inter-Am. C.H.R., OEA/ser.L/V/II.85, doc. 9 rev., at 259 (1994) (internal citations omitted), reprinted in Thomas Buergenthal & Dinah Shelton, Protecting Human Rights in the Americas: Cases and Materials 514, 520 (4th ed. 1995).

91 Protocol I of the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952, art. 3.

92 *See The Greek Case*, 1969 Y.B. Eur. Conv. on H.R. 179 (Eur. Comm'n on H.R.).

93 *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, 1987 Eur. Ct. H.R. (ser. A) at paras. 48-50.

94 *Ahmed and Others v. United Kingdom*, European Court of Human Rights (Chamber), 1998 Eur.Ct. H.R. at para. 75 (1998) (internal citations omitted).

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.[95]

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 ... ."[96] 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 realisation of human rights and fundamental freedoms are best ensured by an effective political democracy and by a common understanding and observance of human rights.[97]

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."[98] 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 State.[99] 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 inter-

95 *See Matthews v. The United Kingdom*, European Court of Human Rights (Grand Chamber), 1999 Eur.Ct. H.R. at paras 64-65.

96 Franck, *supra* note 89, at 61.

97 *Ahmed and Others*, 1998 Eur.Ct. H.R. at para. 52.

98 Franck, *supra* note 89, 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, June 29, 1990, reprinted in 29 I.L.M. 1305, 1308, para. 3 (1990) [hereinafter Copenhagen Document].

99 *See* Franck, *supra* note 89, at 66 (citing to Copenhagen Document, *supra* note 98, at para. 5).

> national commitments, there is little left in terms of governmental institutions that is domestic.[100]

The Copenhagen document went beyond any existing human rights instruments.[101] 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.[102]

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 are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned."[103] 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 noninterference."[104] 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."[105] 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."[106]

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

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100 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* note 89, at 68.

101 *See* Meron, *Democracy and the Rule of Law*, 153 World Aff. 23, 24, (1990).

102 *See* Copenhagen Document, *supra* note 98, at 1310, para. 7 (1990).

103 CSCE, Document of the Moscow Meeting of the Conference on the Human Dimension, Oct. 3, 1991, Preamble, reprinted in 30 I.L.M. 1670, 1672 (1991).

104 Franck, *supra* note 89, at 83.

105 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).

106 Military and Paramilitary Activities (*Nic. v. U.S.*) (merits), 1986 I.C.J. 14., para. 258.

on a parallel set of standards derived from the Security Council's competence to maintain peace and security[107] or the General Assembly's general mandate to promote peace, development and human rights.[108] Nonetheless, the legal basis of the entitlement to democracy is well grounded in the principal human rights instruments. Thomas Franck has rightly 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.[109]

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.[110]

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."[111]

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.[112]

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 insisted on the participation of all

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107 *See* also Gregory Fox, *The Right to Political Participation in International Law*, 17 Yale J. Int'l L. 539, 571, 588-89 (1992).

108 *See* also Douglas Lee Donoho, *Evolution or Expediency: The United Nations Response to the Disruption of Democracy*, 29 Cornell Int'l L. J. 329, 335-38.

109 Franck, *supra* note 89, at 77.

110 *Id.* at 79.

111 Enhancing the effectiveness of the principle of periodic and genuine elections: Report of the Secretary-General, U.N. GAOR, 47th Sess., Addendum, Agenda Item 97(b), at 1, para. 2, U.N. Doc. A/47/668/Add.1 (1992).

112 *See* G.A. Res. 130, U.N. GAOR, 47th Sess., 92nd plen. mtg., at para. 8 (1992).

major political groupings.[113] Fox has noted, with regard to the UN decolonization electoral missions, that

> [t]he most important of [the standards consistently promulgated by election monitors] was the prohibition on any substantive restrictions on party activity. 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.[114]

This standard was applied also by later monitoring missions.[115] 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.[116]

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."[117] 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.[118]

More recently, the European Court of Human rights addressed the 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 Tur-

113 *See* Fox, *supra* note 107, at 578-79.

114 *Id.* at 579.

115 *See id.* at 581 (describing the role of ONUVEN).

116 Fox, *supra* note 107, at 590. See also Henry Steiner, *Political Participation as a Human Right*, 1 Harv. Y.B. Int'l L. 77 (1988).

117 *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, 514-37, reprinted in Buergenthal & Shelton, *supra* note 90, at 511; see also Fox, *supra* note 107, at 566 (commenting on the Report of the Commission on Cuba). Cf. Chiiko Bwalya v. Zambia, Human Rights Committee, Communication No. 314/1988, U.N. Doc. CCPR/C/48/D/314/1988, para. 6.6 (1993), reprinted in 14 Hum. Rts. L.J. 408 (1993).

118 *The Greek Case*, 1969 Y.B. Eur. Conv. on H.R. 179, 180 (Eur. Comm'n on H.R.).

key involved the dissolution of political parties.[119] The Court both reiterated that "[t]here can be no democracy without pluralism"[120] 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."[121]

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.[122] 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.[123]

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.[124] Self-determination has come to be seen 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."[125] 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.[126] Thus seen, self-determination contributes to "refocusing au-

119 *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30 January 1998, 1998-I Eur. Ct. H.R., *Socialist Party and Others v. Turkey*, Judgment of 25 May 1998, 1998-III Eur. Ct. H.R., *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Judgment of 8 December 1999, 1999 Eur. Ct. H.R., *Refah Partisi and others v. Turkey*, Judgment of 31 July2001, 2001 Eur. C.H.R.

120 *Refah Partisi and others*, *id.* ¶ 44.

121 *Id.* ¶ 47.

122 *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess, Supp. No. 16, at para. 5, U.N. Doc. A/4684 (1960).

123 *See* Enhancing the effectiveness of the principle of periodic and genuine elections: Report of the Secretary-General, para. 12, U.N. Doc. A/46/609 (1991).

124 *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)).

125 *Id.*, at 752 (quoting Beigbeder, *id.*, at 18) (internal quotation marks omitted).

126 *Id.*, at 752-55.

tonomy claims from the expectation of independence brought on by the success of decolonization to modes of participation in the domestic political arena."[127] Thomas Franck has observed that "the idea of self-determination has evolved into a more general notion of internationally validated political consultation"[128] and that the "story of self-determination" was the "first building block in the creation of a democratic entitlement."[129]

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. [130]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."[131] In appropriate circumstances it constitutes also a component of "post-conflict peace-building."[132]

The last of the decolonization era electoral missions was in Namibia (1989).[133] 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."[134] The mandate was broader 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."[135]

The electoral mission in Nicaragua (ONUVEN), also established in 1989, was the first monitoring mission to take place in a sovereign State.[136] The President of Nicaragua requested the assistance of the United Nations. In a letter to the President of the General Assembly, the Secretary-General explained that it was a request involved which had the backing of the other four Central American gov-

127 *Id.* at 755.

128 Franck, *supra* note 89, at 55.

129 *Id.*

130 G.A. Res. 157, U.N. GAOR, 43rd Sess., 75th plen. mtg. at paras. 1-3 (1988).

131 Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, Report of the Secretary-General, U.N. Doc. A/47/668/Add.1 (1992), at 1, cited in Fox, *supra* note 107, at 778, n. 214 (citing Beigbeder, *supra* note 124, at 111).

132 An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping, Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992, U.N. Doc. A/47/277 - S/24111, para. 56 (1992).

133 *See* S.C. Res. 628, 2842nd mtg. (Jan. 16, 1989).

134 S.C. Res. 385, 1885th mtg. at para. 7 (Jan, 30, 1976).

135 Fox, *supra* note 107, at 774.

136 *See* Margaret Satterthwaite, *Human Rights Monitoring, Elections Monitoring, and Electoral Assistance as Preventive Measures*, 30 N.Y.U. J. Int'l L. & Pol. 709, 720-21 (1998).

ernments.[137] The mission was supported by the General Assembly as "an extraordinary measure related to the maintenance of international peace and security"[138] and was linked to peace-making rather than to human rights.[139] 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.[140] 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."[141] 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."[142] Endorsement may include such advantages as recognition, bilateral 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."[143] 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."[144] It is noteworthy that the Secretary-General in his 1992 Report referred only to a "potential international disruption"[145] and that in his 1993 report he does not even mention the need for an international dimension as a condition for UN involvement.[146]

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

137 Enhancing the effectiveness of the principle of periodic and genuine elections, Report of the Secretary-General, U.N. Doc. A/46/609, para. 28 (1991).

138 G.A. Res. 10, U.N. GAOR, 44th Sess., 35th plen. mtg. at para. 8 (1989).

139 *See* Franck, *supra* note 89, at 80.

140 *See* Fox, *supra* note 107, at 775; cf. Franck, *supra* note 89, at 72.

141 Franck, *supra* note 89, at 72-73.

142 Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AJIL 866, 868-69 (1990).

143 *See* Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, Report of the Secretary-General, U.N. Doc. A/46/609, at para. 79 (1991); Enhancing the effectiveness of the principle of periodic and genuine elections: Report of the Secretary-General, U.N. Doc. A/47/668, at para. 53 (1992).

144 Fox, *supra* note 107, at 775-76.

145 Enhancing the effectiveness of the principle of periodic and genuine elections: Report of the Secretary-General, U.N. Doc. A/47/668, at para. 57 (1992).

146 *See* Enhancing the effectiveness of the principle of periodic and genuine elections: Report of the Secretary-General, U.N. Doc. A/48/590, at paras. 59-60 (1993).

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."[147]

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.[148] 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 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.[149]

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."[150] 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,[151] 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.[152] 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."[153] 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 for specific types of medium-term expert assistance aimed at supporting and strengthening the existing capacity of the

147 Fox, *supra* note 107, at 776.

148 *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).

149 Enhancing the effectiveness of the Principle of periodic and genuine elections: Report of the Secretary-General, U.N. Doc. A/47/668, at para. 69 (1993).

150 Franck, *supra* note 89, at 73 (citing to Electoral Assistance to Haiti: Note of the Secretary-General, U.N. Doc. A/45/870/Add.1 (1991)).

151 *See* Enhancing the effectiveness of the principle of periodic and genuine elections: Report of the Secretary-General, U.N. Doc. A/48/590, at para. 53 (1993).

152 *See* Enhancing the effectiveness of the principle of periodic and genuine elections: Report of the Secretary-General, U.N. Doc. A/49/675, at paras. 32-36 (1994).

153 Enhancing the effectiveness of the principle of periodic and genuine elections: Report of the Secretary-General, U.N. Doc. A/50/332, at para. 125 (1995).

> requesting Government, in particular through enhancing the capacity of national electoral institutions.[154]

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.[155]

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."[156] 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 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

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154 G.A. Res. 129, U.N. GAOR, 52nd Sess., at para. 13 (1997).

155 Report of the Secretary-General on the work of the Organization, U.N. GAOR, 54th Sess., Supp. No. 1, paras. 109-10, U.N. Doc. A/54/1 (1999).

156 Franck, *supra* note 89, 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, Nov. 21, 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, 205-24 (3rd ed. 2002).

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.[157] 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.[158]

III. 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 to transgressions by States.[159] They are perceived as an intermediate option "falling between the extremes of diplomacy and military intervention."[160] Multilateral sanctions have thus been imposed for example on Iraq,[161] the former Yugoslavia,[162]

157 Barbara Crosette, *U.N. Report says New Democracies Falter*, N.Y. Times, July 23, 2002. The Report published for the UNDP will appear under the imprint of Oxford University Press.

158 Joshua Muravchik, *Democracy's Quiet Victory*, N.Y.T. Aug. 19, 2002.

159 *See* Christine Gray, International Law and the Use of Force 154-156 (2000).

160 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).

161 *See* S.C. Res. 661, U.N. SCOR, 2933rd mtg. (Aug. 6, 1990) (trade sanctions); S.C. Res. 670, U.N. SCOR, 2943rd mtg. (Sept. 25, 1990) (air embargo).

162 *See* S.C. Res. 713, U.N. SCOR, 3009th mtg. (Sept. 25, 1991) (arms embargo); S.C. Res. 757 U.N. SCOR, 3082nd mtg. (May 30, 1992) (trade sanctions and flight ban).

Somalia,[163] Libya,[164] Liberia,[165] Haiti,[166] Rwanda,[167] and the Sudan.[168] 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),[169] UNITA (Angola),[170] the Bosnian Serb forces (Bosnia-Herzegovina)[171] and the Taliban (Afghanistan).[172]

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,

> [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.[173]

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,[174] and Haiti, for violations of human rights.

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163 *See* S.C. Res. 733, U.N. SCOR, 3039th mtg. (Jan. 23, 1992) (arms embargo).

164 *See* S.C. Res. 748, U.N. SCOR, 3063rd mtg. (Mar. 31, 1992) (arms and air embargoes); S.C. Res. 883, U.N. SCOR, 3312th mtg. (Nov. 11, 1993) (freezing of assets, oil equipment).

165 *See* S.C. Res. 788, U.N. SCOR, 3138th mtg. (Nov. 19, 1992) (arms embargo).

166 *See* S.C. Res. 841, U.N. SCOR, 3238th mtg. (June 16, 1993) (oil and arms embargo, freezing of assets); S.C. Res. 917, U.N. SCOR, 3376th mtg. (May 6, 1994) (trade and financial assets).

167 *See* S.C. Res. 918, U.N. SCOR, 3377th mtg. (May 17, 1994) (arms embargo).

168 *See* S.C. Res. 1054, U.N. SCOR, 3660th mtg. (Apr. 26, 1996) (diplomatic sanctions); and S.C. Res. 1070, U.N. SCOR, 3690th mtg. (Aug. 16, 1996) (conditional flight ban).

169 *See* S.C. Res. 792, U.N. SCOR, 3143rd mtg. (Nov. 30, 1992) (petroleum products embargo).

170 *See* S.C. Res. 864, U.N. SCOR, 3277th mtg. (Sept. 15, 1993) (arms and oil embargoes); S.C. Res. 1127, U.N. SCOR, 3814th mtg. (Aug. 28, 1997) (flight and travel ban); S.C. Res. 1173, U.N SCOR, 3891st mtg. (June 12, 1998) (freezing of assets).

171 *See* S.C. Res. 942, U.N. SCOR, 3428th mtg. (Sept. 23, 1994).

172 *See* S.C. Res. 1267, U.N. SCOR, 4051st mtg. (Oct. 15, 1999) (flight ban and freezing of assets).

173 Lori Fisler Damrosch, The Civilian Impact of Economic Sanctions, in Enforcing Restraint: Collective Intervention in Internal Conflicts 274, 277-78 (Lori Fisler Damrosch ed., 1993).

174 *See* Adam Winkler, *Just Sanctions*, 21 Hum. Rts Q. 133, 143 (1999).

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."[175] 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.[176]

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?[177] Are sanctions not liable to backfire, causing hostility toward the international community and a sense of solidarity within the targeted regime?[178] 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.[179]

In contrast to Haas, some commentators believe "that political change is directly proportional to economic hardship."[180] 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 signifi-

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175 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 Z.a.ö.R.V. 871, 874 (1996).

176 *See* Report of the Secretary-General on the work of the Organization, U.N. GAOR, 54th Sess., Supp. No. 1, at para. 124, U.N. Doc. A/54/1 (1999). See also Simon Chesterman and Béatrice Pouligny, The Politics of Sanctions, A Policy Brief (International Peace Academy, Center for Institutional Studies and Research and the Royal Institute of International Affairs (2002).

177 *See* F. Gregory Gause III, *Getting It Backward on Iraq*, Foreign Aff., May/June 1999, at 54, 58 [A-66]; John Mueller & Karl Mueller, *Sanctions of Mass Destruction*, Foreign Aff., May/June 1999, at 43, 48-50.

178 *See* Richard N. Haas, *Sanctioning Madness*, Foreign Aff., Nov./Dec. 1997, at 74, 78-79.

179 *Id.* at 79.

180 Larry Minear et al., Toward More Human And Effective Sanctions Management: Enhancing the Capacity of the United Nations System 4 (1997).

cantly depriving both the population and leaders of goods and services."[181] 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."[182]

Others take a morality- or fairness-based approach. They ask: How can sanctions be justified when they harm mostly civilians?[183] 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 behavior is unlikely to be affected by the plight of their subjects."[184] Damrosch has suggested normative criteria such as a "*conflict containment 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."[185]

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.[186]

Although "[a]ny decision on economic sanctions must … necessarily take human rights into account,"[187] it is rather in the perspective of international humanitarian law that sanctions have been studied.[188] 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 noncombatant immunity and intentional targeting of ordinary civilians as highlighting the most

181 Fausey, *supra* note 160, at 199.

182 W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 Eur. J. Int'l L. 86, 131 (1998).

183 *See* Damrosch, *supra* note 173, at 275-76.

184 Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, U.N. Doc. A/50/60-S/1995/1, at para. 70 (1995).

185 Damrosch, *supra* note 173, at 279.

186 Gasser, *supra* note 175, at 881.

187 *Id.* at 880.

188 *See id.* at 873.

troubling moral dilemma of economic sanctions.[189] 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.[190]

Humanitarian and human rights concerns have affected both normative and institutional considerations. The United Nations has been 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."[191] 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."[192]

Security Council Resolutions on the Taliban (Afghanistan) refer to violations of international humanitarian law[193] – 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.[194] 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 Resolution 1381 (2001)

189 *See* Winkler, *supra* note 174, at 147.

190 *See* Reisman & Stevick, *supra* note 182, at 94-95.

191 Statement dated 29 December 1997 by the Inter-Agency Standing Committee on the Humanitarian Impact of Sanctions, U.N. Doc. S/1998/147, at para. 1 (1998).

192 *Id.*

193 *See*, S.C. Res. 1193, UN SCOR, 3921st mtg. at preamble, para. 14 (1998); S.C. Res. 1214, U.N. SCOR, 3952nd mtg. at preamble and para. 7 (1998); S.C. Res. 1267, *supra* note 172, at preamble.

194 *See* S.C. Res. 1267, *supra* note 172, at paras. 1-3.

stressed 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 atrocities and violations of the international humanitarian law in Darfur compelled the Security Council to move from mere condemnation in Resolution of 1547 (2004), to application by Resolutions 1556 (2004) of Chapter VII and to sanctions against non-governmental entities and individuals, including the Janjaweed. Such sanctions included prohibitions on supply of arms and training. This Resolution also endorsed the deployment of international monitors, including the protection force envisioned by the African Union, to the Darfur region, continued the measures established in Resolution 1556, and warned the government of Sudan of further measures should it fail to disarm and bring to justice the leaders of Janjaweed. This warning was repeated in Resolution 1564 (2004). Finally, by Resolution 1591 (2005), the Council applied the sanctions established by Resolution 1556 to all parties to the N'Djamena Cease Fire Agreement of April 8, 2004 and any other belligerents in North, South and West Darfur, thus extending the sanctions to the government of Sudan. Turning from sanctions to criminal responsibility, by Resolution 1593 (2005), the Council referred the situation in Darfur since July 1, 2002 to the Prosecutor of the International Criminal Court.

a) Humanitarian Exemptions

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.[195]

Humanitarian exemptions, which allow essential humanitarian items to pass through a sanctions program once imposed, reflect moral and humanitarian considerations[196] and are "in keeping with the right of civilian populations to receive humanitarian assistance as recognized in international humanitarian law."[197] 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.[198] These exemptions are minimal and "hardly protect all those whom the laws of just war would consider innocent noncombatants."[199]

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195 *See* Gause III, *supra* note 177, at 58-59.

196 *See* Damrosch, *supra* note 173, at 296.

197 Minear et al., *supra* note 180, at 37.

198 See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 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, Section III, Chapter II, arts. 76-77.

199 Winkler, *supra* note 174, at 151. Meron, *Prisoners of War, Civilians and Diplomats in the Gulf Crisis*, 85 AJIL 104(1991).

The practice of the Security Council has, however, been more liberal than the requirements of Article 23.[200] 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 opinion. 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."[201] 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."[202] Humanitarian exemptions have been included in Security Council resolutions in most situations.[203] 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.[204] 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."[205] 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.[206] 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, foodstuffs."[207] The determination of what constituted "humanitarian circumstances" was delegated

200 *See* Gasser, *supra* note 175, at 890-91.

201 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Rep.16, at para. 125 (June 21).

202 Minear et al., *supra* note 180, at 37.

203 *See* Damrosch, *supra* note 173, at 295-96.

204 *See* S.C. Res. 253, U.N. SCOR, 1428th mtg.at para 3(d) (May 29, 1968).

205 Reisman & Stevick, *supra* note 182, at 98.

206 *See id.* at 101.

207 S.C. Res. 661, *supra* note 161, at para. 3(c).

to the Sanctions Committee.[208] 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.[209]

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 program, initially refused by Iraq, became effective in December 1996.[210] 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.[211]

Haas has argued that "[s]anctions ... should not necessarily be suspended if the humanitarian harm is the direct result of cynical government policy, such as Iraq's, that creates shortages among the general population in order to garner international sympathy."[212] 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.[213] Further sanctions – freezing of assets and prohibition of the sale, supply and maintenance of oil refining equipment – were imposed in 1993.[214] The Sanctions Committee established under Resolution 748 (1992) was authorized "[t]o consider and to de-

208 *See* S.C. Res. 666, U.N. SCOR, 2939th mtg. at para. 1 (Sept. 13, 1990).

209 S.C. Res. 687, U.N. SCOR, 2981st mtg. at para. 20 (Apr. 1991).

210 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, U.N. Doc. S/1999/356, Annex II, paras. 28-42.

211 Reisman & Stevick, *supra* note 182, at 107.

212 Haas, *supra* note 178, at 82.

213 *See* S.C. Res. 748, U.N. SCOR, 3063rd mtg. (Mar. 31, 1992).

214 *See* S.C. Res. 883, *supra* note 164.

cide expeditiously upon any application by States for the approval of flights on grounds of significant humanitarian need ...."[215] In Security Council debates, the US representative defended the sanctions as limited and tailored to penalizing the government of Libya for the offense.[216] 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.[217] 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.[218] Another resolution permitted the approval by the Sanctions Committee of supplies of non-food, non-medical "commodities and products for essential humanitarian needs."[219] The Security Council established additional sanctions on the FRY and the Bosnian Serb territory in 1993 and later.[220] 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.[221]

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.[222] These suspensions were regarded as "measures

215 S.C. Res. 748, *supra* note 213, at para. 9 (e). It seems that this provision essentially contemplated pilgrimages to Mecca.

216 Security Council Debates, U.N. Doc. S/PV.3063 (1992), at 67 (comments of U.S. Representative Ambassador Pickering).

217 *See* S.C. Res. 713, *supra* note 162.

218 S.C. Res. 757, *supra* note 162, at para. 4(c).

219 S.C. Res. 760, U.N. SCOR, 3086th mtg. (June 18, 1992).

220 *See* S.C. Res. 820, U.N. SCOR, 3200th mtg. (1993); S.C. Res. 942, U.N. SCOR, 3428th mtg. (1994).

221 Reisman & Stevick, *supra* note 182, at 113.

222 *See* S.C. Res. 943, U.N. SCOR, 3428th mtg. at para. 1 (1994).

which benefited primarily the people of the FRY, not their rulers."[223] 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?[224] 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).[225]

Nonetheless, applying sanctions against the population as a whole 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 programs. 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.[226]

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."[227] 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

223 *See* Reisman & Stevick, *supra* note 182, at 113.

224 *See* Reisman & Stevick, *id.* at 119; Damrosch, *supra* note 173, at 305.

225 *See* Damrosch, *id.* at 305.

226 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, U.N. Doc. E/C.12/1997/8, at paras. 4-5 (1997).

227 Minear et al., *supra* note 180, at 39; see also Note by the President of the Security Council: Work of the Sanctions Committee, U.N. Doc. S/1999/92 (1999).

require committees to create specific exemptions lists for each country under sanctions based on its particular needs and circumstances.[228]

b) Application of Humanitarian Law to Sanctions Programs

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.[229] They argued that "sanctioners must reasonably maximize discrimination between combatants and non-combatants."[230] 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."[231] 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.[232]

The Committee on Economic, Social and Cultural Rights likewise noted that

> [i]n considering sanctions, it is essential to distinguish 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. [233]

228 *See* Minear et al., *supra* note 180, at 45-49.

229 *See* Reisman & Stevick, *supra* note 182, at 93-94; see also Haas, *supra* note 178, at 78-79.

230 *See* Reisman & Stevick, *id.* at 131-40.

231 *Id.* at 132.

232 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, U.N. Doc. S/1995/300, Annex (1995).

233 Committee on Economic, Social and Cultural Rights, *supra* note 226, at para. 4.

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.[234] 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.[235]

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."[236] 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."[237] The "minimal standard" approach of international humanitarian law to humanitarian assistance is difficult to apply to long-term economic sanctions regimes.[238]

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.[239] Commentators have argued for more targeted sanctions against Iraq.[240] But doubts about the effectiveness of such sanctions have been voiced,[241] especially when the targeted group can insulate itself and its assets.[242] Another approach has been to limit sanctions to a geographic area, as in the case of areas held by UNITA (in Angola)[243] and the Bosnian-Serb controlled areas in the former Yugoslavia,[244] 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 an-

234 *See* Reisman & Stevick, *supra* note 182, at 94.

235 *See id.* at 96.

236 Damrosch, *supra* note 173, at 281-82; see also Gasser, *supra* note 175, at 900-01.

237 Gasser, id at 882.

238 *See id.* at 901.

239 *See* Winkler, *supra* note 174, 149-50.

240 *See* Mueller & Mueller, *supra* note 177, at 52.

241 *See* Damrosch, *supra* note 173, at 298.

242 *See* Haas, *supra* note 178, at 79-80.

243 *See* S.C. Res. 864, *supra* note 170; S.C. Res. 1127, *supra* note 170; S.C. Res. 1173, *supra* note 170.

244 *See* Damrosch, *supra* note 173, at 297.

> swered 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.[245]

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,
> (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.[246]

IV. 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. The resolution included language respectful of State sovereignty in which it envisaged the establishment of "humanitarian corridors."[247]

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245 Fausey, *supra* note 160, at 212.

246 XXVIth International Conference of the Red Cross, Resolution IV, Section F, para. 1, reprinted in Int'l Rev. Red Cross, Jan.-Feb. 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, Dec. 1999, at 880-85.

247 G.A. Res. 100, 45th Sess., 68th plen. mtg. at para. 6 (1990).

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.[248]

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.[249]

b) Interventions under Security Council Resolutions

Except for legitimate self-defense 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.[250]

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

248 G.A. Res. 182, 46th Sess., 78th plen. mtg., Annex, at para. 3 (1991)(emphasis added).

249 *See* Laurence Boisson de Chazournes & 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)[A-89]; 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).

250 *See* David A. Westbrook, *Law Through War*, 48 Buffalo L. Rev. 299, 317-323 (2000).

> the jurisdiction and prerogatives of the General Assembly and its subsidiary bodies.[251]

However the majority of Security Council believes, correctly in my view, that the Council may deal with human rights issues when appropriate.[252] 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.[253] Several members made reference to "human rights as an issue of concern to the international community,"[254] 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."[255]

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.[256] 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.[257] The Council may thus tend to view its common law on intervention as a gradual expansion of its competence with regard to trans-frontier 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.[258] It also "[i]nsist[ed] that Iraq allow immediate access by international humanitarian organizations to

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251 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. Y.B. Int'l L. 107, 137 (1992).

252 *See* Alston, *supra* note 251, at 136-37.

253 Note by the President of the Security Council, U.N. Doc. S/23500, at 2 (1992).

254 Van Boven, *supra* note 70, 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).

255 Statement by Zimbabwe, U.N. Doc. S/.3046, quoted in van Boven, *supra* note 70, at 12.

256 Donoho, *supra* note 108, at 351 (footnotes omitted).

257 S.C. Res. 688, U.N. SCOR, 2982nd mtg. (1991).

258 *Id.* at para. 2.

all those in need of assistance in all parts of Iraq"[259] and "[d]emand[ed] that Iraq cooperate with the Secretary-General" humanitarian relief efforts.[260] 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."[261] As such, "resolution 688 provides the basis for a significant breakthrough in terms of securing access for humanitarian organizations."[262] 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.[263]

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,[264] 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."[265] 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 encouragement 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.[266]

259 *Id.* at para. 3.

260 *Id.* at para. 7.

261 Alston, *supra* note 251, at 150.

262 *Id.*

263 *Id.* at 144.

264 *See* Sean D. Murphy, Humanitarian Intervention: The United Nations in an Evolving World Order 285-87 (1996).

265 Donoho, *supra* note 108, at 363.

266 *Prosecutor v. Tadić*, ICTY (Appeals Chamber), Case No. IT-94-1-AR72, Decision on the Defence Motion For Interlocutory Appeal on Jurisdiction, para. 30 (Oct. 2, 1995).

Distinctions between national and international crises are not clear-cut. As the former UN Secretary-General Pérez de Cuellar 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."[267]

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."[268] 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."[269] The cumulative effect of actions during the Gulf War, the turmoil in Haiti, and the conflicts in Yugoslavia and Somalia "have changed 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."[270]

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."[271] 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.[272]

Successive UN Secretary Generals, as well as States participating in Security Council debates, have suggested that guidelines should be adopted by the Secu-

267 Report of the Secretary-General on the Work of the Organization, U.N. Doc. A/45/1, section IV (1990), quoted in van Boven, *supra* note 70, at 23.

268 Note by the President of the Security Council, *supra* note 253, at 3 (1992).

269 Alston, *supra* note 251, at 161.

270 *Id.* at 108.

271 *See* S.C. Res. 841, U.N. SCOR, 3237th mtg. (1993); S.C. Res. 940, U.N. SCOR, 3413th mtg. (1994).

272 Donoho, *supra* note 108, at 331-32 (footnotes omitted).

rity 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"[273] 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."[274] Whether it would be wise to constrain future action by the Security Council on the basis 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.[275] 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."[276] 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."[277] The Security Council lamented the "loss of human life and material destruction,"[278] and expressed its concerns for "the safety and well being of third State nationals in Iraq and Kuwait."[279] It also referred to the need for humanitarian assistance for the civilian populations of Iraq and Kuwait,[280] and for respect of the Geneva Conventions.[281] 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 seized 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 assis-

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273 U.N. Doc. S/PV.3046, at 131 (1992) (comments of Zimbabwe representative Mr. Shamuyarira), quoted in Alston, *supra* note 251, at 167-68 [A-86]; 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).

274 U.N. Doc. S/PV.2982, at 53 (1992).

275 *See* Alston, *supra* note 251, at 110-11.

276 *Id.*

277 G.A. Res. 170, U.N. GAOR, 45 Sess., 69th plen. mtg. at para.1 (1990).

278 S.C. Res. 661, *supra* note 161, at preamble.

279 S.C. Res. 664, U.N. SCOR, 2937th mtg. at preamble (1990); see also S.C. Res. 667, U.N. SCOR, 2940th mtg. at preamble (1990); S.C. Res. 674, U.N. SCOR, 2951st mtg. at preamble (1990).

280 *See* S.C. Res. 666, *supra* note 208, at preamble.

281 *See id.*; S.C. Res. 674, *supra* note 279, at preamble.

tance to Somalia and imposed an arms embargo under Chapter VII.[282] 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."[283] In the Security Council 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 neighboring countries, were also recognized.[284] Despite some agreements between the Somali factions and the UN 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.[285] 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."[286] 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."[287] 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."[288] President George Bush explained US involvement as justified also by the need to protect the safety of Americans and others engaged in relief operations.[289]

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,[290] or the situation of a "failed" or a disintegrating State. Indeed, the operation in Somalia presented a unique character because no governmental authority existed that could have consented to

282 *See* S.C. Res. 733, *supra* note 163.

283 The Situation in Somalia: Report of the Secretary-General, U.N. Doc. S/23693 & Corr. 1 (1992), para. 74, quoted in Murphy, *supra* note 264, at 220.

284 *See* Murphy, *supra* note 264, at 220-21.

285 *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, U.N. Doc. S/24868 (1992), reprinted in The United Nations and Somalia: 1992-1996, at 209 (1996).

286 S.C. Res. 794, U.N. SCOR 3039th mtg. at para. 7 (Dec. 3, 1992).

287 *Id.* at preamble.

288 Murphy, *supra* note 264, at 240; see also Lillich, *supra* note 273, at 7-8.

289 *See* Letter to Congressional Leaders on the Situation in Somalia, 28 Weekly Comp. Pres. Doc. 2338, 2338-39 (Dec. 10, 1992), quoted in Murphy, *supra* note 264, at 237.

290 *See* Murphy, *supra* note 264, at 229.

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.[291]

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,[292] and of the UN operation as a whole in February 1995.[293]

The French initiative for a peace-keeping operation in Rwanda was authorized by the Security Council,[294] 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.[295] 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 ... ."[296] Whatever other considerations may have motivated the French initiative,[297] the primary objective was humanitarian.[298] This operation 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.[299]

Military intervention in Haiti was considered following the failure of the Haitian military to abide by the Governors Island Agreement. The use of force

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291 *Id.* at 238.

292 *See* S.C. Res. 897, U.N. SCOR, 3334th mtg (1994).

293 *See* S.C. Res. 954, U.N. SCOR, 3447th mtg. (1994).

294 *See* S.C. Res. 929, U.N. SCOR, 3392nd mtg. (1994).

295 *See* S.C. Res. 918, *supra* note 167, at preamble.

296 S.C. Res. 929, *supra* note 294, at para 2.

297 *See* Murphy, *supra* note 264, at 259.

298 *See* Statement by France in the Security Council, U.N. Doc. S/PV.3392, at 5-6 (1994); Murphy, *supra* note 264, at 257.

299 *See* Murphy, *supra* note 264, at 258.

was authorized by Security Council Resolution 940 (1994).[300] 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).[301] The request of the exiled President of Haiti to the Security Council to take "prompt and decisive action"[302] 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."[303] Resolution 940 thus authorized

> Member States to form a multinational force under unified command and control and, in this framework, 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.[304]

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 ... ."[305] In reality, however, 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-defense. Intervening States, reluctant to invoke a doctrine of humanitarian intervention, have relied on the right of self-defense.[306] 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

300 *See* S.C. Res. 940, *supra* note 271.

301 *See* Donoho, *supra* note 108, at 347, 356 [A-38]; Lillich, *supra* note 273, at 4-5.

302 Donoho, *supra* note 108, at 347.

303 Murphy, *supra* note 264, at 265.

304 S.C. Res. 940, *supra* note 271, at para. 4.

305 S.C. Res. 917, *supra* note 166, at preamble.

306 Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 William and Mary L. Rev. 1683, 1703 (2000).

or political independence of any State." Article 2(4) together with Article 51 on the inherent right of individual or collective self-defense 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 respected."[307] 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,"[308] 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."[309] 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.[310] 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.[311]

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 August 27, 2003, described the above Se-

307 Murphy, *supra* note 264, at 150 (quoting ECOWAS, Standing Mediation Committee, Final Communiqué of the First Session, Aug. 7, 1990, para.11).

308 *Id.* at 160.

309 Note by the President of the Security Council, U.N. Doc. S/22133 (1991).

310 S.C. Res. 788, *supra* note 165, at preamble.

311 Murphy, *supra* note 264, at 163.

curity Council decisions as a precedent for approving after the fact that which "when initiated was in violation of the letter of the Charter" (paragraph 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 (paragraph 42). The Report 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" (paragraph 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" (paragraph 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 August 1, 2003.

The Constitutive Act of the African Union, adopted at Lomé (July 11, 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 (Article 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 (Article 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.[312] "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. The establishment of the zones was resisted by Iraq,[313] requiring the continuation of enforcement by allied air

312 *See id.* at 172.

313 *See id.* at 174, 175, 184.

forces. The acknowledged objective of these measures was to assist the civilian populations, but helping insurgencies may have been a factor.[314]

The United States and its allies grounded the establishment of the safety zones on Security Council Resolution 688,[315] 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.[316] 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.[317] This contrasts with the earlier UK position that the protection of human rights does not justify intervention involving the use of force.[318] 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."[319]

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,[320] the saving of Moslem Kosovars from Serbian atrocities. That intervention outside the framework of 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.[321]

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

314 *See id.* at 182-83.

315 *See* Backgrounder, 18 April 1991 (USIS, Canberra), at 1, quoted in Alston, *supra* note 251, at 126; Murphy, *supra* note 264, at 187-88; see also Oscar Schachter, *United Nations in the Gulf Conflict*, 85 AJIL 452, 469 (1991).

316 *See* Peter Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Appraisal?*, 12 Eur. J. Int'l L. 437, 445 (2001).

317 The Expanding Role of the United Nations and its Implication for U.K. Policy: Minutes Evidence, Hearing Before the Foreign Affairs Comm. of the House of Commons, Sess. 1992-1993, Dec. 2, 1992, at 92 (Statement of Anthony Aust, Legal Counsellor, U.K. Foreign and Commonwealth Office), quoted in Murphy, *supra* note 264, at 189.

318 *See* Gray, *supra* note 159, at 26-27.

319 United Kingdom Foreign Policy Document No. 148 (1984), reprinted in 57 B.Y.B.I.L. 614, 619 (1986).

320 *See* Antonio Cassese, *Ex iniura ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 E.J.I.L.23.

321 Brown, *supra* note 306, at 1687-1690; Gray, *supra* note 159, at 24-26.

> a violation of the United Nations Charter and other universally recognized norms governing international relations.
> ...
> [T]he 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.[322]

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.[323]

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 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."[324] The intervention thus involved a collision between two basic principles of the UN Charter, sovereign equality and the protection of human rights.[325]

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.[326] Supporters argued that the departure from the Charter was necessary and acceptable, especially in light of the multilateral character of the

322 U.N. GAOR, 54th Sess., 8th plen. mtg. at 15, 16, U.N. Doc. A/54/PV.8 (1999).

323 *Id.* at 11 (1999).

324 Report of the Secretary-General on the work of the Organization, U.N. GAOR, 54th Sess., Supp. No. 1, at para. 66, U.N. Doc. A/54/1 (1999).

325 *See* Hilpold, *supra* note 316, at 452; Marcelo G. Kohen, *L'emploi de la force et la crise du Kosovo: Vers un nouvel désordre juridique international*, 32 R.B.D.I. 122, 123-124 (1999).

326 *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* note 325, at 132. See also Independent International Commission on Kosovo, The Kosovo Report: conflict, international response, lessons learned (OUP, 2000), at 288-289.

intervention.[327] 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 willful destruction of property. The Secretary-General of NATO and officials of States participating in the operations invoked humanitarian justifications.[328] 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 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.[329]

More reluctant to acknowledge humanitarian concerns 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.[330]

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,[331] but has not yet materialized.[332] 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

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327 *See* Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AJIL 831, 831-32 (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).

328 Brown, *supra* note 306, at 1687-1690; Kohen, *supra* note 325, at 134-136.

329 Christopher Greenwood, *Yes, but is the War Legal?*, The Observer (28 March 1999).

330 *See* Gray, *supra* note 159, at 33-35.

331 *See* Cassese, *supra* note 320; see also Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AJIL 841, 843-44 (1999); Wedgwood, *supra* note 327, at 835

332 *See* Antonio Cassese, *A Follow-up: Humanitarian Countermeasures and Opinio Necessitatis*, 10 E.J.I.L. 791, 796 (1999).

validation for the intervention.[333] Louis Henkin suggested that by accepting the settlement imposed on the FRY, the Security Council had in fact ratified the intervention.[334] Given the criticisms of the intervention by several States, it is doubtful, however, that a customary rule justifying such an intervention has been accepted.[335] But the fact is that relatively few States condemned the Kosovo intervention as contrary to the UN Charter.[336]

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 defense 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.[337]

In the *Nicaragua* case, the ICJ rejected protection of human rights as a legal justification for the use of force:

> While the USA might form its own appraisal of the situation of human rights in Nicaragua, the use of force could not be the appropriate method the monitor or ensure such respect. With regards to 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.[338]

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 aggres-

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333 *See* U.N. Doc. S/1999/328, mentioned by Cassese, *supra* note 320.

334 *See* Henkin, *supra* note 327, 833.

335 *See* Gray, *supra* note 159, at 38; Hilpold, *supra* note 316, at 460; Kohen, *supra* note 325, at 140-141.

336 Cassese, *supra* note 320, at 792.

337 Quoted in Innocencio Arias, *Humanitarian Intervention: Could the Security Council Kill the United Nations?*, 23 Fordham Int'l L.J. 1005, 1010 (2000).

338 Military and Paramilitary Activities *(Nicaragua v. U.S.)* (merits), *supra* note 106, ¶ 268.

sion, the Security Council has special responsibilities under Chapter VII of the Charter."[339]

It is now recognized that States cannot invoke State sovereignty as a shield of impunity for egregious violations of human rights and that the treatment of their citizens is no longer entirely a matter of domestic jurisdiction.[340] But States that grossly mistreat their citizens still insist on the attributes of their national sovereignty. [341] 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.[342] 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,[343] 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.[344] In a thoughtful proposal,

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339 Case Concerning Legality of Use of Force *(Yugoslavia v. United States of America)*, Request for the Indication of Provisional Measures Order, Order of 2 June 1999, ¶ 33.

340 *See* Problems and Prospects for Humanitarian Intervention, Stanley Foundation, 2000, at 13.

341 *See* Reisman, *supra* note 105, 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 defense 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)).

342 *See* Westbrook, *supra* note 250, 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 d*id.* In particular, international law is no longer defined in opposition to force."

343 *See* Using "Any Necessary Means" for Humanitarian Crisis Response, *supra* note 341, at 34-35; Wedgwood, *supra* note 327, at 839.

344 *See* Brown, *supra* note 306, at 1722 ff; See also, International Peace Academy Conference Report, Humanitarian Action: A Symposium Summary, 20 November 2000, pp. 4-6.

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.[345] 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.[346] Many have argued that "better and more objective standards for intervention are needed."[347] 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.[348] 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.[349]

There is, indeed, room for skepticism 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

345 *See* Henkin, *supra* note 327, at 835.

346 *See* for instance the works of the International Law Association in the mid seventies, cited in Hilpold, *supra* note 316, at 455-456.

347 *See* Problems and Prospects for Humanitarian Intervention, *supra* note 340, at 11.

348 *See id.* at 22-23.

349 Lillich, *supra* note 273, at 14 (citing Oscar Schachter, *Commentary*, 86 Am. Soc'y Int'l Proc. 320 (1992)).

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). It is uncertain that more time, more patience and a more determined effort by the United States and the United Kingdom would have produced an agreement in the Security Council. The result was an essentially unilateral military 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 and hopeful democratisation of Irak are necessarily mixed with concerns about the future of the UN collective security system.

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 reconstruction. 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. The developments since the invasion suggest that momentum towards multilaterism is growing again.

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.

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